

>> ALL RISE.  
HEAR YE, HEAR YE, HEAR YE,  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.  
ALL WHO HAVE CAUSE TO PLEA, DRAW  
NEAR.  
GIVE ATTENTION, YOU SHALL BE  
HEARD.  
GOD SAVE THESE UNITED STATES,  
THE GREAT STATE OF FLORIDA, AND  
THIS HONORABLE COURT.  
LADIES AND GENTLEMEN, THE  
SUPREME COURT OF FLORIDA.  
PLEASE BE SEATED.

>> GOOD MORNING.  
WELCOME TO THE FLORIDA SUPREME  
COURT.  
BEFORE WE BEGIN WITH OUR CASES,  
LET ME JUST ANNOUNCE THAT TODAY  
WITH US WE HAVE THE UNIVERSITY  
OF FLORIDA LAW SCHOOL'S FLORIDA  
CONSTITUTIONAL LAW CLASS, AND  
THE PROFESSOR IS PROFESSOR,  
FORMER SPEAKER, JOHN MILLS.  
IF THE CLASS WOULD STAND?  
[INAUDIBLE CONVERSATIONS]  
>> BIG CLASS.

[LAUGHTER]  
WELCOME.  
OKAY.  
FIRST CASE ON THE DOCKET IS R.J.  
REYNOLDS V. MAROTTA.  
WHENEVER YOU'RE READY.  
>> GOOD MORNING.

GREGORY KATSAS ON BEHALF OF THE  
APPELLANT, R.J. REYNOLDS TOBACCO  
COMPANY.  
MAY IT PLEASE THE COURT, IN  
DOUGLAS THIS COURT HELD THAT THE  
DEFECT AND NEGLIGENCE FINDINGS  
MADE BY THE JURY IN ENGEL BY  
OPERATION OF RACE JUDICATA  
ESTABLISHED IN FAVOR OF THE  
CLASS, ALL THEORIES OF DEFECT  
AND NEGLIGENCE THAT WERE OR  
COULD HAVE BEEN ADJUDICATED IN  
PHASE ONE OF ENGEL.  
ONE OF THOSE POSSIBLE THEORIES  
OF DEFECT OR NEGLIGENCE IS THAT  
CIGARETTES ARE DEFECTIVE BECAUSE

THEY ARE, BECAUSE THEY CAUSE DISEASE AND ARE UNREASONABLY DANGEROUS. -- UNREASONABLY DANGEROUS.

>> AREN'T YOU LEAVING OUT WHO THE PARTIES WERE OR THOSE THAT WERE DIRECTLY AFFECTED BY THAT LITIGATION AND DIRECTLY INVOLVED IN THAT LITIGATION? WEREN'T THERE CERTAIN NAMED PARTY THERE?

>> OH, THERE WERE CERTAIN DEFENDANTS IN ENGEL. ANY CASE, OF COURSE, HAS ONLY CERTAIN DEFENDANTS. THE QUESTION IS NOT HOW MANY DEFENDANTS ARE IN THE CASE, THE QUESTION IS THE BREADTH OF THE THEORY OF LIABILITY.

NOW, MR. MAROTTA SAYS THAT THE THEORY OF LIABILITY PURSUED BY THE CLASS IN ENGEL WAS LIMITED TO THE CIGARETTES OF THE PARTICULAR DEFENDANTS.

BUT THAT'S NOT SUSTAINABLE ON THE ENGEL RECORD.

IN DOUGLAS WHEN THIS COURT REVIEWED THE ENGEL RECORD TO ADDRESS WHAT THEORIES WERE IN PLAY, IT SAID THAT THE MAIN GENERIC, COMMON THEORY WAS THAT CIGARETTES ARE DEFECTIVE BECAUSE THEY CAUSE DISEASE AND ARE ADDICTIVE.

THERE IS NOTHING SPECIFIC TO THE DEFENDANT'S CIGARETTES THAT MAKE THEM ANY MORE CARCINOGENIC OR MORE ADDICTIVE--

>> I THOUGHT THEY HAD EVIDENCE IN THAT CASE WITH REGARD TO HIDING--

>> THE MANIPULATION?

>> RIGHT, THE MANIPULATION AND ALSO THE ADDITIVES, THE CERTAIN BRANDS OF CIGARETTES.

>> THE QUESTION IS--

>> DID THEY PRESENT THAT?

>> THEY PURSUED ALL SORTS OF MANIPULATION AND OTHER BRAND-SPECIFIC AND TYPE-SPECIFIC

THEORIES, THAT'S TRUE.  
BUT THIS COURT IN DOUGLAS SAID  
THAT THE ONLY THEORIES  
ADJUDICATED WERE COMMON ONES.  
AND THE THEORY OF  
MANIPULATION-- THIS IS, THIS IS  
A CRITICAL POINT.

THE THEORY OF MANIPULATION  
PURSUED BY THE CLASS IN ENGEL  
WAS THAT EVEN THOUGH CIGARETTES  
INHERENTLY HAVE ANYTHING TEEN,  
ALL-- NICOTINE, ALL CIGARETTES  
HAVE NICOTINE.

THAT'S UNDISPUTED.

THEY SAID, WELL, THE ENGEL  
DEFENDANTS MADE THEIR CIGARETTES  
MORE ADDICTIVE BY ADDING AMMONIA  
TO CERTAIN BRANDS AND BY USING A  
BRAND OF TOBACCO CALLED Y1  
TOBACCO IN OTHER CASES.

THAT IS DESCRIBED IN THE OMNIBUS  
ORDER BY THE ENGEL TRIAL COURT  
WHO, OF COURSE, SAT THROUGH THE  
TRIAL AND SUMMARIZED THE THEORY  
OF THEORIES OF DEFECT.

THOSE ARE THE MANIPULATION  
THEORIES THAT THE ENGEL TRIAL  
COURT SUMMARIZED.

THE PROBLEM IS THOSE THEORIES  
WERE NOT COMMON IN THE SENSE  
THAT THIS COURT USED THAT WORD  
IN DOUGLAS.

IF YOU GO BACK INTO THE RECORD,  
WE LAY THIS OUT IN OUR REPLY  
BRIEF--

>> WE WENT THROUGH THAT RECORD.  
WE WENT THROUGH THAT RECORD OVER  
AND OVER.

>> RIGHT.

RIGHT.

AND WHAT THAT RECORD SHOWS IS  
THAT THE ALLEGATIONS OF  
AMOANUATION GOVERN SOMETHING  
LIKE 20% OF ALL CIGARETTE  
BRANDS, AND THE ALLEGATIONS OF  
Y1 TOBACCO GOVERN ABOUT THREE OR  
FOUR YEARS OF TIME.

SO THOSE THEORIES, THEY WERE  
ASSERTED IN ENGEL, BUT THEY ARE  
NOT COMMON THEORIES.

UNDER YOUR REASONING IN DOUGLAS,  
THEY COULDN'T HAVE BEEN THE  
BASIS FOR WHAT YOU SAID HAD TO  
BE COMMON FINDINGS.

AND EVEN IF THEY COULD HAVE BEEN  
DECIDED IN DOUGLAS ARE, THEY  
CERTAINLY WEREN'T THE ONLY  
THEORIES THAT WERE PURSUED IN  
DOUGLAS BECAUSE THE CLASS ALSO  
PURSUED THE BROADER OR THEORIES  
KEY TO THE INHERENT  
DANGEROUSNESS OF CIGARETTES, THE  
CARCINOGENIC AND THE FACT  
THAT UNMANIPULATED CIGARETTES  
HAVE NICOTINE AND, THEREFORE,  
ARE ADDICTIVE.

AND YOU LAID OUT IN DOUGLAS, YOU  
SAID THERE ARE TWO DIFFERENT  
KINDS OF THEORIES.

ONE IS THE BROAD ONE, CIGARETTES  
ARE ADDICTIVE-- SORRY,  
CIGARETTES ARE DEFECTIVE BECAUSE  
THEY'RE ADDICTIVE AND CAUSE  
DISEASE, AND ANOTHER, ALL OF  
THESE NARROWER, BRAND-SPECIFIC  
ONES ABOUT THIS KIND OF  
ADDITIVES OR LIGHTS AND FILTERS  
AND SUCH.

AND YOU SAID THAT THE COMMON  
THEORIES WERE THE ONES DECIDED.  
THE COMMON THEORY IN THIS CASE  
IS DEFECTIVE BECAUSE ADDICTIVE  
AND UNMANIPULATED CIGARETTES ARE  
ARE DEFECTIVE BECAUSE THEY ARE  
ADDICTIVE AND CAUSE CANCER.  
LOOK AT THE FINDINGS IN ENGEL AS  
WELL IF YOU WANT TO CONFIRM THE  
FACT THAT THEY PURSUED THIS  
THEORY AND THE BREADTH OF THE  
THEORY.

FINDING ONE IS THAT CIGARETTES  
CAUSE VARIOUS DISEASES.  
IT IS NOT THAT CIGARETTES SOLD  
BY THE ENGEL DEFENDANTS CAUSE  
DISEASES, IT'S THAT CIGARETTES,  
ALL CIGARETTES, CAUSE DISEASES.  
FINDING TWO IS THAT CIGARETTES  
WITH NICOTINE ARE ADDICTIVE,  
NOT THAT CIGARETTES WITH  
ARTIFICIALLY-MANIPULATED

NICOTINE LEVELS ARE ADDICTIVE AND NOT CIGARETTES SPECIFICALLY SOLD BY THESE DEFENDANTS ARE ADDICTIVE.

ALL CIGARETTES IN THEIR NATURAL FORM CONTAIN NICOTINE, SO THE FINDING THAT CIGARETTES WITH NICOTINE ARE ADDICTIVE, WHICH IS FINDING TWO FROM ENGEL, COVERS ALL CIGARETTES AND TEES UP THE QUESTION WHETHER THAT THEORY-- WHICH IS KEY TO THE INHERENT DANGEROUSNESS OF ALL CIGARETTES-- IS OR IS NOT IMPLIEDLY PREEMPTED.

THAT'S THE THEORY THEY'RE PURSUING IN ENGEL, SO LET ME, LET ME TALK ABOUT THE MERITS OF IMPLIED PREEMPTION FOR A FEW MOMENTS IF I MAY.

THE U.S. SUPREME COURT IN USDA HAS FORECLOSED THE CIGARETTES FROM THE MARKET.

THEY DID SO BASED ON A SERIES OF STATUTES SPECIFIC TO SMOKING AND HEALTH IN WHICH CONGRESS HAS CREATED A DISTINCT REGULATORY SCHEME FOR TOBACCO AND THAT A BAN ON CIGARETTES WOULD FRUSTRATE THE OPERATION

..

>> THE IDEA OF WHETHER IT'S A THEORY OR NOT THE GOOD THEORY, I MEAN, IF THAT'S IMPLIEDLY SO CLEAR, I'M JUST HAVING TROUBLE WHY ALL THE EXCELLENT BE LAWYERS THAT ARGUED EVERY OTHER THEORY DID NOT RAISE THAT THEORY BEFORE THIS COURT.

>> THE DEFENDANTS DID RAISE IMPLIED PREEMPTION IN ENGEL--

>> BEFORE YOU SAID THE THIRD DISTRICT.

>> BEFORE THE THIRD-- THEY PERSUADED, THE DEFENDANTS PERSUADED THE THIRD DISTRICT--

>> BUT I THINK I ASKED YOU AND YOU AGREED, IT WAS NOT ARGUED BEFORE THIS COURT.

>> NO.

BECAUSE THE DEFENDANTS WON ON THAT ISSUE IN THE THIRD DISTRICT AND THE CLASS AS THE APPELLANT BEFORE THIS COURT DIDN'T TAKE UP IMPLIED PREEMPTION.

SO THE RACE JUDICATA THEORY THAT WOULD FORECLOSE US IS ONE THAT IF A PARTY DOES, IN FACT, RAISE AN ISSUE AS WE RAISED IMPLIED PREEMPTION, WINS IT AT ONE LEVEL OF COURT--

>> WELL, I'M TRYING-- COULD YOU EXPLAIN IF THEY FOUND IN FAVOR OF DEFENDANT ON IMPLIED PREEMPTION, HOW IS THERE A CASE? I MEAN, YOUR CONCEPT IS IMPLIED PREEMPTION, IT'S THE END.

>> NO.

IT'S A VERY NARROW THEORY. IT DOESN'T, IT DOESN'T AFFECT AT ALL THE ABILITY OF, THE ABILITY OF CLASS MEMBERS TO PURSUE CLAIMS FOR CONCEALMENT OR CONSPIRACY.

IT DOESN'T AFFECT THEIR ABILITY TO GET OTHER BENEFITS FROM ENGEL LIKE THE TOLLING RULE AND THE GENERAL FINDINGS ON DISEASE CAUSATION AND ADDICTION, NOR DOES IT EVEN PREVENT ENGEL CLASS MEMBERS FROM RAISING STRICT LIABILITY AND NEGLIGENCE CLAIMS THAT AREN'T PREDICATED ON THE INHERENT DANGEROUSNESS OF ALL CIGARETTES.

>> SO IS THIS, YOU'RE SAYING THIS IS THE FIRST CASE, R.J. REYNOLDS HAS HAD SINCE ALL OF THESE CLASS MEMBERS BROUGHT THEIR INDIVIDUAL CASES THAT-- [INAUDIBLE]

>> NO.

I'M SAYING, I AM SAYING THE CLASS RAISED IMPLIED PREEMPTION IN THE CLASS PROCEEDINGS. THE DEFENDANTS RAISED--

>> THAT THEY WON IN THE THIRD--

>> IN THE THIRD DISTRICT.

>> OKAY.

>> AND--

>> SO I'M TALKING ABOUT THE  
INDIVIDUAL--  
[INAUDIBLE]  
THEY SAID THEY HAD--  
>> RIGHT.  
>> [INAUDIBLE]  
>> RIGHT.  
>> THIS IS THE FIRST ONE THAT  
R.J. REYNOLDS HAS HAD THAT HAS  
BROUGHT THIS CLAIM?  
>> NO.  
WE RAISE IMPLIED PREEMPTION--  
>> I'M TALKING ABOUT IN THE  
INDIVIDUAL CASES, NOT IN THE  
CLASS.  
>> I UNDERSTAND.  
I UNDERSTAND.  
>> OKAY.  
>> WE RAISE IMPLIED PREEMPTION  
AS A MATTER OF COURSE IN PROGENY  
CASES.  
THE QUESTION--  
>> WHAT HAPPENED IN THOSE CASES?  
>> WELL, IT DEPENDS ON THE CASE.  
IN A LOT OF CASES WHERE  
PLAINTIFFS, PROGENY PLAINTIFFS  
PREVAIL ON CLAIMS FOR  
CONCEALMENT OR CONSPIRACY,  
IMPLIED PREEMPTION DROPS OUT OF  
THE CASE, BECAUSE THAT IS--  
>> I GUESS AS A FOLLOW-UP TO  
JUSTICE PARIENTE'S CASE, I'M  
JUST WONDERING WHY WE ARE NOW,  
YOU KNOW, TEN YEARS LATER JUST  
GETTING THIS PARTICULAR--  
>> RIGHT.  
>>-- CLAIM FROM R.J. REYNOLDS.  
>> WELL, BECAUSE IN, BECAUSE IN  
ENGEL WHEN THE CLASS COULD HAVE  
TAKEN UP IMPLIED PREEMPTION AS  
THE APPELLANT BEFORE THIS COURT,  
THEY CHOSE NOT TO.  
AND THEN ON REHEARING IN ENGEL  
WHEN THERE WERE QUESTIONS ABOUT  
HOW THE PRACTICAL COMPROMISE,  
THE PRAGMATIC SOLUTION CREATED  
BY THIS COURT IN ENGEL WOULD  
APPLY IN PROGENY CASES, THE  
CLASS SAID, WELL, DON'T WORRY  
ABOUT THAT NOW.

IT'S PREMATURE NOW BECAUSE YOU DON'T REALLY KNOW HOW THINGS WILL PLAY OUT IN PROGENY CASES. SO THEY TOLD YOU IN ENGEL THAT QUESTIONS LIKE THIS WERE PREMATURE.

FAST FORWARD TO PROGENY CASES. WE RAISE IMPLIED PREEMPTION, AND WE RAISE ARE DUE PROCESS. -- WE RAISE DUE PROCESS.

AND THERE WAS A LOT OF UNCERTAINTY IN HOW THESE ISSUES WOULD PLAY OUT.

WHEN THE PLAINTIFFS WERE RAISING DUE PROCESS ARGUMENT WHICH WAS THE MAIN FEATURE, THEY TENDED TO SAY, WELL, THERE'S NO DUE PROCESS VIOLATION BECAUSE THE FINDINGS COVER ALL CIGARETTES. THEY COVER ALL CLAIMS.

THERE'S NO UNCERTAINTY FROM CASE TO CASE.

IN DOUGLAS WE MADE THE POINT THAT DOUGLAS COMES UP ON DUE PROCESS.

NOW, YOU COULD HAVE ADDRESSED IMPLIED PREEMPTION INDIRECTLY IN DOUGLAS IN THE COURSE OF DECIDING DUE PROCESS.

WE AGAIN TRIED TO PUT IMPLIED PREEMPTION BEFORE YOU IN DOUGLAS.

WE SAID IF YOU ADOPT THEIR VIEW OF THE FINDINGS FOR PURPOSES OF ADDRESSING OUR DUE PROCESS ARGUMENT, YOU'LL CREATE AN IMPLIED PREEMPTION PROBLEM. THIS COURT DIDN'T ADDRESS THAT QUESTION.

YOU COULD HAVE BUT YOU DIDN'T. YOU LEFT IT OPEN, AND BECAUSE YOU LEFT IT OPEN IN DOUGLAS, IT'S NOW BEFORE YOU TODAY.

THE IMPLIED PREEMPTION THEORY, I JUST WANT TO STRESS AGAIN THE NARROWNESS OF OUR THEORY.

WE ARE NOT, WE ARE NOT SAYING THAT FORMER CLASS MEMBERS CAN'T LITIGATE THROUGH ENGEL, THAT THEY CAN'T GET THE BENEFIT OF



THE TOLLING RULE, THAT THEY CAN'T GET THE BENEFIT OF THE FINDINGS ON DISEASE CAUSATION, THAT THEY CAN'T GET THE BENEFIT OF THE FINDING OF ADDICTION AND-- ON ADDICTION AND THAT THEY CAN'T PURSUE CONCEALMENT AND CONSPIRACY CLAIMS OR STRICT LIABILITY AND NEGLIGENCE CLAIMS THAT DON'T ATTACK THE INHERENT DANGEROUSNESS OF ALL CIGARETTES. OUR THEORY IS LIMITED TO CIGARETTES, IT'S LIMITED TO THE BROADEST OF ALL POSSIBLE DEFECT CLAIMS, AND SO THE PARADE OF HORRIBLES ASSERTED ON THE OTHER SIDE REALLY DOESN'T HAVE MUCH FORCE.

UNLESS THERE ARE QUESTIONS, I'LL RESERVE THE BALANCE OF MY--

>> I GUESS I JUST WANT TO MAKE CLEAR HERE, THIS ARGUMENT--  
[INAUDIBLE]

IS ONLY APPLICABLE IN THE STRICT LIABILITY FINISH.

>> YES.

>>-- AND NEGLIGENCE CLAIMS?

>> YES.

YES.

BECAUSE THE KEY, THE TRIGGERING FEATURE OF IMPLIED PREEMPTION, IN OUR VIEW, IS THAT THE UNDERLYING STATE LAW DUTY IS ONE NOT TO SELL CIGARETTES.

IF YOU SAY, IF YOU SAY THAT THE CIGARETTES ARE DEFECTIVE BECAUSE THEY CAUSE DISEASE AND ARE ADDICTIVE, THAT'S ALL CIGARETTES, ANY DEFENDANT WHO SELLS CIGARETTES WOULD VIOLATE THE DUTIES OF STRICT LIABILITY. IF THE STATE LAW DUTY IS DON'T COMMIT FRAUD, WELL, THAT'S NOT AN ATTACK ON THE SALE OF CIGARETTES, AND THAT'S ENTIRELY PERMISSIBLE UNDER OUR THEORY.

THANK YOU.

>> MORNING.

MAY IT PLEASE THE COURT, MY NAME IS RICHARD ROSENTHAL, I

REPRESENT THE RESPONDENT,  
MR. MAROTTA.

>> [INAUDIBLE]

>> I'D LIKE TO BEGIN BY  
ADDRESSING JUSTICE PARIENTE,  
YOUR QUESTION TO COUNSEL TO MY  
BROTHER AT THE BAR, AND IT TIES  
IN WITH JUSTICE QUINCE'S  
QUESTION, AND THAT IS WHY ARE WE  
HERE TEN YEARS LATER JUST  
DISCUSSING IMPLIED PREEMPTION  
WHEN TEN YEARS AGO THIS COURT  
DECIDED ENGEL?

AND--

>> SO LET ME, JUST TO CLARIFY,  
HIS ARGUMENT IS THAT THE  
PLAINTIFFS NEVER BROUGHT THE  
IMPLIED PREEMPTION ISSUE TO THIS  
COURT AND THAT IT WAS DECIDED  
AGAINST THEM BY THE CURRENT  
DISTRICT.

>> WE RESPECTFULLY DISAGREE.  
IT WAS DECIDED AGAINST US IN THE  
THIRD DISTRICT.

IT'S A--

[INAUDIBLE]

>> WHEN YOU SAY IT CAME UP TO  
THIS COURT, DO YOU MEAN YOU MADE  
A SPECIFIC ARGUMENT IN THIS  
COURT THAT THE THIRD DISTRICT  
ERRED IN MAKING THE RULING YOU  
JUST REFERRED TO?

>> YES.

IT WAS ONE-- THERE WERE A  
NUMBER OF RULINGS, A NUMBER OF  
BASES FOR THE THIRD DISTRICT'S  
OPINION WHEN IT SET ASIDE THE  
VERDICT ON BEHALF OF THE CLASS.  
ONE OF THOSE-- AND IT WAS  
SOMEWHAT ELLIPTICAL BECAUSE IT  
WAS IN FOOTNOTE 35 AND A LITTLE  
BIT ON PAGE 460, WAS ABOUT  
IMPLIED PREEMPTION.

OUR BRIEF TALKED ABOUT IMPLIED  
PREEMPTS, I BELIEVE IT'S ON PAGE  
4 OF OUR MERITS BRIEF, AND IT'S  
QUOTED IN OUR ANSWER BRIEF.  
AND WE TALKED ABOUT THE ENGEL  
DEFENDANTS COULD NOT BE HELD  
LIABLE BECAUSE CIGARETTES ARE A

LEGAL PRODUCT, AND YOU CAN'T PUNISH SOMEBODY FOR SELLING SOMETHING THAT'S LEGAL. IT WAS RESPONDED TO BY CLASS COUNSEL MR. ROSENBLATT, AND HE WENT ON A LONG DISCOURSE IN HIS CLOSING ARGUMENT IN WHICH HE SAID JUST BECAUSE SOMETHING MAY BE A LEGAL PRODUCT, THAT DOESN'T MAKE IT RIGHT, THAT DOESN'T MAKE IT IMMUNE FROM LIABILITY. AND THAT WAS DISCUSSED IN OUR MERIT BRIEF, AND THIS COURT'S DECISION IN ENGEL IS COMPLETELY--

>> I'M STILL STRUGGLING TO SEE A PARTICULAR LEGAL ARGUMENT THAT THE THIRD DISTRICT ERRED IN THE CONCLUSION ABOUT IMPLIED PREEMPTION.

>> YOUR HONOR--

>> WHAT WAS YOUR SPECIFIC LEGAL ARGUMENT THAT WAS MADE IN YOUR BRIEF IN THIS COURT ABOUT THAT ISSUE?

>> AGAIN, IT WAS ELLIPTICAL, IT WAS SHORT, AND THE ARGUMENT WAS THAT IT WAS PERFECTLY ACCEPTABLE FOR THE JURY TO FIND LIABILITY AGAINST THESE DEFENDANTS NOTWITHSTANDING THE FACT THAT CIGARETTES ARE A LEGAL PRODUCT, THAT THEY HAVE--

>> BUT THAT'S, THAT'S AN ASSERTION.

THAT'S NOT A LEGAL ARGUMENT.

>> WELL, I RESPECTFULLY DISAGREE WITH YOU, AND I WOULD SAY THAT THIS COURT'S OPINION MAKES NO SENSE.

HOW COULD YOU QUASH THE THIRD DISTRICT'S OPINION IF, INDEED, ONE OF THOSE THEORIES WAS PREEMPTED?

IT WAS CLEARLY TEED UP FOR THIS COURT TO CONSIDER, IT WAS IN THE THIRD DISTRICT'S OPINION K IF YOU HAVE ANY DOUBT ABOUT IT, YOU CAN LOOK AT THE PETITION FOR CERTIORARI THEY SENT TO THE U.S.

SUPREME COURT IN WHICH THEY LIST AS ONE OF THEIR TWO QUESTIONS PRESENTED WHETHER IT WAS IMPLIEDLY PREEMPT.

IF THEY HAD PREVAILED ON IMPLIED PREEMPTION, WHY WERE THEY ASKING THE U.S. SUPREME COURT TO REVIEW THAT?

AND WHY DID THEY PLAY THE TWO CLASS REPRESENTATIVES WHO YOUR HONORS REINSTATED THEIR JUDGMENTS, WHY DID THEY PAY THOSE JUDGMENTS?

NOW, THE RESPONSE YOU GET IN THE REPLY BRIEF IS, WELL, YOU HAD REINSTATED OTHER CAUSES OF ACTION AS WELL ON THEIR BEHALF. OKAY--

>> LET ME GO BACK TO THESE CAUSES OF ACTION, AND I'M LOOKING AT THE SECOND DISTRICT RECENT OPINION THAT AGREE.

>>S WITH THE FOURTH DISTRICT WHICH IS THAT THE ENGEL CASE DID NOT HAVE TO DO WITH SAYING THAT JUST BECAUSE CIGARETTES ARE ON THE MARKET AND THEY HAVE NICOTINE, THEY'RE INHERENTLY DANGEROUS.

CORRECT?

>> THAT WAS NOT OUR THEORY, CORRECT.

>> AND SO IN YOUR CASE DID YOU, FOR THE FIRST TIME, RAISE A DIFFERENT, ADDITIONAL THEORY--

>> NO.

>> SO WHAT WERE THE THEORIES THAT WERE, THAT YOU BELIEVE YOU WERE BOUND BY OR WANTED TO BE BOUND BY AS A RESULT OF THE ENGEL CASE?

>> THE EXACT SAME THEORY THAT WAS PRESENTED IN ENGEL WHICH IS THAT NOT ALL CIGARETTES ARE DEFECTIVE, NOT ALL CIGARETTES ARE UNREASONABLY DANGEROUS. THE CIGARETTES THAT ARE DEFECTIVE AND UNREASONABLY DANGEROUS ARE THOSE THAT CONTAIN UNSAFE LEVELS OF ADDICTIVE

NICOTINE.

AND THOSE ARE NOT ALL  
CIGARETTES.

THEY EVEN ADMIT ON PAGE 12 THAT  
FOR YEARS THEY HAVE BEEN ABLE TO  
AND, IN FACT, HAVE MARKETED  
CIGARETTES THAT ARE NOT  
UNREASONABLY ADDICTIVE.  
LOW NICOTINE CIGARETTES.

IN RVA--

[INAUDIBLE]

THEY WERE CALLED PREMIERE AND  
ECLIPSE.

PHILIP MORRIS MARKETED THEM  
UNDER NEXT AND ALTRIA.

BUT THEY'VE KNOWN THIS FOR 80  
YEARS.

THEY MARKETED THEM, AND FOOTNOTE  
THREE IN HIS REPLY BRIEF MAKES A  
REMARKABLE, CANDID CONCESSION  
WHICH IS THEY SAY, YEAH, WE  
COULD HAVE MADE SAFE CIGARETTES.  
THAT IS TO SAY NON-ADDICTIVE  
CIGARETTES WITH LOW NICOTINE.  
BUT THEY DOESN'T SELL VERY WELL,  
SO WE TOOK THEM OFF THE MARKET.  
WELL, THAT'S AN ASTONISHING  
THING, THAT THEY COULD HAVE MADE  
NON-ADDICTIVE CIGARETTES THAT  
WOULD NOT HAVE SOLD AS WELL OR  
THE ADDICTIVE CIGARETTES THAT  
SOLD LIKE GANGBUSTERS, AND THEY  
OPTED FOR THE LATTER.

>> THE FIRST ARGUMENT IS IT'S  
RACE JUDICATA.

>> THAT'S RIGHT.

>> SECOND, LET'S GO INTO THE  
MERITS THAT, ON IMPLIED  
PREEMPTION.

>> OKAY.

TURNING TO THE MERITS, ONE QUICK  
FOOTNOTE.

IN ADDITION TO RACE JUDICATA, WE  
THINK THERE'S NO REASON TO  
REVISIT DOUGLAS.

BECAUSE THAT WAS CLEARLY  
PRESENTED IN DOUGLAS, AND THIS  
COURT SAID IN A PRODUCTS  
LIABILITY CLAIM YOU REINSTATED  
THE VERDICT, EXCUSE ME, YOU

AFFIRMED THE VERDICT IN FAVOR OF THE PLAINTIFF.

THAT DECISION IS COMPLETELY INCOMPATIBLE WITH THE ARGUMENT YOU'VE HEARD TODAY.

>> I DON'T-- I MEAN, AGAIN, I'M LOOKING AT DOUGLAS, AND IT WOULD SEEM THAT WOULD HAVE BEEN THE CASE TO HAVE RAISED IMPLIED PREEMPTION.

>> AND IT WAS, YOUR HONOR. WE CITED IN THE BRIEF THREE INSTANCES IN THEIR BRIEF, PAGES 33, 37 AND THE VERY FIRST PAGE OF THE REPLY BRIEF IN DOUGLAS WHERE THEY WERE MAKING THIS IMPLIED PREEMPTION ARGUMENT. AND IT CONTINUED ALL THE WAY TO THE END WHEN MR. BOISE, BRILLIANT COUNSEL, STOOD AT THIS PODIUM IN DOUGLAS IN RESPONSE TO YOUR QUESTION, JUSTICE PARIENTE, YOU ASKED-- AND THIS IS AT PAGES 32 AND 23 OF THE ORAL ARGUMENT TRANSCRIPT TOWARD THE VERY END, WHY DOESN'T THE CLASS DEFINITION AS ARGUED INCLUDE THAT, ALL CIGARETTES THAT HAVE NICK TEACH? IT'S VERY BROAD.

MR. BOYCE BE RESPONDED, IT'S NOT ENOUGH SIMPLY THAT IT CAUSES HARM AND IT'S ADDICTIVE. EVEN IF FLORIDA LAW WERE DIFFERENT, FEDERAL LAW WOULD HAVE PREEMPTED THAT RULING. END QUOTE.

IT WAS THE INITIAL BRIEF, IT WAS THE FIRST PAGE OF THEIR REPLY BRIEF, SOME OF THE LAST WORDS THAT MR. BOYCE SAID FROM THE PODIUM.

IT WAS THEIR THEORY, AND THIS COURT REJECTED IT SQUARELY IN DOUGLAS.

THERE'S NO QUESTION THIS HAS BEEN ASKED AND ANSWERED, AND YOU'VE GOT NO RESPONSE IN THE BRIEF, IN EITHER THE INITIAL BRIEF OR THE REPLY BRIEF AS TO

WHY THIS COURT OUGHT TO RECEDE  
FROM DOUGLAS.

SO WE THINK THERE'S BOTH THE  
RACE JUDICATA BAR OF ENGEL, AND  
WE THINK THERE'S THE STARE  
DECISIS EFFECT OF DOUGLAS.

>> WHAT'S THE STATUS OF THE FACT  
THE 11TH CIRCUIT, I MEAN, THIS  
ALL CAME UP BECAUSE THE 11TH  
CIRCUIT DECIDED THERE WAS  
IMPLIED PREEMPTION.

>> RIGHT.

>> WHAT'S THE STATUS OF THE FACT  
THAT WHETHER WE, IF WE AGREE  
WITH THE 4TH AND THE 2ND,  
THAT-- SO, BUT WE CAN'T QUASH  
THE 11TH CIRCUIT.

SO DO WE HAVE TWO STANDARDS  
GOING ON IN THE--

>> NO, YOUR HONOR.

THE 11TH CIRCUIT VACATED THAT  
PANEL OPINION.

WHEN THEY TOOK THE MATTER EN  
BANC AS THEY DO AS A MATTER OF  
COURSE, THEY VACATE THE FEDERAL  
OPINION.

IT IS A MATTER OF  
FEDERAL LAW.

THAT MATTER WAS ARGUED JUNE 21ST  
IN ATLANTA, WE'RE ALL WAITING  
FOR THE DECISION.

BUT EVEN AFTER-- EXCUSE ME,  
EVEN BEFORE WE WAIT FOR THAT  
RULE, WE HAVE THE BERGER OPINION  
FROM THE MIDDLE DISTRICT OF  
FLORIDA IN WHICH JUDGE CARR  
SITTING BY DESIGNATION IN  
JACKSONVILLE SAID I DON'T REALLY  
NEED TO WAIT FOR THE 11TH  
CIRCUIT EN BANC TO TELL ME WHAT  
TO DO.

I'D LIKE TO HAVE THAT RULE IN MY  
BACK POCKET, BUT I DON'T.

THE PLAINTIFF THERE WAS  
TERMINAL, AND HE WANTED TO ISSUE  
A RULING, AND SO HE ISSUED AN  
EXTRAORDINARY OPINION WHICH I  
THINK OUGHT TO BE WHERE THIS  
COURT STARTS TO LOOK WHEN IT  
LOOKS AT THE MERITS OF IMPLIED

PREEMPTION, AND THAT IS TO SAY THERE ARE NO MERITS TO THAT ARGUMENT.

WHAT JUDGE CARR IN THE BERGER OPINION AND WHAT THE SECOND DCA PANEL SAID IN LORRY WAS THAT THIS RESTED, THE ENTIRE ARGUMENT ABOUT IMPLIED PREEMPTION IS PREDICATED ON WHAT I'VE CALLED THE ALL CIGARETTES MYTH, THIS NOTION THAT SOMEHOW THIS OPERATES AS A BAN ON ALL CIGARETTES SOLD IN FLORIDA OR ALL CIGARETTES SOLD TO PEOPLE DURING THAT TIME FRAME WHICH IS SIMPLY NOT SO.

BUT MORE DIRECTLY TO YOUR QUESTION, JUSTICE PARIENTE, I THINK THAT'S WHAT YOU HAVE TODAY.

YOU HAVE REYNOLDS HOPING TO CREATE SOME SORT OF DAYLIGHT BETWEEN THE STATE COURT SYSTEM, WHATEVER YOUR HONORS WILL RULE, AND WHAT THE 11TH CIRCUIT WILL RULE WHEN IT ISSUES ITS EN BANC OPINION IN GRANT.

AND WITH ALL DREW RESPECT, I DON'T THINK THIS COURT NEEDS TO OPINE ON THE MERITS OF IMPLIED PREEMPTION.

I THINK IT IS PERFECTLY SATISFACTORY AND ACCEPTABLE FOR THIS COURT TO SAY THIS IS BARRED BY RACE JUDICATA.

AND WE'VE INDICATED IN OUR BRIEF THAT AS A MATTER OF THE CONSTITUTIONAL AVOIDANCE DOCTRINE, AS A MATTER OF RESTRAINT, THAT REALLY IS WHAT COURT OUGHT TO DO.

IT OUGHT TO FIND THE NARROWEST HOLDING THAT DOESN'T OPINE ON THE CONSTITUTIONAL QUESTION. THIS IS ROOTED IN THE SUPREMACY CLAUSE, CLAUSE SIX OF THE U.S. CONSTITUTION.

ASK BE SO BEFORE THIS COURT REACHES OUT TO DECIDE WHETHER THIS IS--



>> WELL, THEN IF THAT'S THE CASE, THEN WHY SHOULD WE KEEP THIS CASE?

IN OTHER WORDS--

>> I DON'T THINK YOU HAVE TO. RESPECTFULLY, I DON'T.

AND I THINK THE FIRST PART OF OUR BRIEF IN THE MERITS SAYS THERE'S REALLY NO CONFLICT ANYMORE.

THE BASIS THAT CAUSED THE 4TH DCA TO CERTIFY THE QUESTION, THEY CERTIFIED IT AS GREAT PUBLIC BE IMPORTANCE, BUT REALLY WHAT THEY WERE SAYING WAS THERE'S A CONFLICT BETWEEN FLORIDA LAW AND FEDERAL LAW. THAT CONFLICT NO LONGER EXISTS BECAUSE THE FEDERAL 11TH CIRCUIT HAS VACATED ITS PANEL OPINION WHICH CREATED THE CONFLICT. IT'S A NULLITY.

THERE ISN'T.

NOW, IN THEORY DEPENDING ON WHAT THE 11TH CIRCUIT DOES, THAT CONFLICT COULD REEMERGE IF THEY DECIDE OTHERWISE--

>> BUT AREN'T WE IN THE BEST POSITION TO DECIDE WHETHER WHAT WAS DONE IN ENGEL AMOUNTS TO A CONFLICT WITH THE FEDERAL-- IN OTHER WORDS, THIS ISN'T A QUESTION OF EXPRESS PREEMPTION WHERE MAYBE THE FEDERAL COURTS WOULD HAVE, FOR SOME REASON, MORE EXPERTISE.

IT'S A QUESTION OF WHAT ENGEL STANDS FOR.

AS JUSTICE LEWIS SAID, THIS COURT HAD THE ENTIRE RECORD OF WHAT WAS ARGUED, AND IT WASN'T JUST NICOTINE IN CIGARETTES, IT WAS A WHOLE CONSPIRACY, BUT A MANIPULATION AS YOU SAY OF THE LEVELS TO RENDER IT ADDICTIVE.

>> THAT'S EXACTLY RIGHT.

>> SO IT SEEMS TO ME, I DON'T KNOW, YOU HAVE YOUR OWN STRATEGY, MAYBE YOU'RE BANKING THAT THE 11TH CIRCUIT'S GOING TO

AGREE WITH YOU, BUT WHY THIS COURT WOULDN'T, WOULDN'T WEIGH IN ON THIS IMPORTANT ISSUE.

>> WELL, PLEASE, IF I'VE BEEN UNCLEAR--

>> I'M JUST CURIOUS.

>> NO, LET ME CLARIFY.

WE'RE PERFECTLY HAPPY TO HAVE THIS COURT ANSWER THIS QUESTION PRESENTED.

I DON'T THINK THE COURT HAS TO, BUT WE HAVE NO PROBLEM WITH YOUR HONORS ANSWERING IT.

WE THINK THE WAY IT OUGHT TO BE ANSWERED IS TO SAY THIS IS ERASED BY RACE JUDICATA.

THAT'S CONSISTENT WITH THE PRINCIPLES THAT THIS COURT HAS ARTICULATED NUMEROUS TIMES.

THAT'S THE EASIEST WAY.

NOW, IF YOU DO REACH THE MERITS, THAT, OF COURSE, CREATES THE POTENTIAL FOR DISPARITY BETWEEN WHATEVER THIS COURT MAY SAY ON THE MERITS AND WHAT THE 11TH CIRCUIT MAY SAY WHENEVER IT ISSUES ITS EN BANC OPINION.

>> OKAY.

SO LET'S ASSUME THE 11TH CIRCUIT SAYS THERE IS IMPLIED PREEMPTION, DOES THAT OPERATE TO BAR ALL THE REST OF THE CASES IN FLORIDA?

>> IT WOULD OPERATE, WELL, YOU'RE SAYING IF THEY WOULD RULE BEFORE THIS COURT WERE TO RULE, IS THAT YOUR HONOR'S QUESTION?

>> YOU'RE SAYING WE DON'T NEED TO TAKE THIS CASE OR WE DECIDE RACE JUDICATA.

SO THEY DECIDE THAT THEY'RE, THEY AGREE WITH THE PANEL DECISION EVEN THOUGH THEY VACATED--

>> JUST TO BE CLEAR.

>>-- ISN'T THAT THEN BINDING AT THAT POINT, OR IS IT THAT THE APPELLATE COURTS OPERATE TO SET THE LAW FOR THE STATE COURTS?

>> NO, IT WOULDN'T STATE THE LAW

FOR THE STATE COURTS AS A MATTER OF COMITY, THE STATE COURTS MIGHT FOLLOW WHAT THE 11TH CIRCUIT SAYS.

THEY'RE NOT BOUND BY IT-- IT WOULD CERTAINLY BIND ALL THE LOWER FEDERAL COURTS WITHIN DO 11TH CIRCUIT IN DEALING WITH THE FEDERAL CASES THAT ARE PRESENTED.

AND THERE ARE STILL SOME OF THOSE THAT ARE PERCOLATING, OF COURSE.

BUT JUST TO BE CLEAR, YOUR HONOR PREDICATED THE QUESTION BY SAYING WE'RE ASKING YOU TO DECLINE ANSWERING THE QUESTION BECAUSE OF RACE JUDICATA.

NOT SO.

WHAT I'M SAYING IS YOU COULD DECLINE TO ANSWER THE QUESTION IN ITS ENTIRETY AS A MATTER OF THE COURT'S DISCRETION, OR ANSWER THE QUESTION BUT ANSWER IT BY RELYING ON RACE JUDICATA. I THINK THAT IS AN ANSWER TO THE CERTIFIED QUESTION.

THE ANSWER WOULD BE THIS DEFENSE IS BARRED, BECAUSE IT COULD HAVE BEEN RAISED IN ENGEL AND, IN FACT, WAS RAISED IN ENGEL, IT WAS DISPOSED OF IN ENGEL.

THAT'S THE END OF THE STORY.

AND REMEMBER, WHAT YOUR HONOR SAID IN ENGEL IS THAT MY CLIENT, MR. MAROTTA, STANDS IN THE SHOES OF ALL THOSE CLASS MEMBERS THAT WERE TRYING THE CASE IN 1998 AND 1999, 18 YEARS AGO.

THAT CASE IS SO OLD THAT IF IT WAS A PERSON, IT COULD VOTE IN NEXT WEEK'S ELECTIONS.

WE STAND IN THE SHOES OF THOSE PLAINTIFFS.

IMAGINE IF YOU HAD GONE LONGER THAN A ONE-YEAR TRIAL, SOME 57,000 PAGES OF TRIAL PRINT TRANSCRIPTS.

AND THERE'S A FINDING OF LIABILITY.

ONLY THAT WE NOW HAVE TO GO BACK  
AND DEAL WITH THE IMPLIED  
PREEMPTION DEFENSE IF THERE'S NO  
WAY.

THAT WAS A QUESTION OF  
LIABILITY.

IT WAS WHETHER THEY CAN BE HELD  
LIABLE FOR THEIR CONDUCT WHICH  
IS THE WAY THIS COURT PUT IT IN  
DOUGLAS.

SO WE THINK THE COURT, IF IT  
ADDRESSES THE CASE AT ALL,  
SHOULD RULE ON RACE JUDICATA--  
>> NOW, HE'S SAYING-- SEE,  
THAT'S THE THING THAT MAKES THIS  
TRICKY.

WHAT HE'S SAYING IS THAT ONLY IF  
THE CLAIM IS THAT CIGARETTES ARE  
INHERENTLY DANGEROUS, WOULD  
THERE BE IMPLIED PREEMPTION.  
BUT WHAT YOU'RE SAYING IS THAT  
WAS NEVER THE CLAIM IN ENGEL--  
>> THAT'S CORRECT.

>> SO THAT NEEDS TO BE CLARIFIED  
THE IF IT HASN'T BEEN COMPLETELY  
CLARIFIED BY DOUGLAS AND  
EVERYTHING ELSE SO THAT THERE'S  
NO CONFUSION THAT THIS WAS NOT  
AN ALL CIGARETTES ARE DANGEROUS  
CASE.

>> I THINK YOUR HONORS, I LEE IT  
TO YOU TO DECIDE WHETHER IT WAS  
SUFFICIENTLY CLEAR, BUT I THINK  
READING DOUGLAS MADE IT CLEAR.  
THAT WAS THE ENTIRE DEBATE ABOUT  
DOUGLAS, WHAT WAS THE DEFECT,  
WHAT WAS THE THEORY OF  
LIABILITY.

AND YOUR HONORS SAID ON PAGE 423  
OF THE DOUGLAS OPINION THAT THE  
REASON THE DEFENDANT'S  
CIGARETTES WERE DEFECTIVE WAS,  
QUOTE, BECAUSE THEY ARE  
ADDICTIVE AND CAUSE DISEASE.  
END QUOTE.

THAT IS TO SAY THE CONFLUENCE OF  
THOSE TWO THINGS.

IT'S NOT JUST LIKE THESE  
CIGARETTES WERE PULLED PLANTS  
OUT OF THE GROUND AND WRAPPED IN

PAPER.

THEY WERE A HIGHLY ENGINEERED,  
SCIENTIFICALLY ENGINEERED TO  
MAXIMIZE THE ADDICTIVENESS OF  
THE NICOTINE.

AND AS WE'VE INDICATED--

>> WE DIDN'T SAY THAT IN  
DOUGLAS.

>> NO, I SAID THAT JUST NOW.

[LAUGHTER]

>> I THOUGHT YOU WERE TALKING  
ABOUT DOUGLAS.

>> NO, SORRY.

I SHOULD HAVE SAID END QUOTE.

I APOLOGIZE IF I DIDN'T.

>> OKAY.

>> THAT WAS CERTAINLY THE  
ARGUMENT PRESENTED TO THIS COURT  
FROM THIS PODIUM WAS TALKING  
ABOUT HOW THE COMMON DEFECT,  
THERE WERE A BUNCH OF MICRO  
DEFECTS AS HE REFERRED TO THEM  
IF YOUR HONORS WILL OCCUR.

YES, Y1, YES, AMMONIUM.

THESE WERE DIFFERENT MECHANISMS  
FOR THEM TO ENHANCE THE  
ADDICTIVENESS IN THE NICOTINE  
WHICH THEY COULD HAVE TAKEN OUT  
AND IN SOME INSTANCES DID TAKE  
OUT.

THEY MARKETED NON-ADDICTIVE, LOW  
OR NO-NICOTINE CIGARETTES CALLED  
PREMIERE AND ECLIPSE.

AND THIS IS A HISTORICAL FACT.

IT'S NOTED IN FOOTNOTE TWO OF MY  
BRIEF WHERE THE COURT SAID THIS  
HAS BEEN AROUND FOR 80 YEARS,  
IT'S IN FOOTNOTE THREE OF HIS  
REPLY BRIEF WHERE HE INDICATES,  
YEAH, WE TRIED TO SELL THEM, BUT  
THEY DIDN'T SELL WELL.

THEY TASTED LIKE FISH.

WELL, THAT'S TOO BAD.

NEW COKE DIDN'T SELL WELL

EITHER, IT'S STILL A LEGITIMATE  
PRODUCT TO SELL.

AND THE ONLY LIABILITY THESE  
DEFENDANTS WILL HAVE IS FOR  
SELLING UNREASONABLY DANGEROUS  
CIGARETTES WHICH IS TO SAY THOSE

CIGARETTES WHICH HAD AN UNREASONABLY DANGEROUS LEVEL OF NICOTINE.

>> COUNSEL, IN-- UNDER ENGEL WHAT MUST BE BROUGHT AS A CLAIM FOR STRICT LIABILITY, WHAT HAS TO BE ALLEGED, AND HOW IS THAT DIFFERENT THAN WHAT YOUR OPPONENT SAYS IS JUST PUTTING ALL CIGARETTES ON THE MARKET?

>> IN ENGEL THE THEORY OF LIABILITY, IS AND WE'VE INDICATED BOTH THE CLASS COMPLAINT, THE CLASS DEFINITION, THE VERDICT FORM ITSELF, SAID THAT THE KEY WAS ADDICTIVENESS. IF PEOPLE ARE NOT ADDICTED, IF A SMOKER, IF MR. MAROTTA HAD NOT BEEN ADDICTED, THERE WOULD BE NO ENGEL LIABILITY.

THERE HAD TO BE ADDICTION TO THEIR NICOTINE WHICH IS TO SAY NOT ALL CIGARETTES.

THEY DID NOT HAVE TO MAKE THESE CIGARETTES WITH ADDICTIVE LEVELS OF NICOTINE.

>> BUT WASN'T ONE--

[INAUDIBLE]

NICOTINE IS ADDICTIVE, ISN'T THAT ONE OF THE FINDINGS THAT WAS IN THE ENGEL-- I MEAN, I GUESS--

>> [INAUDIBLE]

YEAH.

>> WELL, RIGHT.

I GUESS BY EXTRAPOLATION YOU COULD TAKE THAT TO THE EXTREME AND SAY THAT ANY, IF A CIGARETTE CONTAINS NICOTINE, IT'S ADDICTIVE.

>> TWO POINTS, FIRST OF ALL--

>> I MEAN, IT SEEMS TO ME THAT THAT IS THE STRICT LIABILITY--

[INAUDIBLE]

THAT IT'S A CIGARETTE, IT CONTAINS NICOTINE.

THEREFORE, IT'S--

[INAUDIBLE]

>> THE PROBLEM, YOUR HONOR, IS THERE ARE CIGARETTES.

>> DO NOT CONTAIN ADDICTIVE LEVELS OF NICOTINE. IT IS NOT TRUE THAT CIGARETTE ARE NECESSARILY HAVE TO INCLUDE ADDICTIVE LEVELS OF NICOTINE. WHEN FACT GROWS IN THE GROUND, IT HAS SOME LEVELS, BUT THE WASHING AND BLANCHING PROCESS-- AND THIS WAS THE EVIDENCE IN THE RECORD-- REMOVES MOST OF THE NICOTINE, AND THEN THEY AFFIRMATIVELY PUT IT BACK IN AND MANIPULATE IT USING DIFFERENT METHODS TO ENHANCE THE ADDICTIVENESS QUALITIES. SO THEY TODAY COULD BE MAKING NON-ADDICTIVE CIGARETTES.

>> MY QUESTION IS THE FINDING WAS NICOTINE IS ADDICTIVE-- [INAUDIBLE] AT CERTAIN LEVELS NICOTINE-- [INAUDIBLE]

>> YOUR HONOR, IF MY CLIENT WERE NOT ADDICTED TO THE NICOTINE IN THEIR CIGARETTES, HE WOULD NOT HAVE BEEN AN ENGEL CLASS MEMBER. THE DEFINITION OF THE ENGEL CLASS IS PEOPLE WHO SUFFER DISEASES OR MEDICAL CONDITIONS CAUSED BY THEIR ADDUCTION TO THE CIGARETTES THAT CONTAIN NICOTINE. MR. MAROTTA WOULD NOT HAVE BEEN ENTITLED--

>> I THINK WHAT JUSTICE QUINCE IS TRYING TO GET AT WAS THAT THE UNDERLYING THEORY WASN'T JUST THAT THEY CONTAIN NICOTINE. THEY HAD-- IF THEY WERE INHERENTLY DANGEROUS, THERE STILL HAS TO BE CAUSATION UNLESS YOU'RE ADDICTED TO IT. SO GOING BACK TO THE THEORY JUST SO WE KNOW IN ENGEL, WAS NOT JUST THAT THESE CIGARETTES CONTAINED NICOTINE. THAT WAS NOT THE HER THEORY OF STRICT LIABILITY, OR WAS IT?

>> IT WAS.

THERE WERE A BUNCH OF WHAT WE CALLED MICRO DEFECTS, A NUMBER OF DIFFERENT MECHANISMS THE TOBACCO COMPANIES USE TO ENHANCE THE NICOTINE ADDICTIVENESS. BUT THE THEORY, IF YOU LOOK AT THE VERDICT FOMENTER IN ENGEL-- FORM IN ENGEL, IT TALKS ABOUT WERE THESE PEOPLE ADDICTED TO THESE PARTICULAR CIGARETTES. THERE WAS A PRELIMINARY QUESTION AS TO WHETHER CIGARETTES CAUSE DISEASE, COPD, LUNG CANCER AND THE LIKE.

THAT WAS NOT SUFFICIENT TO SUBJECT THEM TO LIABILITY FOR STRICT LIABILITY.

THE JURY--

[INAUDIBLE]

THEY ALSO HAD TO CHECK SEPARATE BE QUESTION AS TO WHETHER THESE CIGARETTES, THE CIGARETTES SOLD TO MY CLIENT CONTAINED ADDICTIVE LEVELS OF NICOTINE.

I'M OUT OF TIME.

THANK YOU,, YOUR HONORS.

>> ON THE QUESTION OF WHAT THE DEFECT THEORY OF ENGEL WAS, YOU LAID IT OUT IN DOUGLAS.

YOU SAID THE THEORY IS THAT CIGARETTES ARE DEFECT I BECAUSE THEY'RE ADDICTIVE AND CAUSE DISEASE.

THE ADDICTIVENESS OF CIGARETTES FLOWS FROM THE FACT THAT A THEY CONTAIN NICOTINE.

JUSTICE QUINCE, YOU'RE EXACTLY RIGHT.

THE FINDING MADE IN ENGEL BY THE JURY WAS THAT CIGARETTES WITH NICOTINE ARE ADDICTIVE.

>> THEREFORE, JUST GOING BACK TO IT, IF WITHIN THOSE FINDINGS WERE SOMETHING THAT WAS SO BROAD THAT IT WOULD BE PRECLUDED BECAUSE OF IMPLIED PREEMPTION--

>> RIGHT.

>>-- THEN BY QUASHING THE 3RD DISTRICT AND SAYING THAT THESE CASES GO THROUGH ON THESE



MULTIPLE THEORIES, THE TIME TO HAVE RAISED IT WAS BACK THEN. AND THEN IN DOUGLAS, NOW, WAS IT NOT RAISED AGAIN IN DOUGLAS? IS HE WRONG ABOUT THAT IMPLIED PREEMPTION WAS AGAIN RAISED BY THE PARTIES IN DOUGLAS?

>> IT, IT-- WE RAISED IMPLIED PREEMPTION IN BOTH ENGEL AND DOUGLAS.

WE RAISED IT IN ENGEL AND WON IN THE 3RD DISTRICT--

>> I KNOW.

BUT THEN AS YOUR OPPOSING COUNSEL SAYS, WE QUASHED THE 3RD DISTRICT.

WE ALLOWED ALL THOSE CLAIMS TO GO THROUGH.

SO WE-- THE ISSUE OF WHETHER THEY WERE IMPLIEDLY PREEMPTED IS FINISHED IF WE APPROVED THE TRIAL COURT'S AND THE JURY'S FINDINGS WHETHER THEY WERE BROADER THAN THEY SHOULD HAVE BEEN OR, YOU KNOW, NOT AS BROAD.

>> YOU SAID THAT THE FINDINGS HAVE RACE JUDICATA EFFECT.

NOW, WE KNOW THAT THAT RULING FROM ENGEL DIDN'T RESOLVE THE QUESTION WHETHER THEY COULD BE USED CONSISTENT WITH DUE PROCESS.

THAT'S BECAUSE--

>> SEE, I GUESS--

>>-- THAT LATER IN DOUGLAS.

>> LET ME AGAIN TRY TO SAY, YOU KNOW, THE WHOLE IDEA OF THE CLASS ACTION WAS TO TRY TO LIMIT WHAT WOULD BE LITIGATED.

>> RIGHT.

>> AND I GUESS I JUST FIND IT SO-- HOW MANY CASES HAVE BEEN TRIED SINCE ENGEL WAS DECIDED? HUNDREDS, RIGHT?

>> ABOUT 200.

>> AND WE'RE HERE A DECADE LATER TALKING ABOUT WHAT MAYBE COULD HAVE BEEN RESOLVED IN ENGEL WITH ALL OF THE GREAT TOBACCO LAWYERS THAT WERE DEFENDING THAT CASE?

I'M, I JUST-- AND THIS GOES  
BACK TO THE RACE JUDICATA ISSUE.

>> JUSTICE PARIENTE, WE HAVE  
RAISED IMPLIED PREEMPTION AS  
EVERY TURN.

THE ONE AND ONLY THING WE DIDN'T  
DO WAS RAISE IMPLIED PREEMPTION  
IN THIS COURT IN ENGEL ITSELF  
AFTER WE HAD WON IN THE 3RD  
DISTRICT AND THE OTHER SIDE  
DIDN'T BRING IT UP.

SO--

>> BUT THEY, BUT THEY WERE  
ASKING US TO QUASH THE 3RD  
DISTRICT OPINION.

IF THERE WAS-- WAIT A SECOND.  
YOU CAN'T, YOU CAN-- YOU CAN'T  
QUASH WITH IT BECAUSE IT'S  
IMPLIEDLY PREEMPTED--

>> NOT.

>> HOW COULD THAT BE, I MEAN, IT  
DEFIES MY CREDIBILITY HAVING  
BEEN INVOLVED IN THAT CASE FOR  
YEARS, THAT THAT WOULD NOT HAVE  
BEEN THE FIRST THING THAT THE  
TOBACCO LAWYERS WOULD HAVE SAID.  
LISTEN, EVEN IF THE 3RD DISTRICT  
IS WRONG ON EVERYTHING ELSE,  
IT'S IMPLIEDLY PREEMPTED.

>> THEY RAISED, THEY RAISED  
VARIOUS ARGUMENTS FOR QUASHING  
THE 3RD DISTRICT PREPONDERANCE  
ON OTHER GROUNDS-- OPINION ON  
ORE GROUNDS--

>> BUT DIDN'T RAISE THE MOST,  
AND THEN IN RESPONSE THE LAWYERS  
DIDN'T SAY, BUT WAIT A SECOND,  
EVEN IF THOSE OTHER GROUNDS WERE  
SOUND, IT'S IMPLIEDLY PREEMPTED?

>> WE COULDN'T HAVE ELIMINATED  
THE STRICT LIABILITY AND  
NEGLIGENCE FINDINGS ON IMPLIED  
PREEMPTION IN THE POSTURE THAT  
THEY CAME TO THIS COURT BECAUSE  
THE CLASS WAS, AT THE TIME, WAS  
DENYING THAT THEY WERE RAISING  
CLAIMS BASED ON THE INHERENT  
DANGEROUSNESS OF CIGARETTES.  
THAT'S PAGE 233 OF THEIR 3RD DCA  
BRIEF.

THEY EXPLICITLY SAID WE ARE NOT RAISING THAT KIND OF CLAIM. WHAT THEY TOOK TO THIS COURT WAS AN ARGUMENT ABOUT CLOSING ARGUMENT, LAWFUL DON'T MAKE IT RIGHT.

WE THOUGHT THAT WAS AN ATTEMPT TO IMPOSE LIABILITY BASED ON THE INHERENT DANGEROUSNESS OF CIGARETTES.

THEY DIDN'T SAY, YES, THAT'S WHAT WE ARE DOING, AND IT'S LEGALLY PERMISSIBLE.

WHAT THEY SAID WAS WE'RE MISUNDERSTANDING THE IMPORT OF THAT ARGUMENT.

THAT ARGUMENT IS SIMPLY THAT WHEN THEY PROVIDE THE WARNINGS, YOU DON'T ELIMINATE ALL CLAIMS SO THEY CAN PURSUE FRAUD CLAIMS, THEY CAN PURSUE FAILURE TO WARN CLAIMS BEFORE 1969.

EITHER WAY, PREEMPTION DOESN'T ELIMINATE--

>> STRICT LIABILITY BASED ON THERE BEING UNNATURAL LEVELS, MANIPULATED LEVELS OF NICOTINE WHICH WAS THE ESSENCE TO HAVE THE THEORY.

>> THEY COULD PURSUE THAT CLAIM--

>> WELL, THAT WAS ONE OF THE CLAIMS THAT WERE FOUND.

>> THAT WAS ONE OF MANY THEORIES.

THE COMMON THEORY THAT YOU PRESSED MANY DOUGLAS WAS-- IN DOUGLAS WAS CIGARETTES ARE DEFECTIVE BECAUSE THEY ARE ADDICTIVE IS AND CAUSE DISEASE. ALL CIGARETTES WITH NICOTINE ARE ADDICTIVE, THAT WAS THE FINDING OF THE ENGEL JURY ITSELF. SO THE ONLY POSSIBLE THEORY THEY HAVE IS THAT WE DIDN'T MANIPULATE NICOTINE LEVELS TO REMOVE NICOTINE TO SELL A NICOTINE-FREE CIGARETTE THAT NO OTHER MANUFACTURER IN HISTORY HAS EVER SOLD.

THEY ADMIT THAT THAT CIGARETTE,  
IF INDEED IT IS EVEN A  
CIGARETTE, WOULDN'T SELL.  
SO WHAT THEIR TELLING YOU ON  
IMPLIED PREEMPTION IS THAT EVEN  
IF CONGRESS WANTED TO PROTECT  
THE NATIONAL MARKET FOR  
CIGARETTES, IT WOULD SIMPLY BE  
FOR A CIGARETTE THAT NO ONE  
WOULD WANT TO BUY.  
>> ALL RIGHT: AND I'M ADDICTED  
TO STAYING ON TIME.  
THANK YOU.  
>> THANK YOU.