Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23

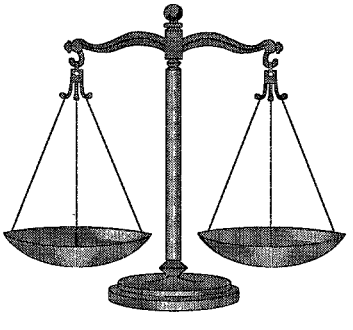
Volume Three

Leonidas Ralph Mecham, Director
Administrative Office of the United States Courts

May 1, 1997

Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23

Volume Three



Compiled by the
Rules Committee Support Office

Leonidas Ralph Mecham, Director
Administrative Office of the United States Courts

May 1, 1997

Working Papers
Advisory Committee on Rules of Civil Procedure
Proposed Amendments to Civil Rule 23

SUMMARY TABLE OF CONTENTS

Volume 1

BACKGROUND INFORMATION ON PROPOSED AMENDMENTS TO RULE 23

- Text of Alternative Versions of Draft Amendments to Rule 23 and Committee Note
- Minutes of Meetings of Advisory Committee on Civil Rules (1990 through 1996)
- Summary of Comments, Statements, and Testimony Submitted on the Proposed Amendments to Rule 23

Appendix A —	Index - Alphabetical listing of commentators (by organization and individual) with page reference to both hearing transcript and written comment or statement
Appendix B —	*Empirical Study of Class Actions in Four Federal District Courts*, Federal Judicial Center
Appendix C —	*Rule 23 Challenges to the Rulemaking Process*, Professor Edward H. Cooper, reporter to the Advisory Committee on Civil Rules

Volume Two

WRITTEN COMMENTS ON PROPOSED AMENDMENTS TO RULE 23

Volume Three

HEARINGS BEFORE THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO RULE 23

- Philadelphia Hearing Transcript
- Dallas Hearing Transcript
- San Francisco Hearing Transcript

Volume Four

WRITTEN STATEMENTS ON PROPOSED AMENDMENTS TO RULE 23

Volume Three

Testimony of Witnesses at Public Hearings on Proposed Amendments to Rule 23

Table of Contents

PHILADELPHIA, PENNSYLVANIA
NOVEMBER 22, 1996

Professor Susan Koniak 8
Allen D. Black, Esquire 24
Melvyn I. Weiss, Esquire 35
Max W. Berger, Esquire 44
Steven Glickstein, Esquire 53
Barbara Mather, Esquire 65
David Vladick, Esquire, for Public Citizen Litigation Group 73
Beverly Moore, Jr., Esquire, for Class Action Reports 83
Professor Roger C. Cramton 93
Professor John C. Coffee 109
Professor Judith Resnik 121
Professor Stephen Burbank 139
Eugene A. Spector, Esquire 142
William Leighton 144
Robert N. Kaplan, Esquire 148
H. Laddie Montague, Esquire 154
Jonathan Cuneo, Esquire 164
Gerald Rodos, Esquire 170
Stuart Savett, Esquire 177
Edward Labaton, Esquire 185
David Weinstein, Esquire 193
William T. Coleman, Jr., Esquire 204
Thomas Sutton, Esquire 215
Michael Donovan, Esquire, for National Association of Consumer Advocates 222
Shirley Sarna, Esquire 240
Dean Robert Reinstein 244
Professor John Leubsdorf 256
Professor Joel Gora 264
Leslie Brueckner, Esquire, for Trial Lawyers for Public Justice 269

Deborah Lewis, Esquire, for Alliance for Justice 280
Alfred Cortese, Esquire 281

DALLAS, TEXAS
DECEMBER 16, 1996

Stephen Gardner, Esquire 4
Richard A. Lockridge, Esquire 22
Professor Samuel Issacharoff 28
Professor Charles Silver 40
John Martin, Esquire, for Ford Motor Company 51
Claudia Wilson Frost, Esquire 59
John Henderson, Esquire 67
Henry B. Alsobrook, Jr., Esquire, for International Association of Defense Counsel 73
John Beisner, Esquire 97
Donald H. Flanary, Jr., Esquire 104
Alan Dial, Esquire, for Owens Winobay 111
John L. Hill, Jr., Esquire 114
Clinton A. Krislov, Esquire 117
D. Dudley Oldham, Esquire, for Lawyers for Civil Justice 127
Stanley M. Chesley, Esquire 133
Patrick E. Maloney, Esquire, for Defense Research Institute 146
G. Luke Ashley, Esquire 153
Professor Bartlett H. McGuire 159

SAN FRANCISCO, CALIFORNIA
JANUARY 17, 1997

Patricia Sturdevant, Esquire, for the National Association of Consumer Advocates 8
Beverly C. Moore, Jr., Esquire, for Class Action Reports 14
Nicholas J. Wittner, Esquire, for Nissan Corporation 20
Professor Eric Green 28
Lewis H. Goldfarb, Esquire, for Chrysler Corporation 37
Elizabeth J. Cabraser, Esquire 45
C.C. Torbert, Jr., Esquire 58
Professor Arthur D. Miller 63
Charles F. Preuss, Esquire, for the International Association of Defense Counsel 81
Leonard B. Simon, Esquire 86
Samuel B. Witt, Esquire 94

John L. McGoldrick, Esquire, for Bristol-Myers Squib 98
Sheila L. Birnbaum, Esquire 106
John Aldock, Esquire, for the Center for Claims Resolution 118
John W. Stamper, Esquire 126
Richard Wentz, Esquire 130
James J. Johnson, Esquire 138
James R. Sutterfield, Esquire 144
Jeffrey J. Greenbaum, Esquire 148
Miles N. Rutherberg, Esquire 157
Stuart Baird, Esquire, for Wells Fargo 165
Stephen B. Ringwood, Esquire 174
William A. Montgomery, Esquire, for State Farm Insurance Companies 178
Joseph Goldberg, Esquire 186
Gerson Smoger, Esquire, for the American Trial Lawyers Association 189
Brian C. Anderson, Esquire 201
Robert Dale Klein, Esquire 209
Steven M. Kohn, Esquire 215
Donn P. Pickett, Esquire 219
James N. Roethe, Esquire, for Bank of America 225
Clyde Platt, Esquire 234
Joseph Tabacco, Esquire 248
William M. Audet, Esquire 256
John L. Cooper, Esquire, for the American College of Trial Lawyers 266
Professor Lawrence. B. Solum 274
Alfred W. Cortese, Jr., Esquire 280

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

PUBLIC HEARING:

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL
PROCEDURE, RULE 23.

- - -

Philadelphia, Pennsylvania
November 22, 1996

- - -

THE HON. PAUL V. NIEMEYER, Chairman
UNITED STATES CIRCUIT JUDGE

David S. Ehrlich, CSR (A.M. Session)
Gregg Wolfe, CSR (P.M. Session)
Official Court Reporters
Room 1234
U.S. Courthouse
Philadelphia, PA 19106
(215) 925-2319

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription (CAT).

APPEARANCES:

CHAIR:

HONORABLE PAUL V.NIEMEYER
United States Circuit Judge
United States Courthouse
101 West Lombard Street, Suite 910
Baltimore Maryland 21201

MEMBERS:

HON. ANTHONY J. SCIRICA
United States Circuit Judge
22615 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

HON. DAVID S. DOTY
United States District Judge
670 United States Courthouse
110 South 4th Street
Minneapolis, Minnesota 55401

HON. DAVID F. LEVI
United States District Judge
2504 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

HON. JOHN L. CARROLL
United States Magistrate Judge
United States District Court
Post Office Box 430
Montgomery, Alabama 36101

PROFESSOR THOMAS D. ROWE, JR.
Duke University School of Law
Box 90360
Durham, North Carolina 27708

CAROL J. HANSEN POSEGATE, ESQ.
Giffin, Winning, Cohen & Bodewes, P.C.
One West Old State Capitol Plaza
Suite 600
P.O. Box 2117
Springfield, Illinois 62705

FRANCIS H. FOX, ESQ.
Bingham, Dana & Gould
150 Federal Street
Boston, Massachusetts 02110

Assistant Attorney General for the
Civil Division (ex officio)
HONORABLE FRANK W. HUNGER
U.S. Department of Justice, Room 3143
Washington, D.C. 20530

LIAISON MEMBER:

SOL SCHREIBER, ESQ.
Milberg, Weiss, Bershad, Hynes & Lerach
One Pennsylvania Plaza
49th Floor
New York, New York 10119-0165

REPORTER:

PROFESSOR EDWARD H. COOPER
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, Michigan 48109-1215

SECRETARY:

PETER G. McCABE
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

(This matter convened at 10:03 a.m.)

JUDGE NIEMEYER: All right, I am going to call this hearing to order. This is the first of three hearings that we have scheduled on proposed changes to Civil Rule 23.

We have at the podium here members of the Civil Rules Advisory Committee and our reporter. I think we are all adequately labeled with our signs.

And we of course are here interested to hear from you. And we will perhaps ask you some questions.

But we have a lot of people scheduled to testify. And I can say we are very interested in hearing your views on this.

Our plan is to have a hearing here, a hearing in Dallas, and a hearing in San Francisco. And we are then going to collect the comments - we have some written comments -- and the testimony, and evaluate the comments and react to it at a meeting that is now scheduled for April, 1997.

As all of you know, the Supreme Court has taken two cases in this class action area; one from the state of Alabama, so that case will have to be reaching the constitutional question. There was an issue there as to whether opt-out rights were

foreclosed. And I suspect the Supreme Court is going to address whether that violates due process.

And the other case that they have taken is the Georgine case, which has classes of persons who have been injured and futures classes. And it is not altogether clear what they will decide, but it is in the same area that we have our proposed rules.

So, what we may do, subject to the will of the committee, is to consider all these matters in April. But we may have to wait to hear what the Supreme Court has to say before we take any final action.

We have a long list, and one of our problems will be to hear all of you and to hear the substance of what you are saying. And so I would hope that you have organized your thoughts in a manner that you can get your point across within 10 minutes. That will be the time that I propose to allow.

And I will also try to enlist you to support or to adopt the comments of someone else who has already made the point, because if we have heard the same point five or six times, it probably doesn't help to hear the point again, but it would help to hear whether you are supporting that particular point.

The other thing is that I may try to do a little bit of grouping; that is, to have several of you who may be on the same side of an issue or making the same point come forward and talk on that. And I will see how that goes. You will have to be able to identify where you are on a particular point in order to assist us in that regard.

We have a morning session scheduled from 10 until 1. We will probably break for a recess mid-morning and run this a little bit like a courtroom. And then we'll have an afternoon session from 2:15 to 5:30, and likewise have a mid-afternoon session.

We have several handouts at the table. We have the proposed rules, the notice, we have lists of people who have signed up. And I circulated this morning a little memorandum which characterizes the changes, only for the purpose of putting a handle on them for our discussion.

I have listed them as five changes:

The first being a modification to the 23(b)(3) factors, and there are really three substantive changes under there, so you have 1 A, 1 B, 1 C;

The second change is the change that

proposes special treatment of settlement classes. That is the addition of (b)(4);

The third change is the change on eliminating restrictions on the timing of class action determinations. We have made a small language change, but what that does is, it gives the District Court the flexibility to decide class actions whenever practicable;

The fourth change is the imposition of a hearing requirement whenever a court dismisses or settles a class action; and

The fifth is the addition of 23(f), which provides for interlocutory appeal, somewhat parallel to 1292(b), but not entirely.

So what we'll do is, without any further adieu, unless any member of the committee here has any further comments, I propose to just -- we propose to be listeners and try to understand your points.

And we don't have any particular order. There is a list around, but that list is only the list of the comments in the order in which they came, so it does not determine the order in which you will speak.

Why don't we start maybe with an academic commenter, and then maybe we'll move over to a plaintiff's bar commenter, and then a defendant's bar

commenter. You may not want to identify yourself as such, but why don't I start on those three categories and get anybody else who wants to come up to the table during those comments, and we can group them and maybe it gives a little more flexibility on the time. And if we can do that.

So maybe I can call on -- is Mr. Professor Resnik or Professor Koniak here?

PROFESSOR KONIAK: I'm Susan Koniak, Your Honor.

JUDGE NIEMEYER: Would you like to come forward then and be a leadoff batter? You know, every game has to have a starter.

PROFESSOR KONIAK: My pleasure.

JUDGE NIEMEYER: Well, good.

I don't know if any of you have read Miss Koniak's comments or wants to join up here at the table, but why don't we begin with her and give her ten minutes and go from there.

PROFESSOR KONIAK: Thank you for having this hearing. I come here to urge this committee to reject (b)(4) of the settlement class provision, and (b)(3)(F).

Although my written comments, this time around -- I have commented before -- concentrate on

(b)(4), I would like to also devote my time here to commenting on the settlement class rule. I know that others have spent -- will spend some more time on (b)(3)(f) -- although, if you have questions on either of those provisions, I would be happy to answer them.

I think (b)(4) should be rejected. And I think instead, the committee should amend the rule to provide that courts be prohibited from certifying for settlement purposes any class action that could not be certified for trial.

Further, I think that for those settlement classes in which there is no contest over whether the certification is appropriate, in other words the defendant and plaintiff agree not to fight because they want to settle the case - what I call in my written comments a benign settlement class - the rule should be amended to make sure that a clearer showing that the adequacy of representation is present and that the settlement is fair should be shown before the Court approves any settlement in which there is no contest over the certification requirements, which are put in place, after all, to protect the absent class.

I also urge the committee to adopt other provisions which I note in my testimony that would protect absent class members and help prevent

collusive settlements.

The problem with the proposed rule is that instead of addressing the problems which I see as widespread in the system now of corruption and abuse, collusive settlements, it invites and opens up a new avenue for such abuse while doing very little to protect the absent class members.

In my testimony, I spent some time talking about my competence to be here, because I understand -- and the Chair has just described there being three categories, and my being an academic, which some academics actually might take issue with --

JUDGE NIEMEYER: There actually may be more categories. I just was going to start with those three.

PROFESSOR KONIAK: So I don't want to review my competence to be here today, except to say two things, which is:

My experience and my comments are informed not by academic musings, but by my experience in this area of what is going on up there;

And second, that I think it is important, as I noted to the committee, to consider the interests of all witnesses. And one advantage that academics have that the other witnesses don't, is by and large

we do not have the financial interests at stake that other witnesses do in seeing a proposed rule go forward.

And we all know, since there is some controversy over what actually are the facts of what is going on out there, that this committee needs to consider the motives of the witnesses whose speak here today.

Okay. Before you decide whether to prohibit, to license or restrict what has been called a settlement class, it is important to define what is a settlement class, which this rule doesn't do.

I say in my testimony there is two plausible definitions for a settlement class. One is a class that cannot possibly be certified for trial, let's take Castano, the tobacco litigation. And we have the Fifth Circuit's opinion that says, this class can't be tried in this fashion, and then we have a settlement. So two days later they come in -- and this happened in the Rhone-Poulenc case, I believe. The Seventh Circuit said you couldn't certify it for trial, but then they went back and settled.

That is one form of settlement class; something that we know could not be tried.

The second kind of settlement class, which

I call -- and I call the first kind malignant. I call it malignant because I believe that it is an invitation to widespread abuse because all of the leverage in such a situation is with the defendants because the plaintiff's lawyer who is put in the position of knowing they can only settle a class and could not possibly bring it to trial, means that if they get up and walk away from that table, they are left with only their inventory of cases, 100 cases, 1,000 cases, but not the whole class.

And so, they are under enormous pressure to accept whatever deal the defendant offers them; a global settlement, that will bring them counsel fees, particularly since they know the next plaintiffs' lawyers to sit down at that table can make the same bad deal and maybe they lose their inventory too, but they certainly lose any future business.

So that is why I call it the malignant form, which is, again, a class that cannot possibly be certified for trial, something that this committee should prohibit.

The other kind of settlement class is the kind that I believe the Second Circuit and Fifth Circuit meant to license in Weinberger and In Re Beef Industry. That kind of settlement class, which I call

benign - in the sense of a benign tumor, by the way, not in the sense of a benign wonderful thing; in other words, something that can be treated and is a necessary -- you know, it is kind of in this situation a necessary evil. That kind of settlement class is one in which the class actions are filed or is anticipated by the defendant, and instead of fighting for rational reasons of not wanting to spend money, over class certification, they sit down and arrive at at some point some settlement with the plaintiffs; and it is brought to a court. And the class looks like a plausible class under (b)(3). But a Judge can't make a final determination, a definitive determination, that such a class could be tried, because there is no adversary process. And as we all know, an adversary process is the way in which we are sure that when judges make a decision, that the decision they are making is one which we could have some confidence in.

So in this benign form you have a judgment with a class that looks like a class; it looks like, well, these people, lumping them together makes some sense; that goes through the (b)(3) things, and they say, well, without argument, without hearing the reasons why it shouldn't be a class, it certainly looks like one.

But I am not sure that if this settlement fell apart, that I would, if I heard argument, feel the same way, or decide it the same way -- feelings being unimportant -- decide the same way.

Now, I don't see how that can be avoided without prohibiting settlement, which one can never do. So I see that as something that is a sensible thing for the courts to license, and what was being licensed in In Re Beef Industry and Weinberger.

But that is a fundamentally different animal because it doesn't leave the plaintiffs with no leverage in negotiation, it doesn't allow them to settle things that they couldn't possibly try.

And as the courts said in Weinberger, clearly, that that too has a great potential for abuse because they would just be getting together, lumping people together who don't belong together, selling out class members; there is no check, there is no fight going on, so it would be just too friendly for a class, this deal. So extra precautions have to be taken to make sure abuse doesn't occur there.

And, by the way, extra precautions need to be taken even in cases that are litigated that look like they are going to fall, because abuse is possible in any settlement, which is what 23(e) obviously was

intended to try and prevent but needs to be beefed up; and no reference to Beef Industry here.

Now, so I don't think that collusion is a function, or abuse is a function of the malignant settlement class. I think it exists and it needs this committee's attention.

However, what I do think is that allowing classes to be settled when, as one might put it, when -- If it couldn't possibly be tried, if one were to think about it, it is not a class. It is not a class that makes sense in the sense of being some group of people that whose claims belong together and who have at least the same interest common enough for them to be -- with enough protection in place.

You are not interrupting me, so --

JUDGE CARROLL: Let me ask you a question, Professor Koniak. The part of your comments that trouble me are your comments that seem to overlook a very important class of cases, which is, in states where there is no effective consumer regulatory agency, often the consumer regulatory agency is a class action involving state law fraud. Generally, those kinds of cases, if they were taken to trial, cannot be certified because of the problems of reliance.

They can be settled, though, and consumers get benefit that they would not otherwise get if you allow a settlement class; which seems to me a good argument in favor of settlement classes.

How would you propose or do you not see that as a particular --

PROFESSOR KONIAK: I reject the premise that those things could not be certifiable -- the reliance question.

If we have a question -- If we have a class -- One is, the rule itself now provides, and courts have acknowledged, there are parts of a class that do have common-enough interest, even if not all of the issues could be tried in a group.

And if the class had common-enough interests, but reliance wasn't one of the interests, they would say, well, is there liability, you know, assuming some level of reliance.

Now, that can be certified as a litigation class, which I believe it could be - there is other issues common to the class that could be certified - then I believe that a settlement that then doesn't give a common resolution to reliance, but instead has enough subgrouping or categories where reliance is shown in this way, could be something that would be

acceptable and would not fit into the category of one that could not be litigated.

MR. SCHREIBER: Professor, I am curious about your use of the terms corruption, abuse and collusive. Now, you are not a procedural specialist, you are an ethicist, is that right?

PROFESSOR KONIAK: That's right. With a degree --.

MR. SCHREIBER: Yes, I know your background.

In fact, you have never participated in the bringing of a class action, but you now appear as an expert on the ethical aspects, isn't that correct?

PROFESSOR KONIAK: I have on two occasions, as my testimony has said, that's right.

MR. SCHREIBER: Okay. Well, is it your testimony that all settlement classes that you have seen are corrupt, abusive, and collusive?

PROFESSOR KONIAK: My testimony is that all of the evidence that has come to me, which I describe where it has come from, and all the conversations that I have had with people, say that lawyers understand and are more than willing to take advantage of the opportunities for corruption, for selling out a class, for abusing the system, for making money at someone

else's expense, in all kinds of class actions; that that incentive is there, and that it is much more possible to do in this context than in any other.

MR. SCHREIBER: That is not what I asked you. I am asking you, on all the settlement classes that have taken place --

PROFESSOR KONIAK: The answer is no.

MR. SCHREIBER: So it isn't a question that we shouldn't have settlement classes; it is a question of how we should have them.

PROFESSOR KONIAK: No, number 2 does not follow. Your second proposition does not follow from your first.

It does not have to be shown, and I think it would be an outrageous standard for this committee to adopt, that every single settlement class is abusive or corrupt before this committee decides not to license them.

If it has enough potential to be corrupt and collusive, that should be enough for this committee --

MR. SCHREIBER: What are the standards --

PROFESSOR KONIAK: -- to prohibit it, rather than having anyone have to show that every single one is no good.

MR. SCHREIBER: What are the standards you recommend to this committee for the Court to determine whether there is corruption, whether there is abuse, or whether there is collusiveness? Tell us the standards.

PROFESSOR KONIAK: I think that it is very easy to hide that from a Judge. And I think that that is why most of my suggestions -- One thing you do is, you cut off an area that everyone can understand is just ripe for that thing, or you don't allow that, because it is hard to tell in an individual case whether it has gone on. So instead, you cut off areas that are very subject to abuse, like what I call the malignant settlement classes.

The second thing you do is, you build in procedural safeguards.

MR. SCHREIBER: What are the procedural safeguards?

PROFESSOR KONIAK: And I list the procedural safeguards in there, including the one that my colleague John Leubsdorf will put forward, that there be an advocate appointed when there is a certain monetary level reached in any class action settlement, whether it is a benign settlement class --

JUDGE NIEMEYER: Is that a change you would

suggest to 23(e) then?

PROFESSOR KONIAK: That would be a change to 23(e), that notice be improved; that it -- that a brief in the analogous situation is from the Anders brief, that the brief has to include disclosures to the Court of any material adverse facts.

Now, I can tell you from personal experience that the kind of adverse facts that are not told to a court are that comparable settlements are being made in inventory cases that are one hundred times better than the deal I am presenting to you. That is an adverse fact. That doesn't mean the Court has to reject it. But if you require lawyers to tell that, it would answer some of the questions that Mr. Schreiber just raised.

JUDGE NIEMEYER: I guess the thrust of what you are saying, without carrying it too far, the thrust of what you are saying, as I understand it, is that the adversary system can work between parties to negotiate a settlement, but your concern is about the absent class members who are not at the table, is that --

PROFESSOR KONIAK: They are not at the table, and --

JUDGE NIEMEYER: And whether there is

enough safeguards to protect those people from the settlement process.

PROFESSOR KONIAK: That is my concern.

My second concern is with the integrity of the judicial system, which I think is being compromised by allowing deals -- things to be settled where there is no checks in place for making -- no subclasses are required. All of the justifications which would -- if you permit me my last point I would like to make, which is, I talk in my testimony about if we accept that at least -- as I think this committee has to, I must say, unless you want to give me a better argument -- that this is an area ripe for abuse -- ones that can't be tried but can be settled -- if we accept it as ripe for abuse, which doesn't mean everyone is abusive, then you say, what justification is there for changing this rule?

And I heard one question on the justification. But even if those weren't allowed, let me just say I am not sure it outweighs the damage that could be done. But the justifications offered by this committee are three:

One, choice of law, you know, would be more easy to deal with. Well, those laws are important. They are state laws. We don't want to plunge over

those differences so quickly. It's important that people with different states -- that pass these laws, they think they have legislatures to do this. So I am not sure that justification works.

Subclassing are there to protect class members so their rights aren't traded off against other class members' rights. So the idea that subclasses would not be available is not a good justification; and

Third, this large-scale comprehensive solution thing is a very nebulous kind of vague notion about what courts should be doing; what large-scale problems that shouldn't be subject -- that aren't subject to adversary litigation.

I think that refers to the futures class, which is what Georgine is about, which we all understand have serious -- all of the problems magnified for absent class members being vulnerable are magnified 10 times, at least, by the presence of these future classes in which there is no way to give effective notice to the class, they don't know their rights are being adjudicated, they wake up one day, you know, 10 years later, and they find out that some lawyer settled their claim and they are dying and they can't go to court and they didn't even know what

happened.

I think my time is up. So --

MR. FOX: Can I ask one question, Mr. Chairman?

JUDGE NIEMEYER: Yes.

MR. FOX: In one sentence, how would a rule word the difference between malignant and benign classes, or would I recognize it when I see it?

PROFESSOR KONIAK: No. The class has to be -- the Judge has to believe that the class meets, absolutely meets the requirements of (b)(3). And if a Judge doesn't --

But, if there is no adversary process on that, then we call it a tentative determination; just like the words In Re Beef Industry. If it doesn't, you can't settle it. It has to meet --

MR. FOX: You mean, he has a firm conviction that it would, but he is not absolutely clear; but there may be some in which he has firm conviction that it wouldn't, and that --

PROFESSOR KONIAK: That's why -- and the examples are like Castano, how could you have a firm conviction it would be settleable. And you know that there are circuits that you can try it. And anything that looks like that then, you know is something that

can't be tried and, therefore, you can't settle it -- have a settlement.

JUDGE NIEMEYER: Thank you, Miss Koniak.

All right, why don't we move on to someone who is willing to identify himself with the plaintiffs bar.

Do you want to come forward? And Mr. Weiss, do you want to come forward?

Anybody else here? Yes, sir.

MR. BERGER: Max Berger.

JUDGE NIEMEYER: Mr. Berger.

You are, sir?

MR. BLACK: I am Allen Black, of the firm of Fine, Kaplan and Black, in Philadelphia.

JUDGE NIEMEYER: Okay. And why don't we have -- Mr. Berger, why don't you come forward to the table. And we'll see if we can't get some of these comments lodged together. Maybe you all don't have the same interest, but why don't we start with you, Mr. Black.

MR. BLACK: Thank you.

I am best known as a plaintiff's side class action lawyer, although my firm and I do from time to time represent defendants. In fact, we are representing defendants in a class action antitrust

case in the Eastern District of New York right now. So we somewhat work both sides of the street, but we are justifiably known as plaintiff-side lawyers primarily.

I have submitted written testimony and I would like to direct my remarks this morning to three of the new proposals: The new (b)(3)(A), the new (b)(3)(F), and the new 23(f) on interlocutory appeals, just briefly at the end.

I think it would be a mistake to adopt (b)(3)(A) and (b)(3)(F). Both of them I think have undesirable and perhaps unintended and unforeseen consequences, and I think that the objectives sought to be achieved by those proposals could be achieved in other ways that don't bring with them the undesirable baggage that I see in the current proposals.

As I understand it, 23(b)(3) now rests on two, at least two, complementary rationales. One is to aggregate medium- and large-size claims -- claims regardless of size, really -- to achieve efficiencies and avoid duplicative litigation, where you litigate the same facts over and over again, you know, in many different courts;

And secondly, to allow the aggregation of small claims that otherwise could not practicably be

asserted at all.

New (A) and new (F), it seems to me, undermine both of these rationales without explicitly saying either in the rule or the notes, that that is what is intended.

Let me look at that in the context of a practical example. And I would like to talk about the Corrugated Container antitrust case, which is one in which I and others tried to a jury, and ultimately resulted in a 500 million-dollar-plus recovery, on behalf of a class of tens of thousands of members, in which some of the largest class members, companies like Procter & Gamble, and so forth, got checks in excess of 10 million dollars in that class action, and some of the smallest class members got checks for maybe 25 or $50.

Now, Corrugated is a case that as far as I know is regarded by almost everybody, except maybe the defendants in that case, as a paradigm of how class actions ought to work.

Tens of thousands of claims were litigated in one jury trial, the class members received substantial recoveries, and the whole thing was processed in, I guess, about four years, or something like that.

But let's see how that case would fair under new (A) or new (F). What should a court do with that class before it was certified if it had new (A) and new (F)?

Would new (A) require the court to deny certification in Corrugated because there were a large number of really big claims in there? That would be a really horrible result for everybody concerned. It would be a horrible result for the people with big claims, it would be a horrible result -- really a horrible result for people with small claims, and it would be a horrible result for the judicial system because some number of the people with big claims would bring their own individual suits, they would be forced to.

Or would (A) require the Court to cut out of the class people with claims more than, I don't know, 100 thousand dollars.

JUDGE NIEMEYER: Let me ask you this. The rule, the (b)(3) rule, already has in it the notion that the class action ought to be superior. And the change to (A) I suspect is intended to be some kind of aspect of that going to the practicality of a class action, and the other change, which was in --

In which section was that?

JUDGE LEVI: (F).

JUDGE NIEMEYER: -- goes to cost considerations or the economic efficiencies of doing something like that.

Aren't they already factors that the Court can consider under existing rules?

MR. BLACK: The Court can, but I -- and I think that in extreme cases the courts do. You look at cases like, you know, hotel telephone overcharges, and you look at the evidence compiled for this committee by the empirical study, and the empirical conclusions are that they found no evidence of classes being certified and cases going forward where there were trivial claims, based on trivial claims. Those cases either get dismissed or thrown out on summary judgment or the class is not certified.

But I think that adopting these two proposals would point the courts in the wrong direction and point the courts toward giving too much emphasis toward those factors.

I suggest that the second possibility, getting back to the Corrugated case, of having the Court exclude everybody with claims over a certain amount, is again a bad option, because many of those large claimants would prefer to litigate as a member

of a class, and to avoid the possibility of retaliation from a defendant who might cut off their supplies if they are sued by somebody in an individual case, and to avoid the costs and burdens of individual litigation. And it is a bad option from the point of view of the judicial system because, again, it encourages multiplication of claims.

On the other hand --

JUDGE NIEMEYER: I was just going to say, you just have a couple of minutes. I was interested also in hearing your comments on change 5, which is the interlocutory appeal. So I don't want you to forego that if you --

MR. BLACK: Okay, I won't. I wasn't aware that you were strictly enforcing the 10-minute rule.

JUDGE NIEMEYER: We are not, but we have a courtroom full, and what I intend to do is to hear from Mr. Weiss and Mr. Berger too, and I assume they are on the factors question.

I think we understand your point on that, unless you have something further to add to that.

MR. BLACK: Let me just say that (F) suffers from the same problems.

In terms of practical considerations, one of the big problems, it seems to me, with both (A) and

(F), is that they are both built on the assumption that the Court can characterize the size of the claims in the class with one number. And that is just contrary to the fact. Most classes have small claims, medium-size claims, and big claims. The use of an average is an easy way out, but I will suggest it is a cop-out, because it really doesn't logically address the problems that these proposals seek to address, and it is unfair to the class members.

Why should my four-thousand-dollar claim be precluded from class treatment because I happen to be in a class where the average of other people's claims is one hundred thousand dollars, or the average of other people's claims is $50? My claim is still four thousand dollars. It ought to be eligible for class prosecution.

There are procedural problems as well. Both of these proposals require the Court in some way or another to look at class certification time at the amount of relief that individual class members might get sometime. And that is going to require, I hope, a hearing. I hope that is not done just on the Court's sort of visceral feeling about how big the claims are going to be.

What are the issues going to be in that

hearing? The issues are going to be damages and to some extent liability because often you can't figure out even ballpark damages without knowing liability.

If you have a hearing, you are going to have to have discovery. And you are going to have to -- These proceedings are going to get very complicated and expensive, much more so than they are now.

The discovery aspect is a real Pandora's Box, let me suggest, particularly with (F). (F) says that the Court is to determine what are the costs and burdens of the class litigation. That entails looking into the cost of defense, I respectfully suggest. It has to. So I as a plaintiff's lawyer am going to go in and ask the defendants what are you paying your lawyers, and for what?

And what if the defendant has decided to adopt a scorched-earth defense? Is the Court simply to accept that and say, "Well, okay, that's fine, that's your choice, I can't dictate to you how you are going to defend your case. Let's just wait and figure out how much that's going to cost"?

Or should the Court allow the plaintiff to explore in discovery and then present evidence about whether there wouldn't be more economical ways to

defend the case. "Why are you hiring 15 experts? Why should that go into the balance against my class claims? One expert would do."

I don't think we need to get into that. I don't think we want to get into it, I don't think we need to get into it.

It brings me to the main point of my remarks about (A) and (F). I think that neither one of them is really necessary.

(A), as I understand it, my sense is that (A) is intended primarily to address the mass tort class actions, and two risks in those cases. One is the risk that large claims will -- large claimants will somehow get swept into a class against their will.

I suggest that the logical way and the best way to deal with that is to make sure that the claimants are well informed about their rights to opt out. Then they can make up their own minds if they have a large claim whether they want to stay in the class and litigate as a class member, or opt out and litigate on their own, or opt out and not litigate at all.

But they should be allowed to make their own decisions on that rather than have a Court make

those decisions for them in the absence of knowing their concerns or desires.

JUDGE LEVI: What about in an area of law that is developing and maturity is a consideration? Why shouldn't the ability of the individual class members to pursue the litigation separately also be a consideration? It is just a consideration.

MR. BLACK: Well, in that area maybe it should be. And I think maybe it already is under current (A).

To the extent that the concern is extinguishing future claims, the Supreme Court may answer that for us and simply say it is not allowed. Or, if the Supreme Court doesn't take that route, I would suggest that the rule address that concern directly rather than -- and simply say you can't include in a class action claims that haven't arisen yet, or something like that, rather than bringing in (A) with all the discovery and other difficulties.

JUDGE NIEMEYER: All right, do you have anything on 5 you want to add? I want to sort of bring this to a head. You have two people behind you, and I let you go over already.

MR. BLACK: Yes, I do want to say something about the proposed intermediate appeal provision,

interlocutory appeal provision.

I come at that more -- my concern there is rooted more in the concern for the law as an institution than in terms of the practical considerations I have been addressing on these other issues. And that is this:

Under our current regime, under the current rule, the law on class certification comes by and large from the District Courts, and it comes as a result of the District Court's exposure to all sorts of class cases; every class that seeks to be certified comes before the District Court, and our body of law grows out of that wide range of experience.

If 23(f) is adopted, I think it is likely that the Courts of Appeals will take only the most egregious cases on both ends of the spectrum. And what we will get in the medium-to-long range is a body of law that is based upon the egregious cases and not upon any of the wide middle.

JUDGE NIEMEYER: Well, if you eliminate the egregious cases, you may have a pretty good body of law.

MR. BLACK: But your appellate law is going to be all based on that.

JUDGE LEVI: They are starting to do that

anyway.

MR. BLACK: And one practical consideration is that I think you will find that every class certification decision one way or the other will result in an application for an appeal.

JUDGE NIEMEYER: Okay.

JUDGE LEVI: Aren't they doing it anyway --

MR. BLACK: Yes.

JUDGE LEVI: -- now, in the egregious cases?

MR. BLACK: I think they are handling it well that way.

JUDGE NIEMEYER: Well, they are stretching the mandamus writ, aren't they, sometimes?

MR. BLACK: Sometimes, but not terribly. Not abusively.

Thank you.

JUDGE NIEMEYER: Thank you, Mr. Black.

Mr. Weiss, do you have anything to add or do you have other points to make?

MR. WEISS: Yes, Your Honor.

I want to bring my perspective based upon 30 years of experience in actual practice of class action litigation.

I heard a professor stand here a few minutes ago criticizing on a widespread basis, in a

rather emotional fashion, the way people practice law in our country in class action jurisprudence. And I must say that her conclusions are not consistent with my experience. And I have not an inconsiderable amount of experience.

As a lot of you know, I have been involved in hundreds of cases. Indeed, when some of you were in private practice, you were involved with me in some of those cases.

My consistent experience has been that lawyers who practice in this field practice diligently, ethically, at arms lengths against their adversary. These are hard-fought cases. Judges typically provide a great deal of oversight with respect to these cases; especially in the last 10 years, judges have become very comfortable with their role as people who provide oversight.

Rule 23 has now been in existence for 30 years and it has worked. It has worked very effectively, and for a variety of reasons; because it serves all the interests.

And let's just analyze it for a minute, because where I am going to is, settlement classes should be something that you should consider very seriously because that's what we do. That's the way

these cases are resolved, overwhelmingly. And I am going to show you, I hope, why it has worked.

From the defendant's perspective, I know Professor Coffee thinks that defendants only use class action as a settlement device because they can get out cheaper.

But that is not necessarily true. From a lot of defense perspective, it provides certainty, or at least better predictability, with respect to their problems far sooner than any other vehicle provides for that. They may even be willing to pay a premium to get that certainty and that early resolution.

It is an easier vehicle to provide the uniformity in treatment of class members, and very frequently defendants want to do that.

As an example, in my life insurance policyholder cases, which I now have in many courts, I have just settled with New York Life with 3 and-a-half million policyholders, Phoenix Home Life with 650,000 and now Prudential which is going before the Court with 10.7 million policyholders. There is a real interest in those companies resolving those disputes fairly and equitably because they have their customer base involved on the other side of those cases, and they have real corporate concerns about it and they

also have regulators breathing down their necks.

It also accelerates the resolution of their problems.

So the mere fact that they are settling a class action isn't necessarily driven by cost consideration.

From the plaintiff's perspective, when you settle a settlement class, you are putting the class member at the optimum benefit point in the litigation in terms of providing the class members with information and options.

At that point in the litigation, they have the right to opt out so they can make a clear choice do I want to stay in or not. And in making that choice on an assessment of the merits that is being presented to them, together with a history of the litigation, with the recommendations of attorneys --

JUDGE CARROLL: Mr. Weiss, some of the commenters have suggested that that opt-out provision is really some sort of illusory right because nobody can afford to opt out in a meaningful way.

Would you address that particular issue?

MR. WEISS: Well, that seems to me to really pose a very interesting aspect to the argument, because if it is true, then what is their option? If

they have no other option to get a remedy, then you are saying give them no remedy. And that seems to me to be the inherent inconsistency in the argument. They don't have a real opportunity to pursue an independent remedy. So, therefore, we shouldn't give them any remedy.

Now, I think that the way to handle that is because -- is with the Court observing his or her fidelity to his or her obligation under the rule. And that is to make a determination as to fairness. And that fairness determination is going to be based upon the Judge's overall -- to borrow from a corporate phrase -- the entire fairness of the situation; which will include how vigorous the lawyers were in pursuing --

JUDGE SCIRICA: It has been suggested that an advocate should be appointed in order to ensure this.

MR. WEISS: I think that is a disaster waiting to happen. I think it is going to create nothing but witch hunts.

I have seen advocates appointed and in action. And I think what you are going to do is, you are going to subject every one of these cases to another whole series of procedural experiences that

none of us are going to enjoy. It is going to be costly, it's going to be nitpicking. I mean, once you hire an advocate, the advocate has to advocate.

And there is another very interesting aspect to it. Does the advocate have to make every argument? What is the advocate's fiduciary responsibility in that situation? Can the advocate use a business judgment approach, can they use a sensibility approach?

I mean, I have seen advocates sit there and say, "I can't deal with you because my job is to follow the Court's injunction that I raise all the arguments on behalf of my client, and my client is the class member."

"Well, Mr. Advocate, I represented that class for the last umpty-ump period, whether it be months or years, also, and I know a lot about the problems that this class has, or that the individual claims have. And contrary to Professor Koniak, I think the lawyer's job is to take a case and make the best case out of it that you can.

And even weaker cases are deserving of good advocacy by the plaintiff's lawyer.

Now, you can't always be totally candid about your problems in a case. So, the Judge is there

to provide the overall supervision with respect to whether or not lawyers are indeed being observant to their responsibilities, officers of the court.

We are officers of the court. We have to stand before courts day in and day out and we have to make them satisfied that we know what we are doing ethically and honorably.

JUDGE NIEMEYER: Do you have any problems with the proposed changes, change 2, which is the class action; change 4, which is the hearing requirement? Or I gather that you are basically speaking in support of both of those?

MR. WEISS: I assume that we are going to have a hearing every time I want to drop a class action. That has always been the way I practice. I have to satisfy the Court that -- unless, unless there is no compensation going to either the -- to anybody, to the plaintiff or to the lawyer, as a result of the resolution.

There are times when we go before a court and we say, look, Your Honor, we just want to drop this case without prejudice, nobody is going to be hurt; I'm not getting a dime, my client's not getting a dime, why go through all the expense under those circumstances of having a hearing.

But under any other circumstance, I think there should be a showing as to why a case should be dropped.

As far as I am concerned, the jurisprudence is very clear. Once I file a lawsuit denominated a class action, I have a fiduciary responsibility and the Court has certain obligations.

We cannot do things just the way we want to do it. The statute of limitation is tolling during that period of time.

There are a lot of implications from filing a class action.

So, that's the way I conduct myself.

JUDGE NIEMEYER: Okay.

Why don't we hear from Mr. -- your --

JUDGE SCIRICA: Could I ask Mr. Weiss what his opinion is on the interlocutory appeal?

MR. WEISS: I am against it. You may know that I argued Coopers & Lybrand versus Livesay before the Supreme Court. There was a time when we used the death knell doctrine concept to pursue interlocutory appeals on the grounds that without a class action it was the effective death knell of the case. So we fit under the final judgment definition.

The Supreme Court made it very clear that

they didn't like those kinds of interlocutory appeals.

In listening to Mr. Black, I agree with what he is saying. He and I and his partner, Arthur Kaplan, were the plaintiffs' attorneys in Blackie v Barrack, which was a great class action decision in the Ninth Circuit. And my observation over the years is that when bad cases come along, somehow the courts find ways to handle them, even if they have to stretch mandamus rules a little bit to do it. They somehow are able to weed out the bad cases and get rid of them. And now we have more and more Professor Koniaks around coming in and objecting. These cases are being scrutinized --

JUDGE LEVI: Could I ask you -- Excuse me. -- about this malignant class that was talked about earlier, since you have handled so many of these cases. Can you speak to this point about the economic pressures on a class action lawyer in a case where the lawyer suspects that the class will not be certified, and so -- You heard her testimony this morning.

MR. WEISS: Yes. I can't deny that there are times when those factors weigh in the determination of lawyers to do things; on both sides. That is why we have Rule 23. That's why lawyers can't

just drop cases, settle cases, take payoffs. They have to go through a process. They have to send out notice, they have to make people aware of what they are doing, and they are subject to objections, to a hearing, to a Judge's scrutiny, to a court awarding fees. It is a fish bowl litigation like no other in our society.

Now, if those things exist, they exist throughout litigation from time to time. There is nothing you can do about that. So why trash a rule that has worked efficiently and effectively to resolve problems for the Court, for defendants and plaintiffs, and class members, because there may be some of those concerns? Just be more aggressive as Judges in the oversight --

JUDGE NIEMEYER: All right, I'm going to have to move on here, I think, if we are going to give everybody an opportunity.

Why don't we hear from Mr. Berger.

And if you can, if you are willing to adopt any of these other comments and shortcut that way, that would be appreciated.

MR. BERGER: Good morning, Your Honor. Thank you for allowing me the opportunity to speak here today.

Because of the time constraints, I have written out my comments, but feel free to interrupt if you would like to.

Unlike Mr. Weiss, I don't know most of you, so by way of introduction, I am a senior partner in a 17-lawyer firm in New York that specializes in the prosecution of securities fraud, consumer discrimination, and antitrust class action litigation.

My firm directly and through our predecessor firm has specialized in this type of litigation for the past 25 years.

We were lead counsel, along with Mr. Weiss, in the celebrated Washington Public Power Supply System litigation, the largest securities fraud class action, settlement for class action in history. I currently represent the African-American employees of Texaco in the discrimination class action that is undoubtedly known by now to most of you.

I respectfully refer the committee to my written submission dated November 7, but I will briefly address two of the proposed rule changes which cause me concern, and that is (b)(3)(F) and 23(f).

JUDGE CARROLL: Mr. Berger, let me ask you a question on (b)(3)(F).

I picked up USA Today recently and saw been

there has been a nationwide class certified against, I think it is Lean Cuisine, for people who bought Lean Cuisine. Lean Cuisine admits, as part of the settlement, that some things that were advertised as lot fat were not in fact low fat. And the settlement allows you to get a coupon to have so much money off your next Lean Cuisine purchase.

What's wrong with a federal court deciding that given its limited judicial resources that it should not certify a class like that because the recovery to the individual claimant is so small?

MR. BERGER: Well, I am not familiar with the Lean Cuisine case. But there are certainly circumstances where courts would be justifiable in not certifying classes because they consider them to not have meritorious claims.

But if --

JUDGE CARROLL: Well, let's assume that's true, that Lean Cuisine has in fact defrauded us by saying that some of their foods were low fat when they were not?

MR. BERGER: Well, if there is a -- I will give you an example of a similar type of situation and then I will leave it for you all to judge whether you think these claims ought to be represented in a class

action or not.

But it is my overriding philosophy that anyone who has a cognizable claim which they are unable to prosecute individually, but otherwise meet the requirements of class action status, ought to be able to do so, because the alternatives are just simply unacceptable.

And the alternatives are that somebody could commit frauds on multitudes of people in small amounts and leave them without any recourse.

And the example -- Let me give you what is a timely example in response to that. My firm has just concluded a consumer class action against America On Line. The charges in that case were relatively straightforward. America On Line engaged in the undisclosed practices -- these are charges -- in the undisclosed practice of adding 15 seconds to every subscriber session and then proceeding to round up the total session time to the nearest minute. Thus, a subscriber was actually on line for a minute and 46 seconds, he or she would actually be charged for 3 minutes.

Moreover, the on-line and end-of-session clocks that appeared on the computer screen did not reflect the additional time that was charged. It was

only the minute and 46 seconds that appeared on the computer screen, not the 3 minutes that they were charged for.

Plaintiffs believe, and I ask you to assume, that the evidence of nondisclosure was overwhelming.

Damages were quite small on an individual basis, averaging about 3 dollars per class member.

JUDGE LEVI: I don't think that is a good example because the class members are identified and the cost of rebating to them might be very simple.

We are looking at something where the costs of the mailing might exceed the cost of the recoupment.

MR. BERGER: Well, I don't think -- I mean, I don't think the rule is that limited. I think that the rule that is being proposed is where the recovery to the individual class members is outweighed by the costs associated with the litigation.

Certainly in this particular case, there would be -- there were 6 million class members. Damages were -- the aggregate damages were roughly around 15 million dollars, but the average damages per class member were approximately 3 dollars.

So, should the class -- should the

subscribers be allowed to be represented by someone like our firm in a class action subject to judicial intervention and supervision to recover for them if the Court finds after a trial that they were entitled to a recovery, or should they be allowed to keep what we would consider to be their ill-gotten gains? I respectfully submit --

PROFESSOR ROWE: Could the problem that you see with 23(f) be solved by keeping some form of 23(f), but changing its language such as to refer not to damages to individual class members, but to aggregate damages, or as Mr. Black has suggested in his testimony of changing it to read whether the claims of the individual class members is trivial. That might take care of Lean Cuisine.

MR. BERGER: Well, the problem you have with aggregate damages now is, if you take a look at -- if you just change the words from "probable individual damages" to "aggregate damages," what you have is the Court having to do essentially an extensive investigation into the merits of case at the earliest stages of the litigation when class determination issue is really made.

So, there will be disputes as to what constitutes damages in the case, what constitutes

aggregate damages. Defendants always contend that the damages are nonexistent, plaintiffs contend that they are high. We'll have depositions, we'll have discovery, we'll motion practice, all at the beginning of the case. And before due process is done, the Court is going to have to make a determination with regard to that issue in order to determine whether to certify a class.

What is certainly better, but in my view unnecessary under the circumstances, is to change the proposed rule to read, "aggregate claimed damages," or something like that.

In other words, I think that it's been a long-standing practice that courts don't look into the merits of the litigation when deciding at the early stages of the litigation class action determination. So -- and rely upon the pleadings in the case, good-faith pleadings in the case, in order to make that determination.

I suggest the same would be true, or should be true with regard to this rule, if it was going to be adopted. I am suggesting it is not necessary. But certainly there ought not to be a minitrial on the merits with regard to damages in the case early on in the litigation. And I think by just adding the word

aggregate, that would happen.

JUDGE NIEMEYER: All right. Now, I gather your comments on 5, that is the 23(f), are the same as the other two gentlemen, or do you have anything new to add?

MR. BERGER: Well, the only thing I would like to say, if I may, Your Honor, because I think it is important to point out it has not been pointed out before, and while I strongly believe this rule is unnecessary -- let me just give you an example of how we perceive it would work and make a suggestion to you as to how certainly if you were going to recommend this rule it would be improved.

Many class actions are securities fraud class actions. And under the recently adopted Private Securities Litigation Reform Act, which was adopted in December of 1995, most securities class actions will not be able to proceed on the merits as a practical matter for at least 6 to 9 months. That's it. That's virtually a given.

In many cases -- in most cases it will be much longer than that because they are at mandatory discovery stage relating to motions to dismiss.

Class motions are often decided after motions to dismiss, and if stays always -- already

always requested by defendants -- if stays are routinely granted pending appeals, the litigation will be stale before it even gets under way.

We could be looking at a year, two years before you even get an opportunity to serve discovery in the case.

So courts should at least be urged not to grant stays or appeals except under extraordinary circumstances. And if you are going to propose this rule, I would strongly suggest that the rule not just say that stays do not have to be granted -- I don't have the precise words in front of me, excuse me -- but that stays should only be granted under extraordinary circumstances, and appeals should only be granted under extraordinary circumstances. Otherwise, sure as night follows day, there is not a class action that will ever be filed where a class is certified which will not be followed by an appeal.

JUDGE NIEMEYER: All right. Thank you.

All right, why don't we identify some people who are willing to stand up and say they are speaking from the other side of the V sign; the defendant's bar. Do we have anybody here who wants to testify on this list on that?

Yes, sir. If you will identify yourself.

MR. GLICKSTEIN: Sure. My name is Steven Glickstein.

JUDGE NIEMEYER: All right.

And --

MS. MATHER: Barbara Mather.

JUDGE NIEMEYER: All right, Mr. Glickstein.

MR. GLICKSTEIN: Thank you.

By way of background, I practice in the private liability field. I was counsel of record in In Re American Medical Systems, where the United States Court of Appeals for the Sixth Circuit granted a writ of mandamus to reverse the class certification in a purported class action involving penile prosthesis.

I was also involved in three other class actions involving the same product where class certification was denied at the District Court level;

Represent Shiley in connection with the Shiley heart valve litigation where we initially were successful in defeating class certification for litigation purposes in the Northern District of California.

Subsequently, when a second class action was brought against the company in the Southern District of Ohio, we consented to a settlement and

reached a settlement class.

My partner, David Klingsberg, who cosubmitted the testimony with me, was cocounsel with me in all these cases. In addition, he has significant class action antitrust experience from the defense side; and the comments, the written comments concerning antitrust issues, are his, not mine. I don't have the antitrust experience.

I would like to address first the issue of interlocutory appeal. From my perspective this is potentially the most significant change in the class action rules.

It is important from the plaintiff's perspective, because as a practical matter, very frequently if class certification is denied, the plaintiff may or will abandon the litigation, and so the class certification decision evades appellate review.

From the defendant's perspective, with which I am concerned, as a practical matter if class certification is granted, the defendant is faced with potentially hundreds of millions, sometimes tens of millions, hundreds of millions, sometimes billions of dollars, of exposure; perhaps it becomes a "I bet your company" case. If not, it is at a minimum, "I bet

your product-line" case.

Very few companies can responsibly make the decision to go to trial in those sort of circumstances. And so again, the practical effect here is to coerce a settlement, not based on the merits of the case, but simply based on the possibility, no matter however remote, of liability times billions of dollars of damages has to result in a settlement.

And so, once again, that class certification decision evades appellate review.

MR. SCHREIBER: Mr. Glickstein, the point you make about bet your company, bet your product, is it your view, however, that every class action, when it is certified, should go up on appeal if it doesn't deal with a bet your client, bet your product?

There are about 900 to 1200 class actions. "Bet your company" comes up maybe 3 or 4 times a year, or even less. Are you proposing to this committee that they go forward with the appeal on all class actions, or on the sort of disaster class actions?

MR. GLICKSTEIN: We are not urging a change in the rule that goes beyond what your committee is proposing, so that it would be akin to an

interlocutory appeal from a Preliminary Injunction where you have automatic appellate jurisdiction.

MR. SCHREIBER: Yeah. But if your argument is it is inappropriate to have a "bet your company," that only holds true in a de minimis number of cases. Why should the committee permit every case to go up?

MR. GLICKSTEIN: The committee is not permitting every case to go up. What the committee has in essence done is establish the procedure which is akin to certiorari review by the Court of Appeals over a District Court decision.

The District Court can look at the -- for lack of a better term -- petition for review, in the opposition and determine whether there are appeal-worthy issues in the case.

MR. SCHREIBER: You mean the appellate court can.

MR. GLICKSTEIN: The appellate court.

MR. SCHREIBER: Oh, I'm sorry.

MR. GLICKSTEIN: And if there are, this Court has provided a vehicle to review those issues.

And I was going to get to the third important reason why we need a vehicle for appellate review, and that is, because in most cases, the plaintiff, if they lose class certification, doesn't

stick around for an appeal; or if the defendant, if they lose, class certification doesn't go through trial and therefore there is no appeal.

There is in many situations a paucity of appellate decisions. And this paucity of appellate decisions results in a situation where there is not adequate guidance to the District Court judges in terms of the standards and guidelines that ought to be applied class actions in particular types of cases.

JUDGE SCIRICA: But as a practical matter, isn't it the case that the District Court Judge knows that unless it really is an egregious situation, the Court of Appeals is not likely to take this matter up on mandamus, and so that's the end of the issue until you get a final order?

MR. GLICKSTEIN: That is precisely my point why you need the rule.

JUDGE SCIRICA: I understand that. But if the "bet your company" cases are really a small fraction, could not the problem be handled with a change in the commentary that encourages the use of mandamus in the egregious case?

MR. GLICKSTEIN: It certainly is a lot cleaner to do it through the vehicle of appeal. Mandamus has attached to it a lot of baggage,

oft-repeated error, capable of repetition, etc., etc., etc.

And to take our case, and we were successful in getting a writ of mandamus to reverse a class certification, that was an egregious certification both on the merits and because of procedural improprieties at the District Court level. And the Sixth Circuit addressed both of those.

I am not sure that the Sixth Circuit would have taken the case on mandamus absent the procedural proprieties in the court below.

It could have. We are only -- we are dealing necessarily with speculation here. But certainly it was the procedural errors that gave us a greater hook in the mandamus situation to obtain appellate review.

There is no reason if the mandamus petition is going to come anyway, there is no reason why we shouldn't establish a more normal vehicle for appellate review of these cases. It is akin to certiorari. You are giving the Court of Appeals, like the U.S. Supreme Court, in essence, unbridled discretion --

JUDGE SCIRICA: Let me ask you the question in a different way. Does not this change benefit the

defendant much more than the plaintiff? And if that is the case, is the rule really neutral?

MR. GLICKSTEIN: I don't see why it does. I think -- my own view is that the District Courts in general can use more guidance from Courts of Appeals in what situations is class certification proper, in what situations is class certification not proper.

If a class is proper, and the Court of Appeals is willing to say that a class is proper in an appropriate situation, that is to the benefit of the plaintiff. If a class is not proper, then it is to the benefit of the defendant. The appeal is really neutral, except if you are going to posit that Courts of Appeals will be less likely to find classes appropriate than would District Courts. And in that case, if it is defendant oriented, it is appropriately proper because the Court of Appeals is espousing a rule of law that says in a certain situation class certification is not appropriate.

JUDGE SCIRICA: We are not necessarily looking for new business.

PROFESSOR ROWE: I wonder if you could speak to the point that Mr. Black argued about how the appellate law that would be developed would be unrepresentative and perhaps not good guidance because

it would be coming up in egregious cases, not representative cases?

MR. GLICKSTEIN: I don't think that that is how it is going to work in practice. We are dealing again with something that is akin to certiorari review. I believe that the Court of Appeals will take appeals that raise important questions, that raise novel questions, that raise questions that perhaps haven't been decided before and should be; as well as to correct egregious situations.

And perhaps one of the problems with mandamus review is that it doesn't permit this sort of appellate percolation in the ordinary case.

MR. SCHREIBER: Counsel, as a point of information, when you are successful in defeating a federal class action, how do you keep it from ending up in Alabama or Mississippi or Texas as a state class action?

MR. GLICKSTEIN: There is nothing that can prevent a plaintiff from attempting to file in state court. However, generally the class action rules in the states are not much different than the class action rules in the federal courts. And in most situations if a class is inappropriate in federal court, as night follows day you will be able to show

that the class would be equally inappropriate in state court, even if limited to only one state.

Certainly in a product liability context, one of the reasons that class certification on a nationwide basis is inappropriate is because the difference is --

MR. SCHREIBER: With all due respect, how do you tell Judge Becker that his GM case which was dismissed and certified in Texas is not a certified case?

MR. GLICKSTEIN: Well, I have been dealing in the area of personal injury product liability cases. There is law to the effect that there is a distinction oftentimes between property damage, product liability cases, and personal injury product liability cases. If there is a defect in a product and as a result the property value is less, as is alleged in GM Trucks, well, that defect is going to have a more or less uniform effect on all the trucks. And so, if the only question that you have deal with is what are the variations in state law, the denial of the certification in federal court can result in the certification in state court.

On a personal injury level, it is not as simple as with property damage. On a personal injury

level, people are exposed to an allegedly hazardous substance. Unlike property, they don't react the same to that exposure; their levels of exposure differ, their problems differ, some may not have any problems at all.

So wholly apart from differences in state law, there are other difficulties and impediments to class certification of personal injury product liability cases. And the defendant, I think, can successfully argue and properly argue -- it is not just a matter of success -- properly argue, that those classes are not properly certifiable in state court as well.

JUDGE NIEMEYER: All right. I think your time is about up, if you want to wrap it up.

MR. GLICKSTEIN: If I could have two minutes just to address settlement classes.

JUDGE NIEMEYER: No more than two minutes.

MR. GLICKSTEIN: Okay.

There are -- I think we have heard many myths about settlement classes. The first thing to remember is that they are purely consensual arrangements, unlike the situation with the litigation class where someone who is not satisfied ultimately with the settlement can have that settlement crammed

down their throat because the decision to opt out or not was made at the outset of the litigation.

With the settlement class, the plaintiff, the absent class member, has the information, has the settlement right in front of him or her, and he or she can decide to take it or leave it; and if they leave it, they can bring their own individual action.

Secondly, it simply is not true that settlement classes have been uncontested. Anybody that knows the history of these types of situations knows that there have been an ample number of objectors in these cases; more than ample.

Georgine and the other asbestos settlements were very contested; breast implant settlement was very contested; our own settlement in heart valves, very contested; GM Trucks, very contested.

So it is just not true that in these situations two parties just sort of waltz into the court and say hi, Judge, we have something; nobody shows up, and it passes time with no scrutiny. That is not the reality of these cases.

There are many, many, members of the plaintiff bar who will object to these types of settlements because from their perspective they see the class action settlement as possibly precluding

them from getting -- handling this type of case in the future.

And so, the practical reality is they are contested.

Second -- Third, you are dealing with a District Judge who cares about the absent class members. And if you look at the proceedings in these settlement class situations, there are hearings, the District Judge makes detailed excruciating findings of fact and conclusions of law. Those findings of fact and conclusions of law are subject to appellate review.

You are not --

PROFESSOR ROWE: How often does this lead to full or partial disapproval of the settlements?

MR. GLICKSTEIN: Well, certainly in General Motors Truck it did.

PROFESSOR ROWE: At the appellate level.

MR. GLICKSTEIN: At the appellate level.

PROFESSOR ROWE: How about at the District Court level?

MR. GLICKSTEIN: I can tell you in our own situation, in heart valve, certainly our settlement was approved. But our District Judge told us that there are a number of objectors out there. I am not

telling you that your settlement is unfair, but I want you to talk to those objectors and I want you to resolve those objections.

He was an active Judge, Judge Spiegel, and he didn't sit there and roll over and say, "Okay, you guys have agreed to a settlement. Let's go to it." He took those objections very seriously and he made us sit down with the objectors, and the settlement was changed to resolve those objections.

So as a practical matter, I think the Judges do intervene and they do make sure that these settlements are fair to class members.

JUDGE NIEMEYER: All right.

Why don't we hear from Miss Mather.

Thank you.

MS. MATHER: Thank you, Your Honor. I appreciate this opportunity to appear before you today on the proposed amendments to Rule 23. I will not repeat my compatriot's analysis of the appeal provisions. We very strongly support them. We think they are the first real opportunity to appeal Rule 23 issues that has been present in the rule for some period of time, particularly given the serious constraints under 1292(b), which these days with class action law being fairly well developed generally are

not met. We are left with the mandamus remedy. It is not the right way to go.

And unlike Mr. Black, I have complete confidence, one, that egregious problems ought to be appealable; and two, that the Courts of Appeal can manage to write thoughtful and guiding opinions even in the context of egregious facts. So I think that is just a nonproblem.

Let me turn instead to several provisions in the rule that we believe are useful steps in the right direction. And let me give you some sense of the background from which I speak as well.

I am with one the large law firms in Philadelphia, and we have over the years represented defendants in the Dalcon Shield cases, in a variety of drug and medical device cases, in the school asbestos cases, in the college and university class action in the asbestos area, a variety of asbestos class actions in state courts as well, a large number of consumer class actions, as well as antitrust and securities actions.

With me, approximately six of my partners are active in this work. I consulted all of them before I came here today. And together we have about 150 years of experience with the class action rules.

And I am attempting to distill that.

The issues that I would like to talk about briefly today are the changes in sections (b)(3)(C), and (C)(1), both of which we believe address a problem in allowing the courts to have a much more mature record before them in considering class actions, and both of which we believe are significant advances in the rule.

JUDGE NIEMEYER: Which changes are you addressing?

MS. MATHER: (b)(3)(C), and (C)(1). (b)(3)(C) is the maturity provision, and (C)(1) is the.

JUDGE NIEMEYER: And the C is the timing --

MS. MATHER: Right.

In this district we have a rule that class actions must be brought on within 90 days. As a practical matter, what this means is that you are typically arguing the case on the basis of a highly theoretical view of what the issues are likely to be at trial; occasionally on the other side with the expert saying, oh, no, as a matter of theory those are not going to be the issues, these are going to be the issues.

As any trial lawyer knows, once you actually get to trial of a case, the 37 possible issues that you may have started the case with are down to the ones that really are going to matter.

We believe that not having the ability to defer the decision on class action until that shakes down in a particular case, until the record is developed, until both the lawyers and the courts have a better understanding of the issues that are actually going to consume trial time will indeed be very helpful in determining which cases ought to be class actions.

In the absence of discovery, our experience has been that class action decisions, once fixed, tend to be very difficult to reverse. For example, we have had some ERISA cases where the issue of causation can be very important and is an individual issue; and which, where the issue has indeed become dominant as the cases developed. And yet when the class has been certified in the early 90-day period, it is very difficult to obtain decertification of any class action.

Plaintiff's counsel, the claimants who have been notified, and the Judge, are all reluctant to upset expectations that are created when the notice

goes out.

Where there is doubt, it would be far better rather than building those expectations in in the first place, to wait until further development of the record and then make the actual certification on the basis of an actual record and a more realistic appraisal of the issues.

In the roughly 150 years of experience that I cited to you earlier, I can find two class actions that we took to trial. One was a securities case, the other a consumer fraud case. In both cases, we obtained defendant's verdicts. And indeed those are the only class actions you take to trial, cases that you are relatively certain are going to be defendant's verdicts.

In all of the others, some of them were disposed of obviously on preliminarily motions, but all of the others are settled. That is the fundamental dynamic of the rule.

Let me also turn briefly to rule (C)(1) and talk about the maturity point.

PROFESSOR ROWE: You mean (b)(3)(C)?

MS. MATHER: I'm sorry, (b)(3)(C). I flipped them.

(b)(3)(C) approaches the same problem of a

fully-developed record from a slightly different angle. The actual experience of trying individual cases is a real aid to the trial court in developing the issues that are actually going to be critical at the trial, as well as giving the Court a good proxy for the uniformity of the claims by simply measuring the diversions of the result.

Although my partners whose specialize in the area believe that there are few if any mass tort cases which are suitable for class action, certainly the maturity consideration would give the courts the kind of concrete information on class members' claims who would enhance a careful consideration of --

MR. SCHREIBER: Counsel, how would you measure maturity? 7 cases, 12 cases, 20 cases, 50?

MS. MATHER: A scattering of cases that seem to have developed the issues, sir. I think in some situations, that may be 4, or 6.

MR. SCHREIBER: But isn't it true that the asbestos companies are still denying liability after hundreds of thousands of cases?

MS. MATHER: Well, I don't think the Court would have that much difficulty dealing with the question of whether hundreds of thousands of cases were sufficient maturity.

MR. SCHREIBER: So where would you draw the line?

MS. MATHER: I think it depends on the situation. If you have a fully developed record in a good handful of cases, that might be enough; in some others, it might take a dozen; in some others, possibly more.

There are a number of devices for handling these kinds of cases that have been used by lawyers on both sides.

Rule 42 consolidation of central and uniform issues has been used in cases. It works to get rid of truly uniform issues;

Exemplar trials. You pick your best six, and I pick my best six, we take those to trial and see whether we can develop a pattern which we can then use to settle the cases.

Those devices are out there. They are available. And in areas where there isn't the kind of maturity for the claim, there isn't the kind of maturity in the development of the record available, they are good viable alternatives. And this particular change would permit further exploration of that kind of viable alternative.

PROFESSOR ROWE: Do you think there might

be any problem with the presence of maturity in the rule from its seeming that it is applicable mostly to the mass tort situation. And I am wondering if it has much application to many other kinds of cases, and might even be mischievous as people try to apply it and argue over it in those kinds of situations. In mass torts, I can see it making a lot of sense. What I wonder is, should we learn to ignore it in other situations or can it make sense, or is it likely to be troublesome?

MS. MATHER: Well, my imagination is not sufficient to contemplate every conceivable situation that might arise; for example, interpretations of consumer issues that don't have any kind of background and where you might want to see a series of cases. But there are a number of areas.

I can't imagine reading this provision without considering its interrelationship with the fundamental issues of commonality and predominance and things like that. Maturity alone seems to me to make sense only in the context of trying to help the Court with those other issues.

Thank you.

JUDGE NIEMEYER: Okay, thank you.

PROFESSOR ROWE: Mr. Chairman, I was

noticing, there may be one other category of people who don't identify themselves readily as academics, plaintiffs bar or defense bar; and that might be public interest people. Their views might often align with the plaintiff's bar, but our categories may not --

JUDGE NIEMEYER: Well, do we have anybody from a public interest group or from a corporate counsel's offices? Why don't we hear from you and then take a brief break.

Let me have your name, and then I want to hear --

MR. MOORE: My name is Beverly Moore, of Class Action Reports.

JUDGE NIEMEYER: Okay.

And you are?

MR. VLADICK: I'm David Vladick.

If I may proceed. I'm David Vladick. I direct something called Public Citizen Litigation Group. And we see the class action issue from really both sides of the street.

Part of our practice is to bring and to maintain consumer class actions. And so we are users of the class action rule.

Increasingly over the last several years,

however, a major component of our docket has been to object to what we think are collusive and improper class action settlements. And we list in our testimony some of the ones that we have been involved in. They include Georgine, the GM Truck case, the Ford Bronco case out of New Orleans, the heart valve case that Mr. Glickstein has referred to before, and a host of others. At the moment, I think we are involved in something like 14 of these case.

Now, our comments address pretty much the array of proposals that the committee has made. But given our time constraints, I want to focus on what we think are the two key provisions.

The first are what I will call the cost benefit proposals that are embodied here. And we oppose these. And I think there are three principle reasons that needs to be addressed by the committee. The first is, where is the problem?

We have long looked for the paradigm case that the committee thinks ought not to be in court, or ought not to be certified as a class action, and yet we have not been able to identify, we have not gotten any guidance from the committee, as to what kinds of cases would fall into that category --

JUDGE CARROLL: Well, it would be my Lean

Cuisine case; although, let me make it clear, I'm not sure it's Lean Cuisine. I don't want to defame them unnecessarily.

MR. VLADICK: Well, you have immunity, Your Honor, I don't.

But putting aside that, we'll call it Lean Cuisine.

The first question I have is, why is that case in federal court?

JUDGE CARROLL: Well, actually, it is in the Circuit Court of Elmore County, but it could be in federal court.

MR. VLADICK: Well, I have real doubts about that. Now that the diversity limit is about to be raised to $75,000 --

JUDGE CARROLL: It has been, counsel.

MR. VLADICK: It's been raised, thank you. -- you'd have to buy an enormous amount of Lean Cuisine, to get in there, and then you would have to alleged a damage claim. So the first answer is, that claim ought not to be in federal court.

JUDGE CARROLL: That's right, it ought not be. But I'm not sure that I agree with you that it could not be.

MR. VLADICK: But if it is, it is there for

a reason: More probably because Congress has set forth a cause of action --

JUDGE CARROLL: No. Because the defendant removed it from state court to federal court.

I mean, that's how it's going to get there.

MR. VLADICK: But then the complaint -- There has to be a good-faith allegation that you can get past the jurisdiction limits. Diversity is the basis for removal. There are very few cases that fall into that category. So that cannot be what is driving this proposal.

What we are concerned about is, there are lots of cases in which the potential recovery is small, but the value of the case is high, either in the aggregate as Professor Rowe suggested; or for a factor that has not been mentioned, and it goes unmentioned, as the committee knows, which is the deterrent value of prosecuting that kind of class action.

Suppose, for example, your case did end up in the federal court. The settlement of that case not only provides the Lean Cuisine users of the world, the chubbies, some relief, but it also sends a clear message to others in the industry that if they engage in that kind of fraud, they may be brought to the

bar. And many of the consumer statutes that we practice under, we care passionately about, the principle goal of litigation is not to return the few dollars to the consumer. It is to deter misconduct in the future.

You look at the Field Credit Reporting Act, the other consumer statutes, deterrence is an overarching goal on all of those.

While we do not like this proposed rule, you cannot overlook the powerful deterrent value that these cases have.

Let me talk a little about --

JUDGE LEVI: Are you at all concerned about the public perception of the bar when the recovery to individual members -- let's stay with the trivial case -- so that the recovery to individual members is truly trivial, just on the order of two dollars or something of that sort, and the recovery to the lawyers for the class is in the hundreds of thousands of dollars or the millions of dollars?

MR. VLADICK: We have opposed many settlements precisely on those grounds.

But I think you need to exercise some care in evaluating those cases. In some of those cases the potential recovery per client is in fact small, and

you do have to, I think, take into account not simply what the recovery has been, but what the potential recovery is. If the potential recovery is thousands of dollars, and yet people end up with coupons that are worth a couple of dollars, then there is a serious -- then there is a serious concern, and the courts need to supervise these settlements more clearly.

That is one of the reasons why we are very strongly opposed to the proposal of allowing settlement classes to go forward where there is -- by definition, the class cannot meet all of the (b)(3) standards, because it is in those instances where we think that the potential for abuse is the highest.

And let me, considering that time is so limited --

JUDGE NIEMEYER: You oppose the (b)(4) addition?

MR. VLADICK: Yes, we do.

PROFESSOR ROWE: It does have to meet the (b)(3) standards. It just may not meet them for trial.

MR. VLADICK: Well, I'm not sure. That maybe makes sense to an a academic, Your Honor, but it doesn't make sense to me.

JUDGE CARROLL: Well, what about a consumer

fraud case where if you read the most recent round of cases, Castano, the RICO class certification out of the Eleventh Circuit, it says you cannot certify a class where reliance is an issue. So if you have a fraud case -- and every state law fraud in the United States requires some sort of reliance -- technically any District Court in the United States would be within its discretion to deny class certification in that case, yet the case might be settled to benefit consumers.

MR. VLADICK: Well, I am not sure why that case cannot be certified on the liability issue, and while that may make it difficult to settle the case.

Castano, is a very different kind of case. Castano, the claim there was not simply fraud. It seems to me that if in fact Castano had gone forward on a simple fraud theory, that case might have been certifiable on the theory that the variations among states on the question of common law fraud either was de minimis or there were a number of --

JUDGE CARROLL: I don't want to argue class action law with you, but there are serious manageability problems when the liability depends on determining whether there is a duty to disclose and whether or not there was reliance. I mean, I just

think those cases stand for that proposition.

But assume that I am right in that certifying these consumer frauds is a problem, don't you have to then have (b)(4)?

MR. VLADICK: Well, let me tell you why I don't want a (b)(4), and then let me see if I can, in so doing, address what your concerns are.

We are very concerned about (b)(4) for several reasons. On the most conceptual level, the problem with (b)(4) is that it transfers a litigation device into a settlement device. The class action device, back as far as 1966, was designed as a way of giving people with small claims the ability to aggregate those claims while at the same time providing maximum protection to the rights of the absentee class members.

In our view, there is no way to effectively proctor those rights if you are going to allow cases that cannot be tried to be settled.

Judge Niemeyer, in an earlier exchange with Professor Koniak, said something, and I am paraphrasing, not quoting, but in essence your question was, what is wrong with this kind of negotiation in an adversarial process.

My disagreement with you is that there is

nothing adversarial about that settlement, because the defendant knows full well that the plaintiff cannot take that case to trial. That is by definition what a --

MR. SCHREIBER: Have you ever tried a class action case, counsel?

MR. VLADICK: Yes, we have.

MR. SCHREIBER: And are you telling me that you go into a discussion with opposing counsel and in effect say to them, look, we can't try this case, let's settle it?

MR. VLADICK: No, I wouldn't say that.

MR. SCHREIBER: Well, what are you going to do with all your potential consumers who cannot fit within your category? What are you going to do with them as far as their claims are concerned?

MR. VLADICK: Well, we may have to bring state claims. We may have to bring state claims.

MR. SCHREIBER: In 50 different states.

MR. VLADICK: It may be.

MR. SCHREIBER: And in the end, as you know, 98 percent of cases are settled in a civil arena. Why can't they are settled in a federal arena?

MR. VLADICK: With all respect, that is no

answer for the potentiality for abuse. Where the defendant has that kind of leverage and, in essence, the capacity to choose a lawyer with whom the defendant is settling, the race to the bottom problem, there is no adequate safeguard to protect the interests. And that is why --

MR. SCHREIBER: But the defendant doesn't know that the Court is going to deny the class. When a settlement class comes in, the defendant has no idea that the Judge is going to say, plaintiff, you better take this because I'm not going to do it.

No Judge will do that.

MR. VLADICK: Judge, I think in that respect, Professor Koniak's distinction between truly malignant and only benign settlement classes makes sense here, because there are cases that are brought as class actions that cannot be certified, and they are brought solely for the purpose of settlement, and that is what we think is wrong.

MR. SCHREIBER: How do you know a case can't be certified if you yourself have said "certify it for liability"? The defendant doesn't know whether it is going to be denied certification, whether it is going to be granted certification for liability and such, isn't that correct?

MR. VLADICK: Take Georgine. Georgine is the classic example of a case that could not be tried. No one during the course of the Georgine wars has ever argued that that case was triable as a class.

MR. SCHREIBER: Why couldn't it be tried on liability?

MR. VLADICK: I will not try to summarize Judge Becker's decision.

JUDGE NIEMEYER: All right, I think we understand your point. And why don't we hear from --

MR. FOX: Let met ask one question before. Do you agree with Professor Koniak's distinction benign, malignant, and if it is -- the one that isn't quite malignant, here are some additional factors that ought to be taken -- Do you buy that or --

MR. VLADICK: Yeah, I'm not sure I would phrase it that way.

MR. FOX: Well, we could probably come up with another way to word it, but --

MR. VLADICK: I do think the lines that she is trying to draw are useful lines.

MR. FOX: Thank you.

JUDGE NIEMEYER: All right. We'll hear from Mr. Moore, and then we'll take a brief recess.

MR. MOORE: Yes. My name is Beverly Moore.

I have been for the last 20-some years the editor and publisher of the legal periodical Class Action Reports.

I also represent plaintiffs and occasionally defendants in class actions; and I also object to what I regard as inadequate class settlements.

I would like to speak in favor of (b)(4) and even perhaps of (F), surprising as it may be. But unlike Professor Koniak, I have not seen any malignant class actions. In fact, some people think that I have never seen a class action at all that I don't like.

But, I mean, there are cases that --

JUDGE NIEMEYER: You only report class actions. And if there are no class actions, you have nothing to report.

MR. MOORE: I also litigate them. In fact, I have one just like Lean Cuisine, which I will get to in a minute.

But Georgine was a triable case; Castano was as triable case; Rhone-Poulenc was a triable case in my view; and we published --

JUDGE CARROLL: Triable as a class action or triable as an individual?

MR. MOORE: Triable as a class action. In

fact, we have done a number of analyses of so-called state law variations in which we think we have been able to show that you can, if you properly structure your class, including excluding certain states from certain claims and having a few subclasses here and there, you can overcome the state law variations.

But the problem with inadequate class settlements, and indeed there are inadequate class settlements, and Georgine was probably one of them. Professor Koniak in her article, "Feasting While Widows Weep," makes a very strong case that the class members in that case were discriminated against. They didn't get as much relief as the people who were individual plaintiffs, for example.

But the solution to all that is not to deny settlement classes. It is just to have judges exercise their authority under Rule 23(e) to disapprove inadequate class settlements.

And as we all note, traditionally Judges have not wanted to do that because they would like to get rid of these big cases off their dockets, and it is easy to do that just by approving a settlement.

However, I think that is changing. I mean, you have seen several cases recently, Bronco 2, the Buchet case in Minnesota, and several other cases

where the proposed settlement has been disapproved at the trial-court level. And there is some state cases like that too.

But what you also increasingly see, at least in my experience, is settlements getting changed as a result of objections. I mean, there have been a number of recent settlements that have been improved as a result of the judge saying, look, I am not going approve this settlement unless you do this, this, and this, and this, this, and this is done.

But the solution is not to outlaw settlement classes, but to have some way of better enforcing the Rule 23(e) provision.

The problem with (b)(4), with not having (b)(4), the problem with Judge Becker's decision, is that it distorts the whole jurisprudence of class certification.

On the one hand, you will have a judge who wants to approve a settlement class, and he will go through all of the requirements of Rule 23, and find them all satisfied, just so that he can approve the settlement. And I don't think any of the defense lawyers here would like that kind of precedent being built up.

On the other hand, you've got decisions

like Georgine, in which Judge Becker in effect says mass tort personal injury class actions can never be certified.

Now, there was a case just like Georgine, it was a smaller case, called Cimino V RayMark Industries, which was tried in Texas. In fact, a class action statistical proof was used to determine pain and suffering damages, of all things. And the recent Ferdinand Marcos class action involving torture, murder and disappearance, certificated as a class action; and damages -- Mr. Schreiber over here was the Special Master -- damages were computed on a class-wide basis for torture, disappearance, and murder.

Now, if those kind of classes can be certified, then it seems to me that, you know, practically any class you can get around the problems.

But the problem is, of course, there are a lot of Judges who don't agree with my view that cases like Cimino and Ferdinand Marcos --

JUDGE NIEMEYER: I guess the question that is legitimately asked in that kind of situation, is that you can go through the motions of doing just about anything and say what you have done is right.

But that doesn't necessarily solve the problems. And the question is, have you adjudicated private disputes in a way that is fairest to the litigants and the parties. And ultimately that is going to have to be the test.

You can railroad a whole country and say we are going to have annual class actions for all disputes; this is the 1997 class coming up and every piece of litigation is going to be apportioned because we know what our liability is going to be statistically and we'll just divide it up.

That doesn't provide for any fairness. So -- I am not speaking for or against. I am just saying that to sweep with such a broad brush and say that a class action can be certified in just about any circumstance seems to me that we shouldn't be here fussing with what we are talking about.

MR. MOORE: What I am saying is, you should focus on fairness. And that is Rule 23(e). And you shouldn't have a situation created by not having (b)(4) where judges are going to certify classes. And that will be precedent. You know, this class here is manageable no matter what it is. You are going to get a lot of cases going both ways and it is just going to distort the whole precedencial value of class

certification because so many classes will be certified for purposes of being able to approve the settlement.

I mean, I am just saying that you should look at the settlement itself under Rule 23(e) and see whether it is fair and adequate to the class, and either approve it or disapprove it on that basis.

Now, the other thing I wanted to just briefly touch on is (F).

I am for cost benefit analysis. I don't think we should have class actions where the cost of -- the 32 cents in postage is more than the 16 cents or whatever the people are going to get back.

However, unless you look at the recovery of the class, in the aggregate, you are going to have a lot of cases thrown out simply because the amounts recovered per individual class member are small, even though in the aggregate the case is cost effective.

Lean Cuisine, I've got a case I somehow was asked to be in, it is called Juicy Juice. This is a product in the grocery store that says it is pure juice. Well, some of you may have seen some TV programs some time back where it was discovered that Juicy Juice is not pure juice, it is adulterated; it has been watered down with something called

Fructoine. So this case is presently being settled for about 6 million dollars worth of so-called coupons. We generally are adamantly opposed to coupon settlements, especially if you know who the people are and you can pay them cash. But here of course you don't know who bought Juicy Juice, who bought the adulterated Juicy Juice. There is no list; there is no -- You can't find the people. The only way you can compensate them at all is to put a little coupon machine in the grocery store next to the Juicy Juice which gives you so many cents off.

And, you make sure that the defendant, in this case Nestles Corporation, actually keeps on putting coupons in that dispensing machine until 6 million dollars of them are actually redeemed. And so in effect Nestles ends up paying out 6 million dollars instead of having one of these illusory coupon settlements like in the airline antitrust case where nobody is ever going to use their coupons, or very few people are going to use it.

JUDGE CARROLL: What is the attorneys fee agreement in your case?

MR. MOORE: It's $800,000 out of six million. So that's what, about 6 --

JUDGE LEVI: What about the private

Attorney General effect, the deterrent effect of permitting class action in these --

MR. MOORE: Well, that is important too. In fact, if you couldn't have a coupon distribution in a case like this -- of course the committee is not addressing this -- you ought to have some kind of an aggregate class damage Cy Pres Fluid Recovery remedy, but that is obviously something that Congress would have to enact, and it is not likely that that is going to happen anytime soon.

But the problem with (F) is, that you already got cost benefit. It is called manageability. It is already in the rule. What you are doing is, you are putting a whole other layer of debate over what are the costs and what are the benefits on top of what you already got. And I think that unless there is something in the Advisory Committee note - and there is not presently - which points out what this means, that you actually could have a 16-cent overcharge bank case, for example, where it only costs two cents, to simply credit the 16 cents against each class member's presently existing account, and you've got 10 million dollars worth of overcharges which were only 16 cents apiece, but still it is cost effective. The attorney fees, distribution

costs, or -- let's say, you know, it is 3 or 4 cents, that is cost effective.

Now, if you are going to have that, you ought to put something in the Advisory Committee note to clarify what you are talking about in terms of the adequate nature of damages.

JUDGE NIEMEYER: All right, thank you, Mr. Moore.

All right, we're going to take -- I'm going to limit it to no more than 10 minutes. We are going to begin at 10 after and we are going to try to finish the people that have asked to testify in the morning session. And I think what we'll do is, we'll just try to begin around in roughly the same order, maybe have a couple of academics testify right after the break.

5 minutes after 12 we'll resume.

(Court recessed at 11:55 a.m.)

(The proceedings reconvened at 12:10 p.m.)

JUDGE NIEMEYER: All right. We are going to resume, please. Take your seats, please.

All right. I think the best way to do this is, as promised, is to continue with the same order. We'll proceed with three representatives from the academic community, Professor Cramton, Professor Coffee and Professor Resnik. And I don't care which

of you speaks first.

PROFESSOR CRAMTON: Well, why don't we go right down in order.

Roger C. Cramton.

I want to first remind the Advisory Committee that it got into this problem because the Judicial Conference suggested the relationship of Rule 23 and mass tort litigation be considered. And that indicates to me that no matter what the body does on this issue, and particularly in dealing with settlement class actions, it will be viewed as conveying very important messages with respect to mass tort litigation. And it is that area on which I have the primary experience on which I am primarily referring to today.

Let me give you a summary of my own personal views on the matters before the committee.

First, as to the three factors in 23(b) that have been slightly modified, A, B and C, those are modest improvements. I'm sort of indifferent. They are not very much to do all by themselves.

(F) I strongly oppose for the reasons thus far stated by Alan Black, and Mr. Vladick for Public Citizen; and also I have seen comments by John Leubsdorf on that issue, and I associate myself with

them. I strongly oppose it.

My principal concern is (b)(4), the addition of settlement classes; I will primarily address that. I strongly oppose it.

The timing of class certification I am inclined to oppose primarily because of its interrelationship with the settlement classes. I mean, without the wide authorization of settlement classes it wouldn't be -- it doesn't -- it isn't really troublesome.

The imposition of a hearing requirement is meaningless. There is a hearing requirement now on the court decisions. The committee has missed an enormous opportunity to include some standards and procedures in 23(e). And if it proceeds any further on this, and particularly if it opens the door very broadly to settlement class actions, it in my view it has just got to do a lot about cleaning up 23(e) with standards and procedures and required findings. And I will get to that.

The addition of interlocutory appeal, I can see arguments on both sides. I just don't have a view on it.

Well, I am going to make one pitch that hasn't been made by anybody here, but I know the

committee has heard it in a letter earlier from my friend and former colleague, Paul D. Carrington, the former Reporter to the Advisory Committee, and that is I believe that the proposal on settlement class actions exceeds the power of the committee and violates the enabling act. It is substantive in character however it is viewed and however people talk about it.

Now, I know the line between substance and procedure is very shadowy and it is manipulated by judges and lawyers all the time. But what are we dealing with here, particularly when you are talking about settlement class actions like the Georgine case or in the mass tort field more generally? We are talking about cases that cannot be tried in the federal courts.

JUDGE NIEMEYER: Doesn't it depend on the reason why it can't be settled? In other words, if there are questions of power, jurisdiction, and that type of thing, then it gets right to your point. But if it gets -- if there are other things that can be waived or whatever --

PROFESSOR CRAMTON: But waiver implies consent. And when you have absent members of the class and future members of the class, the notion of

being built on consent is fictional. And, therefore, it is a straight legislative approach and --

JUDGE NIEMEYER: You mean -- They have opt-out rights.

PROFESSOR CRAMTON: They have opt-out, if you can understand the notices, which you usually can't, and which if they apply to your situation. If your haven't been injured yet, as in the Georgine case, you may not even know you were exposed to the toxic substances, it is totally, as the third edition of the Manual on Complex Litigation says, it is fictional, unrealistic, to think that there is effective opt-out in many mass tort actions. That is what your own manual says, and it is absolutely right.

Well, there are other reasons. Three things are mentioned as problems why you need (b)(4), in the committee note. Why? Get rid of choice of law.

Why are you doing that in these cases that affect millions of people? You are just ignoring the substantive law that in our system is supposed to apply to this adjudication.

Are you ignoring Klaxon, VanDusen, Erie? You are just allowing private persons, a lawyer self-pointed or appointed by the defendant who says he

represents this huge amorphous class of millions of people sometimes, to say, you know, I prefer a new national law which I will put together with Charles Schreiber who is representing the defendant, or somebody else who is representing the defendants, in order to cap the defendant's liability and give them certainty. Really, it is an alternative to the antitrust laws, and to the bankruptcy laws, right? A Federal Judge rubber-stamps a deal which essentially is an end run around the bankruptcy laws in many of these situations and --

JUDGE CARROLL: Is it possible that you are overstating this problem just a little bit?

PROFESSOR CRAMTON: Sure. Sure. But overstatement is often useful, just as the Lean Cuisine example was overstatement and it was useful.

Second, the second factor mentioned in the note on 51, 52 of this document, is judicial management. But what is management in one of these mass tort cases? First the Judge gets involved very early and often. We all know about the experiences of Judge Weinstein with agent orange, and Judge Pointer and Judge Reed with Georgine, and so on. Precisely the issues that the Judge is going to have to pass on later for fairness and reasonableness that judges have

participated in crafting these settlements.

It looks unjudicial; it looks as far as is that really judicial management, where the parties -- you call them parties -- where the lawyer self-appointed for the class has cut a deal with defense lawyer, and all he says that Professor Koniak and Professor Coffee have written about, and the objectors are either not present or have very limited resources, the number of cases in which they show up with real resources rather than it being --

JUDGE NIEMEYER: I guess -- I'm wondering whether what you are talking about isn't inherent in the class action concept altogether --

PROFESSOR CRAMTON: No.

JUDGE NIEMEYER: -- and whether that is unique to the changes that we are proposing.

PROFESSOR CRAMTON: No. You have lots of classes that have identifiable claimants, such as an employment discrimination class, you have lots of securities class actions, antitrust actions where the parties are easily identified, they all have current injuries, there are no futures involved and so on. Class actions take on enormous variety.

JUDGE NIEMEYER: Well, I understand that, but I don't understand why -- and maybe I am missing

something -- the futures is a different problem that everybody has alluded to, and I hope the Supreme Court addresses that. That gets perhaps the case in controversy, justiciability and other things which are far beyond us.

But let's focus on what we have to do in terms of rule, and that is to try to facilitate the resolution of disputes --

PROFESSOR CRAMTON: Well, I will tell you that after one brief comment. But the third reason why you purport to justify (b)(4) is because wholesale schemes or reparations are needed. The wording on page 51, 52 is, these settlement agreements, and so on, "can devise comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation."

I believe, you now have said, you know, what we are doing is doing things which in our federal system, and with separation of powers, and the kind of notions of the judicial role under Article 3, you are going to have individual federal judges exercising discretion to do. And I think the public will view it that way. And if you do a rule getting into this area on consumer class action, Congress will surely take it up because they will think it is substantive in

character. So it is just a warning.

Let me go then to the constructive suggestions. The present language of it is meaningless. It provides no standards, no possibility for the development of a coherent appellate law, because it first gives and then it takes away, right?

I am going now to the language of (b)(4). The notes state that the predominance and superiority requirements of subdivision (b)(3) must be satisfied. But the next sentence says, "Implementation is affected by the many differences between settlement and litigation of class claims or defenses."

And then what are the three situations? I have already discussed them: Get rid of choice law, get rid of -- Substitute some other law of the parties' own devising, which exists nowhere, for the otherwise applicable law.

JUDGE LEVI: I don't understand why that offends you so. Forum selection clauses are very common.

PROFESSOR CRAMTON: In contract cases, yes.

JUDGE LEVI: Well, this is a settlement.

PROFESSOR CRAMTON: But applying to the tort situation, though --

JUDGE LEVI: Well, the parties that are

contracting --

PROFESSOR CRAMTON: Do you think that General Motors can include a forum selection clause in its automobile warranty kind of agreements and sales?

JUDGE LEVI: I think when the parties enter into a settlement which is a contract, they can have a forum selection clause.

PROFESSOR CRAMTON: But now we are in a circular problem, because once you concede that there are problems with notice, as the Manual for Complex Litigation says, serious problems with notice, and you have nothing to deal with them in your proposal, that there are serious problems even if given adequate notice, so you can have some classes in which absent persons will not have effective opportunity to participate.

And then 3, you got the question, you don't have an adversary proceeding, most of the time.

My experience, at least in the mass torts and in some consumer fraud cases in which I have been involved, as an unpaid advisor, is that the objectors who show up in these cases are what I would call bottom feeders. That is, they were not named as class counsel and what they really want is a share of the action, a special deal on their clients' cases and so

on, and if they make enough noise --

JUDGE SCIRICA: But they litigate very forcefully. Even if they haven't intervened, they come in as objectors.

PROFESSOR CRAMTON: But if they abandon their objections and go on with the settlement, once the sweetener is provided, and my experience is that it is not uncommon --

JUDGE SCIRICA: Well, I had cases where that is not the case.

PROFESSOR CRAMTON: There are cases. Certainly in the Georgine case, there are a couple of plaintiffs' lawyers were so upset about that matter that they put up I believe millions of dollars of their own money to try and defeat the settlement. How many lawyers will do that? The cost of defending, really putting up a defense, in an adversary process. A public citizen can tell you what those are. But those are enormous. But if you talk about the cost of defendants, huge, right? Well, the cost of a meaningful adversarial process. So judges are not informed.

All right, what would I do? I think one is, if you go along with some settlement class actions you have improve some standards, and so far I think

Susan Koniak's notion of limiting situations like Weinberger and Beef in which the Judge thought, you know, this is a case I'm probably going to certify but I don't know because there has not been a full trial on those issues, I will conditionally certify it for purposes of settlement. Limit it to that situation, period, and not go beyond.

But then you ought to turn your attention to doing something meaningful about 23(e).

Now, what should you do? First, you ought to require the District Judge to make findings on matters that we know from experience repeatedly arise in these case. This is the Judge Forester approach. I refer to his article and cite it; meaning you just know that there are certain issues that need to be explored. And that provides a basis for adequate discovery on it. And the discovery can advance of maybe the preliminary hearing before the notice goes out, to say nothing about the hearing on the fairness of the settlement.

That would enable meaningful appellate review. And if you are really interested in having a coherent appellate law about what kinds of cert -- then you have a record on appeal, you have specific findings, requirements, a meaningful law can develop.

It is not just totally standardlessness.

Then, one -- Also, I think you ought to make it clear and I note elsewhere that the negotiation process in the settlement class action is open for inquiry. Almost all judges take the point of view that the lawyers for the class and the defendants, it is all covered by attorney-client privilege and work product, against other members of the class who want to know; that is, the objectors. I think that is outrageous. The problems of collusion and so on are so clear that the whole negotiation process has to be opened up from day one, and that all the documents, everything has to be available for discovery and available to the objectors. Otherwise, it is a cover-up.

Notice on the information point, Mr. Weiss conceded that in these settlement class actions, as he put it, "I don't feel that it is my obligation to be candid with respect to the court on all matters." I mean, he told you that, right?

JUDGE NIEMEYER: Well, yes. To be fair to him, though, I think the comment was made in the context of whether you have a weak case or not --

PROFESSOR CRAMTON: But that is precisely what the court has to know.

JUDGE NIEMEYER: -- in negotiations.

PROFESSOR CRAMTON: These are like ex parte proceedings in which the parties combine to sell the Court. Model Rule 3.3(d) states an ethical requirement, applicable in virtually every jurisdiction of the country, in an ex parte proceeding a lawyer has an obligation, a professional obligation, to bring forth all relevant facts; not only those that are helpful for the lawyer's own position. Now, lawyers don't like that, but that's the law, and it should be applied here.

MR. FOX: That's a ridiculous rule. What happened to the legal profession in that rule here? Am I supposed to point out all the weaknesses that my opponent has somehow neglected to note?

PROFESSOR CRAMTON: You are supposed to bring forth facts. And like the fact that --

MR. FOX: No way.

PROFESSOR CRAMTON: Well, then you are saying you can't trust --

MR. FOX: I am an advocate I am not a Judge or an umpire.

PROFESSOR CRAMTON: They are not an advocate. This is a trustee for a class, right, that has lots of absent victims.

MR. FOX: Mel Weiss was saying, if I have some weaknesses, I'm not going to just parade them out into a laundry list. And I agree with him.

PROFESSOR CRAMTON: If there are no objectors? I mean, it's like getting an ex parte temporary injunction from the Court when the other side is not around. Of course you have to be honest with the facts and open and candid about considerations that are important.

JUDGE NIEMEYER: Okay, are there any other areas that we need to cover?

PROFESSOR CRAMTON: Yes.

JUDGE NIEMEYER: Because you are over your time already.

PROFESSOR CRAMTON: The notice.

I was delighted that Mr. Weiss mentioned the Prudential and the New York Life settlements and so on, and such wonderful things these were.

Just yesterday, Ithaca Journal, this conventional column by Jane Bryant Quinn about insurance scam suits that don't benefit victims, deals with Prudential and New York Life, two of the cases he mentioned he was involved in. What does it say about the notice in those cases?

For another, she says, if I can address the

policyholders in protecting their rights, you have to understand the information the insurance company sends you. New York Life's, quote, explanatory documents, might as well have been written in Sanskrit. Pru's is a little better, but not much." I mean, these are the facts of life.

MR. SCHREIBER: But isn't it true in those cases that there are banks of hundreds of people and anyone can call to get information?

PROFESSOR CRAMTON: Sometimes, if they can understand --

MR. SCHREIBER: But I mean in most cases. Isn't it true that the both sides set up a bank with hundreds of telephone operators and with lawyers there so if somebody had a question -- I'm not saying whether or not the --

PROFESSOR CRAMTON: There should be hot lines and they should be able to give adequate information.

MR. SCHREIBER: That's right. And it is true that in those cases you do have hot lines.

PROFESSOR CRAMTON: There should be information provided in the written documents, however, that report the attorneys fees --

JUDGE NIEMEYER: Well, we don't have a

notice provision change on the floor at this point. And I gather what you are saying is that if you have settlement, do you want to -- you think we should improve the hearing and the notice.

PROFESSOR CRAMTON: 23(e) should be improved on all of these matters.

There is another one that -- in the article at NYU, Brian Wolfman and Helen Morrison stress to the problem that objectors have in that they are usually dumped on and surprised because everything that is in defense of the settlement -- they have to make their objections first and then at the hearing they finally find out what the evidentiary basis for the settlement is, or some of it.

JUDGE NIEMEYER: All right. Why don't we hear from --

PROFESSOR CRAMTON: So that ought to be presented, and the burden of proof to establish the fairness, adequacy and reasonableness of the settlement should be on the settling parties.

PROFESSOR ROWE: On the 23(e) criteria, how well developed is the case law? Didn't the Judge draw quite heavily on case law in proposing his articulation which may suggest that we are not proposing something standardless because standards are

out there in the case law.

PROFESSOR CRAMTON: My impression is that, one, the case law is not terribly well developed; second, it is not uniform in the circuits; and third, trial judges don't pay attention to it in a lot of cases.

JUDGE NIEMEYER: Thank you. Right.

Mr. Coffee.

PROFESSOR COFFEE: John Coffee. Columbia Law School.

Thank you for the opportunity to speak before you.

Unlike at least some of the preceding speakers, I want to address the possibility of accommodation, because I do believe there are legitimate interests on both sides on some of these issues.

The tendency among many speakers, all of whom are motivated by a true sense of advocacy and fervor, is to address their particular horror story without acknowledging the horror story on the opposite side of the continuum. Both stories exist.

In my little time, I want to just address to topics: 23(b)(F) and settlement class actions. With regard to 23(b)(3)(F), I think I have to say from

a technical standpoint it's a remarkably ambiguous cost benefit tradeoff that the current draft frames. It could be read almost any way. But when you starting looking at how it would work operationally, you quickly find that you're opening Pandora's Box.

The very first lid on Pandora's Box is in the word "probable relief." You've already heard references to discovery and the need for litigated hearings, but in general, since the Eisen case it has been a taboo area in class certification to look forward to the merits.

If you start looking behind the veil for this purpose, it is hard to justify not looking behind the veil for all other purposes.

Eisen may or may not be right. If you wish to repeal Eisen, you're entitled to do so, but you should take an integrated look at to when you are going to look at the merits and not just think you can do it for this tiny purpose.

To use a politically incorrect phrase, I have to tell you that with regard to looking at probable relief, you're a little bit pregnant. It's not an area where this can be done safely without coming up with a general theory of when the merits can be examined.

Next you have a trade-off that seems to focus more on the individual class member than the aggregate class relief. You may not intend that, it is a little ambiguous how it is read, but I don't think that you can rationally justify looking just at the individual class member.

We know from the Federal Judicial Center study that class relief tends to be on an individual basis, between 300 and 500 dollars. On that basis, the cost will always exceed the individual relief, and you might as well say class actions in the general case are not justified.

Perhaps you don't mean that, perhaps you intend to reinterpret that, but it needs some work.

With regard to cost, do you mean the cost to all the defendants, do you mean the cost to the justice system and the courts plus the defendants? There's an asymmetry here. Why do we look at just the individual class member, but all of the aggregate defendants? Why do we unpack the class to look at the individual class member, but not unpack the corporation to look at the individual shareholder, which is the ultimate level on which the incidence of loss fails. Again, it is an asymmetry.

Most of all what I think you miss is the

claim about general deterrence. I don't say that general deterrence always justifies a class action; but it often does. When Congress passed the antitrust laws and gave treble damages, as they did also under RICO and other statutes, they meant for a private Attorney General to be able to enforce these kinds of actions in order to defer wrongdoing. They didn't mean for the windfall to be there in treble damages just to give a windfall. They wanted to arm and fuel a litigation engine that would stop certain kinds of wrongdoings.

It's the same story with securities class actions. When the Supreme Court recognized and implied causes of action in Case V. Borak, they said it was infeasible to expect the SEC with its enforcement resources, which proportionately much greater in those days than they are today, to be able to deal with securities fraud across the board. And we kept the securities markets clean and honest if we had an effective private enforcement.

You are tilting that judicial balance. Indeed, you're tilting is right after the year in which Congress itself deliberately redressed that balance in the private Securities Litigation Reform Act. It's a kind of double hit without there being

the same overall contemplation of what the impact will be.

So I'm suggesting to you that deterrence often has to be considered. That's not to say that there is never a case that doesn't have a deterrent role. Thus, I suggest to you proposed language that takes most of what you said. It would just focus on whether the claimed aggregate relief to all class members and the deterrent value of the action in assuring compliance with law justifies the cost and burdens of class litigation.

That doesn't deny there are some cases on both sides of this line. It may be that Lean Cuisine falls on the far side, although I happen to think Lean Cuisine is more testimony to the kind of weak cases you encourage when you permit discount settlements. But whatever we think about Lean Cuisine, it may be the case on the far side of the line; I am sure there are cases with small $2, $3 damages, where if we abolish them we are really telling the public there is an effective right to steal one dollar from a million people and the action cannot be certified as a class action. I don't think you need to say that to be able to deal with whatever abuses you perceive.

Now let me shift to the settlement class

action. And here I think we have to start with a general proposition. Like, we've heard all kinds of anecdotal testimony and I am not attacking the integrity of any attorneys.

But I think to state the obvious and undeniable of plaintiff's attorney's leverage in settlement negotiations comes from the attorney's threatability, to threaten a potentially greater loss if a settlement is not reached; that is, unless you settle, there is a great big risk called trial.

Take away that threat, and the attorney's negotiating leverage will be greatly weakened and sometimes extinguished. And the resulting settlement will be predictably weaker.

That any settlement is still reached may be the product of a variety of factors, including, including, the plaintiff's attorney's ability to divest absent class members of their right to sue in another proceeding.

Here we get to the most basic conflict of interest, which I don't think has been adequately emphasized. It's the conflict between the class action attorney in this case who faces a class certification has no economic stake in this litigation, and individual cases in federal court or

state court or state class actions where a different attorney will represent the class members or the individual members.

The plaintiff's attorney in the class action has no interest in the other individual cases, and if he can settle those cases in a settlement class action, he has every economic motive to do so.

Now, what should be done about this? I recognize that there are legitimate reasons for settlement class actions. The original reason was essentially that the defendant didn't want to be trapped. The defendant wanted to agree to a settlement without facing the danger that the Court would say I don't like the terms of that settlement, and since you have agreed that it's certifiable, we'll proceed to trial. That was a great big booby-trap; and effectively, the original purpose for the settlement class action was to permit a kind of contingent certification that could be withdrawn without making any kind of concession that would estop you.

That still is a legitimate reason. There may be some other cases. I think several gentlemen on this side of the room have pointed to the case where there may be no possibility of a recovery in any other forum. There may be only some administrative remedy

or there may be some future possible remedy of pie in the sky, but there is no contemporary remedy that exists anywhere else.

I suggest that's exactly the case where the settlement class action does have a legitimate role. So my suggestion is that you either rewrite (b)(4), or put all of (b)(4), as I would prefer, in a long note in the commentary to (b)(3) because I do think writing (b)(4) this way leaves it standing out there naked and alone and somewhat standardless. But you could say that the parties to a settlement request certification, and the Court -- even though the Court finds that the predominance, or the predominance and superiority requirements of (b)(3) might not be met for purposes of trial, the class can still be certified if the Court finds that there is no realistic possibility that the same or similar claims could be asserted on either an individual or class basis in another forum.

What I am suggesting is, the cases that are being pointed to for why the settlement of class action is important is the case where you say, if this case is rejected, there will be no relief at all.

JUDGE NIEMEYER: That language that you just quoted, is that in your comments?

PROFESSOR COFFEE: Yes, it is.

JUDGE NIEMEYER: All right.

PROFESSOR COFFEE: Where we find there is no other forum, no one is harmed and we are doing something that is for the good of all.

JUDGE LEVI: But if it is likely that it will be brought in another forum, then this loss of leverage that you point to doesn't exist; that is, if the defendant knows that there is no settlement, that it is very likely that this class action may be broken up into a bunch of class actions around the country, then why isn't there --

PROFESSOR COFFEE: I suggest that what you just read in that situation is the prospect of what I call the reverse auction. They know that if there either could be a series of state class actions brought by other attorneys, and so the attorney in this class action is happy to underbid the actions that would be brought in other proceedings.

Or more typically, and this is the world of mass tort litigation today, there are future claims that can't be asserted anywhere today, but those claims for lung cancer and the like will be asserted and will have high value when those injuries mature in 10 years.

Now, if those claims are viable, then I suggest there is a problem with the settlement class action that is going to cancel a future claim that has a several million dollar price tag for a price today of about 50 to $100,000.

The plaintiff's attorney in this situation, having no other ability to proceed, is happy to engage in a settlement class action, but he has no other way of representing that plaintiff whose claim doesn't mature for another 10 years.

That's the kind of area that I think you have to look at both sides of the line on. And I don't think at this point that you have framed the rule that recognizes there are occasions in which individuals are being divested either of future claims or estate claims that have much greater value than they will receive in the settlement class.

Conversely, I recognize there are cases in which to get a global settlement, to get complete relief, to deal with administrative proceedings as well, there may be a desire to have a global settlement today which is going to be better than the possibility which is faint or remote of assertion in some other forum at some other date.

I do think a balanced rule will look at

both those cases and try to relegate the settlement class action to the extent you are freeing it up from the usual certification requirements to a case in which no one is injured, no one is rendered worse off, because we can't really rely on the notice requirements, and we certainly can't rely on the right to opt out for future claimants. They don't know for a decade off that they have been injured.

MR. SCHREIBER: Tell me, Professor, how do you ensure that a future claimant 10 or 20 years from now will either have an insurer or a defendant around to sue?

PROFESSOR COFFEE: In many cases, that could be a factor. I am not saying that I have an answer to all factors. That is a factor that could be in the process.

If we are dealing with a General Motors, as we have been in some of these recent settlements, I don't think that is a legitimate interest.

I am not denying the relevance of factors you are pointing to, but I think that you can't point to that one factor and then sweep away the prospect of silicone gel, breast implant litigation, which is proceeding in many more parts of the world, against a number of very solvent defendants, even in Dow Corning

has gone under. One case can't be used to eliminate the entire problem. There are problems on both sides of the continuum.

MR. FOX: Professor, where does Castano, fit in your formulation?

PROFESSOR COFFEE: I am a believer that that was probably a premature litigation. I accept that that is a class that cannot be certified. What the notes to the rule now say is that because of multiple choice of law -- multistate choice of law problems, a case may not be certifiable, but wouldn't it wonderful if it could be settled.

And I guess my analysis would be, before you say it's wonderful to settle this Castano-type class action, which is essentially what the Fiberbord v Ahearn case would permit today in settlement class action, the Court should evaluate whether there are superior rights and forums available either in a state court action or the developing law on individual actions. It used to be thought that the individual action was not viable to tobacco cases. That is a much more complicated assessment today. And I would think a District Court should be able to make that assessment; it can't be said as a sweeping pronouncement what I really want is, there should be

more a little bit more examination.

JUDGE SCIRICA: Would you say the same thing about Rhone-Poulec?

MR. COFFEE: Well, Rhone-Poulenc does produce -- Rhone-Poulenc at the time that Judge Posner wrote that, he had seen something like 16 out of 17 individual cases lose.

JUDGE SCIRICA: Yes, 13 or 14.

PROFESSOR COFFEE: That would be an area where you could have a settlement class if you could say that individual actions are not viable.

If we thought that individual actions were viable, those are high claimant cases, because people were dying, and if they were viable actions I think there is a problem in allowing the settlement class to divest those claimants of their legal rights in a proceeding where the plaintiff's attorney is essentially crippled by the fact that he could never threaten that he can get to trial.

JUDGE NIEMEYER: All right. Thank you, Professor.

I guess we have all these comments, don't we, that have been sent in?

We'll hear from Professor Resnik.

PROFESSOR RESNIK: Thank you. I begin my

comments with the assumption that the current federal rules structure is a structure that is aimed by and large at disposing of cases without trial. That is not to say there is no adjudication system. About 20 to 30 percent of the cases have some adjudication on motions. But there are very few trials.

And further, that these are rules that are your rules, that have been made over the last -- particularly in the last amendment of the last two decades, are rules crafted by judges and lawyers who say we want a litigation system that is aimed at a settlement and pretrial disposition.

And with that as my predicate, I then have to ask a question: Should class actions be treated differently from the current rule regime, which is organized to settle and dispose of cases without trial; and should we say class actions and those cases alone have to be begun, and that the price of certification is the ability to try the case.

And while reasonable people may disagree, I think that the answer should be, no, class actions like the rest of the civil litigation docket should be able to be commenced, and in this instance certified, without a certificate of triability; but that doesn't mean without a certificate of litigability, or the

ability to litigate the case at all.

And my reasoning for this is actually in part quite practical, which is that everyone of us knows there are other ways to aggregate cases in our system; and whether it is by an MDL or Rule 42 or consolidation or informal pretrial government orders, I believe we are living in a world in which trial judges and lawyers will say, we've got to deal with these group of cases as a group; and I think Rule 23 has a potential virtue, missing in MDL, missing in all these informal mechanisms; a virtue of structure and a role for judges and litigants and pushing them to the visible arena.

JUDGE NIEMEYER: What do you think of Professor Coffee's language that he suggested to the settlement proposal as a --

PROFESSOR RESNIK: I have two other alternative wordings. The language I have to say I object to inordinately is the language that is the proposal before you, which starts with the words, "The parties to the settlement request."

I think that while I agree with the Advisory Committee, settlement ought to be in the class action story, I don't think the phrasing ought to be "the parties to the settlement," because in

essence they are suggesting a kind of two-step: Come in with a settlement or come in ready to go to trial. And I don't know whether my dance metaphor will take me this far, but I want many steps along the way. Imagine a case certified for discovery, for pretrial motion purposes, for litigation, maybe for trial, I don't know. The language we suggest in our testimony, and I think it appears in Rule 6 as --

JUDGE NIEMEYER: I didn't quite understand. What was your problem with the settlement request? It seemed to me since it needs approval, it can only be people making a request.

PROFESSOR RESNIK: I don't want people -- I don't want the Advisory Committee rules, the rules, to encourage people to go outside, stand there, and lawyers saying, "I'm going to be a class lawyer as soon as we walk into court, let's try to figure out a deal."

I would like these rules to say, if you want to be negotiating with anybody on behalf of a large group of people, come in and get your certification. Say it out loud, say it with notice available to other people, so that this process of negotiation of agreements and settlements can occur under the rubric of the federal rules that gives an

opportunity for visibility, that potentially structures in a role for the Judge, that provides notice to other people that you are talking settlement, that lets Rule 19 and Rule 24 operate to pull in the relevant people and change the people who are at the table and presumably potentially enlarge the table of negotiators.

MR. SCHREIBER: But, Professor, are you suggesting actual certification or conditional certification?

PROFESSOR RESNIK: I am suggesting in the language we actually wrote would say, "In certifying a class action, the Court may consider the difficulties that would emerge were the lawsuit to proceed to trial. The Court may certify a class conditionally, allow it to proceed through some or all of the pretrial process, including notice, discovery, and settlement negotiations. When certifying class actions that the Court believes do not or might not meet all the criteria for certification if trial were to occur, the Court should so state in its opinion and should revisit the question of class certification either upon motion of the parties or sua sponte if it appears that the settlement of the dispute is unlikely, or if other information is developed that

makes plain the impropriety of class certification."

JUDGE NIEMEYER: Do I understand then that you would require some court intervention on whether there is a class before there is a settlement negotiation?

PROFESSOR RESNIK: I would encourage it.

One of the concerns I have is that the risk of rule drafting is to draft with like one example in mind. And there had been a good deal of discussion here today, whether it's Georgine, or In re Asbestos, or whatever. We have a few very visible examples. But the world out there in all of our experiences is more complicated and there are more variations on this theme.

I don't want to say per se there would never be a class that walks in with --

JUDGE NIEMEYER: But the language of your proposal suggests at least that the paradigm way is to first have the Court look at whether there is a class and have the attorneys be representing the class under some kind of Court approval before the negotiations rather than have that combined in the negotiations and coming to court all as a single process.

PROFESSOR RESNIK: Absolutely. I think the rule ought to be encouraging people to step in first

and say we here volunteer as self-appointed representatives of a lot of people who are absent and one of you who are Judges should sit there and say, you look okay to me or not, or I am worried along the way. And here is your --

And here is where I actually disagreed with Professor Coffee. I don't think that everyone who files a case says I am going to try it. And I don't think that all leverage equals trial.

In the context of litigation there is a lot of different leverage. Your point is, as we know, that there are other subclasses or individual trials waiting in the wings that are triable; that discovery -- I have seen plenty of cases in which the defendant is hoping beyond hope that nobody will look at all the pieces of paper and records that are around.

So there is lots of leverage in this world of which trial is a potential piece, but not the sine qua non, or the only one.

And so that giving an authorization for a settlement -- for a certification in which you are saying, "I'm not promising you that they will be here at trial time as a class. I don't know the answer to that yet." And thereby enabling a Court, as well as the parties, to learn more by taking seriously what

the 38 rules with their amendments do: Give you discovery, give you multiparty practice, give the Judge a role in the pretrial process.

JUDGE NIEMEYER: Now, what if the attorneys did their negotiations and said, all right, we are going to stage our court approval, and the first effort is to go in and they'll file their lawsuit and get class certification, there will be no opposition; basically they will say, well, we've been talking, and candidly, Your Honor, we are at a position where we are thinking about trying to settle this case after you certify it. Is that --

PROFESSOR RESNIK: Then what I would urge you, Your Honor, in that setting to do would be to say, fine, you better notify your proposed class members that you are not only here as a class, but you are here as a class that you think is about to be a settlement. Because --

JUDGE NIEMEYER: A fait accompli is your problem, I gather.

PROFESSOR RESNIK: And I think the rules encourage -- the current parties to a settlement language encourages to go away and let me see you the first day with your settlement in hand; whereas what the rules ought to be encouraging in saying out loud

we know everybody in the world is going to talk settlement, that is what we have asked you to do, by the way.

MR. SCHREIBER: But, counsel, no defendant worth his salt would agree to a conditional settlement class if they didn't know what the settlement was, because they have no guarantee that the Judge may not keep the class. So, therefore, the principle that the defendant works on is, I will negotiate in good faith, I will come up with a price, we will go in, and if it sails, we will pay, and if it doesn't, we go back to square one.

Under your proposal, I suggest, that you would never get a settlement class because no defendant would ever agree to it.

PROFESSOR RESNIK: I am absolutely trying to make it -- I am not promising you an easier deal. I am actually making the deal harder, because I am worried about --

MR. SCHREIBER: But you are making it so hard that in the reality of the litigation process nobody would go forward.

PROFESSOR RESNIK: I actually don't agree with that version of the reality, because the reality part says that there are cases, ala the Willging

study, et al., that tell us that people do get certifications and then you talk settlement and then you settle.

You may be limiting the number of cases in which defendants will say, I have no objection to settlement -- although I actually think that that is a real empirical question, because I think there are many -- we have seen over the last few decades people who have been, quote, plaintiffs and defendants, switching places about whether they are for and against settlements in class actions, particularly in tort litigation.

MR. SCHREIBER: Counsel, in 30 years of practice, or maybe 40, as a judge -- and I know, because you were the clerk to a fine judge, and we spent time together when I was a Magistrate, in 30 years of practice, I have never seen a defendant walk into court and certify a class without knowing what the cost will be.

So, your suggestion that they might agree to it doesn't fit with the reality of the economics of class action practice.

PROFESSOR RESNIK: I want to respond in two ways. Step 1 is that in the current world there is no incentive for a defendant to so agree and, hence, your

examples.

If, however, the rule was organized to discourage settlement class actions, and defendants have some interests in negotiating with a group of people in this aspiration of the ever-elusive global peace, and a resolution that wraps a lot together, they may be interested in at least not opposing and perhaps agreeing to a conditional certification.

Step 2 is, if the cost is that you have a more contested certification, I am prepared to pay that price to damp down a practice in which people who say -- in which lawyers say, lawyers who are of course already known to the defendants because of their prior experience within a business of a particular segment of litigation, say, "I'm the one who ought to go forward in wrapping the deal." And I think that practice builds in some problems.

And I am here for articulation. If you take the In re Asbestos majority in dissent opinion, we know more. We know about -- coming back to Mr. Fox's comment about the role of the lawyers here, we don't know everything we need to know about what went on in the negotiations. But we know a lot more.

I think the activity in an era in which civil litigation, civil settlement litigation, we

ought to be pushing more of this where you are in representative litigation to the articulated law, law of settlement, law of judges' role dealing with these aggregate they create called classes actions, and the lawyers they so empower.

MR. FOX: Professor, let me ask you a question. The way (b)(4) is presently worded, "the parties to a settlement request certification," you say you are very opposed to that. Doesn't it bother you that a judge may say at the tail end of (b)(4), "I'm not certain at all that this matter could ever be tried; so I strongly urge you folks to get together and settle." Isn't it at least better to have the parties generate that request than to have the judge twist arms pointing to these problems of triability?

PROFESSOR RESNIK: I'm not actually for judges twisting arms for settlement, but I am aware of local rules, including in the District of Massachusetts, and many others, in which they oblige a judge at every pretrial conference to say to parties, have you thought about settling.

MR. FOX: Yes. But have you thought about it, because I am not at all sure that I can ever certify this for trial at all. This is an abomination of a case. So, Mr. Plaintiff's lawyer, you better

take that -- That is kind of troublesome.

PROFESSOR RESNIK: I want to vary your hypothetical. I am not suggesting that judges say I take a case in which I think there is no plausible federal case here, and then suggest to you, have a little green light to try to settle it.

What I am suggesting is that we look at cases in which we say, frankly, manageability may be very difficult. What is this megatrial going to look like? Will I like the variation? How will I do it? In which I say, I don't know whether we can try it, and I don't know it yet. That isn't to say I won't let you proceed through some of this.

Let me just say, in a way -- multilitigation currently occurs in which at least technically these are individual cases collected for the pretrial process. What MDL lacks, and in some sense my suggestion would make this like MDL, because they are pretrial. For pretrial purposes, they are a group. And we know that what happens is that Judges appoint plaintiff steering committees, and that they are de facto class actions; that they occur without any articulation of the ethical obligations of the amalgam of lawyers who make up a plaintiff steering committee, of the individual lawyers who are out

there, and we know that in very few cases are they actually remanded for individual trials.

So what I am saying is, give some of what you offer under the Rule 23 rubric to these advocates, be they MDLs or to the other, by saying, frankly, what you do when you do an MDL; you're not promising a group trial, and you are saying deal with these things as a group.

And I want to come back to the point about who are the lawyers and what are their roles, with the exchange you had with Professor Cramton, which is to say that there is a ton of work to be done to figure out who are these lawyers when there are layers of lawyers.

In our written comments, we mention that in mass tort cases, for example, they are often individually retained plaintiff's attorneys, as well as a plaintiff's steering committee, who is talking to clients, with what kind of information. You commented how can lawyers say what is problematic about their case.

How is the Court going to figure out a way when it makes this little animal, called the class action, to deal fairly with the layers of people that are in it? That is the role.

I know that 23(e) is only a little bit on the agenda right now, and I guess in terms of what the work is to be done, there is an F word in this context. It's called fees. And no one wants to mention a word about attorneys fees as part of the question of whether rules drafting have to say: Fees, costs, the administration of this aggregate.

JUDGE NIEMEYER: The difficulty I think that the editorial press seems to reveal is that in an individual case, the client is the predominant interest, and the attorneys fees is subordinate to the client's interest.

In the class action case, most of the editorials I have seen have commented in regard to now the attorneys are players instead of the -- and with the predominant interest rather than the client. And I don't know -- I think everybody is reaching for ways to try to solve that problem, because on the one hand the aggregation of cases is a necessity for solving a lot of our mass torts large types of cases, which will probably only increase in the type of economy we have.

But on the other hand, we have these at least appearance of abuses that the public, at least some portions of the public, are terribly troubled by. And finding the right handles to solve these

problems seems to be what we are here at this hearing about but what the committee has been striving after too, and I am not sure we have landed on it yet.

PROFESSOR RESNIK: Well, what I would urge in terms of taking it on is that in the aggregate cases that you create you actually have a wealth of potential resources in the bodies of lawyers representing the various layers, and that you might be able to deploy them better if coming in again to this notion of conditional certification you have the capacity to structure the relationship among the lawyers as well and designate different lawyers to be there, especially in the very large cases, it's plain that there are diversity of interests within a claimant class. And when you have more than one set of lawyers around, you have this resource.

And I just want to actually add in terms of the things to put on your plate, the administrative costs, there are things like document depositories, how to allocate the costs among many plaintiffs and many defendants in cases in which, unlike the immediate settlement paradigm, one is hoping that there will be some litigation as a predicate; that there are litigation classes, not trial classes and not just settlement classes.

How to allocate the cost of this activity, whether it is the cost of documents, the cost of exchange of information, in a fair fashion across districts is a terrific problem that case law is beginning to peek at the notion that it is not just fees that can be troubling, but the costs, such as photocopying, attorneys' meetings, the documents.

And there is a beginning layer of case law that I think that this committee could well take on to think about whether or not, for example, you allocate across all the participants all the time.

I mean, just examples of, if you have layers of lawyers and the Court is saying you are lead counsel. In the classic securities case, there is a single set of lawyers who is there on behalf of a whole host of unrepresented people who may have small recoveries. In these mass tort cases, there are individual lawyers for individual clients as well as group lawyers. Who pays what?

And do the clients of the individual lawyers pay twice for the cost, three times for the cost? Do defendants pay for all the different documents that have to be exchanged?

So under the rubric of 23(e) and of 23 in general, looking toward now a much richer set of cases

that fall within the definition of class, there are an array of issues that could come onto your docket in terms of other drafts to start articulating obligations. And I'm a little uncomfortable --

JUDGE NIEMEYER: You should draft only one set of changes, I think.

PROFESSOR RESNIK: Well, you may want -- and that is a concern that several people have suggested to you, that you want to put more of these changes together. And, you know, people have said, "Gee, do more under 23(e)," incorporate some of the standards.

Professor Rowe has responded that there is a fairly stable body of case law. I think people are saying to you, push those judges a little harder in effectuating, and then use your rule-making voice to say under 23(e), here is the bigger job for you and we insist quite upon it.

JUDGE NIEMEYER: All right. I think we have gone over a little bit. But I appreciate having your comments, Professor.

PROFESSOR RESNIK: Well, I appreciate the opportunity. Thank you.

JUDGE SCIRICA: Professor Cramton raised an interesting point. He remarked that in the settlement

class proposal we may be moving into a dangerous area of substantive law, and I see that Professor Burbank is present here who has thought a great deal about this.

Steve, is there anything that you would like to say about this? You are familiar with the rules enabling act.

MR. FOX: Thought you'd never ask.

PROFESSOR BURBANK: First, if I may --

JUDGE NIEMEYER: Is this a setup?

PROFESSOR BURBANK: This part is not, actually.

Professor Cramton remarked that overstatement can be useful. It can also be harmful. And in his group condemnation of judges who are involved allegedly in settlements, he included Judge Reed. And I will like the record to reflect that Judge Reed was not involved in settlement discussions in the Georgine case before he was enlisted to assist Judge Weiner in that effort. And I am sure you will accept that correction.

JUDGE SCIRICA: That is correct.

PROFESSOR BURBANK: In terms of the enabling act, I think that there is potentially a problem here, probably not under the law as it exists;

the law as it exists stated in Hanna v Plummer and Sibbach against Wilson, and it is very difficult for the committee, for that matter the Court, to overstep the boundaries that have been set because they are so loose.

I think it is also the case, however, that one should perhaps take seriously the notion that the standards set forth in Sibbach in particular for the enabling act are not sufficiently rigorous, and that whether or not Professor Cramton's prediction, which of course could be a self-fulfilling prophecy in that he and his colleagues get Congress interested in the problem, and which does little more than equate substantive with controversial. I think one ought to take seriously the notion that there are limits beyond those stated in Sibbach and in Hanna.

I don't think, however, that (b)(4) as currently formulated would pass those limits which I think must have to do with rulemaking that predictably and unavoidably will affect rights under the substantive law. I mean, I don't see that in (b)(4).

And I don't see (b)(4) making the sorts of policy choices that I think raise or should raise serious enabling act problems.

Finally, even if one disagrees with that,

and I think that reasonable people can disagree with that, there is a problem here, and that is that the Supreme Court itself recognizes that its class action rule is substantive. Justice Blackmun said as much in the Mistretta case.

The problem is that when a rule is made, and let's assume at the time that one doesn't believe that it will predictably and directly affect rights under the substantive law, and it turns out that it does, there are lots of rules like that; it's not just Rule 23. It's discovery rules. Indeed, Professor Friedenthal said in the early 1980s that anything more than the tinkering about which Justice Powell complained in his dissenting opinion in 1980 would be for Congress, because the discovery rules have substantive impact. It's a problem. I mean, once you make a rule and it turns out to have some substantive effects, does that mean that the Supreme Court, with your help, is powerless to do anything about it? That any future law making has to be done by Congress.

JUDGE NIEMEYER: We could be in a grab bag, because Congress has suggested that a lot of this rulemaking belongs in Congress, and the courts have suggested a lot of venue questions does it belong in the courts --

PROFESSOR BURBANK: I understand. But it seems to me that a number of the enabling act arguments that are being made now put you in an impossible position -- put the Court in an impossible position, even if it is true that rules have turned out to have substantive effects, because effectively, the Supreme Court can't do anything about them.

Now, if you take that view, I think you have to be very careful that rules do not predictably and adversely affect an identifiable class of litigants. And Professor Cramton I take it believes that perhaps (b)(4) as currently formulated would have such an impact. I don't see it; but, again, reasonable minds can differ.

JUDGE NIEMEYER: Okay. Thank you.

All right. Is Eugene Spector here?

MR. SPECTOR: Yes.

JUDGE NIEMEYER: Do you have anything to --

MR. SPECTOR: I would only add to what Professor Coffee said. I agree with his comments on (F), which is the area of my concern.

And I would reiterate one other thing. I believe --

JUDGE NIEMEYER: (F), you mean, not the appeal --

MR. SPECTOR: (b)(3)(F).

JUDGE NIEMEYER: b(3)(F), right.

MR. SPECTOR: And the only other point I would like to make is that I think we as lawyers who represent classes take our duties to those classes seriously. And I think that is a view that is not shared necessarily by Professor Resnik, at least based on the comments that I heard today. And I think that is part of the system.

JUDGE NIEMEYER: Well, I understand that there is that perception. But just so that it is not overstated, I didn't take Professor Resnik's statement to be that. I think that there is a manageability of attorney resources and accountability to clients, and that type of thing, which doesn't necessarily cross over into abuse or a violation of attorney responsibility. I think that is the way I took her comments. But --

MR. SPECTOR: I am not suggesting otherwise.

PROFESSOR RESNIK: I appreciate it.

MR. SPECTOR: I am just suggesting that it is a perception which has been played into the press which you mentioned, and I think it is something that needs to be dealt with, that we as class action

plaintiffs lawyers especially take our duty to the class and to the Court seriously.

JUDGE NIEMEYER: Well, I think your comments are well taken, even in a broader sense. I think the whole third branch with its attorneys, judges, and everything else attached to it, really has a duty to get the public on board, because we haven't done so well in the last few years and if confidence is lost in this branch, including class actions, then I think we have a serious problem.

All right. Thank you, Mr. Spector.

Mr. Leighton.

MR. LEIGHTON: Yes, Your Honor.

JUDGE NIEMEYER: Do you have anything to add?

MR. LEIGHTON: Well, Your Honor, I have proposed a draft of Rule 23(e).

JUDGE NIEMEYER: Have you submitted that to us?

MR. LEIGHTON: Yes, I did.

JUDGE NIEMEYER: Okay. Then we have that. And that will be considered, of course.

MR. LEIGHTON: I don't think that the public itself has been represented before this committee, because the committee has not advertised or

made known its willingness to receive comments from the public. The public is affected by everything that has been said here today.

JUDGE NIEMEYER: I would hope we would get any comment from any member of the public. I'd assume that this was a public hearing and a public notice. And if you represent the public, I am happy to hear from you.

MR. LEIGHTON: I would like my five minutes, if I may say.

JUDGE NIEMEYER: Well, come on up and let's hear from you.

MR. LEIGHTON: Mr. Chairman, and members of the committee, I come here before you based on the experience before the federal courts and before the state courts in matters of settlements of class actions.

You will find on page 2 of my statement, that, as I have experienced it, a final judgment in a class action should include 10 distinct elements which are not included today.

I have also filed an appendix to my statement which apparently is in the file. You have two specific final judgments that have been entered recently in the Southern District of New York, and

which do not comply with the federal rules of civil procedure.

One basic rule is that you always notify a person who has been enjoined of his duties and liabilities under the injunction. Both of those final judgments contain injunctions which have not been served upon those enjoined. That is the problem. Because, once you enjoin people from going ahead and delving into matters which the settling parties have not adverted to, you have a real problem. I shall illustrate.

Only a few days ago I came across facts which render a final judgment entered about 9 years ago on the basis of false premises. The facts are really very simple.

JUDGE NIEMEYER: Is this a class action?

MR. LEIGHTON: It was.

The facts are very simple. The corporation which settled, accepted 250 million dollars in paper issued by another corporation. The other corporation went bankrupt. The paper was canceled.

The settling corporation has not recovered its money. Why? Because of a class action settlement.

Nobody at the time of the settlement ever

thought that there would be a cancellation of the 250 million dollars worth of paper.

It was labeled "preferred stock." It was really paper, worthless paper. It was canceled for one dollar. Now, that is one thing.

Another class action that I was involved happened about 11 years ago. And that is where facts relative to the standing of the person who advocated the class action were not delved into. The result was a loss of 120 million dollars to the corporation that settled that action.

So, if you do not amend or do not intend to amend Rule 23(e) as I suggested you should, you are really asking for trouble, because under the present wording of Rule 23(e), you can do anything you want, anything you want, estop the shareholders from ever pursuing the matter, and when you find out the truth you find that you are under an injunction not even to raise the matter.

I have not heard today any comment about injunctions contained in final judgments.

I have not heard anything today about the final judgments not being served upon those who are members of the class. And there is no such service.

JUDGE NIEMEYER: Okay. Thank you very

much.

MR. LEIGHTON: That is the sum total of my comments.

JUDGE NIEMEYER: Thank you. And we have your comments too.

Robert Kaplan.

MR. KAPLAN: Your Honor, if I may have just two minutes.

JUDGE NIEMEYER: Sure thing.

MR. KAPLAN: Robert N. Kaplan.

I have been practicing for about 25 years representing plaintiffs in antitrust and in securities class actions.

I think these rules were promulgated because of mass tort and consumer class actions. They are going to have very negative effects if they are passed in this way in antitrust and securities class actions.

First of all, if the practical ability of individual class members to pursue their claims and whether the probable relief to individual class members justifies the cost in terms of class litigation, as a practical matter in the trenches, is going to open up class discovery to absent class members. At the moment, the discovery is limited to

the actual plaintiffs. Defendants' lawyers will be able to now have discovery of absent class members, who are hundreds and thousands of people, to see whether they have the practical ability to pursue their claims, what the probable relief is to individuals. And in a securities class action --

JUDGE NIEMEYER: Your concern is that the discovery will end up probing into irrelevant matters and actually matters that normally would not be discoverable in a --

MR. KAPLAN: That is true. It is going to greatly expand the discovery. In a securities class action, you don't even know who the class members are. A lot of them are in street names the brokers only know. So how are you going to find out who has small claims and who has large claims? Are you going to have discovery of the brokers and get the lists and send out notices and then have discovery of these people?

In an antitrust action, you have some very large claimants, large purchasers. Are you going to be able to have discovery of them to see the amount of their claims, what it would cost them to litigate, whether they have practical ability, whether they don't have the practical ability, what is the amount

of the damages, what is it going to cost, what is it going to cost the defendants, are you going to have discovery of the plaintiff's experts, of the defendant's experts. You are really opening up a whole new area.

At the moment, the rules for class certification are defined, people know them. There is generally a minimum amount of discovery. In securities class actions, we often stipulate to classes. This is all going to change. So it is going to really open up a whole new area.

In the settlement classes, we use those in securities and in antitrust class actions. I have one example where we negotiated for a year and-a-half before a settlement master. Nobody wanted to go to the expense of litigating the class motion. So we put that on the side. We finally arrived at a settlement, and as part of the settlement it is a settlement class.

Now, is the judge not to approve it? It is routinely done in those actions, not because there is any kind of -- something that is not an arm's length, we negotiate the settlements, they take years. We have discovery, but if the class is not certified it is done as part of the class certification.

I might suggest that what is happening here is, because of the mass tort and consumer areas, people haven't really thought about --

JUDGE NIEMEYER: Well, even in those areas we heard comments this morning already that have -- I think Mr. Black or someone else addressed the question of discovery and to costs and the ability to prosecute a suit. So it may not even be limited to what you are talking about. It may be a broader problem.

MR. KAPLAN: Yes, Your Honor. But if there are problems in the mass tort area and the consumer areas which I am not equipped to address here, perhaps there should be separate rules for those areas. Just like Rule 23.1 was split off for derivative actions, perhaps some consideration should be given to where you have futures classes and issues that don't exist in antitrust and securities, because what has been done here is going to create terrible problems in an area that has worked well, and that is not the reason why these rules were being promulgated.

Thank you.

JUDGE NIEMEYER: All right, thank you. I think I have covered the entire list of people that have been scheduled for the morning session. We are about 15 minutes behind.

We are going to try to hold to the schedule. We are going to try to accomplish business during the lunch hour. So, if we resume at 2:15, it may be a minute or two late, but we'll continue with the people that have signed up for the hearing this afternoon.

I do want to thank the people who testified this morning. I think the comments were very helpful and covered a broad range and not only of comments, but of interest, and will be useful to the committee.

We'll see some of you this afternoon.

(This matter recessed at 1:17 p.m.)

(The panel resumed the proceedings at 2:30 p.m.)

JUDGE NIEMEYER: This is a continuation of the hearings on Rule 23. This morning we had a full morning of hearings. We heard from the academic community, from plaintiffs' lawyers, defendants' lawyers and some public interest lawyers, and got a wide range of views. Some of you may have heard those comments.

While I'm sure there's going to be some repetition, if you are here and there's a particularly clear comment that was made that you share in, you can allude to it so that we know you support it without repeating it, if you want.

I'd like to make sure that we get through everybody who is on the list today, and give the opportunity for a hearing. But to the extent that you can tailor your remarks and adopt others, that would be helpful.

I've been alerted by someone that the people I've called up to the table have somewhat similar interests, but maybe not. I'll let you define your own interests. But why don't we begin with Mr. Montague? We're going to try to limit you to ten minutes. I've been a little loosey-goosey

with that, but it would be good if you can --

MR. MONTAGUE: I think I can live with that, Your Honor. I hate to begin by correcting my name, but it's pronounced Montague, Laddie Montague. It's an honest mistake. I'm from Berger & Montague, predominantly a plaintiffs' law firm, although we do some defense work.

I personally have been involved in antitrust class action litigation since 1964, so I've had it under the old spurious rule and the present rule.

I didn't hear everybody this morning, but I did hear Professor Coffee and Bob Kaplan with respect to their remarks on (b)(3)(F). I subscribe to those very strongly and will not repeat those remarks. But I believe that is a very --

JUDGE NIEMEYER: This is the cost justification?

MR. MONTAGUE: Yes. I really do believe that will be a tremendous detriment, and has a chance for abuse with respect to the traditional type of class actions of antitrust and securities and ERISA and that type.

I would like to talk for a minute, from a practical point of view, about the settlement class,

because there seems to be -- at least some of the comments I heard this morning seem to have a misconception, in that a settlement class comes about at least from the plaintiff's side because they say, my God, this is an awful case, we'll never get class certification and we better do something about it. In my experience, that's just not the case.

If a plaintiff felt that way and that was the case, I can assure you that a defendant would never be interested in entering into a settlement class. The reason those --

JUDGE NIEMEYER: Just to be practical about it, I don't think any lawyer who is worth his salt ever thinks less of his case than it's worth, and usually we think more of our cases than it's worth. So if you have a few plaintiffs, even though it may be a difficult case, you may get invested in it, and the question then comes in when you're negotiating with the other side.

All you can see are the good parts and the positive claims and the risks to the other side. I'm sure when you come into negotiations, that's the type of strength that you try to convey.

MR. MONTAGUE: I agree with that, but the

point I am trying to make is with respect to the class action certification. There is usually, at least in the antitrust areas -- and I'm sure it's true of other areas, there's a -- there are certain areas that are always attached, such as can impact of injury be shown by common proof. The defendants always go into all the different myriads of differences in the way they do business and how different customers are treated.

In some cases, they are very serious to overcome it. The plaintiffs get experts and the defendants get experts, and it becomes a very serious issue. There are lots of times when that uncertainty is on both sides of the table, that the parties get together and they say, look, we can settle this case. It is a viable class action in terms of liability, whether or not there's a common violation.

If we can agree on a way to have the funds distributed and how they should be allocated to the injured persons, that satisfies the very issue that we would be litigating in class action.

JUDGE NIEMEYER: But if I understood some of the people who were concerned about the settlement negotiations in that posture, you have

this kind of scenario, which is not probably an unfair scenario. You represent a group of plaintiffs and you're considering or have thought that you should represent a class who are similarly situated. You face your counterpart defendant's office and talk about it and think about how to settle, think about what you want. Finally, the defendant comes up with a number that's agreeable to you.

But, in doing that, he says, now, look, when we settle this case, I want to get as many people in the settlement as we can. At that point, you now have lost all resistance to agreeing. There's no reason why you would agree to get a larger class and have a greater, even for a very small amount of incremental settlement, value to include another million people.

And so at that point is the risk in this whole process -- how far are the two of you going to reach in describing the bounds of your settlement? Of course, there's nothing constraining you from defining the limit and going to court, because now you've both reached an agreement as to how this can be settled, and you now both have an interest. The defendant has an interest, and you include a greater

number, and you -- of course, it makes your pot bigger and your fees a little bigger.

What's going to tell you, I can't do that? And so there is nobody on the other side at that point in the negotiations, and the question is how to address that.

MR. MONTAGUE: You're absolutely right about one thing, the defendants in a settlement -- any type of negotiation, even when there's a certified class, they want as broad a protection as possible under the rule. I'm not quite sure how to address the other, except that just to tell you from my personal experience very recently I rejected that, and, as a result of that, I litigated the class. In 30 years that was the second class certification that I lost. But it just couldn't be done, and it wasn't right. I think plaintiffs' lawyers do take that attitude.

JUDGE NIEMEYER: I'm not suggesting anything untoward. What I'm suggesting is that your incentive at some point is to do the same thing that your opponents' incentive is. Professor Resnik suggested that if there was some way before you actually get that far to get the Court involved, which is to let's certify the class to enable you to

negotiate -- that was her proposal -- there's some ring of benefit to that. I don't know whether our rule does it or not. At least that's the observation of an earlier comment.

MR. MONTAGUE: The rule doesn't do it, and there is some ring to that. But the practical problem is -- and I think Magistrate Schreiber referred to that, and that is, what defendant is going to come -- defendant feels that it's being prejudiced, even if it intimates to agree to a settlement class before it has a settlement, because they are afraid that will spill over and influence the judge and certify the class if it has to be actually litigated. So I think, as a practical matter, that is not workable.

But someone this morning -- and I forget who suggested safeguards. I think that's a very good idea. I'm not so sure that they have to be in the rule. Usually, the courts themselves come up with them, but some of the safeguards at least for the antitrust context --

JUDGE NIEMEYER: One of the safeguards that initially was there. I'm trying to play devil's advocate to find out where this could lead. One of the safeguards was that the class is defined by what

it could be under the rule. If we drop all of the barriers as to what it could be, then we're left to the limits of what the attorneys are agreeing to.

Is that too fraught with danger to allow that? That's the question.

MR. MONTAGUE: Well, I think that Rule 23(a), in effect, defines what the class could be, and what the class should be. If those -- if those standards are followed in accepting the settlement classes, as the rule provides, I think that is the safeguard. But I was going to suggest very simply that (a), that plaintiff distribution, how the parties or how the plaintiffs' counsel plan to distribute the settlement amongst the class members should be part of the settlement approval in a settlement class context.

It's not that way in a litigated class context, but in a settlement class context because that resolves many of the issues -- that shows how the parties resolved the issues that should have been litigated that threatened the class being certified as a litigated class.

Secondly, I don't think that the risk of class certification should be considered by the Court, which is approving the settlement as one of

the risks. I think the settlement has to be acceptable on its own terms, and I think that would resolve some of the problems.

The last two things go together, and that is that the form of notice be a reader friendly notice. That obviously people have an opportunity to --

JUDGE NIEMEYER: What was your view on the settlement? Basically, you're in favor of the settlement?

MR. MONTAGUE: I'm very much in favor of the settlement. It's very constructive.

PROFESSOR ROWE: If I understand your position, you're in favor of the settlement. I wonder if you have thoughts on Professor Sue Koniak's idea of distinguishing between the classes that couldn't be tried, which she calls malignant, because she sees no bargaining leverage on the plaintiffs' side, versus the more benign ones that could be litigated, and possibly limiting the settlement class context to --

MR. MONTAGUE: I was not here for her testimony. I did hear reference to it. I must say I hadn't thought of it before. My instinct was that it was a very constructive idea. There are cases --

that the only way that a redress could be had in one form or another is in this context. In those cases -- and I'm not quite sure how they are always defined. That seems to me to be a reasonable suggestion. Since I've been here no one has talked about the interlocutory appeal.

JUDGE NIEMEYER: Yes, we've had several comments, but you are free to give us your views on that.

MR. MONTAGUE: I think it is both an unnecessary rule, and I think the ramifications could be unfavorable. The reason I say that it's unnecessary is that if you really look what happens -- let's assume a class is certified. There is always the rule in (c)(1), that it can be conditional or it could be altered or amended. Even if, when it's certified, in many cases there's a motion to decertify at the same time a motion for summary judgment is filed. Those cases are often considered particularly when there is -- when the initial certification is conditional.

But let's assume that a case is certified and it goes to trial. If the plaintiffs win, then the case is going to go on appeal, and the class certification issue is going to be heard.

If the plaintiffs lose and it's certified, it may go unappealed, but certainly there is not going to be an issue of class certification.

PROFESSOR ROWE: But isn't that a terribly small part of the universe because we are mostly talking about settled cases, and the certification decision has enormous influence on settlement, whether it's denied, or if it is denied the case often goes away. And if it's grand, it increases the settlement leverage of the plaintiffs.

MR. MONTAGUE: I think there's something to that, Professor, but I also think that it's a little bit overplayed. Our office in the last -- since 1994, has tried three class action cases. And unlike Barbara Mather's experience, we were very successful in both of -- each of those three cases. I personally have tried three class action cases, two of which resulted in a plaintiffs' verdict and one in which was settled after the plaintiffs had completed their case.

So I don't think that defendants, where they think they are -- they have a shot at winning, are afraid to take such a shot at trying the case.

What I don't understand is why that issue with the summary judgment -- issue of class

certification should get any more priority than certain discovery rulings or in limine motions, which are just as important to the success of the case; or what someone thinks the case is going to conclude, or whether a plaintiff who -- a defendant who filed a motion to dismiss or a motion for summary judgment, which is denied, that's just as important.

I think in the Supreme Court Death Knell case, the Coopers & Lybrand case, the Supreme Court pointed that out, that how can you make the class action decision any more important than some of those other decisions. I think this rule does, and I'm not so sure that the empirical evidence would support that.

JUDGE NIEMEYER: Why don't we hear from some of your colleagues?

MR. MONTAGUE: Thank you very much.

JUDGE NIEMEYER: Thank you. Jonathan Cuneo.

MR. CUNEO: Thank you very much for inviting me to appear. My name is Jonathan Cuneo, and I come up at this maybe a little bit circuitous and different route than some of my colleagues.

My background is, essentially, I went to

law school about 25 years ago -- it seems like a far-off day -- in order to further an interest in antitrust and consumer affairs.

After I graduated from what then would be Crampton's Law School, Cornell, I served as a law clerk for Judge Tamm on the D.C. Circuit. Thereafter, I served as a prosecutor of consumer and antitrust cases at the Federal Trade Commission for a period of years. Thereafter, I became a counsel to the House Committee on the Judiciary, subcommittee on monopolies and commercial law. Because that was Chairman Rodino's subcommittee, we not only had jurisdiction over antitrust issues, but over some court-related issues as well.

Thereafter, I moved into private practice, I had represented some of my colleagues in the private bar in Washington, and have participated in a few class actions that I either brought or was brought into in one way or another.

Now, by and large, I want to direct my comments to what you referred to as change 1(a) and change 1(c). Those are the changes in the Rule 23(b) factors. And rather than repeat what my colleagues, Mr. Black and Mr. Robert Kaplan said this morning, I simply wanted to identify with their

remarks and amplify them slightly.

If what I say sounds elementary, then it will also be short. That is that, in my experience -- and this is really experience of over 20 years -- that the private enforcement system of antitrust -- as I say, I have represented the securities bar some in Washington. The deterrent effect of private actions in these areas can hardly be overstated.

When I was at the FTC, there was a marked difference in the way we would settle consumer cases; whereas, you know, there were, at least at that time, there was no broad federal remedy in antitrust cases. The concern of my colleagues in the defendants' bar was always with the effect of the settlement on subsequent private actions.

Thereafter, I think when I served for about four and-a-half years on the antitrust subcommittee, we received hundreds of comments one way or another from the private bar and executives about private enforcement; very, very few in comparison about public enforcement by the antitrust division.

You know, I became curious about this. We did some research. As it turns out, there is a study of the bread industry, which shows just how important the deterrent effect of private actions

can be.

Now, while your proposed rules purport to be addressed to a different kind of case, they are, nonetheless, rules of general applicability. So there is a tremendous concern, I think, in these areas for diminished enforcement.

One point that my colleagues did not touch on is the changes for 1(a) and 1(c). While they noted that they would add new areas of complexity, they didn't really talk about that in terms of deterrence. I think that's an important consideration for the committee to take under advisement.

The fact of the matter is that private cases and private class actions are already lengthy, protracted, complex proceedings, sometimes that involves sprawling records with a multitude of parties, both on the plaintiffs' and the defendants' side.

The fact is that the new factors I think would be -- add an entirely new layer of complexity to that already very difficult litigation.

Judge Niemeyer, you spoke this morning about the public perception of class actions, and I think that one of the concerns in the entire justice

system and the public eye is that it doesn't -- it's already too complex; that it doesn't do justice rapidly enough.

JUDGE NIEMEYER: Maybe you would be in favor of going back to the 38 rules. I might vote right with you.

MR. CUNEO: I think at counsel's caution, before adding new layers of caution, I wanted to move from those general comments to one very specific comment. That is, that the new test, which the committee refers to is change 1(c), the cost justification test at least according to -- and this is in my written testimony. The draft notes threatens to become preeminent. Instead of becoming merely a consideration, I think it threatens to become preclusive. And that is a very, very great concern if it -- in addition to the concerns that were mentioned by my colleagues this morning, and also Professor Coffee, if, instead of becoming merely a test, it becomes -- it would become something to be preclusive.

Now, what I tried to do was to fill in around where my colleagues spoke, and come up with something that hadn't been said. I'd be glad to take any questions that you have.

JUDGE LEVI: Could I ask something? When this rule was under discussion, there was this rule change in what we're calling change 1(c), the cost justification factor. There was quite a bit of debate within the committee, you're undoubtedly aware of that.

What was generating the rule, at least as I see it, was the sense that there was perhaps a limited group, but a group of cases that did discredit to the system. Those were cases in which the recovery was exceedingly small, vastly smaller than the typical case that the FJC found; so, in a trivial area, less than five dollars. The administrative costs were high.

These people were not easily identified, and the attorneys' fees were out of control. I remember Judge Pointer said, maybe we should put something in about attorneys' fees right into the rule, but we were unable to do that.

Do you think that there's any room for a rule that addresses perhaps a very limited number of cases that do discredit to the system?

MR. CUNEO: I heard you ask this morning about cases that involve the two dollar recovery. I was sitting in the audience and the attorneys' fees

are high. If someone through an antitrust violation -- and I'm not trying to be cute with that, but were to steal $4 from every person in the United States and give him the mass distribution of technology -- it's hardly hyperbole to suggest that something like that could happen, but that could wind up being a billion dollar case.

If a plaintiffs' lawyer were to recover two dollars for every four in those circumstances, there are those who might think it was a reasonable recovery.

So I think that the aggregate amount of the recovery -- you know, it's important to understand what was the total of the alleged violation and how widespread it was. Whereas, I do think that there is possible room for improvement -- I think some of my colleagues suggested it this morning -- I think that the current rule would invite scrutiny and would wind up in meritorious cases being questioned and delayed.

JUDGE NIEMEYER: Thank you, Mr. Cuneo. Why don't we continue with this group? Mr. Rodos?

MR. RODOS: Thank you, and good afternoon. My name is Gerald Rodos. I'm a partner in a Philadelphia law firm which has significant

experience in litigation of class actions.

I was here this morning and I heard various presentations, so I'm not going to repeat that, and I'm going to try to be exceedingly brief.

These rule amendments arose in March of 1991, when the Judicial Conference asked about amending the rules to accommodate the demands of mass tort litigation.

I think a few members of the panel this morning mentioned the fact that that's what their purpose was. The problem that I see, and what some others see, is that, of course, they are not written just for mass tort. They are written to apply to class actions in general.

JUDGE NIEMEYER: You know, something that we learned over the last three or four years when we had all these hearings is that the real problems of mass torts are beyond the scope of committee power. It's Congressional power that we need.

MR. RODOS: I think you're right, and so my firm does primarily securities and antitrust cases. So I see these changes, how they affect my area. I submit that, in that respect, they could be very, very harmful.

I think the Federal Judicial Center's

report, their empirical study itself, said that there were well established applications of Rule 23 that would be affected by a major restructuring of class action procedures. That's what I think is the problem, at least from what I see from my fields.

One of the main ones, of course, which has been discussed at length, is 23(b)(3)(F). I'm just not going to go through that again because Mr. Kaplan and Professor Coffee and Mr. Black --

JUDGE NIEMEYER: You share that view?

MR. RODOS: Absolutely. I don't think that a solution is just to turn it from the individual probable relief to the aggregate probable relief. Because, as I think Professor Coffee said, even with an aggregate, you still have the mass -- you're going to have to have the discovery of the experts, what are the aggregate damages.

I think Professor Coffee had a suggestion and it sort of fits in with what I think, is that you have either the alleged aggregate relief or the aggregate relief claim, so that you don't have to have this process that could take weeks and months before a Court could decide what the relief is before the Court then could decide how does it compare with the benefits and the costs -- I mean

the burdens and the costs.

JUDGE SCIRICA: You would add the deterrent effect?

MR. RODOS: Absolutely, yes. I think that's what Professor Coffee said. I hadn't seen it in writing, but what he said I agreed with.

Now, a short point on 23(b)(3)(A), which is sort of -- can be corollary of (F). If the claims are too big, maybe you shouldn't have a class, and (F) is, if it's too small you shouldn't have a class.

In one respect, I just see that there's a conflict, I believe, with the recently enacted Securities Reform Act of 1995. That said Congress there declared that the class members with the largest claims are the ideal class representatives. And the Act, in fact, creates a presumption that they should be the lead plaintiff in a class action.

Now, if you have -- (A) could be read as saying, well, if they are too big there shouldn't even be a class action. I think that just conflicts if not with the words, but with the spirit of Congress.

I think, Judge, one of the problems that

you raised about isn't there some area, some level, dollar amount that is just too small? The problem again, I see, is that it can't be written just for -- or at least it isn't written just for the mass tort area, where maybe there is damage of a dollar or 50 cents.

Some securities cases, that empirical study did show that in this -- of them, at least in its analysis, the average recovery that was mailed out was 50 or 60 or 75 dollars. Now, some people may say that's exceedingly low, but that is a securities case. And as I think the study said, that is more the routine type cases. That you really shouldn't have the situation where you even are thinking about not certifying the class.

And, finally, on the appeal. I agree with some of the others, that it's just not necessary, and just because it's an important decision doesn't mean that you should have an immediate appeal. That's what the defendants always said on a motion to dismiss. They always try to get a 1292(b) because, obviously, if that is reversed, that is a significant difference in the case. The case ends.

JUDGE NIEMEYER: But, you know, we have a fair amount of experience under 1292(b) and get a

fair number of those claims. They move very quickly. In 1292(b), as you know, there's a dual certification, the district court and the appellate court. So you have to go to the district court and usually you get the inclusion in the order and it goes up.

In a very short time, the Circuit Court has looked at it and said, we're going to grant or deny the petition. It's not a parade of horribles attached to that process, that is as disruptive as might be argued.

MR. RODOS: Right. I think someone mentioned this morning, also, that in the Securities Act that was just past, the way that procedure is now, everything gets stayed in the case except for a motion to dismiss until that is decided. That could be nine months or a year.

Then, when you first begin to litigate the case, the first thing is a class action, and when that is decided you get an appeal, you may have a stoppage again. I don't know how much longer this will add.

JUDGE SCIRICA: Of course, that's discretionary.

MR. RODOS: Yes. And I think finally on

this, I think one of the problems is that the note states that this idea of appealing is good because -- and I was quoting -- that an order granting certification may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potential ruinous liability.

Those are the things that you read about in the newspapers. But the federal judicial study, that empirical study itself, looked at that issue in the -- among all the class actions in the districts that it considered, and it concluded that there were no objective indications a settlement was coerced by class certification.

So I submit that the underlying reason for this appeal is not, in fact, true.

MR. ROWE: Just one question. You had mentioned liking the idea of -- for the (b)(3)(F) factor on whether it's worth it speaking in terms of aggregate claimed damages. What's to control the claiming? Maybe we need the German type rule, that if you claim a million dollars and recover only 100,000, you get one-tenth of the fee that you otherwise would have gotten. I wonder if --

MR. RODOS: Yes, I'm looking at this from the area in which I practice, securities cases. We

frankly -- you could say that that's a situation now, in that the Court is not to look at the merits at all, so he doesn't even consider that.

So I think that wouldn't change that much in our field because -- I mean it's very -- to look at it simply, if a stock goes down four points when they announce some terrible news, and you have four million shares that were traded, you could say that the damages or the claim is 16 million dollars.

Now, that may not turn out to be accurate at the end of the case when the defendants come in on summary judgment. Well, it moved because of this, it moved because of that. But it's certainly not a frivolous claim or assertion. It's mathematical. So I don't think that in securities cases it would really create that problem.

JUDGE NIEMEYER: Thank you, Mr. Rodos. Mr. Savett, are you ready?

MR. SAVETT: Yes, Stuart Savett, Your Honor. Over 30 years ago, I started my career in a large law firm in which, I may note, former Secretary of Transportation Bill Coleman was senior partner, and I had the pleasure to work with him. The firm at that time was involved in the --

JUDGE NIEMEYER: That's why he's here.

He's going to testify now to the opposite side of what you're going to say.

MR. SAVETT: I don't know. He was here Monday and Tuesday for the Conrail hearings and we were on the same side and we lost.

I think there's another gentleman on the panel waving to me with respect to that, Judge Scirica. At the time, we were involved in the antitrust case against the electrical union. It was one of the first cases really tried, not class, but it was just so much that it was viewed as a class, and a lot of class actions came from that.

Thereafter, I concentrated on antitrust cases, but then more into the defense part while getting into the securities. I have found, in reading everything I get my hands on in the last several years when the issue came up, to say, we have here an O.J. problem. We have a perception problem. The average person on the street thinks a criminal trial is that which was presented in a California courtroom, and they want to do with away with the jury system, do away with the fact.

Every night there are at least two talk shows about how horrible the system is. This system is close to excellent.

I think the problems, if you really analyze them, are not problems at all. Let's talk, for example, about cost justification. By the way, I concur with Professor Coffee's remarks, but let's carry this through. I was not present this morning, and, fortunately, I was at a call from a client on a problem.

The problem might be ten dollars to 20 dollars a person. It would involve perhaps close to maybe a million persons, approximately even more. We talked about the cost involved, and I mentioned this hearing. He says, is that fair that someone will be able to take ten million, 20 million, 30 million dollars, and just put it into his, her or its pocket and get away with it?

JUDGE NIEMEYER: You know, to put this whole thing in perspective, and if you stand back from it, on the one hand a plaintiff that's lost a dollar bill probably doesn't even notice it, would be very upset by it, but wouldn't take any action by it. So you would say, why is he suing? The person who overcharged the dollar should be in jail and everybody agrees with that. And that person benefited by a million dollars.

And the person who initiates this is the

attorney, and he makes a million dollars in fees for a plaintiff that never would have sued for a defendant that was doing wrong. So the question that is raised, depending on your point of view is, on the one hand, do you want the defendant to get away with bad things that affect a large section of the population? Or, if you're looking at it from another point of view, do you have a lawsuit generated for somebody who lost a dollar in order to give an attorney a million bucks?

Then you get the cynical comments from the public about how this is really just attorneys' litigation.

Well, there's a little truth in all of that, and the question is where the legal system ought to go. Ought we to be addressing the wrong, ought we to be compensating a plaintiff that really doesn't care? Ought we to be fulfilling the pockets of our attorneys who are doing legitimate work that, in most cases, is legitimate cases for a lawyer to make a living?

These are enormously complex issues in the public's perception when you're talking about the public perception. There's another role in this, and, of course, we do have the attorney generals and

we have the prosecutors. But class actions here, we have them, and they seem to be working and our proposals here are thought to have been modest, but maybe they are not so modest after hearing all these comments.

MR. SAVETT: I agree in the manner with what you said, Judge. You have a basic promise there, and I think it's absolutely incorrect, that these plaintiffs don't want this case to be brought. There was a case in Delaware called Singer versus Magnavox which changed the law in Delaware. The gentleman walked into my office, unannounced, and wanted to see me. I saw Mr. Singer.

Mr. Singer worked for the City of Philadelphia. He was in the accounting department, a nice gentleman, completely unsophisticated, and said, Magnavox, a company that I owned stock in, was being taken over by Phillips N.V. of the Netherlands. His damages are not that great.

We talked about it and he said, is this what you guys do? Unless you have this big case you don't take it? And he hit a button with me. I said, okay, we'll take it without getting thrown out of a Chancery Supreme Court with a scathing opinion. We got an opinion by the Delaware Court,

saying there was a wrong here and we should be compensated. We do not bring cases just to make money.

JUDGE NIEMEYER: No, but I can tell you that probably everybody in this courtroom has probably received a notice. I probably received three or four that said I'm a member of a class, and you're entitled to collect $28 or whatever.

I can tell you that I have never sent one in. It's not because I'm lackadaisical or something, it's something that I, myself, wouldn't have brought that lawsuit and don't feel like I should be pressing it.

But other people, the person that you talked about, wanted to bring the lawsuit, and we do have the class action availability for it. But that doesn't answer the question as to why various newspapers and editorials continue to report these ads, adverse comments on the judicial branch and on lawyers and judges.

We have to pay attention to what is being said, so that at least it doesn't appear that what we're doing is perpetuating something to keep us in business as opposed to solving a problem in society, resolving disputes.

My comment was not addressed to criticize any faction. It was just to recognize the problems of perception in this very difficult area.

MR. SAVETT: The answer is very simple; PR. The courts haven't done really anything to educate the public about class actions. The bar hasn't done anything. Again, I say to you, go to O.J., and you ask about a judge, the remarks that you must have gotten or you must have received.

JUDGE NIEMEYER: You don't want us on television, do you?

MR. SAVETT: No. But the remarks that I've gotten from sophisticated friends are just shocking to me and scary to me that they would want to change this system.

You mentioned something before about these people should be in jail. I don't know how many times I said it and how many times I've given up saying it. Why shouldn't these people be in jail? The Attorney General, if they get an antitrust case, unless there's something that I really call sexy about it, securities -- I don't know how many times I've been on the phone with the SEC, and unless you get an Ivan Boesky, unless you can get the biggest headlines in the world, they don't take the case at

all.

I'll give you another example without mentioning names. I had a case I brought concerning two Canadian corporations and a corporation in Texas that I thought was just an outrage. I called the gentleman that I knew at the SEC. I explained what the problems were and I said, I not only need your help, but the public needs your help. The next time I heard from that gentleman was five years later when we finally settled saying, I think I'm going to object to your settling. I said, where the blank were you five years ago when I asked for your help?

They really don't help unless you get a case like equity funding or something like that, the Ivan Boeskys of the world. I realize I'm over ten minutes. Let me just finish up.

When you talk about the class certification, I don't know of one case that, after you settle, the defendants say, now, let's extend the class. That always happens and we always have to be aware of it. I think the one short answer to this is, no one even brought the case on behalf of that class. The statute of limitations has already past on behalf of that extension. And if you can get some more money -- and I think it's incumbent

upon you to get more money -- I see really nothing wrong with it.

On the other hand, if they are throwing someone in -- and it is partially a question as Mr. Montague mentioned. If they really throw nothing in, then I think there's a duty. I think it's up to the courts. I know the courts, at least in this district and this circuit, have been very over-protective with the Georgine case, the GM pick-up truck case. I think the courts has been very sensitive whether the settlement is fair, whether the allocation is fair.

Again, I say you have the O.J. on the one hand, and you have the PR on the other hand. Thank you very much.

JUDGE NIEMEYER: Thank you very much. Mr. Labaton?

MR. LABATON: I'm Edward Labaton from New York. I read some of the testimony. I was not here this morning. But, particularly, I would like to associate myself both with the remarks of Professor Coffee, as I read them, anyway, and as they were reported to me on 23(b)(3)(F), and also the report of the Association of the Bar of the City of New York, the Federal Courts Union.

I am not a member of that committee. I had the privilege of serving on it for two separate terms. It is a paradigm of how a Bar Association committee should work. It is the committee consisting of lawyers from diverse practices, defendants and plaintiffs. The chair of that committee now is a partner in the Debevoise & Plimpton firm, the person who signed a letter to this panel.

I think the remarks in that report -- I don't know whether anyone will speak to the association, but I certainly associated myself with that -- with the comments of that particular report because of its impartiality, because of the tradition that it has had as thoughtful and public-spirited Bar Association, and particularly Bar Association committee. I can't overemphasize the current effects.

I'd also like to comment that when this report -- when Rule 23 was adopted 30 years ago, then professor, now Judge, Kaplan wrote two articles in the Harvard Law Review talking about them. I'd like to just quote from part of the first article. While he was dealing then with why they went for opt out classes rather than opt in classes, I think his

words have a bearing on this particular subject of small claims and small claimants.

He said, "If, now, we consider the class, rather than the party opposed, we see that requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people -- especially small claims held by small people -- who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the government."

I think that's the rationale for why you should not adopt 23(b)(4)(F), because I think that, in fact, we do serve, when we act as plaintiffs, and I have acted primarily representing plaintiffs in this area. Although, when I started more than 30 years ago, and before Rule 23 was adopted, we represented defendants in the spurious class actions which became viable when the Second Circuit held

that one could opt -- could intervene in an act and even in the Barchris case in 1965.

I believe that it is not -- that, in response to your question, under the old 23(b), with that old Escott case, I think Rule 23 class actions would still flourish today. Although I think Rule 23 codified them in a way that makes a great deal of sense.

In response to Judge Levi regarding the comment of control of these situations, I think it would be a mistake to try to codify the rules more than they are. I think that the rules -- I think the great beauty of the Federal Rules is that they leave a tremendous amount of discretion to federal judges. They are not written as a code.

I think the federal district judges have acted wisely on the whole, and not in all the cases that I lost, but, on the whole, they have acted wisely and with good judgment. I think this advisory committee should recognize the vital role they have in fashioning the rules so that they can grow organically to fit within the changes. I think in an attempt to define too closely how a case is prosecuted and how it's handled, it does the judiciary a disservice and does the process a

disservice.

With regard to settlement classes, I think that they work in many cases. They work well in securities cases. We had one recently before Judge Pollak in the Prudential Securities Litigation, which was settled for something north of 100 million dollars. There we had a process where the claims were ripe, not unlike the Georgine case, which I do think did create a problem. I think that we ought to look for a way, maybe try to see what happens with the cases before you try to develop that rule, because I do think there are problems in some kinds of settlement classes. But settlement classes do work in a particular context.

With regard to interlocutory appeals -- I don't know whether Dean Reinstein has spoken. I certainly associate myself with his remarks, and suggest if you are going to have interlocutory appeals, you ought to have the standard that 1292(b) has, not just the power of or the part of a losing party to simply say, I want an appeal. They should show what you have to show in 1292(b); namely, that there's a debatable, controlling issue of law, and that the immediate review would materially advance the litigation, not only because of the class

certification, but for some other reason.

Those are the standards that have been applied where the courts have heard appeals in the Costano case, in the Rhone-Poulenc case and other cases. The Court heard it under 1292(b). I, frankly, don't see why there's now a need to --

JUDGE NIEMEYER: If you added the language that you proposed, then there certainly wouldn't be a need for (f). I think language in 23(f) is a little broader and recognizes as a category, a ruling on a class action that is special because it affects so many people, and/or could affect so many people.

And whether that's advisable or not, that's why we are having the hearing. I'm not sure we solved anything by changing that language as in 1292(b), because we already have 1292(b).

MR. LABATON: The only difference would be that you would not be required to have the district court certification. I think one of the problems that the proponents of the amendment have is that they feel a district judge may have A particular interest in not having an appeal, and he's lost -- he or she has lost sight of the overriding interest and is -- I think judges, like lawyers, develop

possessory interests in their opinions and they may not want them reviewed.

So that takes Dean Reinstein's proposal, it takes that issue out of the --

MR. ROWE: People keep saying mandamus courts work for some of these. Isn't it awfully narrow to bend it out of shape to get at some of these cases like Rhone-Poulenc, and shouldn't --

MR. LABATON: When you have an open-ended rule as you have in 23(f), the problem is that my experience may be jaded and I may be cynical, but I think that somewhere between 70 and 90 percent of the cases you have an automatic attempt to appeal. And I think it would deliberate -- I would prefer to have some defined standard in the rule, if you're going to do the rule, have a defined standard so that it's not routine. Because I think you all recognize that, at least in the area in which I've done most of my practice in the securities area, these cases should not be appealed.

Judges have discretion, and they act within the range of the discretion that they have. And to simply give litigants an opportunity to delay a case and to harass the other side by filing an appeal, in a situation where interlocutory appeal should not be

favored, is a mistake.

JUDGE SCIRICA: I think you're right. I think to the extent that there may be a natural tendency for the litigant who loses that decision to take an appeal, we're going to see a lot more of them.

On the other hand, you got a counterbalance, and that is the natural tendency or inclination of the appellate courts not to take them. So I think my guess is, if something like this happened, it would be used very sparingly, that the appellate courts are not looking to add to their docket. It would be in the kinds of cases where mandamus is used right now, which really don't satisfy the mandamus standards, although we certainly have lived with it, and maybe we should continue to live with that practice.

JUDGE NIEMEYER: Thank you.

MR. FOX: Can I ask one question, Mr. Labaton? I thought I heard you say that you thought Georgine was a problem, but that shouldn't push the committee into drafting the rule built around it? Do you agree with views that have been expressed earlier, that if the case just couldn't conceivably, under any circumstances, be tried, that you

shouldn't certify it, be it malignant --

MR. LABATON: I believe that in theory, but I think lawyers are imaginative enough --

MR. FOX: That there aren't such cases --

MR. LABATON: -- to find a way to say that we could have tried this case.

Who could have imagined the kinds of complex trials we now have in so many cases 20 years ago, these mass asbestos cases which are tried by two judges or three jury cases, or all of them? That I don't think would be a real solution. I think people would work around that relatively quickly.

JUDGE NIEMEYER: Thank you very much. We appreciate hearing from you. Mr. Weinstein.

MR. WEINSTEIN: My name is David Weinstein. I am with the firm of Weinstein, Kitchenoff, Scarlato and Goldman here in Philadelphia. I have been practicing law here in Philadelphia principally in the field of class actions, but in private litigation generally, since 1972.

My experience, perhaps unlike some of the other people who have been on this first panel this afternoon, goes beyond class actions that

comfortably fit in the slot of antitrust or securities. I do both of those. But, in addition, I have experience in handling consumer types of class actions.

And while not always directly applicable to the issues this afternoon, I have experience in handling a fairly sizeable number of state court class actions where there are very similar issues that arise in comparable contexts. That experience leads me to the following comments.

First of all, I must preface my statement by saying that I apologize I could not be here this morning to hear the testimony of what I know was a very illustrious panel of presenters. I was in court in a state court class action in New Jersey, and could not be in two places at once. But I would like to focus my comments first and foremost on the question of appeals, the question of (b)(3)(F), and the issue of maturity, (b)(3)(C).

With respect to (b)(3)(F), I adopt wholeheartedly the comments that I've heard this afternoon from Mr. Rodos, Mr. Savett and especially Mr. Labaton who just spoke. I believe that (b)(3)(F) for a whole host of reasons is imposing upon a vast array of different kinds of class

actions, expensive, unnecessary and potentially very long proceedings to deal with what is virtually a small subset of the class action litigation.

I'd like to address, Your Honor, the question you raised about the very small recoveries. I think that, frankly, in those cases, where a judge certifies a class and there is virtually no interest by the class in the action, as manifested perhaps by the proofs of claim that come in or by the opt outs -- or, if we look at the recovery and say 29 cents just isn't perhaps worth all of the effort, I think a lot of that is already encompassed within the discretion of a trial judge under the superiority nomenclature, especially -- not so much perhaps the literal language of Rule 23(b)(3), where it talks about the superiority, but in the way that trial judges apply the law of superiority.

They will look at that issue. And I'm sure that what we should not be doing -- and I think this is partly what Mr. Labaton was aiming at -- we should not be legislating more and more defined standards when we're talking about the exercise of discretion by trial judges who have a lot of experience in a lot of different kinds of cases,

either personally or through the accumulated case law that we have under Rule 23.

That doesn't mean that there won't be some mistakes made, and the reality is that mistakes are made in a lot of cases. I've had a few cases where class action certification was denied and I thought those were mistakes.

The reality is that there will be cases, there will always be cases where mistakes are made. That, I believe, in the overall, is the tail wagging the dog. If we try to deal with the small group of cases, that, everyone would agree, were -- or virtually everyone would agree was a mistake.

I think that, therefore, the proposed change to add subparagraph (f) to 23(b)(3) is very unwise. It will cause a great deal of -- and this is perhaps ironic. It will cause the expenditure of a great deal of time, effort and money in connection with determining an issue about whether or not there's a lot of money involved. And that, to me, seems rather ironic, and I don't think it's necessary or advisable.

At the opposite end of the spectrum from 23(b)(F), and the attempt only to micromanage a particular situation, you have the issue of appeal,

23(f). I agree with the comments that were just made, that that provision is standardless. It is true that a Court of Appeals over a period of time may develop a body of case law that will help practitioners to understand what is the standard that that Court may apply. I don't believe that's an area that we really would want to encourage, if you will, the common law method for developing standards.

I believe, quite the contrary, that the finality ruling and the notion that you take an appeal only at the end of a case should be the preferred method in every instance. If there is an exception to that rule, then there has to be some guideline.

I can speak very personally and say, I'd like to know what it is that the Court of Appeals really should be looking at. And, as a citizen just looking at the judiciary, I would want to know what it is that people are expecting of the judges when they look at an appeal from a class denial or a class granted.

So, either way, it seems to me that it's important for there to be some stated standard by which everyone understands that there will be a

decision made whether or not to take an appeal. If that standard --

JUDGE SCIRICA: You say that we are constitutionally and institutionally committed to finality, and there's going to be a great reluctance to take them except in a case where it seems that an egregious result was reached?

MR. WEINSTEIN: That may be. That may very well be. The problem, though, is that there will be an appeal by the losing party.

JUDGE SCIRICA: Sir, that's right.

MR. WEINSTEIN: In virtually every case. The litigants spend a great deal of time, effort and energy in the class certification process. I didn't mention it before, but I also do defense work in class actions. The reality is that, in some instances, the defendant believes that the only barrier between it and an unfavorable judgment is the class certification issue. But whether or not it's in that extreme situation, the reality is that lawyers are going to say, well, I've got another shot at it. I'm going to seek the appellate review. I don't think it's a wise approach to do it this way.

MR. FOX: But, Mr. Weinstein, Judge Scirica

is a very stubborn man, and he's telling you that you can file all of these you want, but we're not going to take very many of them.

MR. ROWE: There need be no stay and no response.

MR. WEINSTEIN: There will be a stay in many cases. Let me give you an example of why I say that.

There is, in the rule of the Judicial Panel on Multidistrict Litigation, a provision that says that the mere filing of a motion before the panel does not stay the proceedings in any of the actions that are subject to a motion for consolidation. I dare say that in the vast majority of cases where a panel motion has been filed, in my experience, the district judges automatically stay all proceedings until they know where the case is going.

It seems to me that the same kind of human dynamic, whether it's legislated or provided in the rules as discretionary or not, the same dynamic is going to impel the judges in most cases to stay proceedings until they see whether or not the Court of Appeals is going to pursue the class certification; and, if so, what the result will be.

JUDGE SCIRICA: I can't think of any

interlocutory appeal that I've considered that I've taken more than a week on. Usually it's 48 hours or less. Now, these may be more complicated, so they may necessitate more time. But, I don't know. I'm skeptical about the time delay. I'm very skeptical it will take time in the Court of Appeals.

MR. WEINSTEIN: Well, I understand, Your Honor. The reality is that those issues are not uniform, especially when you're talking about a panel of more than one judge, number one; and, number two, not all judges are as admirable in terms of the time frame in which they get decisions made on these kinds of issues. So getting --

JUDGE SCIRICA: I'm speaking for my court and not for myself. I'm speaking for the entire court.

JUDGE NIEMEYER: Actually, on 1292(b) I have not heard of any delay problems caused by those motions, and I'm speaking for a different court than Judge Scirica's court. They are treated like motions and handed down in a matter of days.

MR. WEINSTEIN: What I'm suggesting is that the notion of a stay is the defendant or the plaintiff -- probably more often the defendant in this kind of a circumstance -- is going to be filing

a motion for a stay along with the application to the Court of Appeals.

JUDGE NIEMEYER: What will happen is the Court will consider the motion for stay and the petition simultaneously. And if it grants the petition, then it will probably grant the stay. And if it denies petition, it will probably deny the stay.

MR. WEINSTEIN: What I'm suggesting is that the application will go to the district court at the same time --

JUDGE NIEMEYER: The district court, he's invested. He's going to go ahead with his case. He's got a docket and he believes in his ruling. Well, you raised some practical problems. There will be some additional procedures, there's no doubt about it. The question, I think, is going to be whether it's worth the price.

MR. WEINSTEIN: That's correct. I would like to spend just a few moments on the issue of maturity. I don't think a lot of people have talked about that from the information that I was able to glean a few minutes before the session --

JUDGE NIEMEYER: I'll just give you a couple minutes on it.

MR. WEINSTEIN: All right. Again, this is a rule change that was motivated by a specific area of the law and a few cases, big cases, no doubt, but still a few in number.

The problem that I see with it is that the issue of maturity of other pending litigation could have an adverse effect on cases, where it should not.

One example, given the limited amount of time. In antitrust litigation, it's not uncommon, in some instances, for there to be private plaintiffs who file their own actions along with other plaintiffs who file class actions. Sometimes they have the same theory, sometimes they have compatible theories. But, for one reason or another, those cases are handled together.

An example of that would be the Prescription Drug Antitrust Litigation in the Northern District of Illinois. If the issue of class certification is to turn in part on the maturity of other litigation, then the result that it was obtained there, which was class certification -- and indeed the decision by the district judge that the class case should be tried first -- that consideration would be nullified by this rule.

The reason for this proposed rule, I understand, is in areas where the maturity of the legal principles isn't yet known. Unfortunately, the language of the rule reads differently than what appears to be the motivation behind it. The language, as another person mentioned earlier today, this is language of general application in a whole host of different kinds of cases. I think it is a mistake to have that in there in the form in which it is, unless it is limited to a new and developing area of the law.

Even then, there may be some reasons to handle all of the litigation at one time. But at least, in the vast majority of cases, whether they are private securities cases, for example, somebody who has a large block of shares, they seek to pursue on their own or the antitrust -- there are, believe me, other areas as well in the consumer field.

I don't believe that there should be, if you will, a default setting of the computer that says that we really should wait and see what the private litigation does before we even decide whether or not we're going to certify a class. I think that's a mistake. The language of the rule is way too broad for that.

If there are any questions, I'd be glad to answer them.

JUDGE NIEMEYER: Thank you. I appreciate that testimony. Why don't we hear from people who are willing to identify themselves with the other side of these cases, some defense bar, if there are any on that list? Mr. Coleman, Secretary Coleman? Come on forward. We'll hear from you.

Anybody else want to come forward on this at this point? We'll hear from you.

MR. COLEMAN: Good afternoon, Your Honors. I appreciate very much the opportunity to make a few remarks. I'm not here only because I occasionally have represented plaintiffs in class actions and other time defendants, but also I can say that I was present at the creation because I was on the committee in 1966, when Dean Acheson was the chairman and the rule was developed.

I assure you that with respect to what the courts have done with respect to Rule 23(b)(3), it was far beyond what we have ever intended. To the extent that there's difficulty, is not because of anything that was drafted in 1966, but how the rule has been handled since that time.

JUDGE NIEMEYER: You underestimated the

creativity of attorneys.

MR. COLEMAN: No, I was younger then, but I always felt lawyers had great vision and they did a good job.

Our principal problem today is that a large part of the public thinks -- and I think it's true -- that there are instances where there's a story in the newspaper, a lawyer files a suit, makes a claim, and the next thing a company is faced with a big decision.

We had one experience where NHTSA was making an investigation on a particular part of a car. The plaintiff got wind of that. They brought a lawsuit. NHTSA then decided for a recall, and, believe it or not, we spent six months in court fighting the plaintiff's lawyer because he said that before you settle this case, there's part of it that the judge has to give me a fee. That was the whole basis of the litigation.

I would certainly say there's a lot of instances in which the public thinks then, from experience, I feel that many of these lawsuits are filed mainly because a lawyer makes a determination and is trying to make a fee. So we think that there should be some changes in Rule 23(AB)(3),

particularly if you're not going to go back to what was really meant when it was drafted.

It's kind of hard to say when the note said that this means that most mass torts would not be covered, and yet you have a lot of litigation trying to cover it. I think that what we really had in mind was, one, in the civil rights field where a person -- a claim that a group of people were denied the opportunity to work, that you could get an injunction, (b)(2).

Also, you could get back pay. And the suggestion was, well, gee, what about future damages? So we struggled with that.

In addition, I would say something like TWA 800, where you have an accident in an airplane and maybe the pilot may have something different, and maybe the stewardess, but certainly everybody else on that plane suffered about the same damages, and certainly the negligence and responsibility is to be known.

But the idea now, whenever there's an accident and people bring naturally a class action, it seems to me that the federal court -- Swift versus Tyson was overruled -- that the negligence law throughout the country is different. All of the

rules are different, and how you can say that a judge can sit there and work out a class action. If you look, you will find that federal judges are trying to be very responsible, certainly the best set of judges that we -- well, yes, just about the best set of judges that we have in the country, where they are trying to say, clearly, this is too complicated. But can I break it down and can I try certain issues here and send the rest of them someplace else?

Now, you have the circuit judges saying, no, you can't do that. That it would -- what you really meant was that it was a common question of law in fact, and that meant most of the questions of law and most of the questions of fact were common, but the plaintiffs have gotten away from that.

So, in my remarks, we have set forth about four recommendations. The first one is the requirement that the complaint should really lay out just what are these common facts and common cause of action. Too often we get a very scoundrel complaint, and that is way after discovery.

Secondly, there ought to be some responsibility, that in those cases where the federal district judge says that there is no class

action -- and this is two years later after litigation -- that perhaps you should bar from what you already have done now with respect to discovery, and to give the federal district judge the possibility that he could impose counsel fees. He doesn't have to, but at least that should be determined.

Thirdly, and most important, we really think that 23, Rule 23 should be made clearer as to what you really mean by common questions of law and facts.

Fourth, the superiority qualifications. The fact is that when you are dealing with NHTSA, when you're dealing with other governmental bodies, they do do the regulations. Too often, as you look at the cases, you will find plaintiffs' lawyers go out, and just before the case gets settled they then bring an action. So if you have a Federal Government already taking care of it, there's no reason why you need a lawsuit.

I really think it gets down, sir, and lady, to the question, does this rule really mean that we have created at the bar private attorney generals? Now, Congress has said that with respect to antitrust law. They've said it perhaps now with

respect to the new securities law. But, generally, there is no rule of the Congress which says that whenever there is an accident, that any lawyer who can find one client becomes the Attorney General, and, therefore, can sue and address their own of the whole nation.

That is what fundamentally and ofttimes you come out of a problem the way you go into it. If you say that the Congressional statutes and if the Supreme Court gave you the authority to make substantive law, that what you're trying to do makes sense. But, as I understand it, the rule is that you're supposed to make procedurals, and certainly to say that I'm going to develop a situation in which one says that we have created at the plaintiffs' bar or the defense bar lawyers that can be private attorney generals, even though the federal statute doesn't say that, then I just think we've gone down the wrong track.

Finally, with respect to the appeal, if you want to make it even more complicated, Judge Scirica, I think if it's certified or if it's not certified, there should be an automatic right of appeal. I just recall in the Third Circuit when you have the issue of a shareholders' suit, when you

have to post security and the order was to post it, I think the law was that you have an automatic right of appeal. Just look at it. If I have a case where I have one or two plaintiffs, and at most my client -- if I'm a lousy lawyer or the facts are against me, the law is against me, I'll get stuck with a $100,000 judgment or million dollar judgment.

But, yet, if it's certified as a class action nationwide, I'm talking about a half billion dollars, two billion dollars, certainly that is such a dramatic instance in a case. If you have ever been a general counsel of a company or you've ever been called upon to give an opinion letter as to possible liability, I assure you that as long as that case is out there and there's a possibility that you may get stuck for two or three million dollars, that is something that sharpens your mind, and that causes you to settle the case.

Many of these cases are settled. I hope you will reread, I think in Agent Orange, where the judge after that said, in his judgment, if that case had ever gone to trial, it probably would have been the recovery. But, yet, because the amounts -- he didn't say this, but because the amounts were so large, you, therefore, get the defendants putting up

a lot of money.

I just think -- I hope the panel will take a look at it and pay some attention to what's going out there in the real world, and, therefore, place some restrictions on what has become to us, who originally drew the law something differently. I hasten to add -- I'm not saying because I was on the committee -- I can tell you what the law really means, because Plato once said that the one person who can't tell you what a poem means is the guy that wrote it.

JUDGE SCIRICA: I was just going to ask you that question.

MR. COLEMAN: I know you were, Judge Scirica.

MR. SCHREIBER: Mr. Coleman, would you give us your view of settlement classes?

MR. COLEMAN: I knew you would ask that, sir, and I have awfully great respect for Judge Becker. I think he's as responsible a judge as I know in the Third Circuit. He felt there was a problem. It's in the Supreme Court. I'd love to see the Supreme Court take a whack at it before I give you my opinion.

MR. SCHREIBER: But isn't it true that in

most settlement classes, where defendants have urged this panel or have urged the courts to adopt settlement class, it does not meet the standards that you have just told us?

MR. COLEMAN: Yes, that's true.

MR. SCHREIBER: So, therefore, can't you conclude that if it doesn't meet those standards, you can't accept the settlement class?

MR. COLEMAN: I'll defer to Elliot Richardson. He once said, the amazing thing in life is amazing how you judge things in where you sit. The reason why I can't give you an opinion, I know if I was handling a case for the defendant, and it turned out I was going to cough up 50 million dollars, and I figure I could get all my misery by putting up another 20 million, I think I would put up another 20 million.

Therefore, from that point of view, there's an act of partitionist skill in good conscience. I can't give you an example for that, but I haven't been academic on the issues. I have on the other issues.

MR. SCHREIBER: May I offer one suggestion on Agent Orange? I had the privilege of being the special master on discovery. I would have predicted

that if Agent Orange were brought today, the veterans would not have gotten 180 million, they probably would have gotten close to a billion or two billion.

So we do have an evolution of where we're going. And, with all due respect to 1966, it was my impression that what the committee was concerned about were aviation cases. Nobody knew anything about mass torts. The idea in the aviation cases were that all of those people, one hundred or 200 on a plane had adequate counsel. But if you have a class of 40,000 or 20,000 or 10,000, is it your thought that you can never have a class because you can't meet those rigid standards, in that all those 20,000 cases would then have to be brought into court individually?

MR. COLEMAN: Judge Niemeyer made a good point. Namely, if you were injured and it was settled and it was five or ten dollars, we live in a society where most civilized people don't bring lawsuits.

Secondly, in the federal court you have a rule in a diversity case, unless it involves 50,000 -- I think it's going up to $75,000 -- you're not even supposed to bring a lawsuit. Yet, by this

culmination, people who have damages of just two or three thousand dollars get tired of all the time in federal court only because of the fact that you have Rule 23.

In addition, I still come back to the fact that once you get away from the aviation crash and you are dealing with cases that involve negligence and that sort of thing, the rules are so different throughout the country as Erie versus Tompkins demonstrated, that it is just phony.

In fact, I was faced with an instance where the federal judge said, well, what I'm going to do is take all the rules of negligence and I'm going to select one rule. Anybody that wants to be trying the case under that rule, okay, but even though the Ohio rule or another rule may be much more difficult and more stringent.

So I say that certainly society has rightfully advanced where, if you're injured, you ought to be able to recover. But, on the other hand, you have to realize that if every defendant has a right to a fair trial before a jury, if every plaintiff has that to make these mass cases where you really end up applying not the same facts, not the same rule of law, but some conglomerate, it just

seems to me that that wasn't what was meant when Rule 23 was adopted.

This doesn't mean now that if the bar -- or if you would recommend to the Congress that after debate and discussion that we should go this way. I have no problem with that. But I thought -- and I can't remember the case, but there's one case early on under the rules that said that something was substantive rather than procedural, and, therefore, that part of the rule is unconstitutional. Thank you.

JUDGE NIEMEYER: I appreciate your comments very much. We're going to take a brief recess, let's say until 5 after four, and then we'll finish hearing from the last of the persons who signed up on the list.

(Recess was held at 3:55 p.m.)

(The Panel resumed the proceedings at 4:10 p.m.)

JUDGE NIEMEYER: Mr. Sutton, do you want to come forward?

MR. SUTTON: Thank you, Judge Niemeyer, members of the committee. I'm going to speak very briefly. My name is Thomas Sutton. I'm in an unusual position here. I'm a practicing attorney

with extensive experience in the class action arena, but only as a litigator in the context of Rule (b)(2).

As a legal services attorney for a number of years, I represented several classes, including one of the United States Supreme Court, which came to a very successful conclusion. However, I also wear another hat, which is that I was a litigant in a consumer class action certified under Rule (b)(3), which came to a very successful settlement.

I want to speak only and very briefly about what you called 1(c), the cost justification proposal. As I've set forth in my written testimony, I'm very concerned about this. I want to endorse as a bottom line, if you're going to have a rule here, what Professor Coffee had to say this morning about a proposed alternative.

When I say if you're going to have a rule, I really think that the Lean Cuisine case, if I can, Judge Carroll, these cases that somehow stick in the craw, that make you feel this really is not what the federal court should be about and not the kind of cases you should have, request we tell with appropriate instruction and to the manageability subsection under the superiority criterion in Rule

(b)(3).

However, to the extent that the committee is going to have a rule, it seems to me that it must, to make any sense, compare apples with apples or oranges to oranges. As it is written, it is not ambiguous in the sense that it clearly is asking the courts to compare the relief, and I dare say specifically the, quote, objective dollars awarded, and nothing else to each individual class member on the one hand, with the aggregate costs and benefits on the other. That is a comparison that seems not worth going into.

I can't imagine a class action that would pass muster under that rule, frankly. If it is read that way -- and I must tell you that reading the draft notes, and then today reading the reports of the minutes of your previous meetings, it seems to me that that appears to be the intent behind language which Professor Coffee believes is ambiguous.

I would hope that it's ambiguous. I would hope what you really mean is that you compare aggregate to aggregate, or that you're going to compare individual benefits to individual class members with perhaps the pro rata share of the

defendants, and the court system's costs and burdens, because otherwise that comparison leads to a foregone conclusion.

I believe that conclusion exists without any analysis. The way the rule is structured, and with the instructions given in the draft notes, if you come to a conclusion that the costs and burdens of a litigation outweigh the individual benefits to any individual class member, then that is the end of the superiority inquiry. Because, I read it, that would subsume the first two of the new six factors. It would effectively trump those, and would result in a finding of lack of superiority and, therefore, a denial of certification in virtually every case.

Now, again, I may be overreading this language, and this may be a simple-minded interpretation, but I looked at it carefully, and this is the conclusion that I'm coming to. I hope that I'm wrong, and I hope that the committee will clarify, at least for me and for others who have read it this way, that this is not what the committee intends.

To the extent that you're only looking at the dollars that are payable to an individual class member or class members, you're leaving something

else out of the equation. Mr. Coffee and others have already talked about the deterrent effect, what we want to do with the class action device and what was intended 30 years ago by the original drafters of the rule. There's a little different cast to be put on that as well. Remember that --

JUDGE NIEMEYER: There's a legitimate dispute about that, and maybe we should resolve it and maybe not, but I thought the original rule was intended to be an aggregation device to resolve efficiently multiple cases for judicial economy.

There is an additional notion of deterrence and social good and correcting harms, the private Attorney General notion. There's an enormous split in the public and the bar and among the Bench about whether that's a legitimate role of rules. I hear what you're saying, and if that's the role of the rule and we're supposed to be doing that, then maybe it does do that.

MR. SUTTON: Granted, Your Honor, and perhaps I will stand back from that. Given that split, let me put a different cast on the point. If my action as a litigator is primarily for injunctive or declaratory relief, I have other subsections of this rule under which to prosecute a class action.

If my action sounds in damages primarily, I must be under Rule (b)(3) to have a class certified.

But, in my experience, many damages class actions, and certainly the one in which I was a named plaintiff, involves substantial claims for relief of an injunctive or declaratory nature. Let me give you the example.

In my case, the defendants which were two Blue Crosses and Blue Shield, were alleged -- and I'll put it in that term since the settlement, of course, did not admit liability -- to have given an adequate notice of the availability of certain major medical benefits in notices to subscribers, and failed to pay claims of which they were on notice.

The settlement not only provided for recovery of 100 cents on the dollar to all members of a class, which number 1,350,000 for a five-year retroactive period on presentation of claims, but it also provided that the defendants would either provide very clear notice to all subscribers of the availability of additional benefits when denying basic benefits, namely major medical benefits, or would pay them automatically since they were already on notice of the claims.

In the event, it has turned out that they

have opted primarily to simply pay all claims when presented, so that the additional notice has not necessarily been required. That is a major benefit to me as a member of the class, not to the class as a whole. But that is not cognizable, as I understand the committee's draft in the notes accompanying it. It doesn't have a place in your equation, if you're looking simply at the objective cash value, to use the words from the minutes of one of your meetings of the individual's benefit here versus the costs and burdens of litigation.

And irrespective of where you come down on the split, Your Honor, between the role as a private Attorney General disgorging ill-gotten gains, it seems to me that that ancillary relief of an injunctive or declaratory nature has to be taken into account of when you decide whether you're going to certify a class.

The class action in which I was involved involved damages to me on the order of $150. In fact, there was a great dispute at the summary judgment level in the case about whether I had any damages at all because of the $100 deductible on a yearly basis on my health insurance policy. Again, as it turned out, my lawyers, through diligent

effort, were able to establish that there was sufficient damage to override the deductible and make me an appropriate class representative.

There was a very substantial settlement of a consumer class action that, according to Judge Broderick, made a very real difference for a whole lot of people. And under the rule as you drafted it, I don't believe that case could have been certified. And I'd ask you to consider that.

JUDGE NIEMEYER: Thank you, we will take that.

MR. SUTTON: Thank you.

JUDGE NIEMEYER: Mr. Donovan.

MR. DONOVAN: Good afternoon, Your Honors, members of the panel. My name is Michael Donovan, and I'm here both individually as a partner of the law firm of Chimicles, Jacobsen & Tikellis, on behalf of clients of my firm, and on behalf of the National Association of Consumer Advocates, of which I am the vice-chair.

I do not want to belabor the points that I made in my written remarks, but I would like to highlight some of those points for the benefit of the panel.

Our fundamental point here is that the

proposed amendment of Rule 23(b)(3) should not be approved by this panel and should not be passed along for adoption. If adopted as written, the amendment will effectively destroy consumer class actions and, at a minimum, it will increase the cost burdens and expenses of consumer class litigation throughout the country.

The amendment, in effect -- and I agree with Mr. Sutton on this -- the amendment, in effect, would require the Court, confronted with a consumer class action, to compare apples with pistachios to weigh the likely individual benefits of a case against the public burdens and costs of litigation generally.

As I understand the language -- and I can't be that far off since Mr. Sutton read the language the same way -- if the individual brick is smaller than the building, which it will always be, then the class action should not be certified. I believe such a rule is wrong, it's contrary to public policy, it's contrary to Congressional enactments in the consumer field, and it will deny access to justice to a number of low to moderate income consumers, which is what I pointed out.

I do know that members of the panel had

questioned whether, in fact, we should be performing this private Attorney General function. I believe that Congress has bestowed on us, not just in Rule 23, but in many of the federal consumer statutes, the Truth-In-Lending Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and indeed in the Magnuson-Moss --

JUDGE NIEMEYER: Those acts all provide for Congress' mechanisms for this doing this. This is not a Congressional enactment. They approved it, and the question is, should it be that, should we recognize it as that, as overtly, when it was originally not intended to add another layer of substantive laws? It intended to be a sufficiency in the judicial system.

MR. DONOVAN: That's a good question. All of those acts that I mentioned were enacted after the rule was adopted. They were enacted as an overlay on top of the Rule 23 jurisprudence, that had grown up about aggregating claims in the private Attorney General function.

All of these acts that I've talked about were passed after Rule 23 had grown into its private Attorney General position that it became, and indeed in the Magnuson-Moss Act.

JUDGE NIEMEYER: I don't take issue with that at all when Congress speaks, but Congress picks a substantive statute and says that we want to create incentives and have private attorneys help assist in the policies which we adopted. But the class action rule isn't limited to those cases. The class action rule is across-the-board. And what we would be doing, if we adopted that overtly, is saying that we think that an attorney in any type of case should be entitled to set himself up as an Attorney General to grieve wrongs.

MR. DONOVAN: My point is that, Your Honor, that Congress recognized that the class action rule had that function when it overlaid and specifically referred to Rule 23 in Magnuson-Moss in the Truth-In-Lending Act, in the Fair Debt Collection Practices Act. And the way it dealt with the problem of excessive damages awards or coercion in those acts, was to specify that any one corporate defendant could not be hit for punitive penalty damages of anymore than $500,000, in the Truth-In-Lending Act, for example, in the Fair Debt Collection Practices Act.

So what Congress has done is that it said, look, Rule 23 exists out there as an Attorney

General statute. In these finite areas we're going to ratchet it back and say, for these finite areas, we only want $500,000 maximum penalties against any one defendant.

So that Congress has already said for Rule 23, it is going to be the Attorney General statute, and in these finite areas we want these damages ratcheted back.

In addition, what Congress -- so Congress has dealt with it in a substantive way and in a different way.

JUDGE SCIRICA: It hasn't spoken to the various tort laws and the various states where we have jurisdiction only by reason of diversity.

MR. DONOVAN: No, it has not, Your Honor, and I believe that that aggregation question should be dealt with as a matter of jurisdiction, not as a matter of procedural rule. Jurisdiction is a substantive matter. The Congress' control over the jurisdiction of the appellate and district court jurisdiction is, by constitution, vested in Congress.

I do not think it is wise for the judiciary to be first determining for itself what the scope of its jurisdiction should be, and then recommending to

Congress to thumbs up or thumbs down on the jurisdiction.

If the aggregation issue should be dealt with, then let's have Congress deal with it ab initio on its own, without a predetermined judicial recommendation on it. Now, certainly, you would have to have some input from the Supreme Court. But the Court should not be telling Congress this is what our jurisdiction should be.

JUDGE CARROLL: Mr. Donovan, as a consumer advocate, what is your opinion on (b)(4)?

MR. DONOVAN: We are not taking a position on (b)(4) at this point.

From a personal standpoint, I am torn. I'm torn because I do perceive that there is an issue out there about cases being picked off. There's no doubt about that.

I believe that at this point that the U.S. Supreme Court should deal with that matter in Georgine first, resolve it, and give us some guidance. There may be dicta in that opinion that will be helpful. There actually may be insight through the briefing process.

So I don't think it's necessary for the committee to jump the gun before the Supreme Court

addresses the issue, and will probably benefit from the Supreme Court's opinion in the matter. The Court may not come down until June. So that my understanding of this process is that this process might conclude before the Court even comes down. Maybe the answer there is to wait for that decision.

But, other than that, I wanted to give the opportunity to the panel because I think I'm a little bit different from the other speakers here. I have brought clients, current class representatives of current class cases, and I would like to introduce them. If the panel has any questions, I will make them available for the panel to ask questions of. My purpose here is to demonstrate that these are not lawyer-driven cases.

Contrary to some of the skewed opinions that you read in editorial pages, and also to the basic McDonald's syndrome that is foisted on the class action bar, that anybody who has read the book No Contest will understand how twisted that McDonald's story basically became in the public relations fear. My fear is that we ought to not be twisting what happens in the actual judiciary and reacting to something that doesn't exist.

My first introduction is of Ms. Dorothy Sinclair. Ms. Sinclair is a victims advocate with the Delaware County Senior Victims Legal Services. In the course of her work, she has come to see numerous examples of senior citizens victimized by unscrupulous home improvement scams in our own Chester City right here in -- south of Philadelphia; unfair insurance and investment sales scams with seniors, deceptive medical device advertising, hearing aids in particular, and warning systems that seniors are to wear around their necks, and other consumer ripoffs.

Often these victims turn to understaffed and underfunded legal aid offices, and they can only refer them to an occasional pro bono attorney. Those attorneys usually can't offer them individual help, or, if they do, then the help is not very significant.

In all too many cases nothing can be done at all because the amounts involved are too small. The seniors are too fearful and unknowing of the litigation system, and just threatened by the entire system itself. The litigation is just simply too overwhelming for them to do on their own.

In some cases, a class action is virtually

the only avenue for justice because it provides comfort in numbers. Now, if we're allowing people to incorporate and get comfort and risk protection in numbers through a state sanctioned corporation, why don't we allow our seniors to voluntarily combine in a risk-reducing class action to relieve some of the burden they feel from what they perceive is a corporate wrong, a corporate misdeed?

So Rule 23 actually, as it always grew up inequity from the 1800s, is a fairness balancing device. Whether it's a spurious class action or a Rule 23 class action, it's just basic fairness, which is what the courts are about.

The second introduction I would like to make is of Mrs. Nora Watkins and her brother, Mr. William Davis right here. I would like to tell you about their story because I represent them and I think their story is telling.

Ms. Watkins has a small three-bedroom brick house in Chester City. It's in relative disrepair. She lives there with her mother, who is 99, and they subsist basically on monthly social security checks, supplemented by Ms. Watkins working as a domestic two or three days a week. I'm sorry, Mrs. Watkins, but I'm going to tell them that you are 76. 77, I'm

sorry, Your Honor.

Her experience with corporate scams is all too common with our senior citizens. In November of '93, three men visited her home while handing out flyers advertising home improvements. The flyers said at the top, public notice; government money available to fix up your homes.

The men explained that they were with a government program that would help them fix up homes in need of repair. They gave Ms. Watkins and her mother an estimate that they could fix up her house for about $2,000, consisting of five new windows, two new storm doors and some interior painting.

Confused about the government program, Ms. Watkins and her mother agreed, okay, that's fine, we'd like to fix up the house. The men returned a few days later with some complicated forms, which they said that they had to sign. Ms. Watkins and her mother both signed the forms.

Confused about this government program that was involved that might be a subsidy of some sort, Ms. Watkins actually signed a secondary mortgage loan contract to be held by a major New York stock exchange listed finance company for $12,500, at a rate that was well above existing mortgage rates.

Ms. Watkins doesn't have a mortgage on her home. This is '93. This rate -- and I won't get specific -- is well above 11 percent. '93 rates were way down for first mortgages.

JUDGE NIEMEYER: You are arguing your whole case. You're already over your ten minutes.

MR. DONOVAN: I understand, but I'm trying to give you a flavor here.

JUDGE NIEMEYER: We understand, and I don't want to belittle at all the importance of her claim or any of these claims because they certainly are important.

MR. DONOVAN: My point, Your Honor, is that basically the work here was misrepresented. They put in for windows, they simply spray painted the house, they didn't scrape anything. They didn't do any of the roofing work. They didn't do any replacement of the storm doors.

Ms. Watkins has been faithful and dutifully paid this bill every month that obligates her for 14 years to pay this mortgage. Every month, because she's afraid that she'll lose her house even though she knows that she didn't get anything near what she thought she was going to get.

Now, this is a practice that has been

inspired by a particular lender focusing on home improvement areas in depressed parts of the city. It's going on till this day.

If you adopted amendment (f), there's no way I take the case. I doubt because she's been paying, that she hasn't had her credit ruined, that you can take this case to a jury and get punitives. She hasn't lost anything yet because she is so scared out of her mind, that she's paid. She hasn't defaulted. She doesn't want to file bankruptcy.

That's the problem that we have here. Now, do we have a class case? You say, well, it's just her. Guess what? Same guy went to Mr. Davis' house. Same thing happened. Same finance arrangement, same deal. It happened throughout Chester City. It happens to this day. Does the Attorney General know about it? Yes, he does. Is this a big finance company? Yes, it is, and I'll leave it at that.

Now, I also want to introduce to you because I am just not a consumer --

JUDGE NIEMEYER: Two more minutes.

MR. DONOVAN: Very well.

JUDGE NIEMEYER: So you can gear how you want to do it.

MR. DONOVAN: Mr. Tint was an investor in a major -- was a major New York stock exchange listed company. His investment was taken out by a buy-out group in March, at a price that was far below what he had paid. He paid about $17 for the stock a few years ago and wanted to own it for a long time. He was bought out.

A month after all the shareholders were bought out for a total of about 300 million dollars, the buy-out group discloses, lo and behold, we sold part of the assets we just bought from you, and we sold them for 440 million dollars. We sold one fifth of the assets you sold to us for 300 million, for 440 million dollars a month after you sold out to us.

Mr. Tint didn't know about this 440 million dollar transaction. He didn't even know -- in fact, he was frightened into all the statements that this company was going to file for bankruptcy. So, therefore, you better sell to us or else you get nothing. In fact, it was so frightening that he would have sold for $3 because that's what they said.

That's a securities class action. There are mostly seniors in this. This is not an

institutional stock because it's a certain type of stock. That's why he sued.

If, in fact, Amendment (f) is adopted, I'm not quite certain that I would bring that case, either. I'm not at all certain. Now, maybe my colleagues would. However, that's not why I'm in this.

Mr. Tint is here because he's a live client. I don't care whether I make a dime in this. He has worked on this. How many pages of documents do you have?

MR. TINT: I have 20,000 pages. And the most interesting part of it is that the conflict between what has been told to the senior citizen shareholders and what you find in bankruptcy reports, and what you find in SEC reports -- there was one SEC report of 800 pages before you could find out that there was a sweep on some money in our company.

It would have meant that I would be going up against some of the prestigious names in our country, like David Rockefeller and Goldman Sachs brokerage house.

If I may, I would like to tell you something, not to try the case, but to tell you some

of the background and what happens in a class action suit to the real people. I've listened this afternoon and learned a lot about the law part, and I did hear one gentleman say about the fact. And the fact is that I went to a meeting of Rockefeller Center Properties, Incorporated. Would you like me to step up there?

JUDGE NIEMEYER: No. You can finish up, but shortly. And while it's interesting, what we're doing is we're taking time away from the other people here who also want to testify.

MR. TINT: I am the first one this afternoon, certainly, who is a human being, who has been here and who has been very hurt.

I was at a meeting in 1994 in New York, the shareholders' meeting. I saw grown people crying. What's happened to my money when this company got into trouble? It was no accident that it had gotten into trouble.

It was not having to do with the real estate conditions or anything else. But there were grown citizens crying. One person had a heart attack.

I've been more fortunate. I'm a graduate of Harvard College. I started a business of my own

and ended up years later -- many years ago I sold it for several million dollars. This hurts, but it's not going to put me out of business. But I saw people there who didn't know what was going to happen to them, because what they kept saying was, I trusted Mr. Rockefeller.

And then when I started to get into this, it has taken me two years and two conditions. If I was not retired, I couldn't have done it. If I was married, I couldn't have done it because it is such a complex issue, that you find -- it depends on where you read about this. If you read the bankruptcy court reports, you would find that they had 440 million in the wings. If you read the SEC reports, you would have found out another story. If you read the stockholder reports, you would have found out that they are doing us a favor. Everything they are doing is a favor for us.

MR. ROWE: How many dollars are you claiming you were done out of?

MR. TINT: I, personally?

MR. ROWE: Yes. What's the size of your individual claim?

MR. DONOVAN: I don't think that's a great way to measure it.

MR. TINT: There were 38 million shares outstanding, most of which were owned by senior citizens.

MR. ROWE: It seems to me that the size of your claim would not be affected by the rule that this committee is proposing. I happened to have voted against it, but I'm not sure that it would cause you problems.

JUDGE NIEMEYER: Anything further? I actually have gone over twice about what --

MR. TINT: I do want to bring out one point here; this is from a human standpoint. How could we ever, with whatever rules are put into effect, how could I ever go up against the brokerage house of Goldman Sachs?

JUDGE NIEMEYER: There's no proposal on the floor to abolish class actions, and it seems to me that while we'll take your testimony and hear your cause, the question is, I gather, that your counsel has spoken against change 1(c), which is the cost relationship. That has been testified to by many people, and it's an important question that we have to answer. As to whether that is a factor in determining class actions, this is why we are having the hearing.

But I think at this point, unless you have anything further to add to the proposal that's on the floor, we do appreciate the four of you coming by, and we do appreciate hearing your story in a very short version. We can't hear the substance of it all because I don't think that contributes, number one, and we're not the Court.

MR. TINT: If I may make a conclusion of this? I would expect from this experience that I've had -- and I've had no legal experience prior to this -- that the distinguished panel would be considering ways of making it more accessible for people to be able to bring class action suits. Because there seems to be a new style in our country today.

I'm a veteran of World War II. We are always told how everybody is grateful for this and that, but when it comes down to reality, nobody cares. It's not something that I am saying to you gentlemen and lady, please, that something that is not known. But when I sit here and listen to the concerns about technically tightening up this and that, I didn't hear one person this afternoon mention the human element of this. And that's what it's all about.

I have spent two years, maybe five days and nights a week, studying this case. It is the most unbelievable story. I could never do anything about it on my own. Thank you.

JUDGE NIEMEYER: Thank you very much. All right.

MR. DONOVAN: Thank you.

JUDGE NIEMEYER: Right. We'll hear next from Professor Leubsdorf, Professor Gora and Dean Reinstein. If they will come forward.

MS. SARNA: I am Shirley Sarna, I'm from the Attorney General's Office in New York. My plane is about to take off without me, and I wonder if I could just have two moments of your time?

JUDGE NIEMEYER: Sure, step forward. We'll get you to your plane.

MS. SARNA: I feel like O.J. now. I really just wanted two moments.

Number one, to say a heartfelt thank you to all of you for obviously the great emotional, intellectual time and energy that you're putting into this effort. Quite in contrast to the others who have spoken today, I am an absolute newcomer to this field.

I am with the Attorney General's office.

Class action lawsuits are not our regular course of business, and yet we in New York and the Attorney Generals' offices around the country have discovered more and more in the last year and-a-half or two that the business of class actions is, in fact, impacting in our business. In fact, the Consumer Affairs Committee of the National Association of Attorney Generals added a panel on class actions at our meeting in October so that we could focus on some of the issues that you have been discussing.

With respect to the very much discussed cost benefit analysis, I just want to add my voice to those who have expressed concern with the way the rule is drafted, and to underscore my support for some of the comments that have urged this committee to take into account the deterrent effect, the public interest effect in the cost benefit analysis, if indeed you feel that a cost benefit analysis of that sort is appropriate, is very comfortable with some of the comments that Professor Coffee and others made in that regard.

So I would like to underscore those. I just would like to put one other thing on the table, which has been discussed by a number of speakers earlier today. I don't pretend, I wouldn't even

dare suggest, that I have solutions to these very complicated questions. But it does seem to me that some marginal steps might be taken as safeguards to deal with some of the great concerns that have been expressed.

One of those concerns might be a focus by this committee, although I know it's not in your proposal to consider, the issue of understandability of notice. Perhaps while having an 800 number and having attorneys available to help explain is, for sure, enormously helpful and of great benefit. I think that benefit is reduced dramatically if the notice itself is so impenetrable that it doesn't even alert the reader that other follow-up questions need to be asked. Or it's so difficult --

JUDGE NIEMEYER: It's one of those awful dilemmas, that you need to communicate information to a person so that he has enough information and yet you can't take it away to make it readable. I understand the problem and I have seen the notices, and they are very difficult. The same as we have the disclosure on the proxy statements.

MS. SARNA: The point that I'm making is that there is clearly room. While it might be difficult to set a standard that would be easily

understood and would solve every problem in every circumstance, the committee could, for example, suggest in its notes that in it one of the concerns, with adequacy of notice, is its understandability to the average layperson of average intelligence.

There's a very long distance between what is now typical at a notice and what might be achieved, and I think that that level of understandability might give some comfort for those, and myself among them, who are concerned about some of the practices that are getting an awful lot of attention in the popular press.

We submitted some comments, and we're going to take the opportunity to flesh those comments out and provide maybe some concrete suggestions for this committee's consideration.

JUDGE NIEMEYER: We look forward to that. We also have another hearing in Dallas and San Francisco, but you don't need to come.

MS. SARNA: That's too bad. I was hoping that you would say it's necessary.

JUDGE NIEMEYER: Are you Ms. Berry or Ms. Sarna?

MS. SARNA: Sarna.

JUDGE NIEMEYER: We are pleased to hear

from you.

MS. SARNA: I thank you for your courtesy.

JUDGE NIEMEYER: Have the three of you agreed which should go first? Dean, we'll take you then.

DEAN REINSTEIN: I normally defer to faculty members, but with the exception.

JUDGE NIEMEYER: They would love to hear you say that.

DEAN REINSTEIN: I'm Dean of Temple Law School. I've had that position since 1989. Before then, I was quite active in class action litigation, was involved in cases both for representing plaintiff classes and defending cases against plaintiff classes.

I submitted a fairly lengthy written statement, and I thought I'd spend my time just responding to some of the questions raised about two of the proposed rules. That is (b)(3)(F) and 23(f), the interlocutory appeal rule.

I think it would be an advantage if we could deal with the cases involving trivial individual relief. I'm very skeptical that any proposed rule can really get at that. I'm skeptical about it because it appears that although these

cases exist, we have anecdotal 11 in some of them. They are very, very rare. The Federal Judicial Center tried to find them and didn't. They studied over 400 cases that were terminated as class actions in four districts.

JUDGE NIEMEYER: I'm coming to somewhat of an ambivalent conclusion about that, too. Because you hear from the parties, attorneys for both parties in those cases, and then you read a press account and maybe some other account, and they don't sound like they are talking about the same case. So I'm not sure how we get at it, and whether there is a problem or not.

DEAN REINSTEIN: I was a little bit surprised by the result of that part of the study. They only found nine cases where the median recovery was less than $100, but in seven of those the aggregate recovery was over a million dollars. I'm not sure that we want to pass a rule that would eliminate cases like that.

This appeared to be cases in which there was substantial aggregate harm being done fitting within the original purposes of (b)(3).

So I said in my statement -- I used the metaphor, we are looking for a needle in the hay

stack, and we're going to -- the problem is that we're not going to define it and we're probably going to disrupt a lot of hay in the process.

The reason why I say this is the rule is written in a very unusual way. It's written in a form of individualized ad hoc balancing, which I think is unique for any kind of jurisdictional -- quasi jurisdictional civil procedure rule.

The judges asked to balance two things as part of an overall consideration. In every individual case it's not a general criterion. It's not like an amount in controversy which is a fixed number. The judges asked to take a look at this individual case and do two predictive things. First predict what the probable individual relief is. And, secondly, predict what the costs and burdens of this litigation are, and then weigh the two.

I think it's very difficult to do. This is a prescription for stalling a lot of cases and probably terminating a lot of viable class actions. That's my concern.

I don't know how you can predict probable relief without having a mini-trial on the merits of -- if I was defending against a class action, I would say the probable individual relief is zero

because this case has no merit. That's the first thing I would say.

The second thing is that I would get into a battle with expert witnesses. I would get my affidavits from my experts. I would want to have a mini-hearing on what the actual damages were, assuming that there was liability, which I wouldn't concede. And, of course, all of this is supposed to happen at an early stage in the litigation.

So I think that's very, very troublesome because the judge is being asked to do two predictive things at an early stage in litigation. When this committee debated the issue, should we have mini-trials or should we say anything about mini-trials, I think the vote was 7 to 6 not to say anything, which is not exactly the same thing as don't do it. It's just we are not going to say anything about it because it's a real paradox.

The other problem with the rule is that I do not read it in the same draconian way as some of the other people did. It's a factor to be considered in 23(b)(3) class actions, but that has its advantages and its disadvantages.

The disadvantage, of course, is that this makes this very, very ambiguous and subject to a lot

of discretion and a lot of, I think, erroneous judgments. Because a lot is left out and the district courts aren't told what to do about the lot that's left out. They are told to consider these two factors, and presumably based on that consideration they could deny class certification.

They are not told anything about whether to take into account the potential aggregate recovery. They are not told not to do it. It's just not listed as a factor not to be considered. If the implication is that you can't consider the potential aggregate recovery, then I think the effect of this rule will be to terminate many, many viable (b)(3) class actions.

JUDGE SCIRICA: If it were amended to state that, either the claimed aggregate recovery, the potential aggregate recovery, would that prevent a discovery fight and would -- I think you're saying that would be an improvement, but would it really solve the problems?

DEAN REINSTEIN: I don't think so. I don't think you could have an ad hoc balancing approach here. It would definitely be an improvement. It also doesn't say anything about the private Attorney General function of class actions, and whether the

district court is to consider certainly with respect to some federal statutes.

The district court may very well think that, since Congress has said in certain of the statutes or has indicated as strongly as it can, that these are important federal laws. And Congress expects them to be enforced by private litigants because the resources of the Justice Department are inadequate to do everything or the Securities and Exchange Commission. That should be a factor.

In other cases, on the other hand, like diversity cases, that argument may not be a viable argument, but this is another major ambiguity on how to apply the rule. I don't think that the rule -- that any kind of rule is justified in light of the Federal Judicial Center's finding or inability to find these cases.

So I think that although we could try to refine it, I doubt very seriously that you could write a rule to uncover what appears to be a very small class of very troublesome cases without disturbing a much larger class of viable cases that you don't want to do.

We have to understand, I think, this rule will be asserted against virtually every class

action that is filed.

The other finding of the Federal Judicial Center was in the four districts. The maximum individual recovery, the maximum median recovery was $5,000. Now, the maximum aggregate recovery was gigantic. But looking at it from the point of view, the maximum one was $5,000. The rule will be applied. This defense will be asserted against class certification in practically every class certification that is brought under (b)(3), and I think it's bound to, at the very least, stall the litigation. The probable effect will be to be applied against class actions that should be brought.

23(f), I think this is a value judgment about how important these --- how important these orders are, how important it is to get immediate review, and how troubled you are by what's being done by the appellate courts to the mandamus statutes. And that may be driving all of this.

JUDGE NIEMEYER: There's a lot of concern, I can tell you, in the committee about stretching a mandamus, which is an extraordinary writ and making it ordinary.

DEAN REINSTEIN: It's being stretched. The

problem I got with the way this rule is drafted is that it's not so much what's it going to do with class actions. It will erode the final judgment rule. It's sort of a slippery slope.

JUDGE CARROLL: Is that because you see the appellate courts certifying an appeal every time a class action certification is denied or granted?

DEAN REINSTEIN: No. I think Judge Scirica is right. I think the number of times that the Court of Appeals will want to and take appellate review will be small. But what it does is it's saying that there's a certain category of ruling, of preliminary ruling in a trial that anybody can appeal, and will be appealed.

JUDGE NIEMEYER: Of course, the ruling, if you really think about the nature of the ruling, it affects whether we have three plaintiffs or 3,000. And with respect to those 3,000 who were left out, or the 3,000 who are included, it's not on the merits and not on the -- there's something special about it.

DEAN REINSTEIN: There's something special in the sense that there's something different.

The argument that was made in the notes that was part of the argument, the other argument,

was that the class certification decision has a coercive effect on settlement.

This is something that the Federal Judicial Center study tried to find and they couldn't find. They looked at this at great length to see if they could establish whether that proposition was true in any kind of discoverable way, and they concluded that they couldn't find that that was true. We're all speaking anecdotally, and I have to speak in my own anecdotal experience.

When I recommended to my clients settling class actions, it had very little to do with the decision to certify the class. It had to do with my fear that we would lose the case on the merits.

JUDGE CARROLL: Can I back up for one second? Help me understand what your real objection is to --

DEAN REINSTEIN: To 23(f), it sets no standards for interlocutory appeals. It allows anybody to take an interlocutory appeal on a preliminary ruling.

JUDGE CARROLL: But you conceded that the Court of Appeals won't take many of those.

DEAN REINSTEIN: They probably won't. There's no standard set. They probably won't. The

rule is phrased in a way under like 1292(b). 1292(b) has two screening mechanisms. One is that the district court has to certify it. But the other screening mechanism of 1292 is that at least it specifies the kinds of cases that should be subject to interlocutory appeals.

That is, that there is a debatable material issue of law, and that the Court of Appeals has to believe that the disposal of this issue on an immediate basis will materially advance the litigation. Those standards are not stated in 23(f), no standards are.

Now, the advisory committee notes say that the Court of Appeals will presumably use the standards applied in 1292(b) actions. If that's the case, then I think you ought to put those standards in Rule 23(f). Take out certification.

If the problem is that the district court judges are not certifying cases that should be subject to 1292(b) appeals, and, therefore, mandamus is being used in sort of a tortured way, that problem can be solved just by, in these cases, dispensing with the requirement of the district court certification. But at least it will give some standards.

I think that the final judgment rule to litigants is a real slippery slope. We want to appeal every important adverse judgment against us in litigation.

JUDGE NIEMEYER: You know, it's a good policy and you got to -- there's a notion of finality, but in the federal courts we get the immunity cases, we get the double jeopardy cases. Immunity cases just fill up the volumes, and they are all interlocutory. Of course, the injunctions come up.

DEAN REINSTEIN: Yes, preliminary injunctions. And so you have to make --

JUDGE NIEMEYER: We don't want to open up the floodgates, but it's not a shocker under the 1292(b) category, because that category doesn't burden the courts. I do understand, and we do have evidence from others on the complaint, that there's no standard proposed on the Circuit Court. Right?

DEAN REINSTEIN: Right. I'm not convinced that this is such an important decision -- class certification decision is such an important decision, that we should single it out and allow any litigant to file an appeal.

JUDGE NIEMEYER: Why don't we hear from

your colleagues on this, unless you have anything further on this? We do appreciate hearing from you.

JUDGE SCIRICA: May I ask one short question? You alluded to the problem of moving into substantive law. The private Attorney General concept is one that we discussed often in the committee, and we tried to decide whether it's within our jurisdiction; that is, if it's within the committee's jurisdiction to think about this, is this something that should be left to Congress.

Do you think -- is this something that you feel that we -- the committee should not try to touch, that we should leave it to Congress? When we get close to the line, we ought to back off? Or do you think it's almost impossible to deal in this area --

DEAN REINSTEIN: I think it's impossible to deal in this area without making a judgment whether these cases do serve the private Attorney General theory. I have to tell you my own view is, implicit in Rule 23 was the private Attorney General theory. Rule (b)(2) class actions cannot be explained in any way. They were designed to facilitate civil rights cases with the courts urging the district courts in

the Fifth Circuit, and the Fifth Circuit itself urging this result to allow the private Attorney General theory because the Justice Department couldn't bring the cases.

There was no statutory jurisdiction for the Justice Department to bring the cases. There was some change in 1964, but even with that change the civil rights division was very, very small. It's hard to imagine how the advisory committee thought that (b)(2) class actions would serve -- would be necessitated by the private Attorney General theory, but (b)(2) class actions wouldn't.

I don't know if we're going to consider this, that we can segregate out (b)(3) from all of Rule 23, especially when the (b)(3) class actions are used so much to enforce federal statutes, where I believe there is a very good understanding in Congress in antitrust cases and securities litigation that there are very limited resources in the Federal Government, and they are getting more limited, by the way, to bring these cases.

JUDGE NIEMEYER: Thank you very much. We appreciate it. John Leubsdorf.

PROFESSOR LEUBSDORF: Your Honor, my name is John Leubsdorf. I teach civil procedure and I

also litigated class actions sometime in the past. I thank you for giving me the opportunity to appear here.

I'm going to talk only about Rule 23(b)(4) as proposed, and talk in opposition to it. Before one can decide if a rule is doing the right thing, one, of course, has to understand the problem to which it's addressed. If you look at Rule 23(b)(4) as proposed, I think it seems to rest on a judgment that there is a significant problem of courts refusing to certify class actions and settlement situations where class actions should be settled and certified because the settlement is a desirable one. As far as I know, this is simply untrue.

The judicial center study reveals that general class action settlements go through without the slightest problem. 90 percent of the cases, they are approved absolutely unchanged.

JUDGE NIEMEYER: How can you identify that problem, and how could you ever identify that problem if we had 80 class actions go through and approved, binding people that we don't know about, and people that may not yet exist even? Those people aren't around to complain and won't complain.

PROFESSOR LEUBSDORF: That's the opposite problem. Yes, that problem is there. The problem that I say is not there is the Court refusing to accept settlements when they should. That, there is no evidence. The courts are constantly accepting settlement. There are one or two cases, and notably the two from this Circuit where the district court accepted settlement and the Court of Appeals reversed.

But those are plainly not, whatever you may think of them as, at the merits of the decisions. Those are plainly not desirable settlements. These are very controversial matters, and, in my opinion, these both were awful settlements for which there were many reasons to deny them.

So it seems to me this rule is directed against the opposite of the real problem. The real problem is that settlements are being approved when they should not be. What we have here is simply a gap or failure in the adversary system. As you said, Your Honor, the parties who are affected are not present.

The Court has not decided the case on the merits. There has not been consent by the people who are actually affected. It simply is a certain

small group of people, plaintiffs, and in particular plaintiffs' lawyers and defendants who have gotten together and agreed on the settlement, which was then imposed on the rest of the class.

Now, that certainly raises problems, but no one suggests that we should get rid of class action settlements. But what's proposed here is to make them easier and to accentuate the problem; to, in effect, overrule the few decisions which have struck down settlements as being improper, to remove at the same time perhaps the main method by which the adversary system does operate to some extent to deal with class action abusers. And that is the challenge to the certification and the motion for summary judgment.

Up until now, the usual procedure for a defendant, or at least a frequent procedure has been, first you try to get the class action thrown out, argue that the plaintiffs are not adequate representatives. If that doesn't work, then you proceed to settlement discussions.

This rule change encourages people to go in exactly the opposite way. It encourages you to present the settlement at the same time that you present the certification issue. But, of course, if

you already settled, the defendant has no motive to challenge the adequacy of the class representation.

On the contrary, the defendant has every motive to come in and say, these are great guys. These are the people who should be representing the class because that's what's needed in order to get the settlement through; and, indeed, the appeal provision, which I have no particular objection to, but it does accentuate this. Because if the Court first certifies the class or fails to certify the class, then there's an appeal.

So the obvious message to the litigants is, put off the decision on certification until we can settle the case, and then we don't have to worry about that appeal. We will present the settlement to the judge, the judge will approve it as almost always happens, and we can all go home. So one of the major safeguards is simply watered down by this proposal.

The other safeguard that is watered down is that the requirement that the case be at least, in theory, capable of being tried. That means that the case is brought by plaintiffs on the assumption that they might have to try the case. The lawyers have considered whether it's a sufficiently strong case

to --

JUDGE CARROLL: Your objection is to endorsing then settlement classes. You're perfectly happy, or at least within the confines of this hearing, to let the present rule exist and continue on as it is? Your objection is to object to rule on settlement classes?

PROFESSOR LEUBSDORF: I think that is one of my objections. But if there is to be any change, and I think the change is called for, the change should be in increasing the safeguards so that the bad settlements will not be approved.

By the way, in which that can be done is, I, again, made various suggestions in my prepared statement. One method is to reverse the suggestion of this proposal, which is then to make it virtually mandatory except in the most unusual circumstances to certify the case first before settlement negotiations begin. First, let it be decided whether these plaintiffs and their lawyers are adequate to represent the class. Let the defendants have every motive to challenge that. Then proceed to the negotiation.

Secondly, I would write into the rule the requirement that the lawyers must be certified as

adequate to protect the interests of the class. We all know that, in practice, it's the lawyers who are the class representatives for almost all purposes, but the rule continues to speak of clients.

Third, in any class action in which there's a significant amount of money at stake, I would suggest that the rule should provide for the appointment of an official objector of the courts, a lawyer who would present whatever objections could reasonably be proposed to the settlement. That would deal with the breakdown of the adversary system in a situation where the original plaintiffs' lawyers and the defendants have already settled their agreement and have settled their differences, and the judge has asked to pass on the validity of the settlement without having any sorts of information that could present the contrary arguments.

I believe several lawyers suggested this morning that they would consider it improper, as representatives of a class, to start putting before the judge information that would destroy the settlement. Well, lots of lawyers do think that way, and that's why we need to have someone else to come in.

Fourth, I would suggest, as has already been suggested a few minutes ago, a more adequate notice requirement. The Court and the committee should consider -- well, a more adequate notice requirement; and, finally, an extinction of the opt out provisions to include all actions with where significant monetary relief is in question.

(b)(3) provides for opt out, and yet if, in addition to having a large damage action, you also asked for injunctive relief, then no notice, no opportunity to opt out need be given according to the rules. That really doesn't make any sense, that when more relief is being sought for, the opportunity to opt out is less.

And, furthermore, I would suggest that the opportunity to opt out, one should perhaps be adjusted in time, at least in the case of so-called future claims. If a claim doesn't exist at the time that you're asked to opt out, there's no way in which you can be given proper notice. There's no way in which you could make a proper decision.

Of course, there are many issues involved in so-called future claims, and the committee can't get into all of them. But at least it could provide that notice of the opportunity to opt out is to be

given at a time and in a forum reasonably likely to permit an informed decision of a person to whom it's addressed. That's a straightforward procedural requirement.

JUDGE NIEMEYER: All right, thank you. Professor Gora.

MR. GORA: Thank you, Judge Niemeyer. My name is Joel Gora. I'm associate dean at Brooklyn law school and a professor of law, and I represent the Association of the Bar of the City of New York.

It's my privilege to be here before you this afternoon, to present the concerns of the association with respect to these proposed changes.

JUDGE CARROLL: By way of an aside, my law clerk is from Brooklyn Law School and you've done an excellent job.

MR. GORA: Thank you very much; and so have you in choosing that person.

I've been sitting in the afternoon session. I learned a great deal from both the questions and the answers, and so I can subscribe in my presentations to the principle that brevity is the sole of wit.

There are three concerns that the association has with this proposal, I should note

parenthetically. The association consists of people on the plaintiffs' side, people on the defense side, members of the judiciary, academia, government, service and business. And representing those varied groups there are three provisions that concern us.

First is the provision of 23(b)(3)(A), which seems to discourage participation in class action suits by claims that are too large. The second is the provision of 23(b)(3)(F), which seems to discourage participation in class action suits by claims and claimants which are too small. The confluence of that is what I call the goldilocks problem, trying to find those class action participants whose claims are just right.

And so (A) and (F) independently cause problems, which I'll speak about briefly. In tandem, they cause even worse problems because they seem to suggest a really narrow band, either monetary or some other measurement, where class action would be appropriate. Our opinion is that that undercuts the basic mission of the class action, which is, I believe, in Judge Scirica's term, to deal with the large scale small claims case.

That's what I always imagined the class

action was about, whether those claims be civil rights claims, student claims, employee claims, whether they be damage claims, whether they be overcharge claims, whether the phone company ripped me off.

And if the relief takes the form of $500 in my pocket or five dollars credit on my next phone bill, there's still the sense of relief that they are important. And these procedural mechanisms that help plaintiffs and classes and lawyers representing them to achieve those remedies are important.

We are finally concerned with the provision of 23(f), the proposal for a piecemeal appeal. Let me speak briefly about 23 -- the proposed changes for 23(b)(3)(A) and (F). And, particularly, with respect to (F), whether the probable relief to individual class members justifies the costs and burdens of class litigation.

Judge Levi earlier, and others on the panel, expressed concern about that. One case that seems like a bit of a ripoff of the system is with the return that's very little in a tangible sense for anyone, except perhaps the lawyers involved in the company that gets off the hook. But I think that problem may be -- and the illusion was made

before and I think it's apt, the tail wagging the dog.

Number one, I'm not so sure that all small settlement situations are ones that we should be concerned about. I've referred to ones that I think have value; consumer cases, subscriber cases, where the benefit may be a future benefit, may be a small benefit, but is nonetheless a tangible benefit.

But I also think there are intangible benefits, in the sense that a wrongdoer has been punished, if you will, in a civil sense, and whether that attorney, Your Honor, is the Attorney General theory or the deterrence theory or symbolic justice theory, I think it's been a traditional office of the class action mechanism to be able to achieve that benefit. It requires a tangible predicate, but it also has an intangible payoff as well.

If there are those few cases where there are really no benefit, and just the sense that the system has been made a mockery of, one would hope that they could be dealt with in ways short of testimony across-the-board language of this rule, which asks the district court to consider each case, in each case, whether the probable relief to individual class members justifies the costs and

burdens of class litigation.

Finally, with respect to two other features of these rules, number one, the feature of 23(b)(3)(F), the balancing effect, not only seems to cut against the aggregation of claims, but I think will require the kind of preliminary mini-hearing on the merits that can become quite disruptive of normal litigation.

Coupled with the provision of 23(f), the proposed provision of 23(f), which would allow for routine efforts to appeal from class action determination -- and again the intersection of these two provisions, they are sort of like two explosives planted in the case. There's the explosive inquiry as to whether the probable relief to individual class members justifies the costs and burdens of class litigation, which is essentially an open-ended ad hoc inquiry; and then there's the further inquiry under Rule 23(f), of whether the decision to deny or to grant class certification was a proper decision.

On that one point, if I might, Your Honor, on the question of how is this different from the normal rule of interlocutory appeal under 1292(b), I think the difference is most of those cases, to my mind, are cases dealing with issues of law. Very

often, issues of first impression, issues that are controlling, not because they resolve the case, but because of an uncertain question of law, the resolution of which will resolve the case.

These questions are, as you all know, an enormous mix, class action questions, a fact of law, of various subclasses, of prospects of recovery and the like. To make every one of those extremely individualized issues, the subject of potential appeal is going to add, we fear, yet another burden and obstacle to the class action mechanism.

JUDGE NIEMEYER: Thank you.

MR. GORA: Thank you very much.

JUDGE NIEMEYER: We'll hear from Leslie Brueckner and Deborah Lewis. Do you want to come forward?

MS. BRUECKNER: Good afternoon. My name is Leslie Brueckner. I'm here on behalf of Trial Lawyers for Public Justice. I'll try to keep my remarks brief in deference to the hour and train schedules and so forth.

Trial Lawyers for Public Justice is a public interest law firm located in Washington, D.C. We both bring class action cases and we oppose class action abuse. So I bring both perspectives to this

hearing.

We have recently opposed the proposed settlements in Georgine and in the In Re: Asbestos Litigation in the Fifth Circuit.

JUDGE NIEMEYER: Has a petition for cert been filed in that case or will one be filed for that?

MS. BRUECKNER: No, Your Honor, the petition for a rehearing is still pending. I want to talk about two provisions of the rule, both of which we think could harm consumers and substantially worsen the problems of class action abuse.

On the infamous factor (F), I don't want to beat that horse to death. Let me just say that I wholeheartedly --

JUDGE NIEMEYER: Why don't you at least give us your position on that? We heard just about everything --

MS. BRUECKNER: There's been a lot of talk about trivial claims today. That may well be a problem, although, as Dean Reinstein pointed out, there's no evidence about an FJC study. The problem with the committee's proposal, as I see it, is that even assuming that trivial claims do pose a problem

to the judicial system, subfactor (F) goes much, much farther and threatens legitimate class actions that this committee itself would recognize benefit for both the individual class members and serving the public deterrent value.

The problem in a nutshell is that the definition of the probable relief to class members is drawn as narrowly as possible. As far as I can tell from the advisory committee notes, courts are only permitted to consider the individual claim. Now, this was contradicted, I should say, by Judge Higginbotham in his August 7th memo to the standing committee, in which he stated that a court would be permitted to consider aggregate claims under that subfactor.

But that position, as I see it, is inconsistent with the note. At the very least, we need some clarification on that point.

The other problem, of course, is that the rule would not permit the consideration of the deterrent effect of class actions.

And, finally, the rule indicates that a court would have to consider the likelihood of success on the merits. We know that there was an explicit provision in an earlier version of the

proposed amendments that would explicitly have directed courts to consider that factor. It was very controversial. It seemed to have found its way in the back door of this provision.

Taking these three factors together, you have the narrowest possible definition of probable relief balanced against the imponderable costs and burdens of class litigation. I think this could sweep away a lot of legitimate class actions. There has been no showing that a problem exists to warrant this type of radical provision.

I also endorse Dean Reinstein's answer to Your Honor, Judge Scirica, about the question of, would the problem be solved if we were to redefine probable relief to include claimed aggregate relief? I don't think that solves the problem because, A, it doesn't include any consideration of the deterrent effect, and, perhaps more importantly, it doesn't clarify what a court is supposed to consider when evaluating the costs and burdens on the other side of the equation.

My second point is geared towards the settlement classes. And here we would wholeheartedly endorse Professor Koniak's distinction that she drew between the so-called

malignant class actions; that is class actions that are settled and never possibly have been certified for trial. And what she has termed the benign settlement class actions, which are just class actions that are settled prior to any formal decision on class certification, but that might be certifiable for trial purposes.

It is the former case that has been the breeding ground for abuse. And I believe that those types of class actions would be encouraged by the proposed addition of subfactor (F). At the very least, we would urge the committee to do nothing with respect to class actions. I think there's been an ongoing misperception throughout this hearing that the Georgine case, the rule -- the decision holding that the class action at issue in that case failed -- violated Rule 23 because it could not have been certified for trial, somehow would eliminate settlement class actions. And I believe that is just not the case.

What Georgine talked to, I believe, is the so-called malignant classes, classes that could never be certified for trial. Those are the cases that are the most -- that are the worst breeding ground for abuse. But Georgine, in my view, does

not prevent the settlement of class actions prior to any decision on class certification.

JUDGE CARROLL: Do you see any consumer cases that are malignant by your definition that would, nonetheless, benefit the plaintiff class and the defendant that will be cut out if you don't allow settlement classes?

MS. BRUECKNER: Sure, Professor Koniak's answer to Your Honor in that question, which in my view is choice of law issues can be dealt with in wide-scale consumer class actions; and, therefore, the mere fact that they are complex choice of law problems would not prevent certification for trial purposes of those cases. So I do not see Georgine affecting the possibility of settlement of those cases.

Let me move to my last point, which is that this committee recognized that the so-called (b)(4) malignant class actions pose special risks, and stated at several points in the committee notes that several special protections were built into the proposal to protect absent class members. What I want to talk about a little bit are the various protections that are supposedly in the rule. I don't believe that, in fact, there are any

additional protections in this rule that would protect absent class members.

The first protection that the committee points to is the fact that (b)(4) certification can only be sought after a -- jointly sought by the parties after a settlement has been reached. The fact that the parties have to agree on a settlement before they seek certification under (b)(4), does not to me provide any additional protection for the class members.

The other protections that the committee pointed to is the right to opt out, which I think many commenters have aptly suggested is not terribly meaningful in many cases given the complexities of notice, class actions that are certified where the actual identities of class members are not known. The right to opt out is simply not a meaningful protection for absent class members in these settings.

There's also been some suggestion that if 23(e) were beefed up and hearings were somehow more elaborate, then that might protect absent class members because courts would have more information about how to evaluate the settlement. I also think this is an unrealistic view of how settlements

work. Here class action hearings tend to be, if you'll pardon the expression, dog and pony shows held by the plaintiffs and the defense lawyers. There is no real adversary process except in the very rare instance when a plaintiff's lawyer or public interest group manage to muster the resources to mount massive objections to class actions.

That has happened in certain cases. It happened in Georgine. It has happened in the Fiberboard cases, but those are very, very rare. And I can tell this committee that I personally know of cases, one in particular, a settlement of a future victims no opt out case involving individuals who were exposed to a pesticide that causes bladder cancer. Where some plaintiffs' lawyers who were appalled that their clients were being included in the class, had objected to the case and filed notices of appeal. And what happened in these cases, is a defendant buys them out.

The defendant -- you have one of these lawyers who will have --

JUDGE NIEMEYER: The Supreme Court has taken that issue, haven't they, from the Alabama case? Wasn't that a case where they tried to eliminate the opt out right and force damage cases

into settlement? A little bit like the In Re: Asbestos in the Fifth Circuit?

MS. BRUECKNER: That is the Adams case, and that is pending before the Supreme Court.

JUDGE NIEMEYER: Yes, the Supreme Court, they have that one and they have Georgine.

MS. BRUECKNER: The issue before that case is whether or not a class action that includes both monetary claims and injunctive relief can be certified as a mandatory class, but it's a slightly different issue.

JUDGE NIEMEYER: But wasn't the opt out question the key question that raised the constitutional issue?

MS. BRUECKNER: Yes, yes, but what I'm arguing here is that you can have the most overwhelming attorneys who appears as objectives, and if the defendants want the class to stick, they buy them out. You can have class members with ten thousand dollars and the defendant comes and says, if you drop your appeal, I will pay your clients $100,000 apiece. And you know what? That plaintiffs' lawyer has the ethical obligation, in my opinion, to take that settlement for their client. They cannot withstand these offers.

I have seen a number of class actions, in my opinion --

JUDGE NIEMEYER: Well, you're basically making an argument that you can't settle any class actions. I mean, regardless of these proposals we have on the table.

MS. BRUECKNER: I'm making an argument that particularly in a case of a class action -- Your Honor, I think you're absolutely right, I think that there are always dangers in any class action that is settled prior to certification. And that a court needs to look at that very, very carefully. And that objectors cannot be relied onto create the sort of adversary process in every case that we might ideally like.

However, I think that the policies in favor of settlement do permit -- do encourage us to tolerate that in some circumstances. But when you have a class action that on its face could never be certified for trial, and you have the kind of recipe for collusion that that creates, you need special protections for the class members, and you cannot rely on objectors to create this sort of adversary process to inform the courts in that setting.

I have seen it happen over and over again

where defendants can buy objectors out. The only voice for the absent class members sometimes are public interest groups coming in as amicus, which in many cases the Court won't hear the arguments of the public interest group as amicus, because absent clients we have no standing. And with clients we might face a settlement offer that we can't refuse on behalf of those individuals.

So my bottom line point here is that the committee recognized that special protections were needed to protect against the abuses of the (b)(4) settlement class that could not be certified for trial purposes.

As I read the rule, however, there are no special protections included to protect those absent class members. That was true that Judge Becker in Georgine stated that perhaps the better policy might be to prevent non-litigable settlement classes in certain circumstances. But the Third Circuit cautioned in that case that, of course, if that were to be permitted by this committee and by the judicial conference ultimately, there would have to be special protections in place to be sure that due process was not violated, including, for example, limiting such cases to opt in classes.

Yet, as I read the committee's proposal, it has -- it will massively increase the potential for collusive settlements and does not include any special protections for class members.

JUDGE NIEMEYER: Thank you. Ms. Lewis, are you going to be able to pare this down a little bit? We are sort of getting near the witching hour.

MS. LEWIS: I'm going to pare it down almost completely.

My name is Deborah Lewis, I'm with the Alliance for Justice, which is a coalition for public interest organization that cares about equal access to the courts. Everything I would say has just about been said, so I'm going to make two very, very brief points.

We oppose the cost justification proposal because it would effectively prevent people who have been injured in consumer cases from having any kind of remedy. We believe that the deterrence function of that, that rule is very important, and in the rare cases where attorneys abuse that kind of class action case, we don't believe that the amount in question is a very good surrogate for the integrity of the attorneys for the abuse in this situation.

There has to be some other kind of

alternative.

Secondly, we oppose the settlement class proposal for basically the same reasons that Ms. Brueckner just discussed. And the only thing I would add is that it seems to us that the opt out provision has to carry the heavy load of protecting against the potential dangers of this proposal of the collusiveness, of the conflicts within the class, and that the opt out provision just can't provide that kind of service, particularly for poor absentee class members who would -- for really just for the opt out provision to serve this function, we would have to have advice of counsel to understand both the notice and the proposed settlement, and whether or not the settlement will make them whole. And that would be just prohibitively expensive from for the poor absentee class members.

JUDGE NIEMEYER: Thank you very much. All right, Mr. Cortese.

MR. CORTESE: Thank you, Judge Niemeyer, members of the committee. Well, I guess we solved it all. I think you heard quite a bit today, and I'm sure it's all very clear and it all falls into place. But what I'd like to --

JUDGE NIEMEYER: It makes me think that we

really botched it.

MR. CORTESE: May I submit that you have not really botched it. I do want to say that you should go a little further than you've gone because you haven't really touched the significant problems that exist out there.

I think some of the testimony you've had really gives you some sense of just how much abuse in the class action area there is and just how far the system has gone from the original intentions.

I would commend you basically to promulgate these changes that you suggested for a variety of reasons.

First of all, the fundamental indeterminancy of the substantive law creates a lot of the problems that we see in these massive aggregations, the three decades of sorry experience we've had with class actions since the original 1966 amendments.

There are lots of other factors, the revolution in communications technology, the advent of lawyer advertising. Particularly, the development of the law, and this is judge-made law. It was never written into the rule. It was essentially judicial legislation. That has expanded

the scope of Rule 23 beyond all contemplation.

These are not new problems for the most part. I mean, they developed and they've gotten more and more serious over the years. But I would like to read you an excerpt from a report of the distinguished committee of the American College of Trial Lawyers.

Just a brief mention of it. In the committee's view, that is the American College Committee, the current method for inclusion and exclusion of class members patterned after the highly successful procedures of the Book of the Month Club, has created serious problems, more serious problems than it purported to solve.

This section of the amended rule has resulted in the creation of vast silent and indefinite classes which are only frequent -- infrequently recognized as unmanageable, and more commonly utilized to compel settlement by defendants as a form of, quote, ransom to be paid for total peace.

Now, that statement was made in 1972. And I submit to you that it's got a lot worse than that since. That statement was also made in the context of primarily securities and antitrust cases. And we

still have that problem. Of course, the answer you hear is basically, leave us alone. Don't touch the rule, because no matter what you do with the rule, you're going to mess it up and you're going to make it worse.

Well, I submit that the whole reason that this committee got into this was not only because in 1991 the Judicial Conference Committee on the asbestos cases suggested that the committee examine the question of whether or not mass torts are appropriate for resolution under Rule 23, but because of the serious abuses we see everyday, day in and day out, out there in these cases. And what I'd like to do is to see how that fits that context.

I'm delighted that Secretary Coleman was able to give you some of the experience. And I think John Frank had given the committee earlier, as to the purpose and history and reason for the original 1966 amendments.

Basically, it was, as Judge Niemeyer said, an aggregation mechanism, a procedural method to achieve efficiency in handling cases. Now, no one could have imagined at that time, as I think Secretary Coleman said, where we would be today

trying to deal with these massive cases that just cannot be tried. It's not a matter of just mass torts.

The same thing has happened innumerable times in the antitrust and securities areas and consumer frauds area. And the answer is, well, we've been able to work it out. Of course you've been able to work it out. How could you do otherwise when a company is faced with the prospect of being driven out of business, unless they settle a case because they cannot face that kind of enormous exposure?

So you work it out. And lawyers are very ingenious. I mean you heard some extraordinarily capable lawyers today explaining to you just how it works. And, of course, that's how it works.

But I would submit to you that not every risk is voidable. Not every injury is compensable. And the problem here is that the aggregation prevents justice. It creates mass injustice because it prevents the cases from being tried, or at least a few of them should be tried.

We know we recognize that this is essentially a settlement system of justice, but you have to try some of the cases. And what you need to

do is pick the cases, I submit, that are just right for trial. And that is, I think, my sense of what these amendments attempt to do. That what they attempt to do is to set some standards to guide the district judge, and we're content with abiding by the district judges discretion in applying those standards to make a determination as to what cases are appropriate for litigation as -- I'm sorry, for litigation as class actions, and which cases are not appropriate.

I think if we go through each of those, and to take the categories that you outlined at the beginning, Judge Niemeyer, the combination of the practicality, the maturity and the cost justification factors is nothing more than trying to give, I think, the judge some guidance as to how to select the appropriate cases in light of, is this a superior method to adjudicate common issues of fact and law.

They are not bright lines. You hear a lot of concerns, and I'm sure that they are honest concerns, that these standards, these factors are going to drive cases out of the system. Well, judges drive lots of cases out of the system. They have to decide them. Whenever you decide a motion

for summary judgment, your -- if you decide to grant it, you're throwing a case out of the system. Well, that should be for a good reason.

The same thing should apply to certification because, in effect, somebody mentioned death knell earlier. That is a death knell. The certification is a death knell decision.

And you need things like determining whether or not these cases couldn't try on their own, the practicality or the maintenance factor. You need some experience to determine whether or not these cases are mature, and whether the certification decision should be made at the right time. You also need to balance the benefit of the class action against the risk.

JUDGE NIEMEYER: Can you wrap it up in two minutes?

MR. CORTESE: Yes. I'd like to pause on that for just a minute, and that is to hit lightly on this question of aggregation on the one hand and the addition of the deterrence factor. That's a congressional consideration. It's a legislative consideration.

Now, obviously in a litigated case a judge will make a determination that may have a deterrent

impact on a particular matter, but that is in the context of a litigated case. This committee was very careful, and has been very careful to develop neutral rules that don't take a position on those things.

And all I think that should be done with regard to those factors is to have some standards, some basis for permitting the judge to make those determinations, and the judge will consider them.

So I think that if you deal with that, then you are crossing the line between substance and procedure or legislative functions and procedural functions.

I would like to get into the question of appeal because I think that ties it all back in. What it does is to insure that in those unique cases, where the Court of Appeals should act, whether they are egregious cases or whether they are not so bad cases, there has to be some body of law developed, not just in the district courts. If that were appropriate, then there wouldn't be any need for Courts of Appeals.

But there needs to be a body of law developed applying those standards, applying all standards, and the Court of Appeals should make a

determination on its -- on reasonable standards as to whether or not it's appropriate to grant an appeal. That's an extremely important thing. And I think the whole package taken together is a reasonable package.

I would submit to you that you really ought to take a look at the question of whether or not you ought to just go back to the opt in procedures of pre-1966, because I think that that would solve all the problems.

Now -- and I would just submit that you look at that. I think that's something that the committee in '72 considered, and it's something that was considered in the late '70s, and it's a reasonable way of approaching this.

But at this point, I just want to put that in the record and offer it for your consideration. But I do commend to you that what we're facing here is a situation where many, many companies are facing ruinous liabilities, whether you look at it in terms of the aggregation mechanism, the question of the freeway effect, if you have the system they are going to use it, or the ladyfinger firecracker effect, where you bundle them up together and they'll below your hand off. That's what has been

happening.

I think, essentially, these cases, class actions generally, not just in mass torts, have, in effect, become engines of destruction. And you ought to at least give the courts some guidelines in order to sort out the cases that are most appropriate, or the cases that are appropriate for litigation as classes, as opposed to those that are not.

JUDGE NIEMEYER: Thank you. All right, that's the end of the list.

That wraps up our hearing in Philadelphia. Those of you who are left, I congratulate you. Thank you for the testimony. And, of course, we'll digest it all and reflect on it. We'll act on it beginning in April.

(The committee adjourned the proceedings at 5:40 p.m.)

I N D E X

WITNESS:	PAGE
PROFESSOR SUSAN KONIAK	8
ALLEN D. BLACK, ESQ.	24
MELVYN I. WEISS, ESQ.	35
MAX W. BERGER, ESQ.	44
STEVEN GLICKSTEIN, ESQ.	53
BARBARA MATHER, ESQ.	65
DAVID VLADICK	73
BEVERLY MOORE, JR.	83
PROFESSOR ROGER C. CRAMTON	93
PROFESSOR JOHN C. COFFEE	109
PROFESSOR JUDITH RESNIK	121
STEPHEN BURBANK	139
EUGENE A. SPECTOR, ESQ.	142
WILLIAM LEIGHTON	144
ROBERT N. KAPLAN, ESQ.	148

- - -

I N D E X

WITNESS	PAGE
H. LADDIE MONTAGUE, ESQ.	154
JONATHAN CUNEO, ESQ.	164
GERALD RODOS, ESQ.	170
STUART SAVETT, ESQ.	177
EDWARD LABATON, ESQ.	185
DAVID WEINSTEIN, ESQ.	193
WILLIAM T. COLEMAN, JR., ESQ.	204
THOMAS SUTTON, ESQ.	215
MICHAEL DONOVAN, ESQ.	222
SHIRLEY SARNA, ESQ.	240
DEAN ROBERT REINSTEIN	244
PROFESSOR JOHN LEUBSDORF	256
PROFESSOR JOEL GORA	264
LESLIE BRUECKNER, ESQ.	269
DEBORAH LEWIS, ESQ.	280
ALFRED CORTESE, ESQ.	281

PUBLIC HEARING

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE
CLASS ACTION RULE 23

THE UNITED STATES COURTHOUSE
DALLAS, TEXAS
DECEMBER 16, 1996

COMMITTEE MEMBERS:

HONORABLE PAUL V. NIEMEYER, Chair

HONORABLE JOHN L. CARROLL

HONORABLE LEE H. ROSENTHAL

PROFESSOR THOMAS D. ROWE, JR.

PROFESSOR EDWARD H. COOPER

MR. SOL SCHREIBER

PROCEEDINGS

JUDGE NIEMEYER: Good morning. This is the second of three hearings on Class Action Rule 23. I'm pleased to see that you're here to testify. We have a list of people who have signed up. We're going to allocate ten minutes. There will be a little bit of liberality about it, but we would like you to try to focus your comments in ten minutes. We tried this in Philadelphia and a few people went over, but not often, and it worked pretty well, and I think everybody had his say or her say; and we're also going to have another hearing in San Francisco on February 17 -- January 17, excuse me, thank you, at which point we will then only receive written comments and consider these things.

We've scheduled a meeting tentatively for May 1 and 2, at which we're going to consider all the testimony and all the comments and look at what we have done, what we have wrought and make our final views after that. As all of you probably know, the Supreme Court has granted certiorari in two cases, one out of Alabama and the other out of the Third Circuit, the Georgine case, and issues that we have before us as a result of these proposed changes look like they're also within the scope of what the Supreme Court is going to look at, so that obviously will probably have to play an important role in what we do.

We have circulated, and I think on the table there,

are a list of the changes. We categorized them generally by five changes.

The first change is to add factors to 23(b)(3). The first factor that we've added is a practicality factor as to whether the suit can be practically pursued in its individual status.

The second factor we have added is a maturity factor which considers whether law and science have been sufficiently developed to influence the action or whether the action itself is being testing those items for the first time.

The third an a evaluation of cost justification as to whether "it just ain't worth it," so to speak.

Change two is the settlement class addition which provides, as you know, that you can have settlement classes which do not satisfy all the requirements of (b)(3). That wouldn't preclude the court from certifying the class and approving a settlement.

Change three would add some flexibility to the timing of the determination, instead of saying when practicable -- I mean as soon as practicable, it would be when practicable.

Change four adds a hearing requirement. I think most compromises and dismissals were always had pursuant to a hearing but we've made that explicit, at least we propose to.

And change five, we have added a new section f to the rule which provides for a certiorari type of review. It is patterned partially after 28 U.S.C. Section 1292(b) but does not require the district court certification. It is a discretionary review and is intended to relieve some of the pressure off the mandamus jurisprudence that's now being used for appellate review.

We plan to go to about noon today, break and then continue about 1:15 and hope we can finish about 3:00 to 3:15. As a result, it may turn out that some of the people that are scheduled in the afternoon can be heard this morning. I don't know. Are there any people here scheduled for this afternoon in the courtroom? Maybe it might be if you're willing to stay that we can get you in the morning and if -- maybe I'll mention it again after the midmorning break and see if we can catch anybody else. I happen to think that we can probably get through all of you who are prepared to testify this morning.

So why don't we begin. This is being made on a record. It's all going to be taken to the entire committee, and so whatever you say will be important for us and we will consider.

I want to begin with Mr. Gardner. Is he here? All right.

MR. GARDNER: Good morning. My name is Steve

Gardner. My written comments are already on file with the committee. My testimony today will be limited to a couple of points. Those two points are: One, the concept of settlement classes, which is your change two, fosters abuse.

And secondly, that the proposal to apply a cost benefit analysis to class certification is well-intended but misguided and impossible to administer.

I think there are real problems with class actions as they are conducted today, but I believe that these two proposals in particular will exacerbate rather than address the problems.

Let me first introduce myself and give you a little of my background. I have been a consumer advocate and attorney for over two decades, first as a legal services attorney, as a student attorney at the University of Texas, as an assistant attorney general in the States of New York and Texas, and also served as an assistant professor of law at SMU law school for three years as a visitor, the last year of which I was assistant dean for legal education.

I have participated extensively as a consummer advocate in significant litigation in both state and federal trial and appellate courts up through and including the United States Supreme Court. I have also written numerous articles relating to consumer protection.

Of specific relevance to my comments and what, in

essence, drives a lot of them, I represented objectors and the Center for Auto Safety in the General Motors case that is detailed at length in my written comments. I'm currently in private practice in Dallas where I conduct a very limited, by choice, consumer class action practice in which I do not, as a matter of principle, seek percentage recovery but rather seek a lodestar recovery of my attorney's fees without a multiplier.

As I said, there are no question there are problems probably with consumer class actions and I'm addressing only consumer class actions because that's all I really know. But consumer class actions today, first and foremost in my opinion, it's a simple fact that many consumer class actions are brought for no other purpose than to get attorneys' fees for class counsel, with relief for individual consumers at best a land gap that is thrown in by class counsel to give an aura of legitimacy to their fee request.

The problem arises from cases which are not litigated but when they are settled and it arises at that stage. From my conversations and from what I've heard public statements of a number of class counsel, the very concept of trying, actually taking a class action to trial, is so foreign to their -- and I think I pronounce this right, I thought it was a pretty fancy word, bel tan shong that is incomprehensible to them. Instead, settlement becomes the

sine qua non of class action litigation. In many of these settlements class counsel, who filed a lawsuit and possibly put out a press release claiming that this lawsuit was the greatest thing since sliced bread, become suddenly and extraordinarily pessimistic about the legal and factual merits of their very lawsuit once the case has been settled and their fees have been sewn up.

JUDGE CARROLL: You're suggesting apparently that these cases, were they taken all the way to trial, would result in greater relief for the consumer. Is that your point?

MR. GARDNER: I would suggest they would result in many cases in relief for the consumer. I think a lot of these, and I think the initial GM settlement being one of them, didn't result in relief for most of the class at all. And I believe these are triable classes. I don't want to disparage the legal acumen of the class counsel who are bringing these cases. In fact, the lawsuits are very, very good. The problem is that they are settled quickly and they are settled, in my opinion, dirty.

MR. SCHREIBER: I didn't hear that last word.

MR. GARDNER: Dirty, in an inappropriate manner. In an inappropriate manner.

JUDGE CARROLL: But is the problem that there is no relief for the class and if they went further, there would

be? Is that what you're saying?

MR. GARDNER: The problem is they're never intended to seek relief for the class. I draw this conclusion, and it is a conclusion, from the behavior I observe. The lawsuit's good, the wrong is there, and there is relief to be obtained, but the relief to be obtained in too many cases focuses on fees and not on relief for the class.

MR. SCHREIBER: Can you identify five cases where you think the class has been sold down the road?

MR. GARDNER: I will try. The GM case is discussed at length in my comments, the pickup case.

JUDGE NIEMEYER: Wasn't that reversed?

MR. GARDNER: I beg your pardon?

PROFESSOR ROWE: Wasn't that reversed?

MR. GARDNER: It was reversed. It was a rarity but it was reversed. And it wasn't approved at the trial court level, which is an important aspect of my comments. I think in all honesty, the real problem exists both at federal and state trial court level in that the judges are not taking their fair share of the responsibility in a class action approval. In a class action approval situation you've got what I like to call a triad of responsibilities. You've got the class counsel, you've got the defense lawyers and you've got the judge, who has a special role in class actions of finding the settlement is fair, adequate -- fair and adequate

and reasonable to the class as a whole. I've seen classes where that is simply not done.

MR. SCHREIBER: Are you familiar with the subsequent settlement of the GM case?

MR. GARDNER: I am familiar with it, yes.

MR. SCHREIBER: What is your opinion of that?

MR. GARDNER: I think it's unwinnable on appeal, mediocre at best and a cynical attempt to get enough relief to make it unappealable.

MR. SCHREIBER: Your position is that judges aren't doing their job, class attorneys aren't doing their job and defense lawyers are selling everybody down the river.

MR. GARDNER: No, I think the defense lawyers are doing a tremendous job but they're doing it for the defendants.

MR. SCHREIBER: How can they do that?

MR. GARDNER: They are representing their clients and doing it very well. It's not their responsibility.

MR. SCHREIBER: You mean -- you think that if a defense lawyer has found that his case cannot be settled in the federal court and he then goes to the state court, you see no problems with that?

MR. GARDNER: I see problems with forum shopping, wherever it may be. If you -- part of my comments that I was not going to get into is I do think the committee should

consider addressing those issues predominantly out of fairness to defendants to make it impossible or difficult to do state court forum shopping when a federal court does not -- apparently is not going to approve a settlement.

MR. SCHREIBER: How do you do that in light of the recent case law that's come down from the Supreme Court?

MR. GARDNER: Best I think this committee could do is to recommend changes to the removal statute to permit removal where you don't meet necessary diversity, which is usually the way that people stay out of federal court when they don't want to be there.

PROFESSOR ROWE: I'm afraid that one is for Congress.

MR. GARDNER: Well, the best the committee can do, as I understand it, even under the rules, is recommend the Supreme Court do something. Similarly, I think it would be within the purview of the committee to recommend that Congress look into that area as well. But you can't address them all, but it is a problem and I acknowledge that.

JUDGE CARROLL: Back to Mr. Schreiber's question a while ago, though. I'm concerned about whether or not the pronouncements you're making have an adequate empirical basis.

MR. GARDNER: Okay. I can only address one question at a time. Mr. Schreiber threw several at me.

JUDGE CARROLL: His was five cases where folks got sold out.

MR. GARDNER: The GM case, the initial settlement, to a degree the second settlement. The Ford Bronco settlement, there certainly -- I didn't know there was going to be a pop quiz. I apologize. What I would be pleased to do is submit in writing to the committee, so I'm not just winging it, if you would permit me.

PROFESSOR ROWE: Airlines?

MR. GARDNER: I beg your pardon?

PROFESSOR ROWE: The airline ticket.

MR. GARDNER: The airline -- thank you. Got a lob there. The airline ticket settlement, that one was. I know, I'm a member of the class. I know I received certificates. But the -- if you were --

JUDGE NIEMEYER: I threw that in the wastebasket. Did I miss out on something?

MR. GARDNER: Well, I might as well have. I filed them carefully away. When I found out how difficult they were to use, I forgot about them. I think I still own them. But one of the particular problems with settlement classes and a red flag that should always exist is with coupon settlements. Almost every instance where there has been a coupon settlement, and that's where I will start when I come up with a list for Mr. Schreiber, the settlement is

inadequate for most members of the class.

JUDGE CARROLL: Are you not willing to concede, though, that there's a vast variety of cases where some of the classes are good and benefit the consumer?

MR. GARDNER: I think settlement classes are wonderful. Again, in my written comments I think --

JUDGE CARROLL: Some of the classes could not be litigated.

MR. GARDNER: Some of the classes could not be litigated, no. What I argued that -- the GM case was a two-parter, one in the Third Circuit. I represented initially objectors in the Texas only, the one kept out of the federal court because it avoided diversity issues. It sued some poor son of a gun in Texas as defendant as well. And Justice Hecht on the Texas Supreme Court asked me at oral argument, well, if it couldn't be one, isn't it better that it be settled? And my principal response is from a jurisprudential standpoint, no, it's not. If a case is bad, it ought to be lost, it ought not be settled, and particularly so with class actions. You see class -- you do not discourage abusive filing of class actions by making them easier to settle when they do not have a basis for settlement.

JUDGE CARROLL: What about the situation, though, where the claim is meritorious but the case, for example,

cannot be settled as a nationwide class because of choice of law problem?

MR. GARDNER: Then perhaps it ought not have been brought as a nationwide class. Generally speaking, the nationwide classes are often brought not for relief, because they don't get relief for the class, but because they can come up a bigger fund from which they can get attorneys' fees.

JUDGE CARROLL: I know of significant numbers of nationwide classes that have benefitted the consumer, and you're unwilling to concede those?

MR. GARDNER: No, I'm not at all. I'm just asking y'all to explore the possibility that there are a significant number that don't. And it's -- it is with that minority that the committee must focus its attentions on the abuses or the need for fixing, not where it's working. By and large, as my testimony says, Rule 23 works. There is no need to have a (b)(4). You can make settlement classes work even under the Third Circuit's opinion, even under -- which was very similar to the opinion that the Texas Supreme Court handed down. They can exist, they just can't be a laydown.

PROFESSOR ROWE: Let me ask you question how that would work. You're opposed to the (b)(4) amendment, then, I take it you're saying that we should at least leave alone, pending what the Supreme Court does, the Georgine, the -- the

Georgine ruling that you have to find it litigable for -- certifiable for litigation purposes in order to certify it for settlement purposes. What about the situation in which defense counsel is willing to stipulate to certification for purposes of settlement and to agree to a settlement, but understandably is unwilling to stipulate to certify for litigation purposes, so that what your approach does is forces litigation of every certification question, including litigability, and does away with the possibility of an agreement limited to certification for settlement purposes?

MR. GARDNER: No, I don't think it does. I've written for the ABA class action a little newsletter the ABA puts out, I've written at length on this on how it can work. I'll give you a short-form version of that. And I agree with you, a defendant is not -- most defendants are not going to be willing to lie down and let the certification truck roll over them unless they have a settlement. Some may, because they may feel they have it on the merits and they would as soon win against the class as against individuals.

PROFESSOR ROWE: Or in some areas like securities, it may be so well established.

MR. GARDNER: I'm limiting it to consumer because securities class actions just confuse me.

The trial court retains power at all times to recertify, decertify, uncertify, whatever it wants to do with

the certification. It can change it, it can withdraw it entirely any time prior to judgment. I believe that the -- I think the best course is that you submit a case quickly, as quickly as possible for certification and get that ruling before engaging in settlement discussions so this does not arise. The rules have always encouraged that.

MR. SCHREIBER: In a consumer class where you may have 50,000 or 100,000 or a million class members, if you get certification first, who's going to be able to pay for them, the notice at that stage? Have you ever considered the economics of class action practice, sir?

MR. GARDNER: I have.

MR. SCHREIBER: How to you handle this one issue, a million claimants, certification very quickly, a cost of a million notifications?

MR. GARDNER: In a couple of ways. Most class actions -- consumer class actions, again, that I have seen could have been brought just as well as (b)(2) classes seeking injunctive equitable restitution or other forms of relief, and that's about all you see on the back end anyway. The relief certificates are not damages. The relief is given in what is effectively an equitable manner. You can seek it as a (b)(2) and you don't have to give notice in federal court.

MR. SCHREIBER: How many (b)(2)'s have succeeded

that have been brought?

MR. GARDNER: I beg your pardon?

MR. SCHREIBER: The number of cases brought in consumer cases as (b)(2)'s are infinitesimal. Courts does not accept the (b)(2).

MR. GARDNER: I think that I would differ with you there. I think they're not brought as (b)(2)'s.

JUDGE NIEMEYER: Do you think that the coupon case, if it's put under (b)(2), I gather that would still act as res judicata in connection with a damage case so that if it forecloses a damage claim with the payment of a coupon, you have a problem that the Supreme Court is now going to be facing in Adams, which is you're attempting to bind the national class with a (b)(2) certification because you're using a coupon instead damages, and preclude the damage claim? Do you think that would be appropriate?

MR. GARDNER: I think in an appropriate instance, given most cases, you can get fair and adequate injunctive relief, that it is just as good and just as effective as your damages relief. And if the settlement is good, then it's good whether it be (b)(2) or (b)(3).

NIEMEYER: A damage claim inherently, regardless of the relief you obtain -- take an airline case or take a GM gas tank case, what you have is theoretically a damage case being foreclosed by some form of equitable relief. And it

means by bringing it under (b)(2), you are denying access to the court to the class members who may want the damage claim instead.

MR. GARDNER: You have to give them notice if you settle and --

JUDGE NIEMEYER: But they can't get out, you said, under (b)(2).

MR. GARDNER: Beg your pardon?

JUDGE NIEMEYER: They can't get out.

MR. GARDNER: The concern is notice. I'm addressing that issue. You can do it that way. The other way of addressing -- specifically to Mr. Schreiber, one way of doing it is not to bring these as nationwide classes. There is a significant number of consumer lawyers who actively disfavor nationwide classes and their focus, as far as I tell in California, because California has some really tremendous consumer laws that give greater protection to California consumers than to other consumers. They don't want to see the California rights drawn down to average, so perhaps a nationwide class is not, per se, in every instance the right things to do.

JUDGE NIEMEYER: You've gone over your time by a little bit already. Did you have another provision you want to address briefly?

MR. GARDNER: If I may, just to address the latter

thing. In my comments I did suggest the committee into proposing an amendment to Rule 23 that would permit a judge discretion to shift notice costs at the initial certification stage to the defendant. So I believe that is something that ought to be considered, the economics of an appropriate damages case when you do have --

NIEMEYER: Don't you have a due process problem there?

MR. GARDNER: I don't think so.

JUDGE NIEMEYER: Why don't we go on to the other point?

MR. GARDNER: The other point, and I can address it quite quickly, is -- and it's at length in my comments, is in the -- what I call the small claims rule, the cost benefit rule. One of the best uses I think of class actions is in the consumer areas to aggregate multiple small claims by consumers that are damaged by the wrongful actions of one company. In most consumer fraud matters, most consumer protection or deception matters, it's economically impossible for a lawyer to represent individuals with damages in Texas of about $10,000, just because you won't get enough attorney's fees to warrant representing that individual. Therefore, Rule 23 has long been a very efficient and very effective vehicle for addressing those problems.

The change -- I think it's 1C 23(b)(3)(F) would let

a court consider the costs and the benefits of such a settlement. And I think the point this committee's got to consider is that this rule will turn federal judges into socioeconomic arbiters. Cost benefit analysis has been used at a federal agency level. It came in heavily with Jim Miller, the Reagan dereg czar in the early '80's, and it has shown itself to be an extraordinarily subjective and extraordinarily nonlegal decision-making process that in this instance would turn trial judges into not judges but economic professors who are second-guessing legislative intent.

Congress has paused any number of statutes that provide for what amounts to a small amount of damages. In the Truth in Lending Act, for example, Congress has actually capped the maximum recoverable amount of damages as to one type of truth in lending action at $500,000 in a class action, regardless of the number of members of the class. In many a class actions, what that will mean is that you have minimal relief to the individual members of the class. But the other relief in pursing these consumer protection statutes which are generally enacted as private attorneys general statutes is to punish, deter, discourage the negative conduct by the companies that brought about the need for the lawsuit in the first place.

This cost benefit analysis would make or permit a trial judge to second-guess the intention of those -- of

Congress when it passed that. It would also permit a trial judge to second-guess state legislatures in cases where you have state filed class actions that are removed to federal court. I think it's impossible to reconcile this extreme -- I'm trying to avoid the word nitpicking, but I can't come up with a better one, nitpicking by the federal judge to reconcile that detailed approach to a settlement to a certified class, when you permit in (b)(4) an unstructured, unregulated approach to settlement classes. I think that both of them -- rather than one being good and the other one being bad, I think both of them will make for different problems if enacted. I absolutely agree with what other folks have said about (b)(4), that the committee should wait.

JUDGE NIEMEYER: We have received a lot of testimony on (b)(4).

MR. GARDNER: I'm not going to go into it. I'll just say thank you and quit.

PROFESSOR ROWE: One quick question. Back to the problem you were raising about fee driven litigation --

MR. GARDNER: Yes.

PROFESSOR ROWE: -- of large fees and little recovery. Putting aside the coupon settlements, many of which should be reversed if they haven't been already, even when you have these things going on a percentage basis, don't, in fact, we end up with the percentage being a fairly

small amount of a rather large recovery? Individual recovery to the consumer, to the class members, may be fairly small, but don't the total amounts of damages actually being awarded tend to be at least four or five times greater than the fees in total?

MR. GARDNER: I would say so on average.

PROFESSOR ROWE: In the neighborhood of 20 percent, and you get a recovery of over a million even if people only get $10?

MR. GARDNER: Keep in mind I do earn a living as a lawyer so I'm not meaning to say lawyers should not make money. I'm just saying lawyers should not make money hand over fist at the expense of their putative or at least kind of extended group of clients.

In an appropriate class action I don't have a problem. There is a class settled here that was a tremendous settlement, got large dollars back to each class member. It's a business class, and the lawyers are seeking 30 percent. I think that was appropriate in that case.

In another case, if they file it and settle it and they spent 40 hours on it, I think 30 percent is a hair excessive. I think five percent would be a hair excessive if it resulted in a $50,000,000 attorneys' fees.

JUDGE NIEMEYER: I think I'm going to have to bring this to a conclusion.

MR. GARDNER: I do understand that. Thank you, Your Honor.

JUDGE NIEMEYER: We'll move on to Mr. Lockridge. Is he here?

MR. LOCKRIDGE: Thank you very much. Good morning. My name is Richard Lockridge and I'm an attorney from Minneapolis with an approximately 30-attorney firm. I am exclusively a practitioner of plaintiffs' antitrust and securities class actions.

I'm a former federal law clerk to Judge Bright at the Eighth Circuit and I would say cut my teeth, I would say, working for about 15 of those years with Vance Rohmer, who went on to become the president of West Publishing Company.

I'm here in part today not only because I think that Rule 23 has worked but also simply because of my very, very high regard and esteem for the federal judiciary. Actually if I could just answer -- before I get started, answer your last question to this gentleman, because one of the cases that I had last year involved a case against Piper Jaffrey, a large upper midwest brokerage firm in Minneapolis that got involved in this derivatives debacle and ultimately -- the fund was Institutional Government Income Fund and ultimately, after about a year and a half of litigation, we settled that case for $70,000,000. And, in fact, the attorneys' fees were 15 percent rather than the

more customary 25 or 30 percent. So I think that is a situation where, when there is a comparatively large recovery, often percentages that do go to the attorneys are of a lesser amount.

My essential pitch today, and I will be brief, is Rule 23 works and it works just fine. And it is done precisely what its drafters said it would do. If there have been a few problems, and I would submit that they have been relatively few. I think first of all, most of those -- most of the egregious cases that we read about are in the state courts and there's obviously nothing that this group can do about it.

JUDGE NIEMEYER: You know what prompted this whole inquiry to the rules committee was a new phenomenon called mass tort, which was infrequent at first and gets more frequent daily. And it has its own problems. And those problems have now been discussed and debated in the circuit courts in the last couple of years with increasing frequency. Supreme Court's now taken two cases which may address some of the problems. So in some context, we've heard testimony that the class action does seem to work. In other contexts we have heard a fairly large amount of testimony that in the mass tort area, there's some problems.

MR. LOCKRIDGE: I would respond to that with the caveat that I don't do mass torts, but I certainly read the

cases and see that when they go up on appeal, oftentimes -- not appeal, but in any event, one way or another get reversed by the appellate courts. But I would still maintain that shows the process is working. And it may very well may be that those cases simply should not be certified as class actions. The federal appellate courts are apparently taking care of that.

JUDGE NIEMEYER: Well, you know, I don't want to debate with you too much because I'm interested in your testimony, but it's probably well to put on the table the asbestos litigation in the Fifth Circuit where they certified damage class action under 23(b)(1)(B), I guess it was, limited fund. There's a lot of debate. There's a lot of division on that court. There's a lot of debate in the community of practitioners as to whether that isn't bending the class action process to try to make it work to fit a mass tort situation.

MR. LOCKRIDGE: In that circumstance and some other cases involving mass torts, I think that is a possibility, yes. I think one of my concerns, and certainly some of the concerns of my brethren who testified before you in Philadelphia, is that to the extent you're trying to make changes to address possible problems, in the mass tort area, that it is going to create further difficulties in areas that we think have worked, i.e., in the antitrust areas and

securities area.

JUDGE NIEMEYER: That's what we've heard consistently is that our changes, which may be focused on trying to help the mass tort problems we are interfering with the proper operation of the legitimate -- when I say legitimate, the routine class actions that have been brought over the last 30 years. I gather that's what you're saying.

MR. LOCKRIDGE: Yes, sir, that certainly is a concern, and I think that's a concern in the cost benefit analysis. For example, there's another case, and some of these don't get as much publicity as the asbestos cases, but out of the Northern District of Mississippi was the processed catfish case where ultimately there was settlement for $28,000,000, and some of the purchasers received perhaps $500 and some of the purchasers received $500,000. Well, if you weigh the cost benefit analysis, be it $500 or $500,000, it may cost a couple or three million for the defendants to defend that case. So I would simply urge the panel to be very, very careful in this cost benefit analysis. And I would -- that is one change in particular, obviously, that I am concerned about.

I would note that there is one proposal, however, that I think is beneficial and that is the (b)(4) proposal on the settlement classes. Because it seems to me that if the parties, the plaintiffs and the defendants, can get together

and come up with a settlement, a rational settlement, then the parties should be entitled to enter into that.

Now, obviously I think you can make an argument that perhaps there should be a heightened level of scrutiny by the federal judiciary at that time because obviously I am aware of cases, coupon cases in particular, where there perhaps have been -- I wouldn't use the collusive, but perhaps but less than arm's-length bargaining amongst the parties. And that is certainly, I suppose, a possibility in the (b)(4) type of a class, but I would suggest that a slightly heightened level of judicial scrutiny would help resolve that.

MR. SCHREIBER: What would the court be looking for in a higher level of judicial scrutiny? Would it be the amount of discovery done, would it be the objections that are raised? Would it be counsel fees? I know you have given serious thought to this, and I'm curious, when people ask us to consider a high level of scrutiny, what are they really asking for?

MR. LOCKRIDGE: Well, I think it would be important to determine if there's been no agreement between the plaintiffs and defendants on the attorneys' fees, none whatsoever, preferably not even any discussions. I think it is better when documents have been reviewed and at least some depositions have been taken so that the plaintiffs can come

into court with a reasonable and rational view of their case.

MR. SCHREIBER: There is no discussion, and as you know in the envelopment field, I think it was the Joy case, the court said there can be discussion on counsel fees. If there's no discussion, then how would the class know whether the money is going to come from the class or it's going to come from the defendant?

MR. LOCKRIDGE: I don't have a ready answer to that, sir.

MR. SCHREIBER: I'm just asking why.

MR. LOCKRIDGE: Right. I wish I could give you an answer to that. Nevertheless, I think the fact that when there have been discussions or even agreement between the plaintiffs and defendants on attorneys' fees, that should raise the interest, if you will, of the judge overseeing it. You could certainly put a cap on it, for example, and put that in the class notice, say that the attorneys will not ask for more than, say, X percent of fees or $150,000 or something like that. But I do think that -- that the places where the plaintiffs and defendants have discussed fees and come to an agreement, that really makes the settlement a little bit more suspect.

JUDGE NIEMEYER: Thank you, Mr. Lockridge.

MR. LOCKRIDGE: Thank you.

JUDGE NIEMEYER: All right. Professor Issacharoff

and Professor Silver. Maybe we'll bring you both up to the table and have one talk and then the other -- whoever wants to address first, and the other one can sit at the table. You're the only two from the University of Texas at this point, right?

PROFESSOR ISSACHAROFF: Yes, sir. Co-author Doug Laycock could not be here this morning.

JUDGE NIEMEYER: We will hear from you.

PROFESSOR ISSACHAROFF: Thank you, Your Honor. The court -- the panel has our statement before it, so I won't run through that again.

I wanted to start by raising a couple of points that are not addressed in the proposals and then turn to my basic concern, which is on the question of the impulse to resolve by rule-making rather than by case-by-case experience the problems that are going through the courts right now.

The two areas where I think that this panel might have given some more thought to are, first of all, the continued vitality of Rule (b)(1) and the question whether there -- given our experiences of late, there is any longer any justification for mandatory classes and, in fact, whether Rule (b)(1) has proven to be an inferior substitute for the types of inquiries which are routinely handled through bankruptcy.

And in part this issue will be addressed through

the Adams litigation. In part it may be addressed if the Supreme Court takes cert in the Ahern case, but certainly the fact that the Ahern case was handled as a (b)(1) class and that participation was mandatory and that there was no diminution in shareholder wealth as a result of the resolution of that case, indicates that the (b)(1) mechanism is highly problematic, and I would suggest that the day may very well come soon when we want to say that it is inconsistent with due process protections.

PROFESSOR ROWE: Do you think we are near that day for purposes of rule making or do you think that experience with the (b)(1)(B) limited fund in cases like the Fifth Circuit asbestos litigation is still new enough that an effort at rule making might be premature?

PROFESSOR ISSACHAROFF: I think that an effort at rule making in most of the areas this committee is looking at is premature. And I think if you want to engage in premature rule making, that this would have been perhaps a more felicitous areas for your attention.

MR. SCHREIBER: Would you have thought that in the Ahern case, the defendants really did not prove that if the case went forward there would, in effect, be no insurance coverage and thus there would be a bankruptcy and the class would suffer even greater? Is that your theory?

PROFESSOR ISSACHAROFF: That is my fear, and my

fear is that based upon the experience of the courts and in large part based upon the experience of the state courts, which have followed the federal rule in this area, that the courts are by and large incompetent to make that kind of inquiry absent the more disciplined investigation available through the bankruptcy proceedings. And that bankruptcy has proven to be not so shocking, not so aberrant a practice as to force our attention into the (b)(1) class.

JUDGE NIEMEYER: How do you handle the -- the true limited fund interpleader where they're too numerous to join? You actually have a -- you have an inheritance or some other limited corpus which has a lot of potential claimants. You've got to have a (b)(1), don't you?

PROFESSOR ISSACHAROFF: Judge, I think that's an excellent question. In fact, this is -- when I teach this to my students I use that kind of example as the paradigmatic case of law you need (b)(1). In searching through the case histories, however, it's hard to find such a case ever having been litigated in the federal courts.

MR. SCHREIBER: What sort of case?

PROFESSOR ISSACHAROFF: The one where you have a true limited fund where somebody is basically an interpleader where somebody says, okay, here's the pot of money. You know, I don't have to file the interpleader. It's basically the plaintiff's equivalent of the interpleader. I haven't

seen it. And I just don't -- they just don't seem to be out there.

MR. SCHREIBER: I can give you two examples.

JUDGE NIEMEYER: Thank you, Mr. Schreiber. I'd love them.

MR. SCHREIBER: I am a little saddened because I held the limited fund hearing in the Agent Orange litigation.

MR. ISSACHAROFF: Yes.

MR. SCHREIBER: And there were two or three days of vast amount of testimony as to the economic wherewithal of these companies. So I find it difficult for you to suggest that a judge cannot hold such a hearing.

PROFESSOR ISSACHAROFF: It is not that a judge cannot hold such a hearing, Mr. Schreiber, but with all due respect to the hearing that you held, I would say that compared to the type of inquiry that's handled through the bankruptcy courts where there is a much more disciplined investigation of the financial wherewithall of the company and it is done in a type of setting in which you do not have agreements going into it, as you often do in the prearranged, presettled (b)(1) classes, that that is for more protection for the individuals involved than anything that you might have done in two days.

MR. SCHREIBER: Even though I denied it.

PROFESSOR ISSACHAROFF: Even though you denied it,

yes, I'm aware of that.

The second point which I think is something that bears some attention by this court -- by this panel, or by anyone trying to resolve the problems that are afflicting class actions at present, has to do with rival state court proceedings. This is something which is beyond the competence of this panel which may be beyond Article III powers period. But nonetheless, this is --

JUDGE NIEMEYER: If you wanted to use the commerce clause you might find a way to solve that problem.

PROFESSOR ISSACHAROFF: You might. You might, assuming we don't have seminal Eleventh Amendment problems here or Tenth Amendment, Eleventh Amendment. You might. But these are areas that are emerging as real problem spots because the Supreme Court has given the green light to state court nationwide class actions in Shutts and again in Sun Oil, and we actually do have an emerging body of cases indicating how difficult it is because the full faith and credit clause is not going to be triggered, because these cases are not going to be in the posture that they are a final judgment from the highest court in the state prior to the question of the rival claims of jurisdiction by two different state systems.

Instead, what the panel has done is -- and I now want to focus my attention on the settlement class issue, is

it has jumped -- in my view it has jumped into an area in which there is hesitant and unknowing judicial experience and tried to resolve by rule making something which should be resolved by the development of case law. I think that quite simply it is beyond the --

JUDGE NIEMEYER: You know, your prophesy may be fulfilled. I'm not sure what the proper posture of a committee is that's basically an agency of the Supreme Court in some sense and the Supreme Court making its own decision.

PROFESSOR ISSACHAROFF: Well, Judge, I think that's an excellent point. But I would go a step further and I would say that the proper posture is for the Supreme Court to hear these cases as they rise up through the judicial system with a full record with a case-by-case application.

JUDGE NIEMEYER: But in Georgine they're going to face the issue you're talking about, aren't they?

PROFESSOR ISSACHAROFF: Absolutely they're going to face the issue as it emerges from the Georgine case with a record, with a full evidentiary record before it and not on the basis of impressionistic testimony from people like myself coming up and saying, oh, I've read the cases, let me tell you what's going on.

JUDGE NIEMEYER: You're suggesting that we should wait and look at that, at least do that and maybe pull back altogether?

PROFESSOR ISSACHAROFF: That is correct. That is correct, Your Honor. I think that if, in fact, one looks at the cases that are out there, there are reasons for concern about settlement classes. And I think that the impulse that this committee has shown in trying to facilitate settlement classes is not only premature but quite problematic and I would suggest --

PROFESSOR ROWE: If the Supreme Court reverses Georgine, making settlement classes okay, would you say that we should write a more restrictive rule?

PROFESSOR ISSACHAROFF: No, I would say that if the Supreme Court reverses Georgine and sends it back, that there will be a large number of cases working their way up through the system at that point and that it is simply premature to rush into rule making at the point when you don't have a very well worked out body of case experience. I think that there has been sufficient experience with things like the supplemental jurisdiction statute to tell us that one should be careful about thinking that committees such as this, through careful institutional design, can resolve complex problems that afflict the federal courts.

Let me raise a couple of issues that are out there and not well developed in the settlement class proposal. For example, there are problems when you have groups of plaintiffs who have preexisting relations to plaintiffs'

counsel that other groups of plaintiffs don't have. We've seen this in some of the cases. That should set off some concerns on the part of judges, but that is not addressed in this committee's proposal. There are issues for concern where you have future claimants versus present claimants as in the Georgine case. That is something that the Third Circuit was quite concerned about, tried to handle narrowly through the triability of the settlement class issue. I think that that has problems with it, but nonetheless is a real concern.

I think there is concern that was raised by Judge Niemeyer a few minutes ago about whether there should be a distinction between the tort cases, between the more economic harm contract type cases and how we assess the question of manageability under (b)(3).

My suggestion is that this is hard to address through rule making precisely because I believe, as do my colleagues, that what the court should be looking for right now is some kind of a middle ground. I am troubled by some of the harshness of the Georgine rule as it emerges from the Third Circuit. Defendants who are in the position of recognizing that they have done wrong, recognizing that a class will likely be certified against them, recognizing that they can do best in the settlement process without incurring the cost of further litigation, have to have some hook by

which they can -- they can allow settlement in the present case on the basis of a class without waiving the rights of future cases, without saying what happens if the judge rejects the settlement here, what happens if there's a case filed in another state that looks pretty much like this, are we giving estoppel effect to any claim that we do not want to concede class certification in those cases.

At the same time, I would suggest that the evidence of collusion is real. And let me, if I may, read you the facts of the cases -- this is a state law case but this is going on all over the country. This is one of my favorites. It's from Texas. It's a case called St. Louis Southwestern vs. Voluntary Purchasing Groups. It's a dioxin environmental exposure case. Here's the facts as recounted by the court of appeals in reversing class certification. "Plaintiffs filed petition and class certification application at 11:29 a.m. Defendants filed an answer at 11:34 a.m., five minutes later. At 11:53 a.m. a mandatory class certification order was signed by the district judge. The order states, quote, 'Having been duly considered by the court after presentation of legal citation and oral argument by the parties hereto, and supported adequately to the extent necessary by evidence or referenced evidence including the existence of proposed class settlement" --

JUDGE NIEMEYER: But that's not a problem in

federal court. I mean --

PROFESSOR ISSACHAROFF: I'm not quite so sure about that.

JUDGE NIEMEYER: What about Mr. Lockridge's suggestion that settlement classes are appropriate with heightened judicial scrutiny?

PROFESSOR ISSACHAROFF: Well, I think that there is -- there should be heightened judicial scrutiny, but I think that the scrutiny should be not on the question whether it is a settlement class versus whether it is a litigation class, but rather that the scrutiny should be on the processes by which the settlement was entered into: how arm's-length were the negotiations, what were the relations between various types of class members and counsel for the class, were there any other factors that would indicate collusion heading into this, and particularly what kind of notice was out there, what about rival groups?

JUDGE CARROLL: That sort of approach would allay a lot of the concerns which you have?

PROFESSOR ISSACHAROFF: My sense is that's what's going on right now. And that what's developing in the courts right now --

MR. SCHREIBER: I must say I'm very troubled by the fact that professors keep coming up before us and suggesting that federal judges don't do their jobs, don't understand

what's going on, have no comprehension of the ethics of practice. Where has all this developed from? Why are federal judges becoming lackeys of the system? And you cite one or two apocryphal stories that deal with state courts. Have you ever really examined how a judge handles one of these cases? Have you ever sat through the arm's-length discussions? Have you ever heard the trial judge asking these questions? Why are professors all suggesting that the trial judges don't know their jobs and don't do their job?

PROFESSOR ISSACHAROFF: Mr. Schreiber, I have been involved in somewhere between 40 or 60 class actions.

MR. SCHREIBER: Federal cases?

PROFESSOR ISSACHAROFF: What I have found is that federal judges are extremely able people with extremely limited resources and that federal judges have no capacity to enter into an independent examination of the facts presented to them because they do not know the record, they do not know the evidence.

MR. SCHREIBER: Have you intervened to tell them?

PROFESSOR ISSACHAROFF: Well, it all depends. For example, in the (b)(1) setting you have limited capacity to intervene, particularly when it is a precooked settlement. There is very limited capacity to intervene. There is every institutional incentive, Mr. Schreiber, for judges to clear their three-month roles, and we all know that. And there is

every incentive to trust the parties who come before you because that is the court's only information available.

And what this panel's proposal does is to say to the federal judges the fact that they come before you with something called a settlement should pretty much take care of the issue.

What I am suggesting is that there are enough warning bells out there in the federal system that we should not simply endorse that and that what we should do is let the case law develop to figure out how to handle the settlement classes, which is a new phenomenon. Particularly it's problematic, Mr. Schreiber, because it is emerging in areas that were very -- that are very far removed from what was originally contemplated when Rule 23 was put into effect.

Now, I believe -- I am a defender of class actions. I believe that class actions are appropriate in many more areas than the original restrictive formulation about the antitrust cases and the civil rights injunctive actions. At the same time, I am a disbeliever in rule making in this area. I think that the committee should be leery of presuming its competence simply by the way of very smart people thinking about problems in the abstract and instead should trust to the federal courts to develop these responses on a case-by-case basis. I do believe that federal judges are able to resolve --

JUDGE NIEMEYER: You're actually concluding basically it ain't so broke and we don't need further tinkering.

PROFESSOR ISSACHAROFF: I'm concluding that there are enough warnings out there that it may be necessary to do something, but I think that we have managed since 1966 to police class action practice in the federal system through the case law experience. And I see nothing in the current problems that are identified in the federal court system, some of which this committee has identified, some of which I find striking that the committee has not identified. I see nothing so --

NIEMEYER: We've probably identified a lot more than is perceived unless you look at our proceedings, but that isn't in defense of what we have done. That's just --

PROFESSOR ISSACHAROFF: That may be, Your Honor.

JUDGE NIEMEYER: We've been holding hearings now for five or six years and --

Are you willing to share a little bit of the podium with your colleague?

PROFESSOR ISSACHAROFF: Absolutely.

PROFESSOR SILVER: I am Charles Silver. I'm also at the University of Texas School of Law. Just to follow up on a question that Mr. Schreiber asked at the conclusion there, I don't think either Professor Issacharoff or I are

here to say that federal judges aren't doing their jobs. We're also not here to attack the committee. I think our point --

JUDGE NIEMEYER: Well, we got thick skins.

PROFESSOR SILVER: Very good. I'm glad of that. Then I'll attack anyway. I think what we're here to say really is that if the incentives aren't right for class actions to settle on terms that are appropriate, then class actions won't settle on terms that are appropriate. Federal judges idea was kind of a safeguard. They're there to approve settlements after they have been negotiated. But the problem, as I see it, in addition to the way Sam described it as being one of inadequate resources, is that the standards for comparison are tainted because the standards for comparison that federal judges employ are other settlements. What have I seen in the way of a class action settlement in a case like this? Does this one look good or bad relative to other settlements that have been entered into? What is my experience base in class actions?

JUDGE CARROLL: Professor issacharoff suggested that we ought to let these cases percolate up through the system. Does that mean that you all are in favor of the change that will allow for an appeal of a class action?

PROFESSOR SILVER: No, I'm not in favor of that and I will get to that in just a minute, if I may. At least

I'm very concerned about that, I'll say this. But what I want to say is that if the database of settlements is tainted because the incentives are inadequate across the board, then federal judges will start approving settlements at 14 and fifteen cents on the dollar which they routinely do because those settlements look like all the other settlements that are out there.

PROFESSOR ROWE: Can't the maturity factor help with that?

PROFESSOR SILVER: I beg your pardon?

PROFESSOR ROWE: Can't the maturity factor proposed as an additional (b)(3) factor help with that so that you may not be as ready to certify a class until you have a track record from individual litigation and therefore there you have a standard for individual litigation that is not tainted by the incentive problems that you're talking about if you're only looking to other settlements?

PROFESSOR SILVER: I guess my answer is anything that improves the data set should improve the process, so I guess my answer is yes. But I'm still not optimistic that it's going to work very well. There's always a range, right? The databases in most subject areas are going to be settlements, not settlements of class actions, but in cases where the individual claims are litigable. It's going to be settlements of individual claims. Those settlements will be

within a range, right, and the class action will then settle at some distance from the range and the judge will be asked to make a decision is this good enough. And that decision will only be partly influenced by the range of settlements in individual cases.

And, of course, the maturity element doesn't do anything at all in small claims litigation. In small claims cases the only database for settlements is going to be class action settlements. If all those are tainted then the maturity won't improve those kinds of things at all.

I think that the real focus for the committee's attention, if you want to get rid of this problem, should be attorneys' fees. But I completely disagree with the views that have been expressed before about what the right direction to go in is. I think that this committee should advocate changes in the few rules that tie the attorneys' payoff, the attorneys' fees to the amount of the recovery for the class members and --

MR. SCHREIBER: Is that the aggregate recovery or the individual recovery?

PROFESSOR SILVER: The aggregate recovery. Actually it should work out the same way. If you give a percentage of every class members' individual recovery, and we're not talking about something where there's a reversion or a claims process, then the total fee should come out to

the sum of the percentages of each individual.

JUDGE NIEMEYER: You know the various permeations of that possibility really creates a difficulty because in some cases you can hypothesize in a case where the recoveries are de minimis but there is so many people involved that the public is outraged by the large attorneys' fees.

PROFESSOR SILVER: I'm going to talk about one such case, Your Honor. I'd like to talk about the Texas double roundings case because my concern here is, frankly, that from the perspective of someone who is just a proceduralist, what it looks like to me is that the combination of amendments proposed by this committee actually suggests that the committee is endorsing the tort reform political agenda instead of, as I believe, trying to change the rule in a way that is consistent with the overall purpose of the system of procedure which is to facilitate the enforcement of substantive legal rights and obligations in an efficient manner.

Why do I say that? It's the combination of ingredients that seems odd to me. On the one hand we're looking at class actions. What's the tort reform agenda with respect to class actions? Well, it is to take small claims cases out of the class action category. Those claims are not litigable individually, so if we can get rid of this class action, we get rid of them forever. What about the claims

that are litigable individually? We have two agendas with respect to them. One is we would like to aggregate them as -- and settle them as cheaply as possible, so that's where the proposal for settlement classes comes in.

JUDGE NIEMEYER: I liken your criterion to those cases where real plaintiffs have real concerns and would like to have them addressed even though they're small in amount.

PROFESSOR SILVER: I understand. I'm going to talk about --

JUDGE NIEMEYER: If you want to preserve those claims but eliminate the claims where plaintiffs really don't have much concerns and the attorneys have discovered the case and aggregated and put together the plaintiffs in order to generate a fee, I don't know how you find these cases and how you --

PROFESSOR SILVER: It's very difficult to find them actually. And I'll move on to the double rounding case without talking a little bit more about the tort reform agenda.

JUDGE NIEMEYER: You're pretty close to your time.

PROFESSOR SILVER: Very quickly. The double rounding case is a perfect example of how these cases are found and how important they are. The double rounding case is one in which two insurance companies were alleged to have improperly adjusted the pennies, charging the average member

of the class an estimated 10 to $12 over the class period. The total gain to the companies was estimated between 50 and $100,000,000 over the class period. We will never know exactly what it was because the records were destroyed for a certain period of time and it's just too expensive to try to get an actual dollar value. But $50,000,000 is the value that the parties agreed to work from in the settlement of litigation and it's one that was based upon an independently verified methodology.

The settlement comes in at roughly 36 point some odd million dollars. It's a recovery estimated to be about seventy-five cents on the dollar of loss. By comparison with federal class actions, that's an extraordinary recovery, right? Most class actions are settling in the range of what, four to fifteen cents on the dollar of estimated loss. Here comes a case that's 75 to 77 cents on the dollar of estimated overcharge, a great result. Why is that case important? It's important because the companies amassed 50 to $100,000,000 worth of gain through an unlawful means.

JUDGE NIEMEYER: The criticism -- there was a fair amount of public criticism of that case.

PROFESSOR SILVER: Of course there was. And the nature of the criticism was, look, the class members get Happy Meals and the attorneys get $10,000,000. That's what The Wall Street Journal says about the lawsuit. But that's

true in every small claims class action. Suppose I have a class action where the class members lost $10 apiece. And each one -- and let's say there are 4,000,000 of them.

JUDGE NIEMEYER: Could the attorney general in Texas have done the same thing?

PROFESSOR SILVER: The attorney general intervened in the double rounding case for the purpose of requesting that the settlement be approved. The attorney general was a supporter of the double rounding litigation. The only state official who opposed the case was the insurance commissioner, and frankly, he was irresolute. He couldn't make up his mind while the case was proceeding whether he supported it or opposed it. He took every position you can think of at different times, ignoring the litigation.

This is a lawsuit that I think says everything that's good about the lawsuit. In fact, if you study this case you will find out that it is the most intensely litigated class action you have ever seen. There was an adverse hearing on certification. The plaintiffs' attorneys, a two-man firm, put together a team of about ten lawyers, spent in excess of $3,000,000 and in excessive of 14,000 lawyer hours litigating this case. They put together a list of experts that is unprecedented in the history of Texas. It includes John Coffey, Arthur Miller, Jeffrey Miller, Finis Welch, who is a worldclass economist at Texas A & M, the

heads of all the statistics and mathematics departments throughout the universities in the state of Texas. At one point they had Dershowitz come in and argue a mandamus hearing. This was the most extraordinarily litigated class action you have ever come across and the tort reform press has been unbelievably critical of it for just that reason. Why? Because it's exactly the kind of small claims case which if we can prevent from going into court on the grounds that only the attorneys get rich, it goes away and we don't have to worry about our 50 and $100,000,000 overcharges ever being a subject of litigation. So this is an incredibly important thing to keep alive. What's most important, I think, is to create the right incentive.

JUDGE NIEMEYER: I guess you're really homing in on one of the major policy issues.

PROFESSOR SILVER: The appeal point I would like to get to, too, if I may.

JUDGE NIEMEYER: I think you've already used your time.

PROFESSOR SILVER: One quick point about the appeal process.

JUDGE NIEMEYER: All right.

PROFESSOR SILVER: Texas has a right of interlocutory appeals in class actions. Whenever a class certification is granted or denied, there's an immediate

right of appeal to the courts of appeals in Texas.

PROFESSOR ROWE: As a right?

PROFESSOR SILVER: Excuse me?

PROFESSOR ROWE: As a right?

PROFESSOR SILVER: As a right.

PROFESSOR ROWE: That is not our proposal.

PROFESSOR SILVER: I understand it's not your proposal. However, it is an existing database of information about when cases are appealed and what happens to them on appeal. And what I think you will find is that even though the Texas statute is symmetrical, defendants can appeal and so can plaintiffs' attorneys. It's really turning out to be a one-way rachet against certification. Plaintiffs' attorneys don't appeal when they lose because the economics are against it, but defendants, when they lose on certification, always appeal, and sometimes they win.

JUDGE NIEMEYER: Why if they thought it was -- you say if the class were not certified --

PROFESSOR SILVER: If the class were not certified --

JUDGE NIEMEYER: It seems to me an appropriate court would vindicate it. They're willing to put money in on the come. In other respects it seems to me those plaintiffs, if they really feel strongly about it, ought to be willing to appeal.

PROFESSOR SILVER: I'm not going to pretend to you I have a good explanation for what's happening, okay. My thinking is that it has to do with a matter of statistics. In order to win a reversal of a trial judge's denial of certification I have to prevail on every element on the certification question. If there are seven or eight elements you have to multiply the probabilities of losing on any one element and sum them up and it quickly becomes irrational when you do that to file an appeal form from a plaintiffs' side. But from the defendants' side, all I have to do is prevail on one element, right? If there are seven elements all I have to show that one is not met and consequently from my perspective, even if every one element is only a five or a seven or a ten percent winner on appeal, it makes sense for me to take the case up because the odds of losing on all the elements quickly become very small. That's just a hypothesis. I'm not going to stake my reputation that that's an accurate analysis of what's going on, but I don't want you to be fooled into thinking because you've written what on the surface looks look a symmetrical proposal for appeal, that in practice it will be symmetrical. There will be a selection into treatment effect and I would encourage you to look at the database of Texas cases very carefully to find out what's going on here before adopting the proposal.

JUDGE NIEMEYER: Thank you, Professor Silver.

Mr. Carrell, is he here? Mr. Carrell, Richard Carrell? All right. We'll move on to the next one.

Claudia Frost.

MS. FROST: I'm here, Your Honor. I would indulge the committee to please allow John Martin, who is here who has a tighter schedule to take my place and I'll take his, if that would be acceptable.

NIEMEYER: Mr. Martin, why don't you come forward?

MR. MARTIN: Good morning. My name is Jack Martin. I'm general counsel for Ford Motor Company. I appreciate the opportunity to appear this morning. I don't think anything I say is going to be a big surprise, but I would like to do basically three things, tell you a little bit our class action experience in recent years, basically endorse the proposed changes that are under consideration and mention a couple of other possible changes that I think ought to be considered.

Until about three or four years ago we had only a handful of class actions pending. It wasn't until 1992 that we began to experience a large number of class actions filed against us. And the last time I checked, in that brief period the number of cases have gone from a handful to almost 70 separate class actions, and that's just in relation to our car and truck business. That excludes class actions pending against our financial services operations which for the most

part tend to be statewide rather than national class actions and many of them are in state courts.

To put this litigation in perspective, I might just take a second to mention sort of the regulatory arena in which we operate. As I think most of you know, our operations are governed by the National Highway Traffic and Safety Administration Act. Vehicle manufacturers have an obligation to recall products that have a defect relating to motor vehicle safety. Also the National Highway Traffic and Safety Administration monitors alleged safety defects and reaches conclusions on whether or not manufacturers do have an obligation in the event they don't self-initiate. Manufacturers also conduct recalls for customer satisfaction reasons and they issue what we call technical service bulletins when there are small populations of vehicles that dealers need to make some adjustment in.

What we have now is a situation that every time a defect investigation is announced by NHTSA or there is media publicity relating to a possible defect or a customer satisfaction issue, there may be a class action filed. And most of this large number of recent class actions that we've experienced relate to alleged issues with our products.

The case I mentioned in my written testimony that involves approximately nine percent of the population of the United States, involves a device called an ignition switch.

PROFESSOR ROWE: Your customer base?

MR. MARTIN: I beg your pardon?

PROFESSOR ROWE: Is that your customer base?

MR. MARTIN: That's pretty close. It's 26,000,000 vehicles. And I haven't checked to see that our vehicle park, as we say, in the United States is somewhat larger than that, but that's a very large percentage of the total vehicle park of Ford vehicles.

JUDGE NIEMEYER: You could probably expand that statistic because every vehicle might involve two and a half people constituting maybe the average family.

MR. MARTIN: That's right.

JUDGE NIEMEYER: That's maybe up to 50 or 60,000,000.

MR. MARTIN: That's right. That's an apt observation.

The context here is that there have been a very, very small number of failures of this device over a 15-year period. NHTSA conducted an investigation. During the course of the investigation the company decided for customer satisfaction reasons to conduct a recall of a subset of the population, about a third of the population where the device had been subject to a manufacturing change that the company concluded made it more likely to fail than the other parts in the population. Incidentally, the part was supplied as a

black box item by an outside supplier, was not Ford manufactured.

In any event, the context is there was a recall of part of the population. 99.9 percent of the people plus will never experience any problem with this part throughout the life of the vehicle, and yet we have a class action filed on behalf of 26,000,000 owners, and I think filed because of the economic opportunity that it appears to present to the lawyers that filed the case, certainly not an action that was motivated by clients seeking redress.

MR. SCHREIBER: Is this the case involving cars that when the ignition is off would somehow burn in the garage? Is that what you're talking about?

MR. MARTIN: Yes, there is a risk of fire. The fire risk is almost infintesimal. What is more likely is smoke without a fire, but there have been no serious personal injuries.

MR. SCHREIBER: I understand that. How does the owner of the vehicle know whether he's in the infintesimal group or whether he's in the --

MR. MARTIN: Everybody is in the infintesimal group that has a vehicle. I mean their risk -- the issue is that the risk is indeed infintesimal. There have been a handful of these over this large vehicle population that I identified.

One suggestion that has frequently been made in arguing for what I would call an expansive attitude toward class actions is this private attorney general concept. And I wanted to offer a perspective that does not apply across the board on this concept, but it's often occurred to me that lawyers who tend to take themselves very seriously overestimate the impact of litigation on business behavior. Clearly there is some celebrated cases where litigation has threatened the life of companies. But for most consummer product manufacturers, the people running these businesses run them on the basis of facts, and litigation and the outcome of litigation is so uncertain it's not something that can be taken seriously into account in relation to other factors that are measurable and are so much more significant, issues like warranty expense, like campaign cost, customer satisfaction, customer loyalty. Those are issues that companies have to pay extremely close attention to and have far more impact on business decisions than the inconsistent results that they may obtain in various litigation.

As I said earlier, I want to applaud the changes that are under consideration here. I think they will add a lot of balance to the determination of whether or not class actions should be authorized. I would like to note a couple of qualifications. I think one of the most significant changes that's under consideration is the change in allowing

interlocutory review. I find it disappointing that we have to sort of qualify that by indicating in the notes that such review should be granted with restraint.

I also would recommend deletion of the language in the notes that discourages orders staying trial court proceedings where a class certification order is on appeal. I think in both instances those are -- you know, detract from the basic step that is being recommended here.

MR. SCHREIBER: Mr. Martin, I'm not quite sure I understand your position. You applaud the proposals meaning that you favor settlement classes?

MR. MARTIN: I beg your pardon?

MR. SCHREIBER: Do you favor settlement classes?

MR. MARTIN: Well, I'm -- as a package -- I support the package as a whole. I will concede that personally, you know, I have had some reservations about separate guidelines for settlement classes. I think the way the proposed current changes --

PROFESSOR ROWE: Isn't it true that our proposal doesn't set out separate guidelines for settlement classes? It simply says --

MR. MARTIN: That's what I'm about to say. I think as currently structured I would support the language of the proposed amendments on settlement classes.

MR. SCHREIBER: But you wouldn't support a

proposal that would set up stronger guidelines for the courts when they examine settlement cases as was suggested by one of the prior speakers? Wouldn't that be in line with your philosophy?

MR. MARTIN: I think -- I agree there should be very careful analysis. And these new changes propose a hearing on the proposed settlement with inquiry -- appropriate inquiry and I support that.

I also endorse the changes to 23(b)(3) adding new factors to be taken into account. There is one example in the notes that I find troublesome, and I think is -- could easily be deleted. And it's the example of a defective product that may have inflicted small property value losses on millions of consumers reflecting a small risk of serious injury and also may have caused serious personal injuries to a relatively small number of consumers.

And the note points out class certification may be appropriate as to the property damage claims, but not as to the personal injury claims. I think that's a difficult example with a lot of problems. For one thing, it's not at all clear that there's some -- that there's a nonspeculative amount of damages that were incurred by a person who never is going to experience the problem during the ownership period of the product.

Secondly, the example really flies somewhat in the

face of the maturity factor in the sense that clearly under these proposed changes, before certifying a property damage class action, some experience should be gained in trying the personal injury cases to see how they're coming out, and if there are inconsistent results or primarily defense oriented results, that those factors would strongly suggest the inappropriateness of certifying a class of property damage claimants. So I just suggest you may want to consider another example or stick with the securities example that's in the notes.

JUDGE NIEMEYER: All right. Is that about it?

MR. MARTIN: Let me just mention two things very quickly, and I won't elaborate on them. Others, I think, are going to advance a proposal to adopt a classwide proof requirement of 23. I'm obviously not going to speak from the standpoint of someone who is an active practitioner in this area, but just thinking about the problem, it seems to me that getting judges to focus on the mechanics of how the trial is going to take place would be greatly assisted by including that requirement in Rule 23.

Last point I would make is to endorse suggestions made by others to require particularized pleadings in class action cases.

Thank you.

JUDGE NIEMEYER: Thank you. Ms. Frost.

After calling Ms. Frost we'll take a brief recess. We will hear you and then take a brief 10-minute recess and then --

MS. FROST: Thank you, Your Honor. Good morning.

I am here today to address one part of the proposal and that is the amendment to Rule 23(f) providing for interlocutory appeals.

Just a little bit about me. I'm a partner at Baker & Botts in Houston. I've had an active trial practice for almost 15 years and have devoted the most recent part of my practice to complex cases and appellate matters. As a result, I have some experience both on the federal side and the state side in class actions and appeals therefrom.

And I thought -- and it's a particularly appropriate I think, in view of Professor Silver's comments about our Texas system. I thought that the court -- pardon me, the committee, might be interested a little bit in some of our Texas experience within interlocutory appeals.

We have had in place by statute and now by code a provision for interlocutory appellate review of class certification orders since 1979. That review is appeal as of right for both plaintiff and defendant. The requirements, as you may know, for Texas class certification, are patterned after the federal rules. Our Rule 42 is patterned after Federal Rule 23, so I think the comparison is fairly apt

here.

What Texas does is to provide an appeal as a right. It is an accelerated appeal per se, so every interlocutory appeal is accelerated. That means that the appeal needs to be filed in 20 days, a little longer than the proposal suggests. The appellant files his brief within 20 days, the appellee within 20, and there are provisions in the rules for a truncated or expedited form of transcript and record to go up for the court to consider. Interestingly, I think, and also differently from the proposal is that in Texas in the class action area in particular, there is an automatic stay of the class case below. The class action proceeding and a trial on the merits, if what is being reviewed is an order granting class certification. If the order that's being appealed from is a denial, then there is no stay.

JUDGE NIEMEYER: How many of those have you seen?

MS. FROST: Personally I have been involved in seven. And I have done a very nonscientific study by doing a Westlaw search for Texas with class and interlocutory to see what I could pick up. And I found 25 reported cases from 1979 -- actually didn't limit my search to date, but as a matter of fact, it should be limited from '79 since that's when we started having the process or procedure. But from '79 forward there are 25 reported cases that that search disclosed. I have examined those to determine whether, in

fact, some of the criticism that has been leveled at an interlocutory appeal process is valid, and that criticism being that it really doesn't provide you a neutral playing field, that it is something that is really a procedural mechanism that's more suited to and more user friendly to defendants.

What I found to be the most interesting of my nonscientific survey is that about 15 of the 25 cases were defendants appealing and the rest of were plaintiffs. The plaintiffs were appealing either the denial of class certification itself, changes to the scope of the class, for example, appealing from a decision-making where a court has certified the class as an opt-out class then the court subsequently determined it should be mandatory. The plaintiffs have -- opt-out plaintiffs have appealed from those types of orders. And plaintiffs have also filed appeals from settlement classes where there are objectors to the settlement.

But I don't necessarily think -- I agree with Professor Silver that the Texas experience is probably instructive. It has been going on now for almost 20 years.

JUDGE NIEMEYER: You know, the committee considered that type of process and opted for a 1292(b) structure without having the district court, who may get so invested in it, participating. And there's a database there, too, and I

don't know. We have not been presented with that database, but I personally am familiar from my own court's docket which in the Fourth Circuit that 1292(b) determinations are very quickly disposed of and handled. Now, if the writ or the petition is granted, then you would have a normal appeal process and there is expense and delay in connection with that. If you have a denial, then it's di minimis. But I expect that if we had -- if we're looking for assistance in our rule to a rule which gives appeal as a matter of right, you can look at what's being appealed and what the dispositions are, but I'm not sure the delays in the numbers in relation to the cases is as fair.

MS. FROST: Those are certainly valid reasons for a discretionary cert type review. My suggestion is that our experience, and perhaps the Texas experience, is not totally instructive because I'm not sure that we have had over time the kind of class action traffic that the federal courts have had, but we're having it more and more as the comments, I'm sure you've heard, might indicate. And I think that having an appellate mechanism that is available, and it may not have the kind of curbs on it that either the 1292(b) type discretion with the court of appeals I now know in determining whether to grant the appeal or grant the application, or the comments that Mr. Martin referred to about suggesting that everything be done with restraint are

necessary. I understand there's a concern that there may be a floodgate opened to appellate proceedings as a result of a more open class.

JUDGE NIEMEYER: I listened with interest to Mr. Martin's comment about that note because there's another way to interpret the note which is merely reflective of the manner or sort of a forecast as to how the court will handle it. We have received some comment that the rule does not provide any criteria for the court of appeals. It's open-ended and it's a cert type of thing. But I guess if Mr. Martin and others are reading that note as a restraint or as an instruction to the court of appeals, maybe that's something that ought to be looked at.

MS. FROST: I certainly can see that reading, and I too had a question as to what the standard of review and the standards to be used would be. I would assume that we would be talking in terms of an abuse of discretion as the appropriate standard of review, but I too observed that there are no articulated standards at least for granting the appeal or the --

JUDGE NIEMEYER: Would you advocate some or not?

MS. FROST: I would think some guidance would be useful, yes, to get them beyond those that are --

JUDGE NIEMEYER: If we put in the furtherance of substantial justice, would that help?

MS. FROST: Probably not.

MR. SCHREIBER: Should this committee be telling the circuit courts what to do?

JUDGE NIEMEYER: Well, we do under 1292(b).

MS. FROST: Certainly do. And so in that sense it might be useful. I have not -- I am not here today, though, prepared to give the committee any suggestions other than obviously the traditional standard for abuse of discretion would be --

JUDGE NIEMEYER: Of course, that's another part --

MS. FROST: -- would have to be shown on its face.

JUDGE NIEMEYER: That probably would go without saying --

MS. FROST: It would.

JUDGE NIEMEYER: -- that factual findings would be based on clear error and a fair amount of discretion in the whole process.

MS. FROST: Should be no difference as I see it either. In sum, I think that there's some very laudable goals to be achieved beyond -- or in addition to, let me say, reducing the amount of mandamus activity in the courts.

I think an interlocutory appeal is a very desirable thing. I applaud the committee's efforts to include one in the proposed amendments. I think that there are laudable goals that can be achieved by both parties or both sides of

the dockets from an interlocutory appeal. The plaintiffs clearly will be able to have their denial of their order reviewed early. They may not be able to take the case or want to take the case to its ultimate conclusion and wait to test that denial later. As the court is certainly aware, when a class action is denied --

JUDGE NIEMEYER: Just go to another court in another state.

MS. FROST: You can do that, certainly.

JUDGE NIEMEYER: That's what's happening, isn't it?

MS. FROST: It's very, very difficult though, at least in my one limited experience on the plaintiff's side with plaintiffs' class action and an appeal that I handled. When a class action is denied, a class certification order is denied, and the statutue of limitations commences to run, there's all sorts of machinations that large -- in my instance a 6,000-person class that was denied had to begin to try to intervene and start to get in the cases individual plaintiffs, and some were unwilling and some were not. Anyway, it was a mess. And so I think that there are some very laudable goals that can be accomplished for certainty on the plaintiffs' side to allow them to know right away whether the decision made by the trial court for certification was indeed the correct one or not.

JUDGE NIEMEYER: I suspect we're going to have -- a

person who is bringing the class will have greater multiple opportunities, even though most states have had class action rules, I think the states have traditionally been more reluctant in the past, but I think with the current dialogue and visibility of a class action, the plaintiffs are going to see a greater option as to where they bring the actions and --

MS. FROST: That's absolutely true. And in some on the defense side certainly, and it goes without saying defendants are often -- when a class is granted and -- class order is granted and the case is certified and it appears to the defendant that that was an errant decision and that there is error, that often the economics and risk associated with continuing a case in a class action status through a conclusion to a final judgment to be able to then test the propriety of that decision is something often that defendants in my experience are not willing or able to do. So I think that the committee's inclusion of an interlocutory appeal is laudable.

I appreciate the committee's time.

JUDGE NIEMEYER: Let me just ask you one question about data. You may not know the answer to this. Do you know how many cases have been appealed following final judgment in a class action?

MS. FROST: In the federal system?

JUDGE NIEMEYER: Yes.

MS. FROST: I do not.

JUDGE NIEMEYER: I would suspect the number is low, is that once it's been certified and the case progresses, the incentive on both sides is to resolve.

MS. FROST: That's right. Thank you.

JUDGE NIEMEYER: We'll take a brief break. Let's try to get started again. It's cutting you a little bit short, but let's try to get started about a quarter of, and that will be a tight ten minutes.

(Break taken)

JUDGE NIEMEYER: Let's call the hearing to order. Is Mr. Henderson in the courtroom?

MR. HENDERSON: Yes, I am.

JUDGE NIEMEYER: All right. Why don't you step forward.

MR. HENDERSON: Good morning. My name is John Henderson and I'm a partner at the law firm of Vial, Hamilton, Koch & Knox located here in Dallas, Texas. My practice focuses on the defense of manufacturers and suppliers of products, medical devices and drugs.

Several of my clients asked that I appear before this committee and offer my comments in support of proposed new subdivision (b)(4).

JUDGE NIEMEYER: Have you and your partner gotten

together to coordinate your statement?

MR. HENDERSON: No, we have not. I don't know if Mr. Flanary is going to be here.

JUDGE NIEMEYER: Okay.

MR. HENDERSON: We have been asked by different clients to speak on different subjects, I think.

JUDGE NIEMEYER: All right.

MR. HENDERSON: And my comments are limited solely to proposed new subdivision (b)(4).

JUDGE NIEMEYER: Okay.

MR. HENDERSON: And I do appreciate the opportunity to appear before this committee. A substantial portion of my practice the past several years has been spent defending Dow Corning Corporation in the silicon gel breast implant litigation here in Texas and now subsequent to the bankruptcy filing of Dow Corning I have been asked to represent the Dow Chemical Company in that continuing litigation here in Texas. I've also during that same period, to a lesser extent, represented defendants in Norplant, TMJ and asbestos litigation here in Texas. So my experience is that of a defense lawyer involved in mass tort litigation right here in Texas. And that's the perspective I hope to bring to the this committee.

JUDGE NIEMEYER: Are you in the Ahern case?

MR. HENDERSON: No, I am not.

I support, as do a number of my clients, support the subdivision (b)(4).

JUDGE CARROLL: Would you object to changing the subdivision to add a heightened scrutiny requirement?

MR. HENDERSON: I don't think it's needed. I wouldn't object to it though. I think the important thing -- the one point that I want to get across to the committee in support of (b)(4) is I think it's needed. I think with the recent obviously -- the Georgine decision and other decisions out of the Third Circuit, that courts may become reluctant to certify settlement classes. And I think settlement cases are important. I think they're an important mechanism to resolve these mass torts that are just clogging up our dockets here in Texas as elsewhere.

The experience in the breast implant litigation I think is instructive. The initial, as it was referred to by the people involved, global settlement, if you would, was approved by Judge Pointer. And there was a number of objections, there was a fairness hearing, and as a result of the certification of the settlement class there, the Hedi Lindsey class, over 400,000 women plaintiffs chose to at least initially participate in that settlement and file claims. There were subsequent opt-out provisions, but 400,000 plaintiffs chose to participate at least initially in that class.

But for Rule 23, there's no way that those 400,000 claims could get resolved in anywhere short of 10 to 15 to 20 years of litigation. Prior to, unfortunately, filing for bankruptcy, Dow Corning was just overwhelmed here in Texas with litigation. Harris County had -- you know, 5,000 lawsuits in Harris County. That were 6,000 lawsuits in Dallas County. We had lawsuits in Johnson County to the south here that had 600 plaintiffs. We had lawsuits in Morris County with 900 plaintiffs. We had hundreds of cases filed all over the state. The company was looking at the possibility of multiple simultaneous trials in Texas involving large numbers of plaintiffs at the same time that they were looking at multiple trials elsewhere in the United States.

Rule 23 provided an opportunity -- it didn't work for Dow Corning in that particular case but it did provide an opportunity to attempt to resolve the litigation.

MR. SCHREIBER: Why didn't it work?

MR. HENDERSON: There were too many opt-outs, candidly, for Dow Corning. There were simply too many opt-outs. After the initial claims process, the way the settlement was structured, there was a pot of money there, the amount for each individual plaintiff would be decreased depending on the number of plaintiffs that --

MR. SCHREIBER: So the new proposal in effect in

certain cases can only work in (b)(3) when the opt-outs are limited, is that correct?

MR. HENDERSON: I think that may well be the case, right. All I want to get across is that it is important that Rule 23 be available as a tool for plaintiffs and defendants to use to try to resolve lawsuits. And I think (b)(4), the proposed amendment makes it clear that that tool is available to them.

MR. SCHREIBER: Judge Pointer did it without a (b)(4). If that's correct, why do you need a (b)(4)?

MR. HENDERSON: Because of the Third Circuit decisions. There may be other judges now that following the Third Circuit decisions will say, well, Judge Pointer did it but I'm not going to do it. And you can't -- you know, it's the individual trial court that draws the -- in the MDL context the individual trial court, that draws the MDL on Norplant or TMJ's or breast implants or pedicle screws or whatever the product is.

If that individual trial court decides that he or she doesn't have the power under Rule 23 to certify a class for settlement that could not otherwise be certified for trial, then that tool is lost. And that's the point I want to get across. That's why I think, and my clients believe that (b)(4) is important, it should be in the rules, and that's the point I want to make.

PROFESSOR ROWE: One of the criticisms you may have heard of our (b)(4) proposal is that if you allow certification for settlement of cases that could not be certified for class treatment for trial, then the plaintiffs' side has no leverage to negotiate decent settlements from the plaintiffs' point of view with the defendants. And I'm wondering --

MR. HENDERSON: I don't think that's the case at all.

PROFESSOR ROWE: How does it work?

MR. HENDERSON: I think the realities are such that first of all, the settlement made well come before a decision on class certification. There may well be, and will be, putative class actions filed by the plaintiffs, so there's still the threat over the head of the defendant, if you would, that if they don't settle this that it may well get certified for trial purposes in some fashion. So you still have that threat.

Equally as important, though, is I think the realities that in these mass tort contexts it's just not one plaintiff's lawyer or any one groups of plaintiffs' lawyers that are involved. These types of cases draw wide interest among the plaintiffs' bar. They're well publicized at ATLA meetings. Plaintiffs lawyers get interested in these things and they choose to participate. And there -- they have

formal and informal ways to participate to make sure that these settlements are not sweetheart deals and they still have to be -- they still are subject to fairness hearings by the trial court. And the federal judge normally is going to look at these things very carefully. It's been the limited experience that I have seen from afar -- I have not personally been involved in any fairness hearings, but looking at them from afar, if you would, from somebody who's down in court, you know, fighting discovery battles or trying lawsuits, you still keep up with these things. And my experience has been that federal judges, from what I read and what I'm told by my colleagues, do fully examine and take their responsibilities to conduct a fairness hearing as a very serious matter. And as I say, the reality is there are a number of plaintiffs' lawyers that will actively be involved in that, either opposing or pointing out to the court why the settlement's not fair, as well as other plaintiffs' lawyers bring up facts why the settlement is fair. And obviously the defendants' lawyers will be there explaining why the settlement is fair.

JUDGE NIEMEYER: Thank you, Mr. Henderson.

Mr. Alsobrook. Henry Alsobrook.

MR. ALSOBROOK: Good morning. My name is Henry B. Alsobrook. I'm appearing here today as the past president and member of the class action and multiparty committee of

the International Association of Defense Counsel. Later in these proceedings and before you finish your acceptance of commentary, the IADC will be presenting to this panel a written formal statement. At the present time they are still discussing several of the proposals, particularly in change number one and also (b)(4), so they will --

JUDGE NIEMEYER: Change number one, is it mostly focused on the cost justification?

MR. ALSOBROOK: Right. And also with regard to the settlement, so there is some debate that's still going on. However, I appreciate the opportunity to be able to appear before you and give you some of my comments as a practitioner in this field that I hope will be helpful. One of the things that I think is most troubling to the defendant, and of course that's my bias, is the amount of discovery that is allowed to go on before class certification.

I will give you an example of a case that I'm involved in now that is in federal court where there are six plaintiffs who allegedly are class representatives. They have sued 80 corporate defendants. The case involves a waste site that was remediated in 1991. The federal court maintained jurisdiction over the site for 20 years, so that's why we are able to remove it under the All Writs Act.

Four of the plaintiffs -- four of the six plaintiffs were workers at the site or are spouses of

workers. They were class members in a settlement that I did last year for Ciba-Geigy on one of the pesticides that was put in this -- in this waste site. They have no cause of action relative to this waste site as far as that pesticide is concerned. We are going to file a motion to deny class certification which we think we are able to do on the pleadings as they stand, and also on what else has taken place, because 200 of the people live in a community next to the waste site have already settled their cases in state court. That settlement took place back in the '80's.

However, the dilemma that the 80 corporate defendants face is that the magistrate will not stay discovery pending the decision of whether or not there is going to be class certification. And, of course, all of you know what that means. It means that there will be a lot of document requests by plaintiffs, which will technically and realistically send legions of lawyers to dusty warehouses at a horrendous expense. And this is just one of the -- points out one of the abuses that I hope that these changes will deter, and I hope that sometime the committee will address the horrendous amount of discovery that is burdening defendants in class action litigation and particularly burdens --

JUDGE NIEMEYER: We don't have a proposal that really accomplishes that on the deck, do we?

MR. ALSOBROOK: No, you don't.

JUDGE NIEMEYER: What do you --

MR. ALSOBROOK: I think the closest you come to it -- the closest you come to it obviously is in change 1(a) of the -- change 1(a) in which you have to look at whether or not these -- these cases can stand on an individual basis rather than be a class. And, of course, that doesn't address what I'm addressing but at least it gives us some solace that maybe the judges, if that is accepted, would look at.

JUDGE NIEMEYER: What do you propose? It seems to me that if the judge is going to make a decision, has to have some kind of record, right?

MR. ALSOBROOK: Well, that's true. And there would have to be -- what we're proposing is some kind of limited discovery on clause certification issues alone. But what happens in these cases is that magistrates are loath to limit the discovery just to class certification issues.

PROFESSOR ROWE: Isn't that a matter of case management that is better left to judicial training rather than micromanagement of rule-making?

MR. ALSOBROOK: Well, perhaps so, but I think that what I'm doing here is pointing out an abuse that you should be aware of that perhaps you would have a solution to.

JUDGE CARROLL: Of course, the plaintiffs would not suggest that it was an abuse, would they?

MR. ALSOBROOK: You're absolutely right.

MR. SCHREIBER: In effect, aren't you opposed to the change where the term as soon as practicable has now been replaced by when practicable, and under your theory the court should make these determinations very quickly? Isn't that so?

MR. ALSOBROOK: Yes, sir. I'm not opposed to that language because I would hope that as soon as practicable would be what the court would do for judicial economy.

MR. SCHREIBER: I think the philosophy, however, was that as soon as practicable meant you have to do it very quickly, but when practicable gives the court more discretion. That, I think, was the intent. Now, if that's correct then I think maybe you probably have to oppose this change, otherwise most readers of it will delay the certification rather than move it expeditiously.

MR. ALSOBROOK: That's true. That's true.

The other thing I would like to comment on is change five and, of course, you've heard several speakers this morning talk about. I personally favor that the appeal be a right and I personally favor that there be a stay pending the appeal. In the event that the certification is denied, then that as a matter of practicality operates as a stay. However, if the certification is granted, then -- and there's no stay, then, here again, we get into the horrendous

expense of carrying on with the litigation for maybe years, hopefully not but could be years, before a decision is reached by the court of appeals which may reverse the district court.

JUDGE NIEMEYER: But the court of appeals would be pretty well equipped to evaluate that, wouldn't they? In other words, if you are persuasive enough to suggest to a court appeals that this should be heard, that there's been injustice done, that the rule's been applied incorrectly, it seems to me that same persuasion might carry on to have the court stop the action while they're deciding the case.

MR. ALSOBROOK: We would hope so.

JUDGE NIEMEYER: If they were in greater doubt about it or had no inclination on the basis of the petition, then they might say let the action go ahead while we're deciding. But it seems to me you can make your case depending on the particular circumstances. Some error is more egregious than others.

MR. ALSOBROOK: I agree with that, Your Honor. But you see, get back to my premises of advocating an appeal of right by right, if there was an appeal by right then I would ask that there would also go along with that a stay of the proceedings during that appeal.

PROFESSOR ROWE: Doesn't appeal of right make a stay more troubling because it means just -- it's totally

automatic and you bring everything to a halt no matter what the individual circumstances of the case are?

MR. ALSOBROOK: Isn't that what the appeal would do anyway?

PROFESSOR ROWE: Not necessarily. It would leave both the trial court and the court of appeals in a decision -- in a situation to decide on whether a stay was warranted whether there had been a grant or a denial of the certification.

MR. ALSOBROOK: That's true. But if there is a denial -- if there's a granting of the certification, and then that puts -- and the court of appeals accepts it, or as a matter of right must take it, that's what I'm advocating, then the district court would allow it -- could allow it to go forward, even though eventually the court of appeals may reverse it. And that's my concern.

PROFESSOR ROWE: But can't go forward even though the court of appeals may affirm it.

MR. ALSOBROOK: That's right. If the court of appeals affirms it then it would automatically go forward. There's no doubt about that.

PROFESSOR ROWE: Later.

MR. ALSOBROOK: Later, right. That's my concern.

MR. SCHREIBER: I'm curious. Is it the view of the defendants that they want certification decided quickly by

the circuit court and that will cast the stone or cast the mold, so to speak, for the case? Is that the general view?

MR. ALSOBROOK: Yes, sir, that's the general view.

MR. SCHREIBER: Prefer to have the decision very early?

MR. ALSOBROOK: Absolutely.

JUDGE NIEMEYER: Okay. Thank you, Mr. Alsobrook.

MR. ALSOBROOK: Thank you for allowing me to appear.

JUDGE NIEMEYER: Mr. Baron.

MR. BARON: Morning members of the panel.

My name is Fred Baron. I'm an attorney with the law firm here in Dallas of Baron & Budd, and our firm handles cases involving mass torts and toxic torts. I've been doing that 25 years now, for the last 20 exclusively mass torts.

Our firm and myself, actually, serve as lead counsel for the objectors in the Georgine case. We serve as lead counsel for the objectors in the Ahern Fibreboard case, in the Haden case. We have participated in the Adams case which is now in the United States Supreme Court and we have been involved in the polybutylene case.

JUDGE NIEMEYER: You're the man we should be asking. Is the Ahern case ready to go up?

MR. BARON: Your Honor, there was a very interesting ruling by the Fifth Circuit about a week and a

half ago. As the court knows, there's 17 judges on the Fifth Circuit. The rule says that a majority of the active judges have to vote in favor of rehearing en banc, for rehearing en banc to be granted. Five judges recused themselves, one judge refused to vote. Of the remaining 11, six voted in favor of rehearing, five voted against rehearing, and rehearing was thus denied because of the Fifth Circuit rule requiring a majority of all judges, even the ones that recused themselves --

JUDGE NIEMEYER: The Fourth Circuit has that rule, too.

MR. BARON: Well, it worked a very unusual twist in this particular case because under the rule, 82 percent of the court would have had to have voted for rehearing which is a pretty difficult rule to meet. But the bottom line to it is rehearing en banc has been denied, we expect a cert petition to be filed very quickly.

JUDGE NIEMEYER: And I would guess if the Supreme Court is going to jump into this swimming pool that they may want to have this one in the mix, right?

MR. BARON: I think they're already in the pool, Your Honor. As the court knows, the Adams case from the Alabama Supreme Court, which we believe is parallel to the Ahern case --

JUDGE NIEMEYER: The Alabama case though has to be

under a Fourteenth Amendment analysis probably, whereas the Ahern could be under the rule.

MR. BARON: That's true. And it certainly has to be reviewed under the rule. However, we believe the Fourteenth Amendment issue is perhaps the stronger issue in the Ahern case because, once again, there is no right to opt-out in the Ahern case as there was no right to opt out in the Adams case as there is no right to opt out in the Haden case and essentially no right to opt out in the Georgine case.

Your Honors, I'm here to tell you what happens in the real world. I do this day in and day out. I have a large law firm. We have about 40 lawyers in our firm. We're supposedly the largest plaintiffs' law law firm in the country that does exclusively mass torts. And so we do have experience and we do see what happens on a daily basis.

Over the last few years, the primary problem that we see is that every time we sit down with a defendant to attempt to negotiate the resolution of a large number of cases or a mass tort, the first thing that hits the table is we want finality once and for all for ever and ever and ever and we will not settle with you unless you do a class, and if you won't do a class we know somebody over in Cincinatti or some other place that will do a class. And if you won't bargain with us we'll go visit with these other people.

JUDGE NIEMEYER: You're not so much against that, are you?

MR. BARON: Excuse me?

JUDGE NIEMEYER: You're not so much against that, are you?

MR. BARON: I'm absolutely against it, because what that means is I have no bargaining chips left. I know that a national class action in mass tort cases, particularly ones that involve very individualized injuries that would be differently resolved under different laws, particularly with the state tort reform acts, cannot possibility meet a fair reading of the rule as it presently exists. And so those are cases that could not otherwise be certified. However, if a settlement class does not have to meet those rules, all of the incentive is for the defendant to say, all right, why should we deal with the individual cases, let's go over here to our friendly plaintiffs' lawyer and find a good deal.

JUDGE NIEMEYER: Do I understand you to be saying that you would be against (b)(4) then?

MR. BARON: I'm absolutely inalterably against (b)(4) because of the practical problem that it presents.

Judge Rosenthal.

JUDGE ROSENTHAL: Can the scrutiny that a trial court can bring, particularly if more rigorous scrutiny is written into the rule in an explicit way, take care of the

problems that you're raising?

MR. BARON: I would rather you ask me should it. Yes. Does it? No. I want to give the court some examples of real day happenings. I'll give you one in Houston, Your Honor, because you're familiar with that court. There's a large plant in Bryan, Texas, been making arsenic-based pesticide for years and years and years, spews arsenic over a small community outside of Bryan, Texas. It turns out that EPA comes in and finds that there's a significant hazard to people living in the area.

A good lawyer files a class action for property damage to get the arsenic removed out of the ground and for medical monitoring to set up a way that people can determine whether they have an injury. Other lawyers go out and start filing cases for brain-damaged children and other cases. The defense lawyer goes to the first plaintiff's lawyer and says, listen, we will agree to certify your medical monitoring class, we will agree to certify your property damage class, and we will pay you good bucks for them, but we want you to amend your pleading to include now a personal injury case. And we want to have a personal injury class filed against us for everyone who lived in this area and we will create a fund for those people to recover against.

Plaintiffs' lawyer is enticed, obviously, because he's going to get the best benefit for the classes that he

originally represented, the case is objected to, there's a hearing before a magistrate, and after a day and a half hearing, which is the full length of the hearing, the magistrate approved the class, issued an injunction and everyone is enjoined from filing suit. No opt-out rights. That's what happens.

Georgine, classic example. I met with counsel for CCR before the class is filed, I'm told that there is going to be a class, that I had better jump on the band wagon, that they will settle all of my presently pending cases with me for a huge sum of money if, indeed, I would agree not to contest the class.

The class action was filed January 15, 1993; the answer was filed January 15, 1993; the settlement stipulation was filed January 15, 1993 -- I don't have the date stamps, but I suspect they're within 15 minutes as the Texas case was, and the case was conditionally certified a week later, the judge may have been on vacation that day, and a settlement hearing was set up.

Your Honor, this was a national class action that would have impacted 20,000,000 people. This is what happens.

MR. SCHREIBER: Mr. Baron, would you ever accept a mass tort settlement class if you were appointed counsel to represent the entire class?

MR. BARON: If the terms of the settlement were

such that it would be explained to each individual member, the member would be given a very informed ability to opt out, certainly. I don't have -- all that is, Mr. Schreiber, is just a settlement offer because that's really what it boils down to. The HIV cases are the perfect cases.

MR. SCHREIBER: Isn't it more than that because with all due respect, one of those settlement classes, you might represent 5,000 or 10,000 claimants. If you are the -- if you are counsel for the class, it stands to reason that you would be either supporting it, otherwise you couldn't be part of the class counsel.

MR. BARON: I have on many occasions represented 5,000 people. I represented 2,800 in Tucson, Arizona, with injuries from polluted wells. We settled the case, settled all 2,800 of them, met with each of the 2,800 clients, discussed their individual settlement proposal and were able to work out an arrangement. There was no reason why that needed to be a class. The consolidation rules work. The MDL rules work.

MR. SCHREIBER: Isn't one of the reasons that counsel fees would be decided by the court rather than by counsel?

MR. BARON: That is -- if what you're telling me is the reason I didn't do that --

MR. SCHREIBER: I'm not saying that. I'm saying

isn't that a factor that comes into play?

MR. BARON: Absolutely not. Let me explain to you. There is no reason -- there is no reason at all why there is a necessity to use Rule 23 to settle a large group of cases. They can be settled without the rule very easily. If somebody doesn't like the settlement they would have the ability to do the equivalency of an opt-out. What is the point of using Rule 23 when the consolidation rules permit you to go forward on all issues? Rule 23 only invites mischief in mass tort cases, only invites mischief, because what's going on is there's a second play and that is the other plaintiffs' counsel coming into the case to try to take over the handling of other cases to benefit the defendant to get finality.

PROFESSOR ROWE: Don't you have considerable leverage from the threat of objecting?

MR. BARON: Absolutely. But, you know, it's tough to be a objector. Let me tell you something. If you want to change the rule, as of now, we have spent over -- way over seven figures objecting to Georgine. We have spent that much in Ahern and God know's what we're going to spend in Haden. None of that is reimburable. We won Georgine in the Third Circuit.

JUDGE NIEMEYER: Sounds like a capital intensive practice.

MR. BARON: It's a very capital inexpensive practice, Your Honor. It is impossible for individuals to object to a large class action. The funding is not there, you can't get the experts. We were forced to use law professors who volunteered a lot of their time. But you can't get -- Ahern's a classic example. There was an issue whether there was limited fund in that case, which there clearly is not. Fibreboard is now a Dallas company and shortly will be worth four to $500,000,000 sans their asbestos liabilities that have been capped. But we -- they had all types of economists, they had experts, they had insurance people. It would have cost us at least 750,000 to a million dollars to put together the kind of investment advice that we would otherwise get the court to pay for authorizing a bankruptcy to have challenged the Fibreboard settlement. There was absolutely no way that we could do that.

MR. SCHREIBER: And yet you won in Georgine.

MR. BARON: I did win in Georgine, but I won --

MR. SCHREIBER: All the money.

MR. BARON: Oh, I spent all the money in Georgine. We spent in excess of a million and a half dollars in Georgine. But the point is -- the point is that that's not the way this situation should be handled. And in Georgine we presented to the trial court reams of evidence about how the

defendants had gone to the plaintiffs' lawyers and made a dual track of negotiations, we will settle your present cases if you settle the future cases in a class context. And those --

JUDGE NIEMEYER: How do you solve the --

MR. BARON: -- negotiations went on simultaneously, yet the court ignored that evidence.

JUDGE NIEMEYER: How do you solve the attorney competition?

MR. BARON: How do you solve the attorney -- the competition ends the day that it is determined that you cannot do this type of a class action because then you will only have counsel who actually represent individuals, and the classic example --

JUDGE NIEMEYER: But if you have 15 counsel representing 15 individuals, asbestos injured people, all 15 can assert class actions, right?

MR. BARON: They could.

JUDGE NIEMEYER: And how do we appropriately resolve that?

MR. BARON: If the classes could not be certified under rule -- under the present rule, then you will have 15 empty buckets. If you permit settlement class actions you're exacerbating the problem. Tort cases get handled -- there are what, a hundred law firms, 200 law firms that handle

asbestos cases in the country right now.

MR. SCHREIBER: I thought there were 30 or 12.

MR. BARON: No, there's a few more than that. Those cases get handled and they get handled in a competitive way where we're after a client or however that system works, and we handle cases for individuals and we prosecute them. There shouldn't have been a class action in asbestos, and again, the classic example that I was going to suggest is breast implants. Before there was a class certification attempted, before there was this so-called settlement deal, there were 12,000 breast implant cases pending in the United States.

MR. SCHREIBER: I take it you would not have opposed the Ahern settlement if you had an opt-out.

MR. BARON: I would not have opposed the Ahern settlement with an opt-out if the opt was a true opt-out, and that's one of the recommendations I would certainly make to this panel.

MR. SCHREIBER: What do you mean by a true opt-out?

MR. BARON: Let me give you an example. I'm going to have to do it by example. My daughter has braces. The orthodontist that put the braces on her teeth came in my office the other day, I thought maybe I hadn't paid my bill, he came in the room, closed the door and said, Fred, I worked in Newport News, Virginia in high school in the shipyards and

I've just been told I have just been diagnosed with mesothelioma. My doctor tells me I have six months to live. I have two kids in high school. They are going to have to go to college. I have been sued twice for malpractice. I got stuck both times. Let's have at them.

First question I asked him was, did you opt out of the Georgine class and the Fibreboard class? No, I didn't know anything about it. I didn't have asbestosis three years ago. He is now relegated in Georgine to a very small amount of benefits. And in Fibreboard he had no choice to opt out. If you're going to permit a future claimant's class, which I don't believe you should do to begin with because there's significant due process problems, and if you're going to permit settlement class actions, which again I don't believe you should do because it's imprudent, then you must cap that so that the defendants are not going to be out there buying peace at the expense of due process rights.

JUDGE NIEMEYER: Would you like classes where people opt in?

MR. BARON: I have no problem with that. Quite honestly, the HIV settlement seems to be a reasonably good settlement. It's a proposal where the AIDS victims will get $100,000 if they choose to do it. If the choose not to they have a very liberal right to opt-out. In Ahern or in Georgine I have no problem if someone wants to accept those

settlements. And those settlements will rise or fall, as they should, if they meet the demands of the marketplace, i.e., they are fair. But what you can't let happen is for these people to be stuck in these settlements that wouldn't otherwise be certified without the ability to make their own intelligent choice whether they want to participate. And that's what's happened.

Whether you make it a back end opt-out, which would have to happen in asbestos claims because somebody that, golly, I worked in the railroad when I was in high school and I'm sure I've got at least some increased risk of disease, but I wouldn't have thought to opt out of those cases until I develop it.

MR. SCHREIBER: Mr. Baron, I think you're invincible, by the way. One of the things that concerns me, however -- maybe you can answer this. One of the arguments that's been made about trying to get future claimants into settlements under more rational and reasonable standards than we may have been seeing to date is that if these cases aren't going to come up for 10 or 20 years, who is going to guarantee that there's going to be any defendant?

MR. BARON: That's a good question. And people have dragged the asbestos litigation in the dirt on that one. I'm here tell you that there are about 150 companies that participated in the asbestos market, about a hundred of them

very seriously and significantly. So far there have been 17 companies that have gone into Chapter 11. And I'm here to tell you that over half of those companies employed less than 20 people. They were very, very small businesses. There were a couple of large businesses, but all of those businesses have come -- have emerged from Chapter 11, they are operating, nobody lost their jobs. There are trust funds that are set up for these victims because under the bankruptcy code, and I am an advisor to the national bankruptcy study commission under Judge Jones and others, there is going to be a requirement that future claims be dealt with and that the proceeds of the company be set aside, not just for the present claimants but for the future claimants. But most importantly, under the laws of most states under joint and several liability, and even under laws of several liability, there are numerous other sources for these people to look at. And if there aren't, you can only get so much blood out of a turnip. If somebody -- if there are a hundred thousand claimants against a company with a very limited amount of money, it's gone and it needs to be divided in an appropriate with and that's what we have the bankruptcy laws for. And in my belief, the bankruptcy laws provide the exclusive jurisdiction to do that.

PROFESSOR ROWE: Mr. Baron, you spoke about having trouble with Rule 23 in mass torts.

MR. BARON: Yes.

PROFESSOR ROWE: Is your problem with Rule 23 for mass torts at all or with Rule 23 when there are no opt-outs?

MR. BARON: Well, particularly when there are no opt-outs. I have a problem with mass torts because I don't think the rule does anything that is beneficial. I don't believe anyone benefits.

PROFESSOR ROWE: When the claimants are in the tens and hundreds of thousands as opposed to the few thousands that you were speaking of?

MR. BARON: Yes, that's correct. I don't see any benefit. MDL handles these problems all the time. It does it outside the class context. That's what it was designed to do.

PROFESSOR ROWE: That's only pretrial if they have to be tried.

MR. BARON: The reality, which is what I think we're here to discuss, is that when cases go into MDL they never come out. And the reality of it is is because the parties are forced to sit down to the table and deal with the cases that need to be dealt with voluntarily with everybody participating as opposed to somebody finding, as Professor Coffey says, the lowest bidder, which is what you will sanction if you do (b)(4). I am not a class action lawyer. I used to do -- in my earlier life I did some consumer class

actions and civil rights cases, did a few Title 7 cases and I class counsel in those cases. I enjoyed it.

In mass torts the advisory committee in 1966 was correct. Mass torts are not appropriate cases.

MR. SCHREIBER: In 1966 they were talking about aviation cases.

MR. BARON: Not just aviation cases. In 1973 I filed a mass tort asbestos case as a class action, Meandle vs. PPG, and a judge in the Eastern District of Texas explained to me in a very well-written opinion why I was dead wrong and all of the reasons why mass torts are not good for class actions, and he was right, and he remains right.

At a minimum I'd like to make at least a couple of very quick recommendations, if I might. Just one.

JUDGE NIEMEYER: I'm going to give you about a minute.

MR. BARON: I got a minute. All right. Number one, if you're going to make changes to the rule you have to deal with future claimants' problems, it has to be spelled out that that's not appropriate for class action, which is number two; there has to be very clear opt-out rights in any mass tort case. Number three, there needs to be a provision that at least shifts cost and perhaps fees for successful objectors. Otherwise, you will just have people coming into the courthouse hand in hand and there will be no chance for

people to object. That has to be in the rule. And then finally, we need more scrutiny of any settlement class because the potential for collusion is significant, it's real, it happens in the day-to-day practice. And finally, I would recommend waiting until we see what the Supreme Court does with our case in Georgine, with the case in Adams, and that, of course, will have an impact on Fibreboard. We're getting ready to have an explosion of new case law coming from the Supremes. We ought to listen to what they say.

PROFESSOR ROWE: And if they reverse in Georgine should we write a more restrictive rule?

MR. BARON: Let's see what they say. Let's see what they say. There's an awful lot of possibilities as to what could happen in Georgine. When we appealed Georgine to the Third Circuit, the class certification issue was not our primary point. We thought that the case was not an Article III case because --

JUDGE NIEMEYER: Justiciability?

MR. BARON: Excuse me?

JUDGE NIEMEYER: Justiciability?

MR. BARON: Exactly, Your Honor. That was the point. In fact, we hired Professor Tribe.

JUDGE NIEMEYER: They may still buy into that.

MR. BARON: They may very well, and I would like that because that would end the future claims problems.

JUDGE NIEMEYER: Thank you.

Mr. Beisner.

MR. BEISNER: I appreciate the opportunity to appear before the committee this morning. For the past 16 years much of my practice in the Washington office of O'Melveny & Myers has been devoted to the defense of purported class actions. During that time I've been involved in defending numerous class actions in the federal and state courts of over 26 states.

I came to testify here because I was disturbed by some of the comments that I understand were made in Philadelphia. Several of the speakers there seem to suggest that the main reason that this committee is looking at the moment at class actions is because of concerns about settlements. It was suggested that this has all been raised out of concern that the federal judicial system is being embarrassed by settlements in which individual class members receive very little but the attorneys involved in representing the class walk off with barrels full of money. And I fear that these commenters are missing the real issue here.

The problem is not with settlements. The settlements that were criticized in Philadelphia, and I understand several examples were given, those examples, I think, are really a symptom of a much larger problem. I

think that larger problem is that the class action device in its entirety is becoming a subject of some ridicule. I think increasingly the public views the class action device as a joke. Without question, the device has had a positive impact in some settings, but I think that too many federal and state courts are signaling sort of an anything goes policy with respect to class actions. They are forgetting the bedrock principle that claims are to be litigated individually, that the class action is a narrow exception to that basic principle and that there's little effort being made to limit the availabilty of the device.

For example, I've been astounded in dealing with some class settlements that go out, some of which may have been criticized in Philadelphia, that the mail bags that come back from the members of the settlement class, are increasingly not saying I'm upset with the settlement that the class is receiving here. They're basically coming back with letters saying, are you guys nuts? Who brought this lawsuit in the first place? Who gave them the right to go out and file a claim like this on my behalf? There is a recognition explicit in a lot of that correspondence.

JUDGE NIEMEYER: Is that public, that correspondence?

MR. BEISNER: Absolutely. I'd be happy to supply that to the committee. It's on the record.

MR. SCHREIBER: How many cases has that occurred in?

MR. BEISNER: What's that?

MR. SCHREIBER: How many cases has that occurred in?

MR. BEISNER: I can think off -- I can give you examples of several, two or three. I will be happy to supply correspondence.

MR. SCHREIBER: But we're talking about hundreds of class actions.

MR. BEISNER: I understand that.

MR. SCHREIBER: You're using apocryphal stories to suggest that we do something, aren't you?

MR. BEISNER: I don't think they're apocryphal stories. I think --

MR. SCHREIBER: Two or three out of a hundred?

MR. BEISNER: I think if you canvass -- I'm talking about cases that I'm involved in that have been settled. I think that if you canvass counsel that were involved in a large number of cases, and I've had correspondence and conversations with defense counsel who have told me the same thing, that it's a much broader issue than that. I'm not saying at all that all of these class actions are bad. I'm conceding, as I did at the outset, that the device is properly used in some cases. But the application of the

device, I think, has become far too broad.

MR. SCHREIBER: How do you limit it?

MR. BEISNER: What's that?

MR. SCHREIBER: How do you limit it?

MR. BEISNER: I'll get to that. I have a proposal.

JUDGE NIEMEYER: Only got a couple of minutes.

MR. BEISNER: I will get to it. I think that the focus of this committee should be on creating firmer, clearer limits on the availability of the class device in the first place. And I think that the focus should be on the fundamental requirement for class actions and that is commonality.

This notion of common question is undoubtedly the linchpin of what a court should be looking at in class actions, but I fear that in too many cases the courts are looking at, there are common questions. But as some of the Texas courts, which are certainly much more open to the class device than are the federal courts, I think most people would acknowledge, a number of the Texas courts I think have pointed out what the real issue here is not whether there are common questions in a case. The question is can a jury reasonably give common answers to those questions, answers that apply across the board to all of the members of the classes in those cases.

I think that that is the real issue that the

appellate courts have been getting at in recent months in reversing in seemingly a tidal wave way class certification rulings that are coming out of district courts.

JUDGE ROSENTHAL: Excuse me. Are you in favor of then agreeing with Mr. Baron's proposal and explicitly excluding mass torts as appropriate subjects for class action treatment?

MR. BEISNER: I don't think it's just mass torts. I think it's other sorts of cases as well, and I don't think that you can --

JUDGE ROSENTHAL: How would you categorize them?

MR. BEISNER: I think that if you look at these cases I was just referring to, there's five of them that have come down in the last ten months from the appellate courts. You have Castano in the Fifth Circuit, American Medical Systems in the Sixth; Georgine, which although it keeps being referred to as a settlement class case, actually it says a lot of very interesting things on class certification requirements that I think there are being ignored; the Valentino case of the Ninth Circuit; and the Andrews case out of the Eleventh. Those are all very different type of cases. There are some mass tort cases. The Andrews case is really a consumer class action. But the theme in all of those cases is the courts were not taking sufficient time to look at how the case would be tried. Is this a case in which a jury

really could with the available evidence make a yes-no determination across the board.

JUDGE NIEMEYER: But if we already have the commonality under what is it, 23(a)(2).

MR. BEISNER: Predominance requirment.

JUDGE NIEMEYER: It seems to me that's for the courts to supervise with their appellate process and review process but for us as a rule maker, we can't say any more than what we've said, can we?

MR. BEISNER: What I would propose is that there be added to Rule 23(b)(3) a classwide proof requirement. This has been alluded to but I'm not sure explained much by speakers here and in Philadelphia. It would be a requirement to included in (b)(3) that would say that there needs to be an additional finding, and that finding would be that the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought, is substantially the same as to all class members requiring the court to do, and put right there in the rules so it cannot be missed --

JUDGE CARROLL: Isn't that already there, though, in the predominance and superiority requirements?

MR. BEISNER: It's there. It may be there but I think trial courts are increasingly missing that need to look at evidence.

PROFESSOR ROWE: Except that they keep getting reversed.

JUDGE ROSENTHAL: Don't overcite it.

MR. BEISNER: They're being reversed but I don't think anything -- that there is any device that is being suggested to the trial court as how to do the right thing in these cases. I think the right thing is to put an implicit requirement in there that says, look to see if the same evidence applies to all of the class members. Think about the dilemma that if you certify a case and it goes to trial -- few of these have gone to trial, but my sense is that with defendants finally concluding that we're just going to go ahead and try some of these cases, you're going to have more of them getting to that point that you're going to leave with juries an intractable problem. I think in many of those cases the jury's going to say these claims are not the same, yet I am given a verdict form that says I have to render a yes-no verdict with respect to all members of this class.

MR. SCHREIBER: Can't you use subclasses? Isn't that part of the it?

MR. BEISNER: Not necessarily.

PROFESSOR ROWE: And issue classes?

MR. BEISNER: I don't think that's necessarily the case. Some of these are highly individualized that the court stop in saying, well, there's a common question, is the

product defective?

JUDGE CARROLL: But it doesn't stop there, particularly under some of these new decisions which require you to look at, for instance in Anders, issues of reliance and that sort of thing. Anders read to its most severe conclusion is you can't have a fraud nationwide class action and you can't have a RICO nationwide class action.

MR. BEISNER: I think that the signals are there from the appellate courts. I think that putting in the rule an explicit requirement that says you need to look at the evidence that is going to be admitted here is the only way for the court to protect the due process rights of both the plaintiffs and the defendant class members in these case.

JUDGE NIEMEYER: Okay. Thank you.

Mr. Flanary. Were you here when your partner was here?

MR. FLANARY: No, sir, I wasn't. I was in a hearing. I'm a working lawyer.

JUDGE NIEMEYER: I wonder if he's here.

MR. SCHREIBER: Probably means you don't make as much as your other partners.

MR. FLANARY: Well, you're right.

My name is Don Flanary and I'm a partner at Vial Hamilton. And I have over the past several years become more involved in these Rule 23 matters.

I was first approached about this hearing about three weeks ago and the past ten days I've been in depositions. That's part of the reason you don't have a written statement from me, for which I apologize.

But let me say that when I first was asked to give some thought to these matters the first thing I did was contact several of my clients, all of which had differing views on issues that I really wanted to talk about and raise what I consider to be positional conflicts of interest, if nothing else.

But there was an issue and there is an issue that concerns me. And I have seen it recently in Texas and I think we're going to see it in some upcoming litigation that we have wind of, and that is the cost-benefit matter and issue. It's interesting that recently a class action that's been settled here in Texas involving an insurance problem, an insurance matter. And the settlement is 30, $40,000,000. The individual relief for the individual class members is around five or $6.

JUDGE CARROLL: Is that the double zero case?

MR. FLANARY: I believe it is. I have had three people call me, all are which are friends of mine live in my neighborhood the past several days asking if they could object to that. And their complaint was that they were only getting five or $6 and there was 35 or $40,000,000 being paid

and millions of dollars of attorneys' fees being paid.

They are very concerned. One of them went so far as to contact the plaintiffs' lawyer and received back by Federal Express I think on two occasions documents and information. Thus far, more has been spent on Federal Express charges, probably four times or five times more in Federal Express charges of material to this man than his recovery.

MR. SCHREIBER: I don't understand your thought. Are you saying that a $30,000,000 settlement was too little, that it should have been 60, 90 or 120?

MR. FLANARY: No, sir, that's not what I'm saying. My thought is that as a matter of social policy or as a matter of policy, that it is a serious matter when we're spending the resource of the courts when you have very small negligible claims.

MR. SCHREIBER: But if the defendants paid 30 when he probably was sued because he probably ran away with 90 or 120, are you saying that the court should not try to get 30 back because --

MR. FLANARY: I'm not saying --

MR. SCHREIBER: -- somebody is only going to get $5?

MR. FLANARY: I'm not saying --

MR. SCHREIBER: Maybe he ought to give it to

charity.

MR. FLANARY: I'm not saying that the defendant ran away with 30, 90 --

MR. SCHREIBER: Why would a defendant pay $30,000,000?

MR. FLANARY: -- or whether the defendant ran away with anything.

MR. SCHREIBER: Why would a defendant pay 30,000,000 in a case where there's no liability?

MR. FLANARY: It may be that there's liability. It may be that the cost of the defense is sufficient. It may be that the attorneys' fees are sufficient to make it an economic decision for them. What I'm saying is I think there should be some relationship in the cost benefit -- and cost benefit for the amount of the individual claim and the certification of the class.

PROFESSOR ROWE: Would you weigh the individual claims in the aggregate when you're doing this cost benefit or a small individual claim against the total cost of the case?

MR. FLANARY: A small individual claim against the total cost of the case depending upon --

PROFESSOR ROWE: Isn't that an unfair balance?

MR. FLANARY: I don't think -- to me, the threshold is the problem, is the difficult part of these cases. If

it's clear early on that the case can be settled for a fair amount, then that's one issue. But if it's a complex case and the cost of preparation, the cost of defense, the cost of tying up the courts has no relationship to the individual value of the claims, I think that there should be some measure.

PROFESSOR ROWE: Wouldn't that give the defendants an incentive to run up the costs to establish that circumstance to then try to get the certification denied because --

MR. FLANARY: I don't think -- I don't think that's going to happen. I mean, I don't think that defendants are going to go out and run up costs.

PROFESSOR ROWE: It gets them off the claim.

MR. FLANARY: That's not been my experience. I suppose the defendant could go out and run up costs, but it's not been my experience. It seems to me that there should be some real value to an individual class member. I mean the -- what I'm hearing from the people and I -- from a lawyer's standpoint obviously it makes some sense, but from what I'm hearing from these individual claimants is, counsel, I've got a $5 claim here. What's this going to do to the cost of my insurance? What is this going to do with the way my policy is dealt with? And these are social -- these are policy considerations, I'll grant you, but I think they're valid. I

think they're real and I think they affect both the federal and our state court systems.

JUDGE ROSENTHAL: Would you feel better if your neighbor had received nothing but an injunction had been entered ordering the insurance companies to refrain from the practice in the future, the same attorneys' fees had been paid and it was done under (b)(2) instead of (b)(3)?

MR. FLANARY: No, ma'am, I wouldn't. No, I wouldn't. I think in terms -- and I'm not saying I don't think that the class action shouldn't exist for claims where they are some social policy or some public policy reasons. But in this case, most of the people -- I don't get very many calls from class members about wanting to object or having a problem with a class, but I did in this case and --

MR. SCHREIBER: How many calls did you get?

MR. FLANARY: I got three.

MR. SCHREIBER: How many members of the class were there?

MR. FLANARY: I don't know how many.

MR. SCHREIBER: May have been thousands.

MR. FLANARY: There are thousands.

MR. SCHREIBER: Hundreds, if thousands.

MR. FLANARY: There are.

MR. SCHREIBER: So you're suggesting that this committee make a decision on the fact that you got three

telephone calls out of possibly 300,000?

MR. FLANARY: No, sir, I'm not suggesting that. What I'm suggesting is this committee should consider, when looking at Rule 23, the cost benefit of the cost to the public and the cost to the courts in determining whether or not a class should be certified.

MR. SCHREIBER: Wouldn't you be on stronger grounds if you accepted Professor Rowe's suggestion that it's the aggregate, not the individual? Wouldn't that be a more balancing way of doing justice? Otherwise, it could be suggested that the defendants are doing things where as long as we keep it within $10 it doesn't make a difference how many thousands are affected. Wouldn't be better to use an aggregate approach?

MR. FLANARY: No, I don't think so. I don't think so.

PROFESSOR ROWE: Are you suggesting that private litigation should provide no remedy for the widespread small-scale ripoff in which pursuit of individual claims is not economically justified?

MR. FLANARY: No, sir, I'm not suggesting that. What I am suggesting is that certain claims are so small that there ought to be another remedy available. Rule 23 should not be used in those very small cases if the cost is going to be such that it's all out of proportion with the benefit.

JUDGE NIEMEYER: Thank you, Mr. Flanary.

Mr. Dyal? Are you Mr. Dyal?

MR. DYAL: Yes.

JUDGE NIEMEYER: Why don't we take you if you're prepared.

MR. DYAL: Good morning. My name is Alan Dyal and I represent Owens Winobay with respect to the proposed changes to Rule 23.

I first want to thank the members of this committee for allowing me the opportunity to come before you and share my thoughts as regards to the changes.

My comments this morning will more or less center around the new proposed paragraph (b)(4) which was identified in Judge Neimeyer's outline as change two. In sum, our views are that this committee should more or less postpone the public hearing and public comment period on change until after the Georgine decision. I'm aware, Judge Niemeyer, that you made the comment this morning that you will be considering all comments on May 1 and 2. But we feel that -- and more than likely the Supreme Court will probably not hand down that decision till probably sometime in May.

JUDGE NIEMEYER: You may be right and if they take Ahern, which seems to me presents clearly some of the issues that they have from the Adams case, it may turn out that it's more prudent for us to have a hearing. We're not set in

stone for the May date. The idea is that we have a large amount of testimony, we have a large number of comments. And at some point the committee has to start the debate and get organized on it. But I think your procedural point is well taken and I think we have to take under advisement that possibility.

MR. DYAL: That was really the essence of my comments. I know that Professor Issacharoff had made a comment early and also Mr. Baron about waiting for the Georgine decision to come down, but more or less my comments are centered on -- but the real point I want to address is more or less --

JUDGE NIEMEYER: That they defer to us. They don't do that but --

MR. DYAL: That's exactly. But my real concern is really having an opportunity to comment in light of the Supreme Court decision and here's why I believe the Supreme Court will, no doubt, you know, address some of these public policy concerns surrounding this issue.

JUDGE NIEMEYER: We can speculate on how the court's going to go and how it's going to fracture. This present court, I don't think, has had a class action matter and I wouldn't be surprised to see strange alliances.

MR. DYAL: There's one, I guess, example in history that I point to and this being the adoption of Rule 26 where

there was widespread controversy over the proposed changes to Rule 26 and more or less after the committee had satisfied its duty to publish Rule 26 or to propose Rule 26, the controversy was so severe that it announced the abandonment of the rule and then without further public comment six weeks later recommended the proposed rule to the standing committee and on to the Supreme Court. Justice Scalia in an opinion that I have here for the committee and happy to provide you with expressed grave concern or deep concern.

JUDGE NIEMEYER: We're familiar with that.

MR. DYAL: Exactly.

MR. SCHREIBER: He was in the minority, wasn't he?

MR. DYAL: It was Scalia and White.

MR. SCHREIBER: He was in the minority.

MR. DYAL: He was in the minority. You're correct, Mr. Schreiber.

JUDGE NIEMEYER: He was focused on the attorney-client relationship and whether attorneys are required to advocate for the opposition.

MR. DYAL: Yes, that's right. That's exactly right. That's it. Thank you very much.

JUDGE NIEMEYER: Thank you very much. We can take one more witness here for this afternoon. Yes, sir. Your name, sir?

MR. HILL: I'm John Hill. Could I perhaps --

JUDGE NIEMEYER: Yes, sir. Step forward and we'll hear from you.

MR. HILL: I do thank the panel for its indulging me. I do need to go back on a 2 o'clock plane so this is very helpful and I do appreciate it. I'll be very brief. I want cover two points.

I'm John Hill and I'm formerly chief justice of the Texas Supreme Court.

JUDGE NIEMEYER: Maybe we should ask you a lot of questions about your experience under the state class action process but --

MR. HILL: Well, we didn't have a lot of that because it's interlocutory appeal. I was very pleased with the Texas experience. I think we've -- we have this thing under pretty good control, particularly with the present Supreme Court being as vigilant as they are concerning the abuses that Mr. Baron was speaking about in terms of settlement of class actions. Judge Corning has written a fine opinion in that arena and the Supreme Court has recently taken a case where there was some pretty egregious alleged, at least, collusion and sent that back. So I think we're -- I don't like to put the Texas brag on this distinguished panel, and we're not always someone to watch as an example. We have had more than our fair share of problems about the administrative of justice in Texas. But in this particular

instance, I do think maybe we have something for you to look to with some confidence. And I do hope you will strongly support providing the parties to class action litigation, the right to an interlocutory appeal from the trial court order granting or denying for class certification and together with a right of stay of the trial court's proceedings while the class certification order is on appeal.

I think that will be very helpful in the federal system and I do hope that you will be able -- whatever happens to all of these proposals on the table, I happen to feel like that they're good and should be implemented.

I'm here to support them. But I do want to particularly focus on first the appeal points which I think is very, very important and hope that you will not let anyone take you off of that course. I don't see how anyone can argue about people's right to appeals. And you will certainly, I think, go a long way toward preventing the use of class actions as a tool to extort settlements. I think that these issues should be resolved early if there's not truly a right for class certification, and the sooner the better, and without denying the plaintiff any rights of appeal when he feels the shoe is on the other foot. But what's fair is fair and what's right is right. And that's a sacred right, the appeal, and I think it ought to be fully utilized in the federal system.

Secondly, I want to rise to speak to the proposition that we ought to allow a method of certification for settlement purposes, classes for settlement purposes. I think we can do that and do it in a way that will answer most of the criticisms that my good friend Mr. Baron has raised.

I personally hope that the Supreme Court will hold that the current version of Rule 23 permits certification classes for settlement purposes only. We're probably a long way from getting that final shoe to fall. But the prospect of such a holding, and I do hope that there is such a prospect from that appeal, it should not deter your work from recommending the adoption of Rule 23 (b)(3) which I do believe, once again, we need -- we're wise enough to know how to solve problems of unfairness, problems of fraud, problems of collusion, that sort of thing. That's what lawyers with fiduciary duties are for, that's what our ethics are for, that's what our trial courts are for, that's what discretion is for. Certainly we're capable of seeing that a settlement process is available on a class basis for moving a lot of these cases along. What are we going to do in the administration of justice if we just foreclose? I hear Mr. Baron saying he is out of sympathy with the use of class actions generally, and certainly out of sympathy with them for use of settlement purposes. We just have a philosophical difference of opinion. I believe that the overwhelming

majority of the bar believes that settlements, legitimate settlements done properly with proper notice, are one of the best ways to get a lot of our mass tort litigation under control. Goodness knows, there's a lot of it, and anything we can do to make it quicker and easier for people to receive legitimate compensation and at the same time not just bury our courts with case after case on an individual basis I think would be a good thing.

I'm open to your questions.

JUDGE NIEMEYER: Thank you, Justice Hill. Appreciate your coming to speak to us.

MR. HILL: Thank you very much for hearing me.

JUDGE NIEMEYER: Is there any other person who would like to be heard this morning before we go to lunch? We can take one more if we have someone who is brief.

MR. KRISLOV: Clint Krislov. You've got me up first thing this afternoon but I can go now.

JUDGE NIEMEYER: Sure. Why don't you come forward? This will be the last person this morning and then adjourn for lunch.

MR. KRISLOV: I am probably one of those rare beasts who has been with a lot of these people on this side, that side or the third side of these cases, so perhaps I can give you a slightly different perspective.

In my written submission I focus on the two things

that I think are really appropriate for this committee to deal with. I think that you had should pass up dealing with the Georgine, maybe Ahern, but certainly Adams issues at this point, because I think they will be decided on due process grounds. I think they could be decided on adequacy issues because the fact of the matter it seems to me, where you create -- where you file cases on behalf of one group and then deliver a non opt-out class crafted in Adams especially, crafted thereafter of everybody else, you have created questions of adequacy that the court can resolve and should resolve and could indeed do this under Federal Rule 23.

JUDGE NIEMEYER: Well, the Adams case is brought up out of the state courts so I wouldn't think there's a federal question. They're only going to interpret the rule, Alabama's rule.

MR. KRISLOV: Right. Except that Alabama, I'm sure, has an adequacy rule. I think Alabama's Rule 23 is identical to the federal rule. And so the analysis probably should come up under adequacy and maybe the Supreme Court can't deal with it in effect the federal level except under due process just because of the way it comes up. Nonetheless, there are -- it does bring up the two issues which I do think you should fix. Number one is a settlement question. I think you should establish a road map similar to the road map for class certification that lays out how the

district judge is to proceed in making that analysis requiring the inclusion of all parties, all counsel, both competing counsel within the jurisdiction and outside the jurisdiction. That gets you to another problem which is bubbling up which we have been trying to determine whether it's a committee issue or not, which is this sort of back-end aggregation of using Rule 23 as a means to pull the cases into federal court when they don't belong there or when they wouldn't get there without aggregating claims in one way or another. That I sort of reserved for my San Francisco presentation because we've been trying to muddle through how that should be -- canon should be dealt with by the court.

The road map I think helps because having been an objector more often than probably any other role in major cases, I have found that I would agree with Mr. Baron that the objector's role is a very difficult one. The district judges are certainly not -- are neither incompetent nor incapable, but the way that the matter comes up usually is pretty slanted from objectors. You never get paid if you don't change the settlement in some way. You will probably never get listened to, and it's very difficult. You're the least wanted person there. You are the one who is messing up this train which is headed in a direction and you're trying to derail it, and so nobody really loves having you there. Once in a while lightning strikes, as in Prudential in New

Orleans, we were able to block what we felt was an inadequate settlement. We forced the disclosure of a core document which showed core wrongdoing, and I actually started calling up oil companies to find out if they were interested in buying these interests if they were available and, indeed, on a phone call to an oil company, pretty daunting to find out somebody's willing to pay $500,000,000 for some interest in the ground not really a deal maker.

MR. SCHREIBER: Should the objector be someone who is basically more detached from the case? That is, very often objectors are people who brought their own class actions and basically feel they have been left off committees as such. If you're correct that the court needs an objective view, wouldn't it make sense, then, that the court appoint someone who can be objective and not have any material interest involved?

MR. KRISLOV: The concept of sort of a guardian ad litem, if you will, for the class is brought up at times but it's rarely effective. In Ahern I think there was one actually, and I'm not sure that -- you know, whether it's the incentive or the logistics. There is a real benefit to having counsel in there, whether it's with, you know, certainly the best of intentions, the most aggressive of intentions or the incentive of actually getting paid as well. And I can't tell you that although people certainly on the

defendants' side will tell you that the thing is based on the monetary motivation, the fact is you do want aggressive counsel. You want somebody who is going to get in there and bust things.

MR. SCHREIBER: How does the court make the decision that the aggressive counsel is trying to do good for the class or do good for himself?

MR. KRISLOV: The courts are able often enough, where there are competing objectors, are able to sift through and may pick one as a lead counsel. In Prudential in New Orleans, we suggested to the court that the court should, if you will, anoint a group and select lead counsel to pursue the objectors case. The court chose not to do that and so let a few different people raise points. That was less effective done that way and it resulted in duplication of efforts that you don't want to have occur. But the court can and I think should appoint an organization of objectors' counsel. That also deals with the problem you have people who voice objections that are sometimes not really well-posed and sometimes that are obviously done.

MR. SCHREIBER: How many cases have you been involved in where you were objector and have not been a class counsel, so to speak?

MR. KRISLOV: Most of them. Half a dozen.

MR. SCHREIBER: How do you come in if you don't

have a class?

MR. KRISLOV: When the settlement notice goes out somebody calls us on the phone and says, you know, this thing either -- in Prudential it was thick, it was obviously a prospectus for a roll-up. And somebody called me because I had been a tax lawyer and they knew that I do class actions. In other cases, in the Blue Cross one, which is in the state court in Illinois, somebody called up and said their parents got this sheet of paper and will they get anything out of it, is this fair. And so those very often -- also because I am known sometimes as being an objector counsel, we will get calls on those.

But it is equally true that there are cases where you have a competing case and the settlement, you know -- one thing I pointed out is this Dutch auction process. The settlement may be elsewhere and so you're going in and sure you are doing it. There is the factor to consider, you know, you got knocked out, but the mere fact of your getting knocked out generally doesn't get you anywhere. You have to find something that is fundamentally wrong with the settlement. And typically the "it ain't enough," "it ought to have been more" and "somebody else added in a case that we're in" and "we could have done it better," those typically get rebuffed pretty quickly. You really have to come up with something that is tight, to the point and a really

fundamental problem.

Usually you don't have much of an opportunity to do anything as an objector because if you get the notice, there's very little -- there's no discovery on file usually. You have to go through something that is sort of conceptually on the face of the deal. And so that typically is how we come into those.

The one thing this committee would do well is to create a procedure that the judge must follow, because they certainly do follow road maps really well, and that is -- you know, in the class certification process they religiously follow those four points. I mean you get tired of reading the decisions because you think, okay, save me. I already know what this is going to say. We can save 14 pages if we get to what the issue -- what the only real issue is in this case.

The second point I addressed is what I think is the dumbest rule that exists, the dumbest concept. This one would be on the Letterman show if there were nine others to go with it, is this concept that if you object but do not formally intervene, you can't appeal the approval of the settlement. When I explained to this Judge Livaudais in New Orleans, you mean if I don't allow your intervention then the only people who can appeal the approval of the settlement are the proponents, to which the answer is in the majority of the

circuits, yep. It makes no sense. In fact, in Prudential I did intervene and we blocked the first settlement. And that resulted in a lot of great things, we think a much better second settlement. There was an objector to that settlement who made a cogent argument below, judge didn't agree with him, he did not make a formal intervention and when he appealed the second settlement, the Fifth Circuit summarily dismissed his appeal. That, it seems to me, makes no sense.

And so what this committee could do and I think should do is regard objectors, certainly those who appear below, as parties to the litigation so that they can appeal. This is the trap for the unwary, and indeed you have plenty of objectors.

MR. SCHREIBER: Isn't there some way you can distinguish between -- I mean under your theory, anyone who comes in and objects has an automatic right of appeal, isn't that correct?

MR. KRISLOV: Yes.

MR. SCHREIBER: There could be hundreds of people objecting who have no real purpose and they can hold up a settlement for months or years.

MR. KRISLOV: That is -- as Mr. Baron would say, the reality is that there aren't hundreds who file an appeal. There aren't hundreds who put together briefs. There are typically one or two.

MR. SCHREIBER: Show up in every case?

MR. KRISLOV: No, no. I mean there are typically -- there may be typically people who show up as objectors in every case but they don't appeal every case. And certainly for those people --

MR. SCHREIBER: They can't appeal because in a sense they haven't intervened. They have just come in as an objector. Under your theory these people will have automatic right of appeal.

MR. KRISLOV: They are a member of the class and they participate as objectors below, then I think that they have done what's necessary to justify enabling them to appeal. We haven't seen -- even in Georgine we haven't seen -- and Georgine would be the case where that would occur, we haven't seen hundreds of people filing an appeal. The question --

JUDGE NIEMEYER: Have we covered it?

MR. KRISLOV: We have covered those. If I could address --

JUDGE NIEMEYER: One more minute.

MR. KRISLOV: One more minute?

JUDGE NIEMEYER: Yes, sir.

MR. KRISLOV: The heightened scrutiny I think we've dealt with. As an example, I suppose the worst part I have been class counsel in state courts in the three-way

litigation with the City of Chicago and Trustees Pension Fund and found that the courts sometime approve settlements where the class is against the settlement. Those things should never occur, and by providing a road map, you would prevent that.

The precertification discovery with a stay on an automatic appeal of the grant of certification makes no sense. Right now if the district court enters a judgment, you have to show something in order to obtain a stay for that judgment. It doesn't make sense that we will presume that in granting class certification the district judge was crazy or went off on a lark of his own.

And how to end the attorney competition was one thing that you had voiced, and that would be a requirement that all attorneys be invited to provide their opinions, their opinions be afforded meaningful review. And I think organization of counsel into an anointed objector class would help.

JUDGE NIEMEYER: I think we will close that out. I do appreciate hearing from you.

We will adjourn until -- let's try to make it 1:15, as close to 1:15 as we can, and resume and reach those who have not yet testified and who are listed.

(Afternoon session)

JUDGE NIEMEYER: We will begin the afternoon

session of this hearing.

We will hear from Mr. Oldham.

MR. OLDHAM: Thank you very much. I'm Dudley Oldham and I'm with Fulbright & Jaworski in Houston, but I'm also here today speaking on behalf of a group known as Lawyers for Civil Justice. That's a group consortium of three of the national defense trial organizations, the Federal Association of Insurance and Corporate Counsel, and Defense Research Institute, The International Association of Defense Counsel and then numerous Fortune 500 companies that are part of that consortium, so I speak for that group in my comments.

JUDGE NIEMEYER: Except for Ford. They were here. I think they're Fortune 500.

MR. OLDHAM: They were, in fact. And I think I wish I had been here this morning and heard Mr. Martin's comments. I also came in after Mr. Baron's comments, and Fred and I had class action matters here in Dallas way back. And, in fact, in those lead cases that he had, he had a state class certification and a federal certification and it was only after we were able to decertify both the state class and the federal class that we were able to move forward in those cases. And I suspect that over the years Fred has been most often an objector to classes. I suspect that his thinking has perhaps turned some since that time 15 years ago and I

would like to have heard his comments at this point.

My comments will be brief. I know the committee has heard from a lot of individuals and a lot of points of view, but the focus that I want to have is on 23(b)(3) exclusively and not on the other issues. There is not unanimity on those other issues from my group.

The opportunity to have public comment on these proposed rules at all is really very refreshing and encouraging and I appreciate very much and our organization does the willingness of the committee to move these proposed rules into the public forum comment process.

PROFESSOR ROWE: The Supreme Court has told us that we have to.

MR. OLDHAM: I think it's a wonderful thing to do that. And it's been since '66 since there's been really truly introspective reflection on Rule 23. And back when that rule was put in place, I was coming out of law school, and that's when product liability was just beginning. Some of the things that have happened in the ensuing 30 years were not even on the minds of any drafters or practitioners at that point and it's very healthy, I think, to take a look now at 23 and what has happened since that time and now what it is being applied to in the class action device that is being used now and whether it's achieving the kind of goals, and in the minds of many it is not.

Specifically two or three comments and then I will be open to any questions you may have. I don't believe, and neither does LCJ believe that Rule 23 should be applied to mass torts at all. It has simply been a situation in which there has been much misuse in that area and --

JUDGE NIEMEYER: How would you define a mass tort?

MR. OLDHAM: A mass tort I would believe would be disparate claims involving numerous individuals that need to be adjudicated on an individual basis.

JUDGE NIEMEYER: How would you define a mass tort?

MR. OLDHAM: There are many definitions I could --

JUDGE NIEMEYER: If you say it shouldn't apply to mass torts, and I don't know whether it's feasible to define in any reasonable sense, you could just say in the statute we exclude mass torts in the rule, couldn't you?

MR. OLDHAM: You could.

JUDGE NIEMEYER: Then you would have to have something in mind?

MR. OLDHAM: Cases and courts are talking in terms of the broad term mass torts, but I agree with you that the definition of what is and what is not a mass tort is a difficult thing to put to paper. But I do believe that the analysis of that process, the continuation of this thought may come up with some bases to give courts more strict guideline in the handling of what we would generally term as

mass torts in this class action process vehicle. I think it has been misused and that there could be a better method by looking at the proposed amendments that you all have proposed here in (a) and (b) where you have -- you're making a statement if these rules get promulgated that individual claims are being given preference over class claims if those claims can stand on their own merit. I believe that's an important principle, that courts need to have, I think, that additional backbone, if you will, to be able to take it from the opposite point of view, the emphasis on the other syllable that if the claim can stand alone, it should stand alone.

The maturity aspect that is introduced into these rules under (f), I think it is very well stated in terms of what I would call the mass torts. If the cases and the claims have been adjudicated and the scientific knowledge has been developed to the point where there is certainty about liability issues, then the claims are more properly used at that point for mass resolution perhaps.

I don't want to speak toward the settlement class issue because, as I mentioned, there is not unanimity in the group that I speak for. But there could be a vehicle for that if further analysis could come up with a proper method to permit that sort of resolution mechanism. But it is felt by some that on the settlement cases, that detracts from the

overall interest of looking at Rule 23 to determine whether it should be pared back to more appropriate usage rather than the widespread usage in the last ten years and the usage in areas in which we felt the original drafters in '66 would have never imagined that would have been taken into.

Those are the principal bases of my comments and I think I will probably leave it there. I have submitted a statement that I would submit for the committee's reflection. And we very much appreciate the opportunity to be before you and to submit comments and we will submit further comments before the process is concluded.

JUDGE NIEMEYER: I thank you, and not only in response to your comments but to all the others, I can say on behalf of committee the testimony and the comments have been very enlightening and educating. And you wonder if you keep hearing this problem out, whether you can actually come to a solution that everybody would buy into. I keep hoping for that type of thing, but my colleagues tell me it's not possible.

MR. OLDHAM: It's probably not possible to get something that everyone would buy into, but bits and pieces of these things I think will fall in place to improve the rule and improve the system. And that's what we're all seeking I think from different points of view, but the respect for the system, both within our profession and the

public respect for the system I think is what we're overall trying to achieve here. And there has been some misconception in the public about what we're about in some of these areas of resolution. PROFESSOR ROWE: If I could ask a question, one or two quickly. You spoke favorably of the maturity factor that is introduced as one of the new factors, but you also said that you thought that (b)(3) shouldn't apply to mass torts at all, if I heard you correctly. I wondered if -- doesn't the maturity factor actually apply well to the mass tort situation? You spend a good deal of time litigating individual cases and then if there are a lot of -- especially if there are a lot of plaintiff victories, you may be ready to say, okay, we can at least resolve some common issues in class litigation.

MR. OLDHAM: That's very true, and I don't mean to be on both sides of the fence here, but consolidation of action is one way to approach that issue without having class action. And back again on Mr. Baron's prior litigation that I had some years ago, that's how we were able to achieve that. We couldn't have done it on a class action basis back then but we could do it on a consolidation basis. And the experience there -- I know I've talked with Fred a lot about this over the years, the issue is, I think, that if we pared back 23 from mass torts and had each of those cases looked at on their individual merit, we'd be better served by that.

The maturity factor, I don't think, mitigates against that. The maturity factor I think is important whether or not we have the complete writing out of mass torts in Rule 23. Being realistic about that, that would be a large jump for the committee, but it could very well occur. If it is not, then the maturity factor in beefing up that may be a very helpful addition to moving toward that process.

I think the main theme I want to leave with the committee is to keep this process going. It's now been 30 years since a really close analysis of 23 and it will be several years before 23 is looked into again. And the attention of the committee is focused on 23 now and it would be a lost opportunity not to really take every advantage of making it as good a rule as we can have given the current state of litigation in the country.

JUDGE NIEMEYER: Thank you, Mr. Oldham.

MR. OLDHAM: Thank you very much.

JUDGE NIEMEYER: Mr. Chesley.

MR. CHESLEY: Thank you for the opportunity to openly almost debate as well as my comments already filed.

I disagree with Mr. Oldham but we also appreciate the opportunity of being heard and being able to put our thoughts forward. And as Judge Niemeyer provided for us, I would like to follow his format, which is that various changes and discuss it along the line change one, two, three,

four and five.

I have been involved -- this is of great interest. I have been involved in complex mass tort and product class action litigation in the role of class counsel and lead counsel since 1977. And they have been both federal and state courts, both in cases that have been multidistrict and cases that have not.

The following are the concerns I have on change one, (b)(3)(A). The additional -- the addition of practicability of individual class members to pursue their claims should not be included as a primary consideration in determining whether a class action is a superior method for the fair and efficient adjudication of the controversy presented. In many (b)(3) class actions class members do have the ability as a practical matter to individually litigate.

The more relevant inquiry is whether or not class members have an interest in and the desire to individually litigate. If class members elect to proceed by a class action, it would be important to deny them the opportunity to do so upon the basis that class members are capable of proceeding individually. Further including practicability as a certification consideration provides the opposing party with a very easy argument through which to defeat class certification.

One of the most relevant situations which I can submit as an example is the Bowling heart valve litigation which has even been commented -- that's the open-ended settlement, even commented favorably in the Third Circuit, it's a Sixth Circuit case, favorably by Judge -- I've forgotten, I think it's Judge Becker in Georgine. It was a class of more than 50,000 valve recipients worldwide was certified for settlement purposes of the claims. The claims of the class members all centered up a particular heart valve manufactured by Shiley, Incorporated and Pfizer, Inc. which was allegedly defective in that the valve had a propensity to fracture. All class members had identical causes of action.

The injuries actually suffered fell into several distinct categories. Damages, of course, differ. A large number of class members had the practical ability of pursuing individual litigation. However, due to the complexity and expense of proving liability, more than 90 percent of the class desired to move forward in a class action. And the class action ultimately proved to be the most efficient and practical manner in which to resolve these claims. Also leaving the -- as an open-ended with no cap whatsoever for fractures and for explanation.

Further, the equitable relief obtained through the Bowling settlement, such as diagnostic research, was extremely important to the class members and could not be

accomplished through individual litigation, nor could medical monitoring which we've seen in the Fernald litigation.

Under (b)(3)(C) the maturity of related litigation concerning the controversy already commenced by or against members of the class would be a relevant inquiry. The maturity of any related litigation, irrespective of the subject matter of the controversy, may not be relevant. For example, we could have a mature case where company A is suing their insurance carrier relative to a question of coverage. Is that point meant for maturity for purposes of the individual who later wants to bring a cause of action?

The cause of action set forth in related litigations may be far different from those which are alleged in a class action suit. The maturity of such differing causes of action is not a proper issue, we believe, for consideration when determining class certification.

JUDGE NIEMEYER: Maybe we need to define maturity in the rule better. I guess we tried to in a note. The mature issue is intended to inquire or provide as a factor a question of whether the law and the science has evolved to a point where it can with a certain amount of confidence be applied to the class action context.

MR. CHESLEY: I understand that, but one of the concerns we have is that -- I understand the concern relative to the premature tort, the tort that is premature. But if a

case has been around the courts for five or ten years and that becomes the criterion as to whether or not a class action -- because there is a presumption here under your maturity, in my opinion, that a class action is not a good way to try a case. For example, in our Copley case, we tried it for 32 days as a total class action, mass tort, Judge Bremmer, and settled on the 33rd day of trial. And while that was an immature tort because it was a contamination of a drug, a generic drug, that didn't make it valid that people -- 6,000 people would have to wait until five, six or ten cases were tried throughout the country.

JUDGE NIEMEYER: See, the fact that it was contaminated seems to me a fairly -- that would be a fairly mature concept. That's a -- if you take the breast implants which a lot of people point to as an example of something that hasn't been developed, the question is whether there is any science or law that establishes liability at this point. That presents a different type of a problem than a case where you have a contaminated drug which is a fairly -- goes back to old English common law, that may not be so typical. I think the point being, is that when you put so many eggs in a basket, you want to have a higher degree of confidence and this is one way of getting at it, I think.

MR. CHESLEY: All I'm suggesting is that 10 or 15 trials does not necessarily determine, nor can you wait

for the --

JUDGE NIEMEYER: It doesn't.

MR. CHESLEY: -- epidemiology nor can you wait because the argument under maturity will be we better wait for epidemiology and the epidemiology on breast implants, something that I'm familiar with, is not there yet, and we're going to have this argument on science and peer reviewed articles and who has the most peer reviewed science and the whole gatekeeper. But I'm suggesting that can be done in a class action environment with good lawyers on both sides and that class action can determine causal issues, common issues.

JUDGE NIEMEYER: It can. Then you may determine a whole industry through one six-person jury.

MR. CHESLEY: Unfortunately that happens whether or not you have a class action or not.

JUDGE NIEMEYER: Sometimes it does, sure.

MR. CHESLEY: It can go the other way. It can cause that same effect, and there are many, many cases in which six-person do make a difference as to a particular product.

If I can just continue on?

JUDGE NIEMEYER: Go ahead.

MR. CHESLEY: I appreciate what you're saying about maturity, but it does concern us because what's the definition. That's a subjective standard. Is it mature

enough, one case, five cases. If you have a million breast implants in the marketplace a judge -- a district court judge could be held to say, well, I've got to see at least 50 trials before I think it's mature enough to have a class action. So thousands of people may be sitting in the wings waiting for that 50th case. And if the defendant settles all 50 of those cases on the courthouse steps, you never get to maturity because nobody has ever tried a case. Breast implant is phenomenal. For example, there have been thousands of cases settled but less than 50 or less than 30 tried, yet because most of the cases that get to the courthouse steps have been settled, particularly with several of the manufacturers.

If I might continue on? And I appreciate this opportunity. Class certification decisions are typically made at a very early stage of the litigation. This is under (b)(3)(F), still change one. It is usually very difficult, if not impossible, to determine the probable relief to which class members will be entitled and the costs of the litigation in a (b)(3) class action. At the time of class certification it is impossible to know whether or not the litigation will be resolved through settlement prior to trial or if trial will be necessary. If trial is needed, the cost increases dramatically. From a practical standpoint, any argument made as to this factor would be extremely

speculative. Certification should be neither granted or denied upon the basis of that speculation.

Under change 2(b)(4), current request -- and we are in favor of that. A request for certification for settlement purposes is subjected to a more rigorous judicial scrutiny than certification of a (b)(3) class for litigation purposes. Yet the resolution of class actions through settlement are judicially favored. Obviously these two concepts are contradictory and the stricter scrutiny standards may present a roadblock to resolution.

As a practical matter, the proposed amendment addresses a need and facilitates settlement. Concerns have been raised as to whether -- by some of the naysayers on this point, as to whether the amendment may set the stage for collusion between class counsel and defendants. Yet it must be remembered that every proposed settlement must be approved by a court and must be found to be fair and reasonable.

In addition, prior to approving a settlement, the court can easily conduct a collusion inquiry should allegations arise. And recently allegations of collusion have become a favorite objection for objectors to a settlement and very rarely is collusion actually found to exist.

Under change 3(c)(1), the change in language from as soon as practicable to when practicable is

counterproductive, in my opinion. It is not common practice in most class actions to decide motions to dismiss and motions for summary judgment prior to certification. If the courts decide such notions prior to certification, the decision is res judicata as to any claims but those of the named class representatives. A decision so early in the proceedings do not benefit the court or the parties filing such motions for closure cannot be accomplished. Further, the majority of discovery usually does not take place until subsequent to class certification and those motions for summary judgment are premature prior to certification, in many cases until class certification discovery is stayed as to all issues except for certification issues.

Also as a practical matter, many direct court local rules require a speedy certification decision. This could be changed. The only benefit derived from such change would be to courts which have a history of certification decisions.

Finally, this change in language does nothing to encourage precertification negotiations. In the first instance, precertification settlements are rare. If settlement is a possibility the delay in certification process does not promote speedy resolution and we think flies in the face of the proposed class action for settlement purposes.

Change 4(e), the proposed language change is

burdensome and unnecessary. In many class actions the suit is not dismissed upon settlement. And here I'm not sure the notes are totally clear. More typically the court retains jurisdiction to administer the settlement and the case remains open until final distribution. The way we read the note or I read the note, it indicates that there would have to be a hearing on either a dismissal or a settlement. There's always a settlement or a fairness hearing for settlement and there has to be a hearing. To conclude the case, it becomes concluded when the settlement is final through the courts of appeal. To have another notice proposal and another hearing to dismiss it at that time, if that's the intention, I think that would be costly and burdensome. If the intention is to have a hearing before you can dismiss a class action, that likewise I think is very costly to notice, particularly in a national class case. It's very costly. I would urge the committee to review this particular point on a special hearing on dismissal. As indicated this would constitute an unnecessary cost and would not be expedient for the court or the parties since you have to publish -- just as an example, if you use USA Today one publication notice is $26,000 just to give an example.

Change 5, and I'm just about finished, (f), the proposed rule is inherently unfair and unnecessary and defeats the primary purposes of class action, efficiency and

expediency. An order denying class certification is already considered final and appealable.

PROFESSOR ROWE: Excuse me. Hasn't the Supreme Court decided that the other way, that denial of class certification is not final, is not appealable, that that doctrine was rejected in Coopers & Lybrand vs. Lipsig?

MR. CHESLEY: It's my understanding an order denying class certification is considered final and appealable.

PROFESSOR ROWE: My understanding is to the contrary.

MR. CHESLEY: I'll bow to you. I'm sorry. But let me go to my -- currently the granting of class certification may be questioned by filing a writ of mandamus. I think I have a typographical here and I apologize. The concern that we have is the granting of class certification by making an order of certification immediately appealable as an interlocutory order, a delay of 12 to 18 months in most circuits or more is guaranteed before a decision is rendered by a court of appeals. It is irrelevant whether or not jurisdiction remains with the district court, for as a practical matter, the parties and the court will not want to move forward and continue the litigation for such an extended period of time. It would simply be a waste of time and money to move forward when the possibility of reversal exists.

There is -- I have been involved in many personal situations where courts have are granted interlocutory, and for the most part -- for the most part, district courts are reticent to move forward on any part of the litigation while it's pending in the appellate court, just a fact of life. Courts are very, very busy, and would just as soon handle other cases that are not tied up in a court of appeal than go forward on a case that is tied up. And I can only speak for our circuit, the Sixth Circuit, Judge Niemeyer, I cannot speak for your circuit, but it's 18 months before you would get a decision.

JUDGE NIEMEYER: We're much quicker.

MR. CHESLEY: The Fourth Circuit rocket docket. I compliment you.

JUDGE NIEMEYER: I'm actually just pulling your leg. The Sixth Circuit is a fine circuit.

MR. CHESLEY: Thank you. Lastly -- point I'm making, I believe that the interlocutory appeal would tie up the situation and lengthen the process.

And last, I would like to question the finding of the Federal Judicial Center that the median class member recovery has been 315 to $528 in (b)(3) class actions. I think that's probably true if you look at the securities. But I think a better analysis would be to take a look and divide this between the tort cases and the securities cases.

JUDGE NIEMEYER: They looked at all cases within certain districts. And if you look at the data, I -- we're not here to defend or not. That's a separate group and it's data on which we based some of our findings and information that we considered.

MR. CHESLEY: I mean, I don't want to fault --

JUDGE NIEMEYER: They did a pretty thorough job in certain pilot districts for a given period.

MR. CHESLEY: I don't want to fault statisticians and I'm not suggesting that it's not accurate. The point I'm trying to make is I believe that the reason why there is so much focus on a particular media attention and the media outrage on the class action is this statistic. And I can speak as someone that has seen tremendous benefit in the mass tort field, tremendous benefit to claimants who would never otherwise have an opportunity to have a case. In the Chubb Drought Insurance case, every farmer received a hundred cents on the dollar plus attorneys' fees were paid separately. In the Fernald litigation where there was final justice, there is no way to look at the therapeutics in this statistic either. For example, if you have a medical monitoring to 14,500 people in the Fernald case, in which they found so far six breast cancers that would have never been detected, I don't know how you put a dollar value. That's my concern is when you focus on that type of statistic. I'm not critical

of the panel, please don't misunderstand. I'm just saying that the statistic needs to be divided between the tort cases and the nontort.

And final, I think that -- I compliment the hard work that has been done. I think the class action tool has been used and has been used properly. I think courts are there to monitor, continue to monitor, and when the district court doesn't monitor, that the courts of appeals are not shy, as witnessed in some of the recent decisions. Having been the recipient of some rather harsh language in one court of appeals decision, I think that court of appeals was correct in saying it that the district court was too quick in granting class certification. But I believe it's an important tool and I believe that the competency of the federal and the state judges that utilize that tool, I don't think that there needs to be too much change in the rule, because one of the final comments I would make is when you use words such as maturity or when practicable, you're putting a new subjective standard for the trial court to use, and frankly I believe that could be a message to prevent classes from being certified rather than encouraging certification in moving of cases.

JUDGE NIEMEYER: Thank you, Mr. Chesley.

MR. CHESLEY: Thank you.

JUDGE NIEMEYER: Mr. Maloney.

MR. MALONEY: Good afternoon. My name is Pat Maloney. I'm a partner with the Chicago law firm of Tressler, Soderstrom, Maloney & Priest.

Today I'm here to talk to the panel in my capacity as president of Defense Research Institute. DRI's headquarters are in Chicago. Our membership consists of over 20 -- almost 21,000 individual defense lawyers in this country. And in addition to that, we have approximately 350 corporate members. So my comments very much come from the side of the defense lawyers' point of view.

Our group handles these cases regularly. I expect that our membership has been involved in probably every class action that's been filed in this country. We have been following the suggested rule changes all along and have had several committees appointed to do so. Based on that committee's report, based on this advisory committee's report, we had a board meeting in Chicago last October. Our board consists of 39 individual members, including the presidents of the other three national defense lawyer organizations, and is virtually, I would call it, a who's who among the defense lawyers in this country. We spent an entire Saturday afternoon after having received our committee's report in anticipation of submitting comments on the proposed changes. And as a result of that discussion, I was authorized to submit the comments to this committee which

I did. And I'm going to be brief here. I don't want to go through all our comments.

Basically, as you could tell from our comments, we are very much in support of the suggested changes in Rule 23(b)(3). If I could for just one minute, I would like to talk about three areas that I think are most important to us.

One, we agree with the committee's efforts to encourage the court, the trial courts, to reflect carefully on the advantages of individual litigation before simply certifying classes that include claims it would be sufficient to support an action of their own.

Secondly, and I don't know if I can get into a definition of mass torts on this with you, Judge Niemeyer, but we are concerned with the question of whether Rule 23 wasn't really intended for resolution of what we would call mass torts. And I guess when I think of mass torts, in our practice, for the most part, it involves product liability cases and the drug and medical device litigation. And I know the Sixth Circuit recently said that there seems to be a national trend in those types of cases anyhow, the products liability and the drug and medical device cases against class certification. So we would like to see this committee come forward with some very affirmative comments that this area of quote mass torts are not appropriate for resolution under Rule 23.

JUDGE NIEMEYER: What is the difference between one of those mass torts and a mass tort based on misrepresentation made nationally?

MR. MALONEY: Fraud type case? Without a specific example, I don't know. I can just tell you the ones that I've been involved in, these class actions involving torts, for the most part, quite frankly, the lawyers are the beneficiaries and not the litigants. And I say that knowing -- telling you that our office has defended those cases. When a case like that come in, you look at it, you know there's very little individual dollar benefit of the plaintiff.

JUDGE NIEMEYER: The asbestos cases, there's been a fairly significant amount for each claimant, hasn't there?

MR. MALONEY: Well, not really. I mean a lot of the pleural cases, you know, are not. And some of those cases the judge just says let's just wait to see if it develops into another disease. So I'm not really sure about that.

PROFESSOR ROWE: On mass torts, I'm wondering if there isn't a division among the defense bar because some of them like the availabilty of the class actions for the settlements.

MR. MALONEY: That's exactly right. And I can tell you my organization, when we had this debate on that Saturday

afternoon in Chicago, we spent a good amount of the time on the question of settlements. And as an organization we are not here to make a statement on that because there is a division among our membership on that, that's correct. That's basically a client diversification.

PROFESSOR ROWE: I'm wondering if in the mass tort like, say, a product defect or say general causation in asbestos when there has been an issue about whether a condition can result from asbestos exposure, if you're saying that the use of the class action perhaps for such an issue determination, leaving, of course, individual damages for possible individual or smaller group litigation, are you saying that for that kind of diverse mass tort that a class action would not be appropriate to use it for a common issue?

MR. MALONEY: I think there's other avenues available such as consolidation of common discovery, but when it comes to the trials, I think your causation issues are individual and, in my experience, massively expensive for the clients and for the courts. It just weighs down the courts.

PROFESSOR ROWE: Consolidation can't get a general settlement, say, of a product defect issue. It's only good for those people filed who in the -- actually individually filed.

MR. MALONEY: I agree with that.

PROFESSOR ROWE: And I understand that

consolidation works well in a good many cases. We've been hearing that and I understand it. But if you want to get a generally binding ruling on an issue that cuts across the whole range of the cases, isn't it true that consolidation doesn't do it and a class action does?

MR. MALONEY: That's assuming you want a general binding ruling, which I guess I'm speaking against in those cases where causation is an individual matter.

PROFESSOR ROWE: There's general causation and there's specific causation.

MR. MALONEY: There's medical issues involved in every one of those cases that I think are individually oriented.

PROFESSOR ROWE: But many of these issues are individually oriented and some of them cut across the entire class. Whether asbestos can cause a particular condition at all, and if the answer is no, then there's no liability for that condition. If the answer is yes, then you have individual causation questions that do get adjudicated differently. I'm trying to focus on the -- if I hear you right, you're saying disbursed mass torts, class action never. I'm saying wait a minute. Aren't there some common issues sometimes? Yes, I grant there are individual issues that may take different adjudication, but aren't there some common issues sometimes for which class treatment is the only

way to get a generally binding ruling which may be warranted?

MR. MALONEY: None that I think would predominate over the other issues. I hear your comments. I think in my experience and based on --

PROFESSOR ROWE: You can adjudicate it separately as an issue class.

MR. MALONEY: Pardon?

PROFESSOR ROWE: You can adjudicate it separately as an issue class.

MR. MALONEY: I've seen that happen where the courts get involved into breaking out subclasses of plaintiffs, subclasses of defendants. Basically it's distorting what Rule 23 is anyhow. It's not really fitting it into the definition as Rule 23 has it.

JUDGE NIEMEYER: All right. Thank you.

MR. MALONEY: The only other comment is -- If I could just a second, on the appeals, it seems our organization feels strongly that there should be some meaningful way of appealing from a certification issue so that the parties don't waste all that time between the certification and either not appealing because there's so much expense involved and it forces a settlement, and I don't believe the delays are an issue that we should have to consider in terms of fairness.

Thank you very much.

JUDGE NIEMEYER: Thank you, Mr. Maloney.

Mr. Sweet? Mr. David Sweet?

Mr. Ashley, Luke Ashley.

MR. ASHLEY: Good afternoon. My name is Luke Ashley. I'm a shareholder with the law firm of Thompson & Knight here in Dallas, Texas. I appear here this afternoon as an individual practitioner, was requested to attempt to get on the program by some people with the Texas Association of Defense Counsel. And I guess part of the reason that I was asked to do that is because of experience that I have had during the course of my practice in the mass tort area.

In my statement, which I hope the committee has had a chance to read, I tried to focus on what I think is an often insoluble Constitutional barrier to proceeding with class certification in at least certain types of mass tort cases.

What I would like to address for a few minutes here today is a little bit more of the practical problems in the specific proceeding, the seminal proceeding that I have been involved in as appellate lawyer for slightly over five years now. And I think that the interesting thing about -- and the important thing about the seminal proceeding that was a consolidation -- combination consolidation and class action proceeding that Judge Parker in the Eastern District of Texas put together in an attempt to dispose of the asbestos cases

that had been clogging the docket there.

And he tried to come up with a trial plan that would enable a proceeding, him to use that proceeding to determine the common issues or issues that he felt were common to the cases in -- that he was aggregating, and then use those findings and combine that with other procedures to proceed to judgment on the individual claims.

And what happened in there is I think illustrative of just why Rule 23 is inappropriate for class action certification as a vehicle for disposing of or aggregating disbursed mass tort claims. And what he did was he had a phase I trial that consisted of a trial on the common issues of -- the allegedly common issues of product defect, whether the products themselves were defective, because of a failure to warn. And then liability for punitive damages, whether the manufacturers of those products, their conduct constituted gross negligence.

And then he had a multiplier, a blind multiplier assigned by the jury to be then used later on to award punitive damages when another jury determined the individual damages for a -- for one of the sample class members, as they were known. What he did was he tried the individual cases of 10 class members and these common issues in that proceeding.

Once that phase of his -- the proceeding was completed, he was going to have a trial on general causation,

if you will. And that is rather than having a determination of whether exposure to these products at a particular worksite caused harm to a particular individual, the jury was going to be asked to determine whether there was sufficient -- whether the defendants' products were present on a worksite in sufficient quantities to have caused harm to some members of a particular trade or class that were working on those particular worksites during particular decades.

And for reasons that I won't into go there actually was a stipulation that disposed of that phase of the proceeding, but it was stipulated by the defendants there that a jury would have found that there was enough product for some members, but they refused to stipulate, of course, that any particular member of a class -- of the class who had worked at that worksite during that decade actually was harmed by such exposure.

Then what he did was in a phase III trial before two different juries, he tried 160 -- actually had hearings on 160 individual claims. And in that case the defendants were not allowed to litigate the question of individual exposure, whether this particular plaintiff, member of the 160 group, actually had been exposed to the defendants' product and had been exposed or to go into any of the details of exposure to anybody's product.

JUDGE CARROLL: Did Judge Parker do anything else

but handle these cases while all this was going on?

MR. ASHLEY: This proceeding took approximately -- the actual trial phase of the proceedings took almost a year to go through this. And he instructed the jury with the 160 that they were to assume that each one of these people had sufficient exposure to asbestos to have caused any asbestos related disease despite the fact that asbestos disease is a response thing, the more you get, the more likely it is that you have a condition that's caused by asbestos and the more likely the more serious that condition will be.

Then what he did was then extrapolate from those to the additional 2,000 members of the class in the disease categories, the five disease categories that the plaintiffs' attorneys designated these people, and each of them received a judgment for the average jury award in that particular category.

So what you see in this instance is that the determination in phase I of the trial, that a particular product was defective and the determination in the phase I trial, that that product caused harm to one of the ten phase I plaintiffs, really doesn't answer the question of whether that particular product caused harm to anybody else within the class. You also see that when you try to lift, if you will, or get around the problem of having to litigate whether a particular member of a class was actually harmed by his or

her particular exposure to asbestos, you end up not being able to litigate that at all. It is impossible to actually determine in any meaningful fashion whether that person actually was exposed to a particular defendants' product, whether that exposure actually caused them harm.

The other thing that happened, I think, is that when you separate out, or attempt to separate out the punitive damages element of that and you make a general finding that these defendants engaged in conduct that was sufficiently bad to constitute gross negligence, you have a jury at one end of the proceeding in phase I saying that defendant A ought to pay one, two or three times the amount of actual damages awarded to each of the plaintiffs that come along later as punitive damages. And yet that jury has no way to know or no way to assess how much that's going to be. And it also seems to me that the jury back at the end that's making the actual damages award, either they don't know that they are also determining punitive damages in those circumstances, and have no control over that, and no jury really is able to put that together. No jury knows how much is being awarded in punitive damages.

And there are a number of other issues like that that cropped up throughout this proceeding because what Judge Parker did was go through this and then he actually recused himself and Judge Shell literally spent the next two years

trying to tie up all the loose ends and come up with a way to solve the other problems with individuals' issues, such as comparative causation in these individual cases in order to fashion judgments in these cases.

And what I tried to point out in my statement is this problem, which has Constitutional dimensions in gasoline products doctrine, which has practical dimensions just in trying to get through all of the issues exists in any -- in most, if not all, of these mast tort situations. And as a result of this, my experience has convinced me that there just isn't any way to cram that into a Rule 23(b)(3) proceeding. And as I say in my submission, that's why I take issue with the suggestion in the commentary that these changes in the language of the rules will somehow make a difference or make it more appropriate to certify a (b)(3) class in a mass tort situation than it is now. I don't think that changes in the rule that are proposed do anything to solve those substantive problems which exist and a suggestion that now it's more appropriate to try to apply Rule 23(b)(3) to the mass tort situation is not a warranted commentary and that should be eliminated.

JUDGE NIEMEYER: Thank you very much, Mr. Ashley.

Mr. Carrell, Mr. Richard Carrell.

Mr. Sweet, David Sweet.

I think everybody who signed up to testify has

testified and I do appreciate your --

MR. McGUIRE: Your Honor, Bart McGuire.

JUDGE NIEMEYER: All right. Come forward. Somehow you got knocked off my most recent list. I don't know what you did to cause that to happen but --

PROFESSOR McGUIRE: It was on the list that was faxed to me.

JUDGE NIEMEYER: I'm sorry.

Is there anybody else who signed up that hasn't been heard? All right. This will be the final person to be heard then.

PROFESSOR McGUIRE: Thank you, Your Honor. My name is Bart McGuire and I'm a recovering litigator for 25 years before moving to central Oregon. I represented defendants in class actions, and now as a law professor I teach complex litigation and write about class actions with I hope a degree of objectivity. So your recommendations are of real interest to me. I don't envy you the task of synthesizing all of these comments, but I like your recommendations and I'll mention four of them as counterweight perhaps to some of the opposition that you've received and then go on to a topic of interest to me that I hope will become of interest to you.

The first of the four is proposed Rule 23(b)(4) which deals with settlement classes. That proposal makes sense to me for all of the reasons discussed in your advisory

committee notes. And it would overturn the Third Circuit's decision in Georgine, which is good. In response to Professor Rowe's question about the Supreme Court taking Georgine, you may want to take the court's ruling into account in making final your recommendations, but that ruling will be based on the current Rule 23, and I wouldn't think that that would in any way preclude you from amending Rule 23 where clarifying it.

JUDGE NIEMEYER: If they said it wasn't clear, if they said something else, it might be a little heavy-handed to reverse the Supreme Court.

PROFESSOR McGUIRE: I think you could amend the rule.

JUDGE NIEMEYER: We could amend the rule.

PROFESSOR McGUIRE: That would simply be an interpretation of the existing rule and just --

JUDGE NIEMEYER: I understand. But they may rest it on issues beyond. It may be on justicability, standing, Constitutionality.

PROFESSOR McGUIRE: Of course.

JUDGE NIEMEYER: There could be a lot of reasons, and then you always get the pragmatic question that in some conceptual sense we are an arm of the court and removed a couple of steps, but we're an arm of the court and for us to just say the court misconstrued and we're going to reverse.

Now, if they invite it that's another question. I say this only as a prophylatic that you may be right in a certain sense. They do invite the committee to study these things and to make further recommendations and clarifications on rules.

PROFESSOR McGUIRE: That's why I suspect it makes sense to wait until they rule before you decide on this. But it could well be that basically they did an interpretation of the current rule insofar as the Georgine court says that the Rule 23(b)(3) standards of predominance and superiority need to be applied. And I think even the Georgine case said, gee whiz, we're stuck with the rule as it is and maybe --

JUDGE NIEMEYER: Georgine, Georgine sort of said it's subject to change.

PROFESSOR McGUIRE: Sure. They, in fact, invited you to consider changing it.

The second provision, which I think is a good one, is Rule 23(f) allowing appeals from class certification decisions. That seems to me to be a very helpful safety valve, particularly when it's limited to the discretion of the court of appeals.

Third is the change to Rule 23(c)(1) from the as soon as practicable to when practicable. That change would give the district courts a degree of flexibility that at least some court have held that they don't have, and I think

it would be very useful.

Fourth, and perhaps most important, is the recommendation that the court should consider the maturity of related litigation. Judge Niemeyer, you've talked about the definition of maturity. I go back to the Manual for Complex Litigation which says that maturity is established when prior litigation shows that plaintiffs' claims have merit. That's a different part of the rule when you -- of the manual when you quote it, but a number of courts have picked up on that. And I think that derives from Professor McGovern's research and writing back some years ago.

That really brings me directly to the question of preliminary assessment of the merits. And we may be getting to some extent into the issue you were just talking about, of cross-roughing with the Supreme Court, because obviously the Supreme Court said in Eisen that such assessments were precluded by Rule 23. That was dictum but it was a pretty strongly worded dictum. And yet my experience in my incarnation as a litigator was that the best judges often peeked at the merits. And my research as a law professor indicates that looking at the merits is far more widespread than I or I suspect most lawyers would have anticipated.

JUDGE NIEMEYER: You know, we had this proposal on the table and received a fair amount of testimony or comment about it during our committee hearings and debates and found

that plaintiffs' lawyers and defendants' lawyers alike in the end did not like a look peek at the merits. And they may have said that for the same reason, I'm not sure whether they both said it for the same reason. But the worry was that you end up trying the whole case to some extent to which the parties might be bound on a preliminary basis and any support evaporated for a change in that area so we just didn't go ahead with it. But I'm interested in hearing what you have to say.

PROFESSOR McGUIRE: Well, there are several responses to that, I think. One is that it goes back to something the Professor Rowe said this morning that controlling the proceedings on a preliminary assessment on the merits is very much a case of management process and within the power of the judge, you do it, district judges do it all the time in the preliminary injunction context where again, you take a look at the merits of the case on a preliminary injunction basis, frequently under substantial time pressures, and that doesn't seem to have been a terrible problem.

Another element of that is that if the proceeding is somewhat controlled so you don't try the whole case under the guise of the class action --

JUDGE NIEMEYER: How can you control it if you're going to look at the merits? What each side is going to say

legitimately is the stakes are pretty high. As a matter of fact, the stakes are mighty high. We've never seen stakes higher, they will say, and we would like to have discovery on this issue before the court looks at the peek, so what you do is -- end up doing is inverting the case.

PROFESSOR McGUIRE: Well, I think you can do it in several ways. And I think courts do it to a considerable extent today. My research, as I say, says that the courts have taken looks at the merits with respect to every element of -- some courts with respect to every element of Rule 23(a) with respect to predominance and particularly the superiority requirement of Rule 23(b) and with respect to Rule 23(b)(1)(B), and in the contest of settlement classes.

JUDGE NIEMEYER: Maybe we don't need a change.

PROFESSOR McGUIRE: No, because there is tremendous strife among the courts, tremendous splits, some say we're bound by Eisen, we can't do this. Some courts say we look at certain things and not at other things. There are conflicts. I have written an article that just got published in the FRD last week, which I sent a copy to members of the committee. And, you know, many -- the splits among the courts, mostly at the district court level but also at the circuit level, are very substantial in this area and everybody briefs Eisen in any event in every case and argues it and judges have to decide it. And my suggestion is that you could avoid that by

putting the rules imprimatur on what a great number and increasing member of courts are already doing. That would avoid the conflicts that you have among the courts, that would avoid the time that is spent on this and leave you going back to you question how the district courts can control it. How do you control it in the preliminary injunction process? It is frequently by --

JUDGE NIEMEYER: You don't. If you've been through a lot of those cases --

PROFESSOR McGUIRE: Oh, I have.

JUDGE NIEMEYER: -- you know that they go night and day and the attorneys -- the only constraint is that we're going to have a hearing next Monday --

PROFESSOR McGUIRE: Exactly.

JUDGE NIEMEYER: -- and so the attorneys work around the clock until next Monday and get as much as they can get.

PROFESSOR McGUIRE: Absolutely.

JUDGE NIEMEYER: That ought to be enough when you're talking about a class action.

PROFESSOR McGUIRE: One of suggestions made by the Department of Justice back about 12 years ago -- more than that, I'm sorry, was that you put a time limit of 120 days in their rule. That's a good deal more than you have in the preliminary injunction context which is frequently driven by

the TRO provisions, having a TRO in place, and yes, I mean it's a really tough job for the lawyers. But the problem, I think, is that without that you have the spectacle that this committee has commented on, both in your notes and in the minutes, that you have settlements in class actions that are really undirected that frequently do not reflect the merits either at all or to any significant degree, and that's most class action, because most class actions settle. And if you gave the court an opportunity, the district court, to make an educated assessment based on, granted, a less than complete record, but not a stupidly short record, then you would have guidance for the parties in settlements, and I know that was one of the concerns that was expressed that there might be implications for the future of the litigation. So be it. If there's a strong claim out there and the district judge says, I see it's a strong claim, then that claim is much more likely to be settled on a basis that reflects the strength of the claim. And you can imagine the people like Mr. Baron, for example, being able to come in if there was what was considered to be an inadequate settlement and say, look, the district court said that this was a very strong claim and the settlement is five cents on the dollar.

On the flip side of that is the concern that many defendants have that for weak claims, they're essentially bludgeoned into a settlement. If you don't certify a class

because the judge says that it's a very weak claim, then you don't have that problem so much. And even if the judge certifies a class, says, you know, this is really a close one, I really struggled with this one and I think whatever the test was of substantial possibility of success or something, and I would like to come back to the test, because I'm suggesting a different one than the ones that you've considered. But whatever the test was, it's barely satisfied, and that can be a guidance to the parties in the case. I think you would have settlements that would much more significantly reflect the merits of the case.

There was also concern expressed about the real world implications of a decision of this kind. Well, it's very hard to get accurate information in the real world about class actions that are pending. Auditors basically can't get much information from the lawyers unless the lawyer says we are going to win or lose summary judgment, lawyers would be able to get information, security analysts, corporate directors would be able to get information and do their jobs better if there were objective assessments by courts out there that say something about the merits of the cases.

JUDGE NIEMEYER: When you play poker, neither side wants the other side to know the other's hand if he has to disclose his own.

PROFESSOR McGUIRE: But that's been a problem --

JUDGE NIEMEYER: Rather than just play it out. It's a little -- what I sensed I heard from the bar during our -- the people who are practicing under this rule, that they sort of didn't want to have that early determination.

PROFESSOR McGUIRE: I'd put it to you that that's not the way we ought to be resolving litigation, and I've heard this from lawyers in settlement negotiations in class actions. You start to talk about the merits and they say, look, we're never going to come to an agreement on the merits of this thing so let's just talk about the practicalities, which are, you know, that going to a jury is a crapshoot, and everyone can get stung and the sensible thing to do is settle this on the basis of the amount in controversy with a discount of some kind applied to that and we never -- we never even talk about the merits, so I think that's troublesome.

JUDGE NIEMEYER: Okay.

PROFESSOR McGUIRE: May I just mention that the --

JUDGE NIEMEYER: Yes.

PROFESSOR McGUIRE: May I just mention the rules that you were talking about the various incarnations of it in 1995 or early 1996 really had two parts to it. One said that if there was going to be an assessment of the merits that there had to be an assessment of merits of some kind of balancing process or whatever, to satisfy Rule 23(b)(3). And

then that in reaching that conclusion you looked at probability of success on the merits.

I would not suggest that a look at the merits is something that has to be satisfied. I would suggest that it simply be part of the superiority analysis under Rule 23(b)(3), and that you use a somewhat lesser standard than the probability of success that was used, something like substantial possibility of success, or what the Supreme Court itself said in General Telephone against Falcon which was substantial evidence.

JUDGE NIEMEYER: How do you preclude the parties from litigating the entire case under the superiority question?

PROFESSOR McGUIRE: I think that is a question of management by the district court. I think district courts do that all the time today in making their rulings, at least the ones who are willing to look at merits issues in connection with the predominance requirement and in connection with the superiority requirement. It happens by a lot of district courts today. Look at whatever you think of the Kalonk decision, perfectly clearly that was based on a few of the merits in related litigations.

JUDGE NIEMEYER: Thank you, professor.

All right. I again want to thank you all for coming. We will stand adjourned until January 17 in San

Francisco. See you there.

I N D E X

SPEAKER:	PAGE
SPEAKER STEPHEN GARDNER	4
RICHARD A. LOCKRIDGE	22
PROFESSOR SAMUEL ISSACHAROFF	28
PROFESSOR CHARLES SILVER	40
MR. JOHN MARTIN	51
MS. CLAUDIA WILSON FROST	59
MR. JOHN HENDERSON	67
MR. HENRY B. ALSOBROOK, JR.	73
MR. JOHN BEISNER	97
DONALD H. FLANARY, JR.	104
MR. ALAN DYAL	111
MR. JOHN L. HILL, JR.	114
MR. CLINTON A. KRISLOV	117
MR. D. DUDLEY OLDHAM	127
MR. STANLEY M. CHESLEY	133
MR. PATRICK E. MALONEY	146
MR. G. LUKE ASHLEY	153
PROFESSOR BARTLETT H. McGUIRE	159

C E R T I F I C A T I O N

I, Joe Belton, certify that during the proceedings in the foregoing hearing I was the official Court Reporter and took in stenograph notes such proceedings and have transcribed the same by computer as shown by the above and foregoing pages 1 through 170, and that said transcript is true and correct.

This the 2nd day of February, 1997.

U.S. DISTRICT COURT REPORTER
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

- - -

PUBLIC HEARING:

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE
RULE 23

- - -

SAN FRANCISCO, CALIFORNIA
JANUARY 17, 1997

- - -

THE HONORABLE PAUL V. NIEMEYER, CHAIRMAN
UNITED STATES CIRCUIT JUDGE

REPORTED BY: SARA LERSCHEN, CSR #6213, RPR, RMR, CRR

COMPUTERIZED TRANSCRIPTION BY XSCRIBE

ADVISORY COMMITTEE ON CIVIL RULES

CHAIR:

HONORABLE PAUL V. NIEMEYER
UNITED STATES CIRCUIT JUDGE
UNITED STATES COURTHOUSE
101 WEST LOMBARD STREET, SUITE 910
BALTIMORE, MARYLAND 21201

MEMBERS PRESENT:

HONORABLE ANTHONY J. SCIRICA
UNITED STATES CIRCUIT JUDGE
22614 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19106

HONORABLE DAVID S. DOTY
UNITED STATES DISTRICT JUDGE
670 UNITED STATES COURTHOUSE
110 SOUTH 4TH STREET
MINNEAPOLIS, MINNESOTA 55401

HONORABLE C. ROGER VINSON
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
100 NORTH PALAFOX STREET
PENSACOLA, FLORIDA 32501

HONORABLE DAVID F. LEVI
UNITED STATES DISTRICT JUDGE
2504 UNITED STATES COURTHOUSE
650 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE
8631 UNITED STATES COURTHOUSE
515 RUSK AVENUE
HOUSTON, TEXAS 77002

HONORABLE JOHN L. CARROLL
UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
POST OFFICE BOX 430
MONTGOMERY, ALABAMA 36101

ADVISORY COMMITTEE ON CIVIL RULES (CONTINUED)

HONORABLE CHRISTINE M. DURHAM
JUSTICE OF THE UTAH SUPREME COURT
332 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

PROFESSOR THOMAS D. ROSE, JR.
DUKE UNIVERSITY SCHOOL OF LAW
BOX 90360
DURHAM, NORTH CAROLINA 27708

CAROL J. HANSEN POSEGATE, ESQUIRE
GIFFIN, WINNING, COHEN & BODEWES, P.C.
ONE WEST OLD STATE CAPITOL PLAZA
SUITE 600
P.O. BOX 2117
SPRINGFIELD, ILLINOIS 62705

FRANCIS H. FOX, ESQUIRE
BINGHAM, DANA & GOULD
150 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110

LIAISON MEMBERS PRESENT:

SOL SCHREIBER, ESQUIRE
MILBERG, WEISS, BERSHAD, HYNES & LERACH
ONE PENNSYLVANIA PLAZA, 49TH FLOOR
NEW YORK, NEW YORK 10119-0165

REPORTER:

PROFESSOR EDWARD H. COOPER
UNIVERSITY OF MICHIGAN LAW SCHOOL
312 HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

SECRETARY:

PETER G. MC CABE
SECRETARY, COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE
WASHINGTON, D.C. 20544

I N D E X

TESTIMONY OF:	PAGE
MORNING SESSION	
PATRICIA STURDEVANT	8
BEVERLY C. MOORE, JR.	14
NICHOLAS J. WITTNER	20
ERIC GREEN	28
LEWIS H. GOLDFARB	37
ELIZABETH J. CABRASER	45
C.C. TORBERT, JR.	58
ARTHUR D. MILLER	63
CHARLES F. PREUSS	81
LEONARD B. SIMON	86
SAMUEL B. WITT	94
JOHN L. MC GOLDRICK	98
SHEILA L. BIRNBAUM	106
JOHN ALDOCK	118
JOHN W. STAMPER	126
RICHARD WENTZ	130
JAMES J. JOHNSON	138
JAMES R. SUTTERFIELD	144
JEFFREY J. GREENBAUM	148
AFTERNOON SESSION	
MILES N. RUTHBERG	157
STUART BAIRD	165
STEPHEN B. RINGWOOD	174
WILLIAM A. MONTGOMERY	178
JOSEPH GOLDBERG	186
GERSON SMOGER	189
BRIAN C. ANDERSON	201
ROBERT DALE KLEIN	209
STEVEN M. KOHN	215
DONN P. PICKETT	219
JAMES N. ROETHE	225
CLYDE PLATT	234
JOSEPH TABACCO	248
WILLIAM M. AUDET	256
JOHN L. COOPER	266
LAWRENCE B. SOLUM	274
ALFRED W. CORTESE, JR.	280

FRIDAY - JANUARY 17, 1997 8:30 A.M.

HONORABLE PAUL NIEMEYER: GOOD MORNING. I'M GOING TO CALL THE THIRD HEARING ON CLASS ACTION RULE 23 TO ORDER. AS ALL OF YOU HERE ARE AWARE, LAST AUGUST, WE PUBLISHED FIVE PROPOSED CHANGES TO CLASS ACTION RULE 23.

THE FIRST CHANGE ARE CHANGES TO 23(B), DEALING WITH THE FACTORS TO BE CONSIDERED IN WHETHER A CLASS ACTION IS SUPERIOR OVER OTHER FORMS OF ACTION. THERE ARE THREE CHANGES WITHIN THAT ONE, THREE DIFFERENT FACTORS.

WE HAVE THE CHANGE WHICH ADDS SETTLEMENT CLASSES AS A MATTER FOR CONSIDERATION IN CERTIFYING A CLASS, 23(B)(4).

WE HAVE THE CHANGE WHICH PROVIDES FOR A HEARING ON A CLASS ACTION WHENEVER PRACTICABLE, CONFORMING MORE WITH THE PRACTICE THAN THE ORIGINAL RULE, WHICH SAID "AS SOON AS PRACTICABLE."

WE HAVE THE INTERLOCUTORY APPEAL OF CLASS ACTIONS, UNDER A FORM THAT PARROTS LIGHTLY 1292(B).

WHAT'S THE OTHER CHANGE? AND WE HAVE THE REQUIREMENT THAT ON THE SETTLEMENT AND COMPROMISE OF CLASS ACTIONS, THERE BE A HEARING.

WE HAVE HEARD A LOT OF TESTIMONY ON THIS. IT HAS BEEN ENORMOUSLY CONSTRUCTIVE. THERE HAVE BEEN A LOT OF SUGGESTIONS. A LOT OF PROBLEMS CAN BE POINTED OUT. I CAN BE CANDID IN SAYING TO YOU THAT SOME OF THE PROBLEMS POINTED OUT ARE QUITE WELL TAKEN.

WE PLAN TO RECEIVE THIS EVIDENCE AND TO RECEIVE ALL THE WRITTEN COMMENTS BY FEBRUARY 15. AND THEN WE'LL HAVE A MEETING IN FLORIDA ON MAY 1 TO REACT TO IT. THE COMMITTEE WILL SPEND ESSENTIALLY THE ENTIRE MEETING CONSIDERING IT.

AS YOU KNOW, THE SUPREME COURT TOOK TWO CASES, ONE FROM ALABAMA, WHICH THEY HEARD, AND IT LOOKS NOW THAT THEY MAY NOT EVEN GET TO THE MERITS OF WHAT THEY TOOK IT FOR. IT WAS A CLASS OUT OF THE STATE SYSTEM, AND THEY TOOK IT UNDER CONSTITUTIONAL FOURTEENTH AMENDMENT DUE PROCESS ISSUE OF WHETHER YOU CAN PRECLUDE OPTING OUT ON DAMAGE CLASSES. FROM WHAT I HEARD INDIRECTLY, THE JUSTICES WERE TROUBLED ENORMOUSLY BY THE FACT THAT THAT ARGUMENT HAD NOT BEEN MADE TO THE SUPREME COURT OF ALABAMA, SO WE MAY NOT GET ANY ENLIGHTENMENT FROM THAT CASE.

AND THEN, OF COURSE, THEY TOOK THE GEORGINE CASE OUT OF THE THIRD CIRCUIT WHICH WILL BE HEARD NEXT MONTH, AND DOES ADDRESS THE ISSUE OF SETTLEMENT CLASSES.

FOR MY OWN PURPOSES, I THINK IT WOULD BE IMPRUDENT FOR THE COMMITTEE TO PROCEED WITH ANYTHING FINAL WITHOUT HAVING HEARD FIRST FROM THE SUPREME COURT. SO, WHILE WE ARE PLANNING TO DISCUSS THIS AT OUR MEETING IN MAY, I THINK IT WILL BE THE COMMITTEE'S WILL, ALTHOUGH I HAVEN'T POLLED THEM, TO CERTAINLY HEAR FROM THE SUPREME COURT BEFORE WE TAKE ANY FINAL ACTION. WE WILL THEN PROCEED FROM THERE, DEPENDING ON HOW IT WORKS.

BUT I CAN SAY TO YOU THE MATERIALS THAT WE'VE RECEIVED ARE QUITE A COMPENDIUM ON CLASS ACTIONS, AND I WAS JUST TALKING

THIS MORNING TO THE STAFF ABOUT THE POSSIBILITY OF PUTTING IT TOGETHER IN A FORM THAT WOULD BE USEFUL TO THE PUBLIC. THERE IS A LOT OF RESEARCH; THERE IS A LOT OF COMMENT; A LOT OF INSIGHT INTO THE CONCEPT. THERE IS A LOT OF HISTORY. AND IT MAKES FOR INTERESTING READING. I HAVEN'T FINISHED ALL THE READING ON IT, BUT I INTEND TO COMPLETE IT ALL BEFORE WE MEET. AND I HAVE READ A LOT OF WHAT YOU'VE SUBMITTED. OF COURSE, I'VE ATTENDED ALL THE HEARINGS.

WE HAVE A FULL SCHEDULE TODAY. WE HAD 35 WITNESSES TESTIFY IN PHILADELPHIA; WE HAD 20 TESTIFY IN DALLAS. AND TODAY WE HAD OVER 40, CLOSE TO 50 AT ONE POINT IN TIME, SCHEDULED TO TESTIFY. WE ARE SCHEDULED TO MEET HERE FROM 8:30 TO 5:30. WE HAVE AN HOUR FOR LUNCH AND TWO BREAKS, A MID-MORNING BREAK AND A MID-AFTERNOON BREAK, 15 MINUTES EACH. YOU CAN DIVIDE UP THE TIME.

AND RECOGNIZE THAT IF WE'RE GOING TO HEAR FROM YOU, WE CAN'T GIVE YOU A LOT OF TIME. THE PLAN IS TO ALLOCATE TEN MINUTES TO EACH PERSON. AND THERE ARE A FEW OF YOU, OR A FEW OF YOUR FIRMS, WHO TESTIFIED AT OTHER PLACES. AND WE HAVE WRITTEN YOU AND SUGGESTED -- NOT SUGGESTED -- I THINK WE HAD TO MANDATE THAT WE'RE GOING TO LIMIT YOU TO FIVE MINUTES. I THINK YOU CAN MAKE A CASE THAT YOU'VE HAD YOUR SHOT. BUT I THINK IT'S IMPORTANT TO GET AS MUCH INPUT AS WE CAN GET. AND IF THOSE PEOPLE WHO HAVE TESTIFIED ALREADY HAVE SOMETHING FURTHER TO ADD, WE SHOULD HEAR IT, AND WE'LL GIVE YOU FIVE MINUTES TO DO THAT.

SO WITHOUT ANY FURTHER EXPLANATIONS, WE'LL ALL BE AROUND DURING THE BREAKS AND DURING THE LUNCH HOUR, AND WE'LL ALSO TRY TO ACCOMMODATE SCHEDULES, TO THE EXTENT THAT WE'RE AWARE OF THEM AND HAVE BEEN INFORMED.

WE'LL JUST GO DOWN THE LIST. AND I DO HAVE A COUPLE OF SPECIAL REQUESTS, WHICH I'LL HONOR. AND MAKE YOUR NEEDS KNOWN TO MR. RABIEJ, OUR SUPPORT, AND I'LL TRY TO MAKE FURTHER ADJUSTMENTS, AS APPROPRIATE.

LET'S BEGIN WITH PATRICIA STURDEVANT. IS SHE HERE? YOU CAN MAKE YOUR COMMENTS FROM THE PODIUM HERE IN THE FRONT.

INCIDENTALLY, WHILE SHE'S COMING UP, I HAVE A LIST THERE AT THE PODIUM OF THE FIVE CHANGES. I'VE CATEGORIZED THEM; FIVE CHANGES. AND THEY'RE ROUGHLY IN THE ORDER I GAVE THEM TO YOU. ACTUALLY, I REVERSED THE HEARING REQUIREMENT, BUT YOU'RE WELCOME TO REFER TO THEM AS CHANGE ONE, TWO, THREE, FOUR, FIVE, OR HOWEVER.

WE'LL HEAR FROM MS. STURDEVANT.

TESTIMONY OF PATRICIA STURDEVANT

MS. STURDEVANT: GOOD MORNING, LADIES AND GENTLEMEN. I VERY MUCH APPRECIATE THE OPPORTUNITY TO ADDRESS YOU THIS MORNING, AND I SUBMIT MY REMARKS ON MY OWN BEHALF, AS A CLASS ACTION LITIGATOR WITH 20 YEARS EXPERIENCE, AND ON BEHALF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, OF WHICH I AM THE GENERAL COUNSEL.

THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NACA,

IS A NONPROFIT ORGANIZATION OF CONSUMER PROTECTION ATTORNEYS, INCLUDING LAW STUDENTS, LAW PROFESSORS, LEGAL SERVICES ATTORNEYS, AND PRACTICING ATTORNEYS. IT CAME INTO EXISTENCE JUST A COUPLE OF YEARS AGO, AND ITS MISSION IS TO PROMOTE CONSUMER JUSTICE.

I AND NACA'S MEMBER ATTORNEYS HAVE A REAL INTEREST IN THE PROPOSED CHANGES, PARTICULARLY THE ONE DEALING WITH SMALL CLAIMS CLASS ACTIONS, BECAUSE THE CASES THAT I HAVE HANDLED IN MY CAREER, BOTH ON BEHALF OF LOW-INCOME PEOPLE, AS A LEGAL SERVICES ATTORNEY FOR THE FIRST TEN YEARS, AND AS A PRIVATE PRACTITIONER ON BEHALF OF CONSUMER CLASS MEMBERS FOR THE LAST TEN YEARS, ALL OF THESE CASES, AND ALL OF THE CASES BEING HANDLED BY MOST OF OUR MEMBER ATTORNEYS, WOULD NO LONGER BE ELIGIBLE FOR CLASS TREATMENT IF THAT NEW PROPOSED AMENDMENT IS ADOPTED.

THEREFORE, WE STRONGLY OPPOSE IT. IN OUR VIEW, IT IS EXACTLY THAT KIND OF CASE WHERE INDIVIDUAL RECOVERIES ARE SMALL, BUT THE AGGREGATE AMOUNT OF MONEY IS LARGE, WHERE CLASS ACTIONS ARE SUPREMELY APPROPRIATE.

THE PROPOSED AMENDMENT, WE THINK, IS BASED ON A FLAWED ASSUMPTION AND LOOKS --

HONORABLE PAUL NIEMEYER: YOU'RE TALKING 23(B)(3)(F)?

MS. STURDEVANT: YES, I AM, SIR. IT LOOKS IMPROPERLY AT THE AMOUNT OF THE INDIVIDUAL RECOVERY, INSTEAD OF LOOKING AT THE AGGREGATE DAMAGES TO THE CLASS.

IT ALSO, WE THINK, IS IMPROPER TO FOCUS ON THE AMOUNT OF ATTORNEYS' FEES, BECAUSE THE AMOUNT OF FEES IS REALLY DETERMINED, IN LARGE MEASURE, BY FACTORS THAT ARE OUTSIDE OF OUR CONTROL. ATTORNEYS' FEES ARE LARGE IN THESE CASES BECAUSE DEFENDANTS MAKE THEM EXTREMELY DIFFICULT AND EXTREMELY COSTLY TO LITIGATE, AND BECAUSE, IN SOME INSTANCES, COURT CALENDARS ARE SO CONGESTED THAT A CASE MAY BE SET FOR TRIAL FIVE OR SIX TIMES BEFORE YOU ACTUALLY GO.

SO, THE APPROPRIATE INQUIRY, WE THINK, IS TO LOOK AT THE AMOUNT OF HARM IN THE AGGREGATE, THE AMOUNT OF PROFIT TO THE DEFENDANT FROM THESE WRONGFUL PRACTICES, NOT THE AMOUNT OF THE RECOVERY TO THE INDIVIDUAL.

BUT EVEN IF YOU LOOK AT THE AMOUNT OF THE RECOVERY TO THE INDIVIDUAL, A FEW DOLLARS OR A FEW HUNDRED DOLLARS IS NOT TRIVIAL. THE CLIENTS THAT I REPRESENT, AND THE CLIENTS THAT MOST OF OUR MEMBERS REPRESENT, TEND TO BE LOW-INCOME PEOPLE. THEY DEAL WITH FINANCE COMPANIES.

HONORABLE PAUL NIEMEYER: IS THERE A WAY WHERE WE COULD DESIGN A RULE THERE OR MODIFY THE RULE WHICH WOULD PRESERVE THE CLAIM YOU'RE DESCRIBING, A PERSON IS INTERESTED IN A SMALL AMOUNT, WHO, ECONOMICALLY, COULD NOT PROSECUTE THAT CLAIM ALONE, NEEDS THE AGGREGATION, BUT BY WHICH WE COULD FERRET OUT THE CASE WHERE A DISTRICT JUDGE WOULD SAY, AS MANY PEOPLE HAVE COMPLAINED ABOUT, THAT THE ACTION REALLY IS BROUGHT ALMOST SOLELY IN THE INTERESTS OF THE ATTORNEYS' FEES AND NOT FOR THE

CLIENTS?

WE HAVE BEEN TOLD THERE ARE SUCH CASES, AND IT'S ALWAYS DIFFICULT TO GET TO THAT TYPE OF INTENT. I GUESS THE QUESTION IS: IS THERE SOME WAY TO DRAFT WHERE WE CAN PRESERVE ONE AND NOT THE OTHER?

MS. STURDEVANT: I THINK THE RULE, AS IT EXISTS, ALREADY CONTAINS THAT PROTECTION.

I'VE ALSO HEARD RUMORS THAT CASES ARE BROUGHT SOLELY FOR ATTORNEYS AND THEIR OWN SELF-INTERESTS. I THINK IT'S THE OBLIGATION OF THE COURT, IN MOVING TO CERTIFY A CLASS, TO LOOK AT THAT QUESTION. AND WE WOULD NOT FAVOR -- IN FACT, WE'VE CONSIDERED OPPOSING CLASS SETTLEMENTS WHERE IT APPEARS THAT THE RECOVERY TO CLASS MEMBERS IS DWARFED BY THE FEES.

HONORABLE PAUL NIEMEYER: HOW DO YOU IDENTIFY THOSE CASES WHERE YOU HAVE STEPPED IN AND SAID, "WE OPPOSE THE CERTIFICATION ON THIS CASE BECAUSE IT'S NOT A WELL MOTIVATED CASE"?

MS. STURDEVANT: WE HAVE NOT DONE THAT. BUT UNDER CALIFORNIA LAW, THERE HAVE BEEN CLASSES WHICH HAVE BEEN DENIED CERTIFICATION WHERE THE INDIVIDUAL RECOVERY WAS TRULY TRIVIAL, A FEW CENTS, AND THE COST OF DISTRIBUTING IT WOULD MAKE THE CASE IMPRACTICABLE. SO, THE SAME THING HAPPENED IN GEORGINE.

THERE ARE A NUMBER OF CASES WHERE CLASS CERTIFICATION SETTLEMENT APPROVAL HAS BEEN DENIED. AND IN ONE OF THE ITT CASES, BEAUSHAY (PHONETIC), A SETTLEMENT WAS PROPOSED THAT WOULD

GIVE COUPONS TO EVERY INDIVIDUAL WHO BORROWED, AGAIN, FROM A FINANCE COMPANY AND PURCHASED WORTHLESS POLICIES OF CREDIT INSURANCE. AND THE FEES IN THAT CASE WERE PROPOSED TO BE 26 MILLION. THE RECOVERY TO THE CLASS MEMBERS WAS ILLUSORY, AND THE COURT REFUSED TO GRANT CERTIFICATION, REFUSED TO APPROVE THE SETTLEMENT.

SO I THINK THOSE PROTECTIONS ALREADY EXIST. AND WHAT'S EXTREMELY TROUBLING ABOUT THE PROPOSED NEW RULE IS THE VIEW THAT SOME RECOVERIES ARE TRIVIAL, WHEREAS, TO A LOW-INCOME PERSON, A FEW DOLLARS OR A FEW HUNDRED DOLLARS IS OF ENORMOUS SIGNIFICANCE, BOTH ECONOMICALLY AND BECAUSE IT GIVES THAT PERSON A FEELING THAT HE OR SHE HAS A STAKE IN THE SYSTEM AND CAN OBTAIN JUSTICE. SO, I THINK THE CURRENT RULE ACCOMPLISHES THAT RESULT AND DOES NOT NEED TO BE CHANGED.

I'D ALSO LIKE TO SAY THAT WE DISAGREE STRONGLY WITH THE NOTION THAT IT IS CLASS ACTIONS WHICH ARE THE PROBLEM. THE PROBLEM THAT WE SEE IS THAT BIG BUSINESS PREYS ON LOW-INCOME CONSUMERS.

THERE IS A WONDERFUL BOOK PUBLISHED JUST WITHIN THE LAST FEW MONTHS. IT'S CALLED MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY. IT'S EDITED BY MICHAEL HUDSON AND PUBLISHED BY COMMON COURAGE PRESS. AND IT DOCUMENTS THE SEEMLY UNDERSIDE OF AMERICAN FINANCE, THE WAYS IN WHICH LARGE CORPORATIONS ARE VICTIMIZING LOW-INCOME PEOPLE IN A VARIETY OF CONTEXTS, IN RENT-TO-OWN, IN PAWN SHOPS, IN SECOND

MORTGAGES, IN FINANCE COMPANY ABUSE.

THAT IS THE PROBLEM THAT WE SEE. AND IT'S OF ENORMOUS DIMENSION. AND IT'S ONLY THE CLASS ACTION LAWSUIT THAT ENABLES LOW-INCOME CONSUMERS TO OBTAIN ECONOMIC JUSTICE. IT'S A VERY POWERFUL VEHICLE. IT HAS ACCOMPLISHED SOCIAL CHANGE. IT HAS CHALLENGED UNLAWFUL PRACTICES IN A VARIETY OF CONTEXTS, INCLUDING FINANCE COMPANY FRAUD, INSURANCE PACKING, OVERCHARGES ON CREDIT CARDS, WHEN PEOPLE PAY LATE OR EXCEED THEIR CREDIT LIMITS, AND A WHOLE VARIETY OF THINGS, WHERE INDIVIDUAL RECOVERIES ARE SMALL.

IN THE LATE AND OVERLIMIT CHARGE CASES WHICH I LITIGATED, THE INDIVIDUAL RECOVERIES WERE FROM $3 TO $50. BUT IN THE AGGREGATE, THOSE CASES RETURNED $20 MILLION TO CLASS MEMBERS, AND WOULD BE AND ARE APPROPRIATE CLASS ACTIONS.

HONORABLE DAVID F. LEVI: IT'S BEEN SAID THAT SUCH SMALL CLAIMS SHOULD BE HANDLED BY ADMINISTRATIVE AGENCIES, AND THAT IS WHY THEIR RESPONSIBILITY IS TO CONTROL SOME OF THIS ACTIVITY.

THE WITNESS: THAT'S PART OF THE REASON WHY I'M GLAD TO BE HERE, BECAUSE WE BRING SOME REAL WORLD EXPERIENCE TO THIS DISCUSSION AND THIS DEBATE.

I HAVE BEEN IN PRACTICE FOR 25 YEARS, AND WHEN I BEGAN, I SHARED THAT VIEW. AND COUNTLESS TIMES, I HAVE GONE TO ADMINISTRATIVE AGENCIES AT THE STATE LEVEL AND AT THE FEDERAL LEVEL WITH EXAMPLES OF WHAT I BELIEVE TO BE CORPORATE MISCONDUCT

AND ABUSE. AND I HAVE YET TO SEE ONE INSTANCE WHERE MY TAX DOLLARS AT WORK ACCOMPLISHED A RESULT FOR THE CLIENTS I REPRESENT.

IN SOME OF MY CASES, I HAVE HAD THE DEPARTMENT OF CORPORATIONS IN ON THE SIDE OF AVCO FINANCIAL SERVICES. THERE SIMPLY IS NOT AN EFFECTIVE REMEDY ADMINISTRATIVELY. THAT'S WHY CLASS ACTIONS BY PRIVATE ATTORNEYS AND LEGAL SERVICES ATTORNEYS ARE SO IMPORTANT, BECAUSE THEY ARE THE ONLY DETERRENT TO CORPORATE ABUSE.

HONORABLE PAUL NIEMEYER: OKAY. THANK YOU, MS. STURDEVANT.

MS. STURDEVANT: THANK YOU.

HONORABLE PAUL NIEMEYER: I UNDERSTAND THE SOUND SYSTEM IS OFF AT THIS POINT.

(PAUSE IN PROCEEDINGS.)

HONORABLE PAUL NIEMEYER: ALL RIGHT.

MR. MOORE, I'VE WRITTEN YOU EARLIER AND WE DID HEAR FROM YOU EARLIER, SO IF YOU'LL GIVE US ONLY FIVE MINUTES, THAT WOULD BE APPRECIATED.

TESTIMONY OF BEVERLY C. MOORE, JR.

MR. MOORE: SURE. LET ME TELL YOU MR. KRISLOV, WHO IS NEXT ON THE LIST, ASKED ME TO TELL YOU HE WON'T BE HERE. I'M NOT ASKING FOR HIS FIVE MINUTES ADDED ONTO MINE.

I'M THE EDITOR OF CLASS ACTION REPORTS, AND I SPOKE AT THE PHILADELPHIA HEARING. AND WE'VE SUBMITTED SOME PRELIMINARY

COMMENTS, AND WE EXPECT THAT ALL THESE PAPERS, AND WE HOPE BY FEBRUARY 15TH, DO A PRETTY COMPREHENSIVE ANALYSIS OF ALL THE SUBMISSIONS, INCLUDING, I WILL NOTE THAT A COUPLE OF THINGS THAT HAVE COME OUT OF THESE HEARINGS ARE COMMENTS NOT ONLY ON THE PROPOSALS BEFORE THE COMMITTEE, BUT ADDITIONAL PROPOSALS ABOUT IMPROVING CLASS NOTICE, BEEFING UP RULE 23(E), TO FURTHER ENSURE THE ACTUAL FAIRNESS AND ADEQUACY OF PROPOSED SETTLEMENTS, INCLUDING THOSE THAT --

HONORABLE PAUL NIEMEYER: DID YOU SEE THE RECOMMENDATIONS, THE ONE OR TWO THAT CAME IN RELATING TO LINKING THE 23(B)(F) TO AN OPT IN AS OPPOSED TO OPT OUT?

MR. MOORE: YES. THOSE WERE IN THE ORIGINAL PROPOSALS THAT DID NOT GO FORWARD. AND WE, OF COURSE, OPPOSE THE OPT-IN PROVISION. THAT'S BASICALLY THE FUNDAMENTAL CHANGE THAT WAS MADE IN 1966.

AND PEOPLE JUST DON'T HAVE AN INCENTIVE TO OPT IN WHEN THERE IS NO POT OF MONEY THERE FOR THEM TO GET A SHARE OF, ESPECIALLY IF THE CLAIMS ARE RELATIVELY SMALL. BUT WE WILL ADDRESS THAT. THE OPT-IN PROPOSAL HAS BEEN AROUND SINCE, I GUESS, THE '72 AMERICAN COLLEGE OF TRIAL LAWYERS REPORT, WHICH, IN EFFECT, WANTED TO, IN EFFECT, UNDO THE '66 CHANGES.

BUT WHAT I'D LIKE TO DO BRIEFLY IN MY THREE OR FOUR MINUTES THAT I HAVE LEFT IS TO COMMENT ON THREE OR FOUR OF THE CASES THAT HAVE GOTTEN SOME BAD PRESS AS BEING SMALL CLAIMS, TRIVIAL CLASS ACTIONS. AND WITH ALL DUE RESPECT, MR. CHAIRMAN,

I WOULD LIKE TO START WITH A CASE THAT YOU CITED IN A PAPER THAT YOU GAVE AT THE TUCSON CONFERENCE, IN WHICH YOU QUOTED --

HONORABLE PAUL NIEMEYER: THE INSURANCE CASE FROM TEXAS?

MR. MOORE: RIGHT. YOU QUOTED AN EDITORIAL FROM THE WALL STREET JOURNAL BY MAX BOOT BELITTLING THIS CASE, AND I WOULD RESPECTFULLY SUGGEST THAT YOUR HONOR GO A LITTLE FURTHER IN HIS RESEARCH ON CLASS ACTIONS THAN THE WALL STREET JOURNAL EDITORIAL PAGES, BECAUSE I LOOKED INTO THIS CASE. I HAVE THE PAPERS ON IT. IT'S CALLED SANDEO (PHONETIC) V. TEXAS FARMERS INSURANCE COMPANY. IT WAS FILED IN TEXAS STATE COURT.

HONORABLE PAUL NIEMEYER: WE DID RECEIVE TESTIMONY HERE ON THE FULL EXTENT OF THAT CASE, THE AMOUNT OF THE RECOVERY, $38 MILLION OR WHATEVER, 72 MILLION --

MR. MOORE: IT'S $70 MILLION. AND IF YOU ADD UP ALL THE ATTORNEY FEES, THE LITIGATION EXPENSES, AND THE NOTICE COSTS, ADD THAT ALL, INCLUDING WHAT WAS PAID BY THE DEFENDANT FOR NOTICE COSTS, THE ATTORNEYS' FEES AND EXPENSES IN THIS $5.75-PER-PERSON CASE AMOUNT TO ONLY 17.7 PERCENT OF THE TOTAL RECOVERY.

IN OTHER WORDS, EVEN THOUGH THE INDIVIDUAL DAMAGES WERE $5.75 EACH, MOST OF WHICH WAS CREDITED TO THE ACCOUNTS OF THE EXISTING POLICY HOLDERS, AT LEAST THE MAJORITY OF IT WAS, THE CASE IS STILL A COST-EFFECTIVE CASE, DESPITE THE APPARENTLY SMALL AMOUNT PER PERSON. 18 PERCENT IS WHAT'S CONSUMED BY

ATTORNEY FEES AND EXPENSES, AND 82 CENTS GOES TO THE CLASS MEMBER. AND, IN FACT, THIS IS THE NORM.

I HAVE A DATABASE THAT I'VE COMPILED OVER THE YEARS THAT'S GOT ABOUT, OH, $15 BILLION WORTH OF RECOVERIES. IT INCLUDES FIVE- OR 600 CASES, AND I'VE GOT THE DATA ON THE AMOUNT RECOVERED, THE ATTORNEY FEES, EXPENSES. AND SURE ENOUGH, IF YOU ADD ALL OF THEM UP, THE AVERAGE ATTORNEY FEE IS 18 PERCENT. IN OTHER WORDS, IN CLASS ACTIONS GENERALLY, 18 CENTS GOES TO FEES AND EXPENSES, AND 82 CENTS GOES TO THE CLASS MEMBERS.

NOW, LET ME MENTION ANOTHER COUPLE OF CASES. THERE IS THIS MELLON BANK CASE THAT JOHN FRANK MENTIONED, WHERE MR. RABIEJ, OF YOUR STAFF, GOT A CHECK FOR 8 CENTS. THIS IS BAD. BUT THIS IS THE FIRST TIME I'VE EVER HEARD OF THIS HAPPENING.

IT SO HAPPENS THAT AT LEAST IN THE LAST FIVE OR TEN YEARS, AND ESPECIALLY IN SECURITIES FRAUD CLASS ACTIONS, IF YOU READ THE NOTICE, THERE WILL BE A PROVISION IN THERE THAT SAYS: NO CLAIM OF LESS THAN, SAY, $5 -- SOMETIMES IT'S $3; SOMETIMES IT'S $10 -- WILL BE HONORED.

SO THE PLAINTIFFS' COUNSEL, CLASS COUNSEL AND THE SETTLING PARTIES IN THESE CASES, HAVE AMPLE MEANS TO PREVENT THIS FROM HAPPENING. I MEAN, YOU'RE NOT GOING TO WANT TO SPEND 32 CENTS ON A STAMP PLUS PROCESSING THE CLAIM AND AN ENVELOPE AND ALL THAT TO PAY SOMEBODY 8 CENTS. I DON'T KNOW HOW THIS HAPPENED. IT SHOULDN'T HAVE HAPPENED. BUT YOU DON'T NEED TO

CHANGE THE RULE TO PREVENT THESE EIGHT CENT CHECKS GOING OUT. IF A DEFENDANT IS FOOLISH ENOUGH TO AGREE TO DO THAT, THEN THAT'S THEIR PROBLEM.

THE THIRD CASE IS THE SO-CALLED BANK OF BOSTON CASE, WHICH HAS GOTTEN SOME CONSIDERABLE NOTORIETY. THIS IS ONE OF THESE MORTGAGE ESCROW CASES WHERE THE BANK WITHHOLDS MONEY FROM MORTGAGORS FOR TAXES AND INSURANCE ON THEIR PROPERTY. THESE CASES HAVE BEEN GOING ON SINCE THE EARLY '70S, AT LEAST. THE BANK OVERWITHHOLDS AND, IN EFFECT, EARNS INTEREST ON THE EXCESS MONEY THAT THE HOMEOWNER IS REQUIRED TO DEPOSIT IN ADVANCE.

THE SCANDAL IN THE BANK OF BOSTON WAS THAT SOME CLASS MEMBER, AFTER THE SETTLEMENT WAS APPROVED, CAME FORWARD, CLAIMED THAT HE HAD RECOVERED ONLY $8.76, I BELIEVE, AND WAS SOMEHOW ASSESSED A HUNDRED DOLLARS IN ATTORNEY FEES.

WELL, I TALKED TO THE ATTORNEYS WHO DID THAT CASE, AND AS FAR AS THEY CAN TELL SO FAR, ALL THIS WAS WAS A SINGLE CLERICAL ERROR. IN OTHER WORDS, THEY TURNED THE TASK OF FIGURING OUT HOW MUCH EACH PERSON WOULD GET AND HOW MUCH WOULD BE DEDUCTED FOR ATTORNEY FEES TO THE DEFENDANT, BANK OF BOSTON. THE BANK OF BOSTON, AS FAR AS I'M TOLD, MESSED UP WITH RESPECT TO THIS ONE PERSON.

AND IT'S NOT THE CASE WHERE ANY MORE THAN THIS ONE PERSON, AS FAR AS WE KNOW, HAD THIS HAPPEN TO HIM. AS FAR AS WE KNOW, THE REST OF THE PEOPLE IN THIS CLASS -- AND IN THE DOZENS OF OTHER SIMILAR CLASSES -- SIMPLY HAD A PRO RATA, THE SAME PRO

RATA PERCENTAGE OF THEIR ACTUAL RECOVERY DEDUCTED FOR ATTORNEY FEES AS EVERYBODY ELSE DID. AND IN THAT CASE, THE ATTORNEY FEES WERE 28 PERCENT OF THE TOTAL BENEFIT RECOVERED FOR THE CLASS.

SO, A LOT OF PUBLICITY HAS BEEN MADE OF THIS CASE, BUT I THINK IF IT'S JUST A CLERICAL ERROR, WE SHOULDN'T USE THAT TO DENIGRATE ALL CLASS ACTIONS.

HONORABLE PAUL NIEMEYER: ALL RIGHT. I'LL GIVE YOU ONE MORE MINUTE.

MR. MOORE: AT THE PHILADELPHIA HEARING, BILL COLEMAN MENTIONED A CASE, AN AUTOMOBILE DEFECT CASE, WHERE HE CLAIMED THAT FORD, HIS CLIENT, RECALLED THE CARS. AND THEN THE ATTORNEYS WHO HAD BROUGHT THE CASE DEMANDED ATTORNEY FEES, WHEN FORD WAS GOING TO DO WHAT IT DID ANYWAY.

WELL, I KNOW ABOUT THAT CASE, ALSO. AND IT'S NOT TRUE. THIS WAS A CASE WHERE THE REAR HATCHBACK LATCH WOULD BREAK AND WOULD FALL OFF THE CAR. AND IT WAS AN ECONOMIC DAMAGE CASE. PEOPLE SIMPLY WANTED THE COST OF REPAIR OF THESE COMPONENTS TO BE REIMBURSED TO THEM.

FORD DIDN'T DO THAT IN THE RECALL. IT SIMPLY RECALLED THE CARS, AND IT DID SO PRECISELY BECAUSE OF THE PUBLICITY GENERATED BY THE PRIOR FLORIDA CLASS ACTION, KODNIPSA (PHONETIC), TO ISSUE THE RECALL. HOWEVER, THE CLAIMS ARE STILL OUTSTANDING FOR THE ACTUAL DAMAGES INCURRED BY THE APPARENTLY TENS OF THOUSANDS OF OWNERS OF THESE FORD EXPLORERS, WHOSE REAR LIFT GATES DID BREAK AND FALL OFF.

SO, THERE ARE BAD CLASS SETTLEMENTS, SUCH AS THE NEW YORK LIFE SETTLEMENT THAT JOHN FRANK ALLUDED TO. I, MYSELF, OBJECTED TO THAT SETTLEMENT. IT WAS JUST APPROVED FOR APPEALS JUST THE OTHER DAY. BUT EXISTING RULES, ESPECIALLY IF RULE 23(E) WERE BEEFED UP, CAN PREVENT THAT. AND JUDGES ARE NOW INCREASINGLY DISAPPROVING INADEQUATE AND UNFAIR AND SCANDALOUS SETTLEMENTS.

THANK YOU.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. MOORE.

ALL RIGHT. MR. KRISLOV, I UNDERSTAND --

MR. MOORE: HE WAS NOT GOING TO BE HERE. HE HAS SUBMITTED A PAPER. I DON'T KNOW IF IT EVER GOT HERE. IT WILL BE HERE EVENTUALLY.

HONORABLE PAUL NIEMEYER: IF IT'S NOT HERE, THE PAPER SHOULD GET HERE BY FEBRUARY 15 TO BE INCLUDED AS PART OF OUR RECORD.

MR. MOORE: SURE.

HONORABLE PAUL NIEMEYER: ALL RIGHT. ELIZABETH CABRASER, HAS SHE MADE IT HERE YET? SHE'S INTENDING TO GET HERE, BUT WE'LL TAKE HER LATER.

MR. WITTNER, NICHOLAS WITTNER?

TESTIMONY OF NICHOLAS J. WITTNER

MR. WITTNER: GOOD MORNING, JUDGE NIEMEYER, MEMBERS OF THE ADVISORY COMMITTEE. I'M ASSISTANT GENERAL COUNSEL FOR NISSAN NORTH AMERICA. MY RESPONSIBILITIES INCLUDE MANAGING THE

DEFENSE OF PRODUCT LITIGATION, INCLUDING CLASS ACTION LITIGATION.

I ALSO HAVE THE PRIVILEGE OF SERVING AS CO-CHAIR OF THE PRODUCT LIABILITY COMMITTEE OF THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION. AND ALTHOUGH I AM HERE THIS MORNING TESTIFYING ON BEHALF OF OUR LEGAL DEPARTMENT AND NOT THE SECTION OR THE COMMITTEE, MY COMMENTS ARE BASED, IN PART, ON THE PAPERS THAT HAVE BEEN PRESENTED, AS WELL AS PROGRAMS PRESENTED BY BOTH THE SECTION AND THE COMMITTEE.

IN ADDITION, ONE OF MY COLLEAGUES FROM THE SECTION, JEFF GREENBAUM, FROM THE CLASS ACTION COMMITTEE, IS HERE THIS MORNING. AND I'D LIKE TO, IN THE INTERESTS OF SAVING TIME, ADOPT HIS STATEMENT. I FULLY AGREE WITH IT. AND SO I'VE CUT MY REMARKS SHORT, NOT TO GO OVER THE SAME MATERIAL THAT'S INCLUDED IN THIS STATEMENT.

THE CLASS ACTION, ACCORDING TO THE THIRD CIRCUIT, HAS BECOME AN OPPORTUNITY FOR A KIND OF LEGALIZED BLACKMAIL. OTHER COURTS HAVE DESCRIBED CLASS ACTIONS AS JUDICIAL BLACKMAIL AND INDUCEMENTS TO BLACKMAIL SETTLEMENTS.

JOHN FRANK SAID IT HAS BECOME A RACKET. THAT IS THE SIMPLE TRUTH OF IT. AND HE IS RIGHT. AND HE WAS ALSO RIGHT WHEN HE SAID: THE USE HAS GONE MILES BEYOND WHAT WAS ANTICIPATED. WE HAVE SEEN HUMONGOUS CLASSES THAT CANNOT CONCEIVABLY SATISFY RULE 23 FILED IN IMPROPER ATTEMPTS TO INVOLVE THE JUDICIARY IN THE CRAFTING OF LEGISLATIVE SOLUTIONS

TO VEXING SOCIAL PROBLEMS. AGAIN, THOSE ARE THE WORDS OF THE THIRD CIRCUIT, NOT MINE.

FRIVOLOUS CASES AND SETTLEMENTS FOR NOMINAL RELIEF FOR THE CLASS BUT HUGE FEES FOR THE CLASS COUNSEL HAVE SULLIED THE REPUTATION OF THE LEGAL PROFESSION AND BROUGHT THE LEGAL PROFESSION INTO DISREPUTE. THE DRAFTERS OF RULE 23 NEVER INTENDED ANY OF THIS. INDEED, THEY ADMONISHED AGAINST THE MISUSE OF RULE 23, ESPECIALLY IN MASS COURT CASES. IT IS TIME TO STOP THE ABUSES. THE PROPOSED AMENDMENTS TO RULE 23 ARE STEPS IN THE RIGHT DIRECTION, AND WE SUPPORT THEM. BUT THEY DO NOT GO FAR ENOUGH.

NEXT, I'D LIKE TO EXPLAIN WHY WE SUPPORT THE PROPOSED AMENDMENTS --

MR. SOL SCHREIBER: MR. WITTNER, HAVE YOU EVER SEEN A GOOD CLASS ACTION, A BIG CLASS ACTION THAT YOU DID NOT THINK WAS A FRAUD?

MR. WITTNER: CERTIFIED?

MR. SOL SCHREIBER: CERTIFIED, TRIED, ET CETERA, AS SUCH. HAVE YOU EVER SEEN A CASE INVOLVING MILLIONS OR HUNDREDS OF MILLIONS OF DOLLARS THAT YOU THINK WAS NOT A FRAUD WHICH THE COURTS HAVE APPROVED?

AND, BY THE WAY, THE THIRD CIRCUIT HAS APPROVED HUNDREDS OF CLASS ACTIONS, AND YOU HAVE CHOSEN TO PICK ONE CASE TO CITE SOME LANGUAGE.

ALL I'M ASKING YOU IS: AS SOMEONE WHO HAS PRACTICED

FOR MANY YEARS, HAVE YOU EVER SEEN A BIG CLASS ACTION THAT YOU THINK WAS NOT A FRAUD?

MR. WITTNER: NONE THAT I HAVE HAD PERSONAL INVOLVEMENT WITH THAT WERE IN THE AUTO INDUSTRY.

MR. SOL SCHREIBER: I'M TALKING ABOUT ANY CASE.

MR. WITTNER: I AM NOT FAMILIAR WITH ANY.

MR. SOL SCHREIBER: YOU MEAN YOU ARE AN EXPERT ON CLASS ACTIONS, BUT YOU'RE ONLY FAMILIAR WITH AUTOMOBILE CASES, AND YOU'RE NOT FAMILIAR WITH ANY OTHER CASES?

MR. WITTNER: I AM HERE TODAY TO SHARE MY FIRSTHAND INVOLVEMENT AND EXPERIENCE WITH ABUSES IN CLASS ACTION PRACTICE INVOLVING THE AUTOMOTIVE INDUSTRY. I HAVE DIRECT EVIDENCE AND INFORMATION ABOUT THAT. AND IF THERE ARE OTHERS IN OTHER INDUSTRIES WHO CAN ADDRESS THAT ISSUE, I MEAN, I DON'T WANT TO SPEAK FOR THEM. I WANT TO SHARE MY PERSONAL EXPERIENCE AND GIVE SOME INFORMATION ABOUT CASES THAT I KNOW ABOUT.

FIRST I'D LIKE TO TALK ABOUT SUBSECTION (B)(3)(F). CURRENTLY, THERE REALLY IS NO EFFICIENT MECHANISM FOR DISPOSING OF FRIVOLOUS LITIGATION OR LITIGATION INVOLVING TRIVIAL RELIEF TO THE CLASS. SUBSECTION (B)(3)(F) IS A USEFUL IMPROVEMENT, AND I THINK THAT IT WILL HELP AVERT FRIVOLOUS AND TRIVIAL LITIGATION, OR HASTEN ITS DISMISSAL, IN THE EVENT THAT IT IS FILED.

HOWEVER, THE LANGUAGE OF (B)(3)(F) REALLY OUGHT TO BE EMBEDDED IN (B)(3) AS A THRESHOLD REQUIREMENT, NOT SIMPLY AS A

MATTER PERTINENT TO THE FINDINGS OF (B)(3). IN OUR JUDGMENT, THAT THRESHOLD REQUIREMENT THAT THE PROBABLE RELIEF TO THE INDIVIDUAL JUSTIFIES THE COSTS AND BURDENS IS ABSOLUTELY ESSENTIAL TO ADDRESS THE PROBLEM OF PROTRACTED LITIGATION INVOLVING THE FRIVOLOUS AND TRIVIAL CLAIM. THOSE CASES ARE A BIG PROBLEM FOR US, AND THE ENTIRE AUTOMOTIVE INDUSTRY. WE SEE THEM ROUTINELY WHEN WE ANNOUNCE PRODUCT RECALLS OR SERVICE CAMPAIGNS.

THE CLASS ACTIONS REALLY SERVE NO PURPOSE OTHER THAN TO ENRICH THE PLAINTIFFS' LAWYERS THROUGH THESE BLACKMAIL SETTLEMENTS AND ACCOMPANYING LARGE FEE AWARDS. FOR EXAMPLE, WE ANNOUNCED A SAFETY CAMPAIGN TO REPLACE SEAT BELT BUCKLES IN SOME OF OUR MODELS. THE BUCKLES WERE MANUFACTURED BY TAKATA CORPORATION, AND THERE WAS A PLASTIC PART IN THE BUCKLE THAT COULD BREAK, AND IF IT BROKE, THEN THE BUCKLE EITHER WOULD NOT LATCH, OR IT WOULD NOT UNLATCH.

WE OFFERED TO REPLACE ALL OF THE BUCKLES AT NO COST TO OUR CONSUMERS. THE DAY AFTER A STORY IN THE WALL STREET JOURNAL REPORTING ON OUR SERVICE CAMPAIGN APPEARED, WE RECEIVED A CLASS ACTION SEEKING RELIEF FOR ALLEGED DIMINUTION IN VALUE. THE NAMED PLAINTIFF IN THAT CLASS ACTION, MR. SLIDER (PHONETIC), DROVE A VEHICLE THAT WAS NOT SUBJECT TO THE CAMPAIGN. HE WAS RELATED TO THE LAW FIRM. THE BUCKLE WAS NOT MANUFACTURED BY TAKATA, HAD A DIFFERENT DESIGN, AND HAD DIFFERENT MATERIALS.

THIS HASTILY DRAFTED COMPLAINT WAS A RACE TO THE

COURTHOUSE TO BEAT OTHER CLASS ACTIONS. AND A CURSORY, A CURSORY EXAMINATION OF THE VEHICLE WOULD HAVE REVEALED THAT THERE WAS NO TAKATA BUCKLE IN THERE, BECAUSE THE NAME OF THE MANUFACTURER OF THE BUCKLE WAS STAMPED IN BIG LETTERS RIGHT ON THE BUCKLE ITSELF.

THERE WAS AND IS NO DIMINUTION IN VALUE OF THOSE VEHICLES. THE REPLACEMENT OF THE BUCKLE FIXED THE PROBLEM, AND THERE CERTAINLY WAS NO DETERRENT EFFECT OF THE CLASS ACTION.

MR. SOL SCHREIBER: WAS THE CLASS ACTION CERTIFIED IN THAT CASE?

MR. WITTNER: NO, THERE WAS NO CERTIFICATION IN THAT CASE. AND BECAUSE THE CASE WAS DISMISSED, THE MAIN PLAINTIFF DIDN'T HAVE A VEHICLE SUBJECT TO THE CAMPAIGN OR A TAKATA BUCKLE.

HONORABLE JOHN L. CARROLL: WHICH SUGGESTS THAT THE RULE WORKS.

MR. WITTNER: THE PROBLEM IS THAT THAT CASE DRAGGED ON FOR MONTHS AND MONTHS AND COST US TENS OF THOUSANDS OF DOLLARS IN DEFENSE COSTS AND BURDENED THE JUDICIARY.

THERE IS NO WAY TO PREVENT THOSE KINDS OF SPURIOUS CASES RIGHT NOW. THERE IS NO WAY TO SPEEDILY GET RID OF THEM --

HONORABLE PAUL NIEMEYER: DID YOU SEEK SANCTIONS IN THAT CASE?

MR. WITTNER: NO, WE DIDN'T SEEK SANCTIONS. AND I'LL TELL YOU THERE IS ONE OTHER CASE. AT LEAST THIS ONE INVOLVES A

TAKATA BUCKLE, STILL LINGERING IN ANOTHER COURTHOUSE IN THE COUNTRY CURRENTLY.

MR. SOL SCHREIBER: BUT AGAIN, NOT A CERTIFIED CLASS.

MR. WITTNER: NOT A CERTIFIED CLASS YET.

THE PROBLEM ISN'T THE CERTIFIED CLASS. IT'S THAT MOST OF THESE CASES NEVER GET CERTIFIED, BUT THEY CLOG THE JUDICIARY AND THEY DRAIN RESOURCES FROM DEFENDANTS. AND THERE IS NO QUICK WAY TO DISPOSE OF THEM.

RULE (B)(3), AS YOU PROPOSED IT, WOULD ALLOW AN EFFICIENT MECHANISM TO AVERT THOSE CASES IN THE FIRST PLACE, OR IF THEY ARE FILED, TO HASTEN THEIR DISMISSAL.

HONORABLE ANTHONY J. SCIRICA: WHAT WOULD THE PROCESS BE UNDER (B)(3)? HOW DO YOU ENVISION THAT?

MR. WITTNER: I WOULD ENVISION THAT IF A CASE LIKE THIS WERE FILED, THAT WE WOULD FILE A MOTION PROMPTLY TO DISMISS IT BECAUSE OF THE PROBABLE RELIEF TO THE INDIVIDUAL, WHICH, THERE WOULD BE NONE.

HONORABLE ANTHONY SCIRICA: WHAT WOULD BE THE NEXT STEP, THEN?

MR. WITTNER: THE NEXT STEP?

HONORABLE ANTHONY J. SCIRICA: DISCOVERY?

MR. WITTNER: I WOULD SEE LIMITED DISCOVERY.

HONORABLE ANTHONY SCIRICA: HOW COULD THE COURT MAKE A DECISION WITHOUT DISCOVERY IN THIS MATTER?

MR. WITTNER: I SEE THE OPPORTUNITY FOR LIMITED

DISCOVERY.

HONORABLE PAUL NIEMEYER: SO YOU'D HAVE A 12(B)(6) MOTION COUPLED WITH SOME AFFIDAVITS FOR DISCOVERY, AND A DISMISSAL WITH THE OPTION OF SANCTIONS.

MR. WITTNER: I THINK THOSE ARE ALL GOOD APPROACHES.

MR. SOL SCHREIBER: WHY DON'T YOU JUST BRING A SUMMARY JUDGMENT UNDER 56(F), WHICH PROVIDES FOR LIMITED DISCOVERY, AND MOVE THE CASE WITHIN SIX WEEKS? WHY WOULD YOU WAIT AROUND TO SEE WHAT HAPPENS? YOU KNOW UNDER 56(F), YOU GET LIMITED DISCOVERY ONLY ON THE ISSUE OF A SUMMARY JUDGMENT. WHY ISN'T THAT THE SAME REMEDY YOU'RE NOW SUGGESTING?

MR. WITTNER: BECAUSE, FOR EXAMPLE, IN THE CASE THAT IS STILL DRAGGING ON, THERE IS NO MEANINGFUL BASIS UNDER THAT RULE TO DISPOSE OF THE CASE. THERE IS AN INJURY ALLEGED. THERE IS A TAKATA BUCKLE INVOLVED AND THE CASE IS PROCEEDING, EVEN THOUGH, IF THERE WERE A BALANCING TEST CURRENTLY AVAILABLE, THAT WOULDN'T PLOW.

MR. SOL SCHREIBER: BUT I DON'T UNDERSTAND. YOU BRING A 56(F) MOTION UNDER SUMMARY JUDGMENT. YOU SAY THERE IS NO VALUE TO THE CLASS. THE JUDGE WOULD LIMIT THE DISCOVERY ON THAT ISSUE, AND IN SIX WEEKS YOU'D HAVE A MOTION HEARD BY THE COURT. AND IF YOU COULDN'T HAVE THE MOTION HEARD BY THE COURT, IT WOULD BE THE SAME REASON AS WHETHER YOU HAVE A CHANGE OR NOT. THE COURT WOULD HEAR IT QUICKLY. I DON'T KNOW WHY YOU'RE SUGGESTING A PROVISION THAT WE ALREADY HAVE.

MR. WITTNER: WE DON'T HAVE ANY PROVISION THAT LOOKS AT WHAT THE PROBABLE RELIEF TO THE INDIVIDUAL IS AND BALANCES THAT AGAINST THE BURDENS OF CLASS LITIGATION. THERE ISN'T ANY WAY RIGHT NOW FOR COURTS TO ANALYZE IT. THIS WOULD BE A USEFUL IMPROVEMENT. IT WOULD HAVE A PROPHYLACTIC EFFECT. IT WOULD AVERT THESE FRIVOLOUS CASES.

FOR EXAMPLE, IF YOU LOOK AT THE FEDERAL JUDICIAL CENTER STUDY, OF THE 407 CASES THAT THEY STUDY, 66 PERCENT WERE NEVER CERTIFIED. AND EVENTUALLY, A LOT OF THOSE CASES WENT AWAY. BUT THEY TOOK UP 11 TIMES MORE JUDICIAL TIME THAN AN AVERAGE CIVIL ACTION. SO EVEN IF YOU CAN DISMISS THEM UNDER THAT APPROACH, IT'S NOT UNTIL THERE IS A PROTRACTED LITIGATION AND A LOT OF EXPENSE TO THE LEGAL SYSTEM, AS WELL AS TO THE DEFENDANTS.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. WITTNER.

MR. GOLDFARB?

MR. GOLDFARB: YES, JUDGE NIEMEYER. I'D LIKE TO SWITCH PLACES WITH PROFESSOR GREEN.

HONORABLE PAUL NIEMEYER: ALL RIGHT. PROFESSOR ERIC GREEN?

MR. GREEN: YES.

TESTIMONY OF ERIC GREEN

MR. GREEN: YOUR HONORS, MEMBERS OF THE COMMITTEE, FELLOW BOSTONIAN, MR. FOX, I TESTIFY ON BEHALF OF THE PROPOSED AMENDMENT ADDING RULE 23(B)(4) FOR SETTLEMENT CLASSES. I

TESTIFY IN MY CAPACITY AS A PROFESSOR AT LAW AT BOSTON UNIVERSITY, A FEW STEPS DOWN THE HALL FROM SUSAN KONACK (PHONETIC), WHO, I GATHER, HAS AN OPPOSITE VIEW ON THIS, AS A SPECIAL MASTER IN MANY ASBESTOS CASES IN MASSACHUSETTS, CONNECTICUT AND OHIO, AS THE GUARDIAN AD LITEM IN THE AHEARN AGAINST FIBREBOARD CLASS ACTION CASE, AND AS THE FIRST LAW CLERK TO BENJAMIN KAPLAN, WHO HAS BEEN A MENTOR OF MINE ALL MY LIFE. AND I'VE HEARD A LOT OF REMARKS DURING THE COURSE OF THIS AS TO WHAT THE DRAFTERS OF THE RULE INTENDED. I'M NOT SURE IT WOULD BE APPROPRIATE FOR ANYBODY TO DESCRIBE ANY VIEWS, PARTICULARLY ON THIS MATTER, TO THAT PARTICULAR DRAFTER OF THESE RULES.

THE PROPOSAL TO CLARIFY THE LAW WITH REGARD TO CLASSES THAT ARE CERTIFIED AND SETTLED AT THE SAME TIME I THINK IS NECESSARY AND DESIRABLE AND AN EXTREMELY CAUTIOUS AND CONSERVATIVE APPROACH TO THIS. IT DOESN'T REQUIRE IT. IT DOESN'T MANDATE IT. IT PERMITS IT, IN APPROPRIATE CASES. AND THERE ARE CLEARLY APPROPRIATE CASES WHERE THE SUPERIOR DISPOSITION OF A MASS TORT LITIGATION, ESPECIALLY, IS A CLASS SETTLEMENT, EVEN IN CASES WHERE THE CASE SHOULD NOT, PERHAPS COULD NOT BE MANAGED AND TRIED AS A CLASS ACTION.

THERE ARE SUFFICIENT PROCEDURAL PROTECTIONS TO ANSWER ALL OF THE CONCERNS THAT HAVE BEEN VOICED BY THE 120 OR SO OTHER ACADEMICS LINED UP ON THE OTHER SIDE OF THIS EQUATION, MANY OF WHOM, I THINK, HAVE AN EXTREMELY LIMITED PRACTICAL EXPERIENCE WITH WHAT IS POSSIBLE IN THE FEDERAL COURTS AND WHAT THE DEMANDS

OF MODERN MASS TORT LITIGATION ARE.

I, MYSELF, AS THE GUARDIAN IN A MANDATORY NONOPT-OUT 23(B)(1)(B) CLASS, THE AHEARN CLASS ACTION, OBSERVED CHIEF JUDGE ROBERT PARKER CONDUCT AN EXTREMELY DETAILED AND VIGOROUS FAIRNESS HEARING, I THINK WHICH LASTED NINE DAYS. THERE WAS A SUBSTANTIAL PERIOD OF DISCOVERY AHEAD OF TIME. THERE WERE OBJECTORS, AND THERE WAS THE APPOINTMENT OF A GUARDIAN AD LITEM, MYSELF, WITH FULL AUTHORITY TO CONDUCT WHATEVER DISCOVERY I WANTED INTO THE SETTLEMENT, TO SPEAK TO WHOMEVER I WANTED.

I HAD CONTACT WITH HUNDREDS OF MEMBERS OF THE CLASS. I HAD AN 800 NUMBER. I RECEIVED CORRESPONDENCE FROM MEMBERS OF THE CLASS. I INTERVIEWED ALL THE CLASS MEMBERS. I SCRUTINIZED THE SETTLEMENT AND ALL ASPECTS OF IT, THE ETHICAL ASPECTS OF IT, THE ALTERNATIVES TO THE SETTLEMENT IN A VERY PRACTICAL WAY, AND TESTIFIED IN OPEN COURT AT THE FAIRNESS HEARING.

THE USE OF GUARDIAN AD LITEMS, THE USE OF SPECIAL MASTERS UNDER RULE 23, THE USE OF DEVICES LIKE THIS, ENABLE A COURT TO ASSESS THE FAIRNESS OF THE SETTLEMENT.

THE OTHER REQUIREMENTS OF RULE 23, WHICH ARE ALL PRESERVED IN THE PRESERVED AMENDMENT, CONTRARY TO SOME OF THE HYSTERICAL STATEMENTS THAT HAVE BEEN SUBMITTED TO THE COMMITTEE BY SOME OF MY ACADEMIC COLLEAGUES, ARE ADEQUATE PROTECTION IN THESE CASES.

IT REALLY COMES DOWN TO A FUNDAMENTAL MIND-SET ABOUT WHAT MODERN FEDERAL LITIGATION IS ALL ABOUT. THERE IS A BUNCH

OF US LAWYERS TRAINED IN THE MODEL OF PUBLIC ADJUDICATION, TRAINED IN THE MODEL OF THE GREAT PRISON REFORM SCHOOL, DESEGREGATION CASES, WHO ARE ALL PRISONERS OF OUR EXPERIENCE. AND THEIR EXPERIENCE TELLS THEM THAT ANYTHING LESS THAN FULL-BLOWN OPEN ADJUDICATION UNDER THE SUPERVISION OF A COURT IS LESS THAN THE KIND OF JUSTICE THAT THE FEDERAL COURTS OUGHT TO HAND DOWN.

HONORABLE JOHN L. CARROLL: MR. GREEN, ONE OF MY CONCERNS IS IF YOU DON'T AUTHORIZE SETTLEMENT CLASSES THAT CAN BE LITIGATED, THAT YOU MAY, IN THE END, HURT SOME CONSUMER CLASS ACTIONS. DO YOU SHARE THAT VIEW?

MR. GREEN: YES.

HONORABLE JOHN L. CARROLL: YOUR COLLEAGUES ON THE OTHER SIDE SEEM TO SUGGEST THAT'S NOT A PROBLEM.

MR. GREEN: NO, I THINK THAT IS A POTENTIAL PROBLEM. I THINK THE CONCERN IS A SERIOUS ONE. I THINK WITH THE PROTECTIONS IN THERE, IT OUGHT NECESSARILY -- IT WON'T HAPPEN. BUT THERE MAY BE A DIFFERENCE BETWEEN CASES, PERIOD. BEN KAPLAN TAUGHT ME THAT. YOU GOT TO LOOK AT THE PARTICULAR CASE.

MOREOVER, THERE MAY BE A DIFFERENCE BETWEEN ECONOMIC HARM CASES AND PERSONAL INJURY CASES. MOST OF MY EXPERIENCE IS IN THE PERSONAL INJURY CASES.

I GOT COUPONS IN THE AIRLINE LITIGATION; I GOT A COUPON IN THE CUISINART ONE, TOO. I THOUGHT THOSE SETTLEMENTS WERE EXTREMELY PROBLEMATIC, ALL RIGHT. BUT THIS IS A RULE --

HONORABLE PAUL NIEMEYER: HOW FAR CAN THE SETTLEMENT APPROVAL GO? AND DOES OUR RULE ALLOW TOO MUCH IN THAT REGARD? I'M THINKING NOW GEORGINE INCLUDED A GROUP OF PEOPLE WHO HAD BEEN EXPOSED BUT NOT YET MANIFESTED ENTRY.

MR. GREEN: YES.

HONORABLE PAUL NIEMEYER: AND THESE PEOPLE ARE INCLUDED IN THE CLASS, AND, OF COURSE, THEY WERE INCLUDED IN THE APPROVAL. AND I HOPE THE SUPREME COURT ADDRESSES THIS FULLY, BUT ONE OF THE QUESTIONS, I SUSPECT, IS: IF A SETTLEMENT IS APPROVED BY A COURT, CAN IT DISPENSE WITH JUSTICIABILITY? CAN IT DISPENSE WITH JURISDICTION? CONFLICT OF LAWS, MAYBE.

MR. GREEN: RIGHT.

HONORABLE PAUL NIEMEYER: THEY MAY HANDLE IT ON AN ITEM-BY-ITEM BASIS, AND THE QUESTION IS WHETHER OUR RULE PROVIDES ENOUGH OF THAT TYPE OF ANALYSIS, NOT --

MR. GREEN: I THINK THE RULE PERMITS THE COURT, AND I THINK COURTS MUST TAKE INTO ACCOUNT AN EXAMINATION OF THE CONFLICTS PROBLEMS, THE JUSTICIABILITY PROBLEMS, WHATEVER THE CASE AND AMOUNT IN CONTROVERSY IS. ALL OF THOSE NEED TO BE SATISFIED.

I THINK THE QUESTION OF FUTURE CLASSES IS A RED HERRING, AND IT'S NOT IMPLICATED BY THIS RULE CHANGE. THAT REALLY IS A QUESTION OF STATE LAW, WHETHER EXPOSURE-ONLY CLAIMANTS PRESENT A CLAIM. THERE ARE SOME STATES IN WHICH MERE EXPOSURE TO A TOXIC SUBSTANCE, BECAUSE IT INCREASES RISK OF

CANCER OR BECAUSE OF EMOTIONAL DISTRESS OR A CLAIM FOR MEDICAL MONITORING, DOES PRESENT A CLAIM. THAT'S A QUESTION ORDINARILY IN A FEDERAL CLASS ACTION, I THINK, OF STATE LAW.

AND THIS RULE DOESN'T VALIDATE OR SAY ANYTHING ABOUT WHETHER FUTURES CLASSES ARE APPROPRIATE, AND FRANKLY, I'M NOT HERE TO DEFEND THE GEORGINE SETTLEMENT. IF I HAD TO GIVE AN OPINION IN THAT CASE, WHETHER IT WERE FAIR, REASONABLE AND ADEQUATE, I THINK I MIGHT HAVE SOME PROBLEMS.

BUT THAT IS THE PARTICULAR DEAL IN THAT PARTICULAR CASE. THE AHEARN CASE I LOOKED AT, AND THAT'S A MANDATORY OPT-OUT CASE, WHICH WOULD NOT BE IMPLICATED, I BELIEVE, BY THIS RULE, ALTHOUGH I WOULD ENCOURAGE THE COMMITTEE TO CONSIDER EXTENDING EXPLICITLY THE POSSIBILITY OF A SETTLEMENT CLASS TO (B)(1)(B) CLASSES AS WELL. BUT --

HONORABLE PAUL NIEMEYER: THE CONCEPT YOU POINT OUT I DON'T THINK IS OPPOSED BY A LOT OF THE TESTIMONY WE'VE HEARD. THE PROBLEM THAT WE HAVE BEEN GIVEN AND ASKED IS: DOES THE RULE, AS WE'VE DRAFTED IT, PROVIDE SUFFICIENT BREAKS ON A CERTIFYING JUDGE, OR DOES IT DO JUST THE OPPOSITE, TEAR DOWN ANY CONSTRAINT THAT WOULD OTHERWISE BE THERE?

MR. GREEN: WELL, ALL OF THE OTHER REQUIREMENTS UNDER RULE 23 ARE STILL IN FORCE: NUMEROSITY, SUPERIORITY, FAIRNESS, REASONABLENESS, ADEQUACY. YOU'VE GOT AN INTERLOCUTORY APPEAL AND ALL OF THE OTHER ARGUMENTS THAT CAN BE PUT FORTH BY OBJECTORS, SUCH AS WHETHER NOTICE AND OPT-OUT IS PRACTICABLE AND

REASONABLE AND ENSURES THE VALUES IN OPT-OUT.

AS ARGUED IN GEORGINE, IT DID NOT. THOSE CAN STILL BE MADE UNDER SETTLEMENT CLASSES. I DON'T THINK THIS RULE CHANGE PUTS THE IMPRIMATUR ON ANY PARTICULAR DEFINITION OF A CLASS OR ANY PARTICULAR REMEDY. AND SO IN MY EXPERIENCE, TRUSTING THE FEDERAL JUDICIARY TO APPLY THIS RULE IN THE PROPER WAY, TO PROPER CASES, IS SOMETHING THAT SHOULD BE DONE.

NOW, A LOT OF THE ACADEMIC CRITICS OF THIS RULE CHANGE HAVE NOW SHIFTED THEIR FOCUS TO ALLEGED ABUSES COMING OUT OF STATE COURTS. AND THIS IS RELATIVELY A GROWING PHENOMENON IN CLASS ACTIONS. BUT I HOPE THE COMMITTEE DOESN'T DEFINE THIS RULE CHANGE FOR THE FEDERAL COURTS BASED ON STORIES COMING OUT OF STATE COURTS.

HONORABLE PAUL NIEMEYER: ALL RIGHT.

PROFESSOR THOMAS D. ROWE, JR.: DO YOU THINK THE RULE SHOULD BE PASSED IN THE WAY IT IS, TO LIMIT THE TYPE CLASS IN THE SITUATION TO WHICH THE SETTLEMENT HAS ALREADY BEEN REACHED, OR THAT IT SHOULD ALSO BE A POSSIBILITY FOR THE USE OF THIS DEVICE FOR CASES IN WHICH A SETTLEMENT HASN'T BEEN REACHED YET?

MR. GREEN: I THINK IT WOULD BE SLIGHTLY PREFERABLE, PROFESSOR ROWE, TO COUCH IT SO YOU COULD PERMIT THIS DEVICE WHERE SETTLEMENT ISN'T REACHED AT THE TIME OF CERTIFICATION. BUT I AGREE WITH THE ADVISORY COMMITTEE THAT AS A PRACTICAL MATTER, THAT'S NOT GOING TO HAPPEN TOO OFTEN.

IN MY EXPERIENCE, IN MASS TORTS, PRACTICALLY SPEAKING,

THEY'RE GOING TO COME TO COURT WITH THE SETTLEMENT, PRETTY MUCH A DONE DEAL AND A REQUEST FOR CONDITIONAL CERTIFICATION AS A SETTLEMENT CLASS AT THE SAME TIME. I DON'T THINK THERE IS ANY HARM IN DOING IT THE OTHER WAY.

HONORABLE PAUL NIEMEYER: ALL RIGHT.

MR. SOL SCHREIBER: PROFESSOR, YOU RAISED THE ISSUE OF AHEARN. IN YOUR CASE, AS I UNDERSTAND IT, YOU WERE APPOINTED AFTER A PROPOSED SETTLEMENT WAS PRESENTED?

MR. GREEN: YES.

MR. SOL SCHREIBER: THE COURT WANTED TO SEE THAT FAIRNESS WAS GIVEN TO EVERYBODY?

MR. GREEN: YES.

MR. SOL SCHREIBER: WOULD IT BE PREFERABLE, HOWEVER, IF THE GUARDIAN AD LITEM WERE APPOINTED PRIOR TO THE PROPOSED SETTLEMENT, UNLESS IT BE NO INDICATION OR NO ADVERSE COMMENTS THAT SOME SORT OF DEAL HAD BEEN MADE, AND THE GUARDIAN INCREASED THE RECOVERY, SO TO SPEAK?

MR. GREEN: FROM THE STANDPOINT OF ENSURING FAIRNESS, REASONABLENESS AND ADEQUACY TO THE CLASS, YES. FROM THE PERSPECTIVE OF WHAT'S PRACTICAL IN THESE CASES AND WHEN THE COURT WILL GET AHOLD OF THE CASE AND HAVE THE OPPORTUNITY TO DO SO, THERE MAY BE PROBLEMS THERE.

FROM THE PRACTICALITIES OF NEGOTIATING THE DEAL AND PUTTING IT TOGETHER, IT THROWS THE GUARDIAN RIGHT INTO THE MIX. AND THAT GUARDIAN BETTER BE A SUPERB NEGOTIATOR AND A VERY

EXPERIENCED PERSON, SO AS NOT TO INADVERTENTLY, THROUGH POOR NEGOTIATION OR UNFAMILIARITY WITH THE ISSUES OR WHATEVER, BECAUSE OF SOME NOTION THAT THE GUARDIANS GOT TO ADD VALUE SOMEHOW TO THE DEAL OR TO JUSTIFY HIMSELF OR HERSELF, DISRUPT THE PROCESS.

THESE NEGOTIATIONS, IN SOME OF THESE CASES, HAVE GONE ON, IN EFFECT, FOR YEARS. IT DOESN'T HAPPEN IN A WEEK OR TWO. THAT'S THE END OF IT, INTENSE NEGOTIATION, ALL OVER THE COUNTRY, IN ROOMS. BUT IT'S A RESULT OF SEVERAL YEARS OF STRUGGLE AND BATTLE. IT'S NOT AN OVERNIGHT THING.

HONORABLE PAUL NIEMEYER: BEFORE I CUT YOU OFF, AHEARN, HAS A PETITION FOR CERT. BEEN INVOLVED IN THAT; DO YOU KNOW?

MR. GREEN: I HAVE BEEN AWAY A LITTLE BIT OVER THE ACADEMIC HOLIDAYS. IF IT HASN'T BEEN, IT'S GOING TO BE. YOU KNOW, THE PETITION FOR REHEARING WAS DEFEATED FIVE TO SIX.

HONORABLE PAUL NIEMEYER: I DO KNOW THAT.

HONORABLE ANTHONY SCIRICA: IT HAS BEEN ASSERTED THAT PERHAPS WITH THE SETTLEMENT CLASS, THAT THE RULES COMMITTEE MAY BE GOING BEYOND ITS AUTHORITY UNDER THE RULES ENABLING ACT, AND THAT THIS IS REALLY A SUBSTANTIVE MATTER AND BETTER LEFT TO CONGRESS.

ANY THOUGHT? I REALIZE SINCE YOU HAVE BEEN INVOLVED IN AHEARN, YOU PROBABLY FEEL THAT IT IS WITHIN OUR PROVINCE. BUT ANY THOUGHTS ON THAT CRITIQUE OR THAT LINE OF ATTACK?

MR. GREEN: WELL, I HAVE SPOKEN ON THIS SUBJECT TO THE ASSOCIATION OF AMERICAN LAW SCHOOLS. AND MY VIEW ON THAT WAS: I THINK FOR A LOT OF REASONS, IT WOULD BE PREFERABLE FOR THE RULES COMMITTEE TO ADDRESS THIS RATHER THAN CONGRESS. BECAUSE I THINK IT WILL GET A MORE CONSIDERED STUDY HERE.

IN TERMS OF THE COMMITTEE'S POWER THAT IS NOT AN ISSUE, I HAVE ADDRESSED, AS A PROFESSOR OF EVIDENCE IN OBSERVING THE RULES AMENDING PROCESS THERE WITH REGARD TO THE RULES OF EVIDENCE, I REALLY HOPE WE CAN AVOID WHAT HAPPENED WITH RULES 413, 414 AND 415.

HONORABLE ANTHONY SCIRICA: WELL, ESSENTIALLY, YOU HAVE A GOOD ARGUMENT. BUT YOU DON'T THINK THERE IS ANY QUESTION ABOUT THE AUTHORITY?

MR. GREEN: I HAVEN'T REALLY STUDIED THAT ISSUE, YOUR HONOR.

HONORABLE PAUL NIEMEYER: ALL RIGHT. THANK YOU, PROFESSOR.

YOU CHANGED PLACES WITH MR. GOLDFARB. SO WE'LL HEAR FROM MR. GOLDFARB.

TESTIMONY OF LEWIS H. GOLDFARB

MR. GOLDFARB: THANK YOU, MR. CHAIRMAN, MEMBERS OF THE PANEL. MY NAME IS LEWIS GOLDFARB. I'M ASSISTANT GENERAL COUNSEL AT CHRYSLER RESPONSIBLE FOR MOST OF THE COMPANY'S REGULATORY COMPLIANCE, AS WELL AS DEFENDING ALL OUR CLASS ACTIONS.

MISS STURDEVANT EARLIER TALKED ABOUT HER REAL WORLD EXPERIENCE ON BEHALF OF LOWER-INCOME CITIZENS AND DESCRIBED ONE TYPE OF REAL-WORLD EXPERIENCE. I'D LIKE JUST TO BRIEFLY SHARE OUR REAL-WORLD EXPERIENCE, WHICH IS VERY, VERY DIFFERENT.

I WILL SAY AT THE OUTSET THAT WE DO SUPPORT ALL THE REFORM PROPOSALS EXCEPT THE SETTLEMENT CLASS REFORM, WHICH I'LL DISCUSS VERY BRIEFLY IN A FEW MINUTES.

CHRYSLER HAS THREE TIMES AS MANY CLASS ACTIONS PENDING AGAINST IT THAN IT DID THREE YEARS AGO, AND AT LEAST TWO-THIRDS OF THOSE ARE WHAT WE CONSIDER FRIVOLOUS CLASS ACTIONS, CLASS ACTIONS WHERE THE CONSUMERS HAVE ALREADY GOTTEN RELIEF, OR WHATEVER RELIEF IS BEING PROPOSED IS HIGHLY SPECULATIVE. THERE HAS BEEN ABSOLUTELY NO INJURY WHATSOEVER.

IN OUR VIEW, THE MISUSE OF RULE 23, AND ITS PROGENY ON THE STATE LEVEL, HAS CORRUPTED THE LEGAL PROFESSION. THE RULE WAS INTENDED BY ITS FRAMERS TO PROMOTE JUDICIAL ECONOMY AND UNIFORMITY AND TO PROVIDE SMALL CLAIMANTS WITH A MEANS OF ACCESS TO THE COURTS. INSTEAD, HAS BECOME A BATTERING RAM FOR NATIONWIDE CARTELS OF SELF-SERVING LAWYERS TO SHAKE DOWN LARGE CORPORATIONS FOR MULTIMILLION DOLLAR LEGAL FEES IN ORDER TO SECURE CENTS-OFF COUPONS AND OTHER COMPARABLE TRINKETS FOR UNKNOWING CLIENTS. THAT'S OUR EXPERIENCE OF MOST CLASS ACTIONS.

NOW, IN ANSWER TO MR. SCHREIBER'S QUESTION, WE DON'T CONDEMN ALL CLASS ACTIONS. THERE ARE MANY LEGITIMATE ONES, BOTH WITHIN THE AUTO INDUSTRY AND OUTSIDE. THERE WAS ONE I WAS

INVOLVED IN THAT GOT A $500 REFUND TO SEVEN MILLION OF OUR CUSTOMERS OVER A PROBLEM THAT WE HAD. I'M NOT SAYING THEY'RE ALL FRIVOLOUS; IT JUST SEEMS IN RECENT YEARS THE PROBLEM HAS GOTTEN TOTALLY OUT OF HAND.

MR. SOL SCHREIBER: IS THAT A FEDERAL OR STATE PROBLEM?

MR. GOLDFARB: IT'S A FEDERAL PROBLEM AS WELL AS A STATE PROBLEM.

THE STATE PROBLEM IS BECOMING MUCH, MUCH MORE SERIOUS BECAUSE WHAT IS HAPPENING IS, AND AS THE FEDERAL COURTS BEGIN TO CLAMP DOWN AND ADHERE MORE CLOSELY TO RULE 23 REQUIREMENTS, THERE IS THIS HUGE SHIFT OF CASES INTO A FEW STATE COURTS, IN SMALL DISTRICTS WHERE THE JUDGES IN THOSE DISTRICTS ALMOST SEE IT AS THEIR CIVIC DUTY TO CERTIFY CLASSES.

HONORABLE JOHN L. CARROLL: YOU MENTION THE ALABAMA CASE IN YOUR --

MR. GOLDFARB: YOU NOTICE I AVOIDED MAKING ANY REFERENCE TO THAT.

BUT WE'VE HAD A CASE PENDING IN FEDERAL COURT IN NEW JERSEY FOR A YEAR AND A HALF, AND THEN OUT OF THE BLUE, A NATIONWIDE CLASS ACTION GETS SENT TO US IN THE MAIL, ALREADY CERTIFIED, BEFORE WE'VE EVEN BEEN SERVED WITH A COMPLAINT. THAT IS A REAL SERIOUS PROBLEM, THE REMEDY TO WHICH MAY BE --

HONORABLE PAUL NIEMEYER: IS THAT FEDERAL COURT OR STATE COURT?

MR. GOLDFARB: A STATE COURT IN A COUNTY WITH A POPULATION --

HONORABLE PAUL NIEMEYER: I DON'T WANT YOU TO TOSS TOO BIG A SOFTBALL UP HERE, BECAUSE WE ARE FOCUSED ON WHAT WE'VE PUT OUT FOR PUBLICATION. BUT IF YOU HAD A FULL SAY, WHAT WOULD YOU PROPOSE TO LESSEN THE PROBLEM THAT CHRYSLER EXPERIENCED? YOU SAY YOU'VE HAD A TRIPLING OF YOUR CLASS ACTIONS, AND IN YOUR JUDGMENT, TWO-THIRDS OF THOSE ARE FRIVOLOUS. ONE-THIRD PROBABLY ARE NOT, AND THEY NEED TO BE ADDRESSED. BUT WHAT CHANGE WOULD YOU MAKE?

MR. GOLDFARB: ASIDE FROM THE STATE COURT PROBLEM, OR AS WELL INCLUDING --

HONORABLE PAUL NIEMEYER: WELL, WE'RE HERE ON THE FEDERAL RULES. AND THE QUESTION IS: WHAT WOULD BE AVAILABLE TO LESSEN THAT? THIS MAY BE PART OF THE AGE WE'RE IN; I DON'T KNOW.

MR. GOLDFARB: NO. I THINK THAT THE COST/BENEFIT ANALYSIS REVISION WOULD GO A LONG WAY, TO ALLOW THE COURTS TO LOOK CAREFULLY AT THE EXTENT TO WHICH THERE IS ANY REAL BENEFIT TO CLASS MEMBERS.

HONORABLE PAUL NIEMEYER: WELL, I GUESS THE QUESTION WOULD THEN HAVE TO BE, TO MAKE IT A LITTLE MORE SOPHISTICATED, IS THAT: OF THOSE THAT YOU CONSIDER FRIVOLOUS, ARE YOU ABLE TO GET THOSE KNOCKED OUT UNDER EXISTING RULES? BECAUSE YOU CAN'T REALLY STOP THE FILING. WHAT YOU CAN DO IS STOP THE

CERTIFICATION OF THEM, IF THEY'RE FRIVOLOUS UNDER EXISTING RULES. AND IF EXISTING RULES DON'T ADEQUATELY ADDRESS THAT, THEN OBVIOUSLY THAT WOULD LEAVE ROOM FOR A PROPOSAL.

MR. GOLDFARB: WELL, ALLOWING US TO FILE A MOTION WITH THE COURT ASKING THAT COURT TO REVIEW THE ALLEGED HARM IN THE PLEADINGS WOULD OBVIATE MONTHS, SOMETIMES YEARS OF LITIGATION BEFORE WE EVEN GET TO CLASS CERTIFICATION. AND THAT'S WHY WE TOTALLY SUPPORT THAT PROVISION. WE THINK IT WOULD GO A LONG WAY TO SOLVING IT.

I MEAN, WHAT WE'RE FACED WITH TYPICALLY WHEN WE DO A RECALL OR WHEN THE GOVERNMENT CLOSES THE CASE, THERE IS A LAWYER COMING TO US AND SAYING, "LOOK, WE DON'T CARE ABOUT THE MERITS OF THE CASE. THE LOCAL JUDGE IS GOING TO CERTIFY THIS CLASS. WE FOUND AN EXPERT THAT HAS CONCLUDED THAT YOUR FIX IS NO GOOD. AND IF YOU AGREE TO PAY US A REASONABLE ATTORNEY'S FEE, WE CAN COME UP WITH SOME BELLS AND WHISTLES THAT SOME JUDGE WILL SIGN OFF ON AS PROVIDING SOME BENEFIT TO THE CLASS MEMBERS, AND WE'LL ALL BE HAPPY. YOU'LL BUY YOUR RES JUDICATA; WE'LL GET OUR ATTORNEYS' FEES. AND, YOU KNOW, THERE IS NO HARM, NO FOUL."

AND WE ARE FACED WITH THAT OVER AND OVER AGAIN.

HONORABLE JOHN L. CARROLL: ISN'T THAT BEYOND THE SCOPE OF WHAT WE CAN DO? WE CAN'T DO ANYTHING TO THE STATE COURTS TO MAKE THEM DO RIGHT.

MR. GOLDFARB: THE STATE COURT PROBLEM IS A SEPARATE PROBLEM. THERE ARE MANY THINGS THAT CAN BE DONE LEGISLATIVELY.

HONORABLE JOHN L. CARROLL: YOU CAN REMOVE TO FEDERAL COURT IF YOU HAVE THE APPROPRIATE JURISDICTION.

MR. GOLDFARB: WELL, WHAT THEY TYPICALLY DO IS FIND SOME PLAINTIFF IN THE STATE OF MICHIGAN TO GO DOWN TO ONE OTHER STATE AND DEFEAT DIVERSITY.

SO IT'S A PROBLEM UNDER THE EXISTING RULES. I'M NOT SUGGESTING YOU HAVE A SOLUTION TO THAT. THERE ARE SOLUTIONS, AND I THINK THAT SOMEONE SHOULD TAKE A SERIOUS LOOK AT THEM.

MR. SOL SCHREIBER: IS THERE ANYTHING THAT THIS COMMITTEE CAN DO IN WRITING SOMETHING INTO THE RULES THAT WOULD APPLY TO STATE COURTS? IS THERE SOME WAY OF TALKING ABOUT DUE PROCESS, SOMETHING THAT WOULD LEND SUPPORT TO YOUR CLAIM THAT MANY OF THE STATE CASES ARE FRIVOLOUS AS SUCH?

MR. GOLDFARB: THAT'S A GOOD QUESTION. I HAVE TO REREAD THE BMW CASE. I THINK THERE WAS SOME LANGUAGE IN THERE THAT WENT TO THE QUESTION OF WHETHER IT WAS PROPER TO HAVE STATE NATIONWIDE CLASS CERTIFICATIONS. AND THERE MAY BE SOMETHING THAT COULD BE PUT INTO AN AMENDED FEDERAL RULE 23 THAT BASICALLY --

MR. SOL SCHREIBER: LIMIT STATEWIDE ONLY TO FEDERAL CASES --

MR. GOLDFARB: LIMITS INTERSTATE CASES ONLY TO THE FEDERAL COURTS, THAT WHENEVER A CASE IS BEING SOUGHT TO BE CERTIFIED BEYOND THE BOUNDARIES OF THAT STATE, THAT IT WOULD AUTOMATICALLY GIVE RISE TO A RIGHT TO GET INTO FEDERAL COURT.

HONORABLE PAUL NIEMEYER: ALL RIGHT. DOES THAT ABOUT COVER IT?

MR. GOLDFARB: WELL, I'M WILLING TO STOP THERE.

HONORABLE C. ROGER VINSON: BEFORE YOU SIT, YOU SAID YOU ARE OPPOSED TO THE SETTLEMENT PROPOSAL. TELL US WHY. I MEAN, MAYBE YOU'VE ALREADY --

MR. GOLDFARB: I WOULD LIKE TO, AND IT'S A VERY CLOSE QUESTION. I KNOW THAT MANY IN OUR INDUSTRY HAVE DIFFERENT VIEWS ON IT, BECAUSE SETTLEMENT CLASSES HAVE BEEN BENEFICIAL TO US. WE HAVE RESPONDED TO THAT DIALOGUE THAT WE'VE HAD THAT I DESCRIBED BEFORE WITH PLAINTIFFS' COUNSEL AND BOUGHT RES JUDICATA.

AND FRANKLY, THE REASON THAT CHRYSLER IS OPPOSED TO THE SETTLEMENT CLASS PROPOSAL IS BECAUSE WE'RE TRYING TO WEAN OURSELVES FROM THAT TEMPTATION. IT'S AS SIMPLE AS THAT. IF IT'S NOT OUT THERE, MAYBE THERE WILL BE FEWER PLAINTIFFS' LAWYERS THAT WILL COME FORTH AND SORT OF TEMPT US WITH THAT PROPOSAL. AND THAT'S REALLY THE REASON. BECAUSE IT IS, IN MANY CASES, IN OUR INTEREST TO SIGN ONTO A SETTLEMENT THAT MAY NOT MEET RULE 23.

HONORABLE PAUL NIEMEYER: ALL RIGHT. THANK YOU.

HONORABLE DAVID F. LEVI: WELL, YOU WANT TO KEEP THE COVER BARE SO THAT YOU DON'T HEAT. BUT WHEN YOU HAVE ONE OF THOSE CASES THAT YOU CONSIDER TO BE A GENUINE CASE AND WHEN YOU SETTLE IT, IF THERE IS SOME FEATURES ABOUT THE CASE THAT WOULD

MAKE IT IMPRACTICAL TO TRY, PERHAPS, AT LEAST AN ARGUMENT COULD BE MADE, YOU'RE GOING TO GO INTO THE DISTRICT COURT AND ARGUE THAT THE CASE COULD BE TRIED, EVEN THOUGH WERE THE SITUATION DIFFERENT, YOU'LL ARGUE THAT THE CASE COULD NOT BE TRIED.

AND SO, THE PRACTICAL EFFECT, AND WHAT HAPPENS IS THAT YOU'LL HAVE A CASE WHERE ARGUMENTS CAN BE MADE EITHER WAY AS TO WHETHER THE CASE COULD BE TRIED AS A CLASS ACTION OR NOT. BUT IF YOU DECIDE YOU WANT TO SETTLE IT, THEN THE DISTRICT JUDGES ARE GOING TO HAVE ANYBODY WHO IS IN THERE ARGUING THAT THIS IS NOT A TRUE CLASS ACTION, EVEN THOUGH, PERHAPS, IF THE CIRCUMSTANCES WERE DIFFERENT, THAT'S THE ARGUMENT YOU COULD MAKE.

MR. GOLDFARB: THERE IS ALWAYS SOME LOYAL OPPOSITION THAT COULD COME IN AND ARGUE THAT IT'S NOT CERTIFIABLE. WE DO FACE THAT.

HONORABLE DAVID F. LEVI: FROM OBJECTORS.

MR. GOLDFARB: FROM OBJECTORS, CONSUMER REPRESENTATIVES, CLARENCE DIDLOW (PHONETIC), IN OUR CASE, FOR THE CENTER FOR AUTO SAFETY.

SO THERE IS OFTEN THAT KIND OF DEBATE. BUT, YES, WE WOULD GO IN, AND IN A LEGITIMATE CASE, TRY TO GET --

HONORABLE ANTHONY SCIRICA: YOU'D SAY THAT THERE COULD BE SUB-CLASSES OR WHATEVER, IF YOU HAD DIFFERENT STATE LAW PROBLEMS, AND MAKE YOUR ARGUMENT ON THAT.

MR. GOLDFARB: YEAH, THAT'S RIGHT.

HONORABLE PAUL NIEMEYER: ALL RIGHT. THANK YOU.

I UNDERSTAND MS. CABRASER HAS ENTERED. IS SHE HERE? WE'LL HEAR FROM YOU.

TESTIMONY OF ELIZABETH J. CABRASER

MS. CABRASER: GOOD MORNING TO THE MEMBERS OF THE COMMITTEE. MY NAME IS ELIZABETH CABRASER. I'M AN ATTORNEY HERE IN SAN FRANCISCO, WITH SOME EXPERIENCE REPRESENTING PLAINTIFFS IN CLASS ACTIONS IN THE FEDERAL AND STATE COURTS.

I WANTED TO ADDRESS, I THINK, THE PROPOSED SUBDIVISION THAT IS OF INTEREST TO MANY, IF NOT MOST PEOPLE THAT HAVE TESTIFIED BEFORE THE COMMITTEE. AND THAT IS, THE PROPOSED RULE 23(B)(4), THE CODIFICATION OF THE CONCEPT OF THE SETTLEMENT CLASS.

I KNOW THAT THERE ARE CONCERNS THAT ARE VERY ALIVE AND VERY REAL CONCERNS ABOUT THE PURPORTED CORRUPTION OF PROCEDURES IN CONNECTION WITH THE APPROVAL OF CLASS SETTLEMENTS, BOTH IN THE FEDERAL AND STATE COURTS. I BELIEVE, HAVING BEEN THROUGH MANY OF THOSE PROCEDURES, THAT RULE 23(B)(4) WILL GO VERY FAR TO CORRECT THE PERCEPTION OF CORRUPTION AND ANY REAL TEMPTATIONS IN THAT REGARD. BECAUSE I THINK THE EXISTENCE OF THAT SUBSECTION WILL PROVIDE THE BASIS FOR CASE LAW FOR PRACTICE, FOR STANDARDIZATION OF THE PROCESS. IT WILL DIGNIFY THE SETTLEMENT CLASS IN A WAY THAT THE SETTLEMENT CLASS NEEDS, PARTICULARLY IN THESE DAYS OF CONTROVERSY OVER THE LEGITIMACY OF THE SETTLEMENT CLASS.

FOR A NUMBER OF YEARS, IT WAS ACCEPTED, I THINK, BY MOST JUDGES IN MOST CIRCUITS, THAT A CLASS COULD BE CERTIFIED FOR SETTLEMENT PURPOSES BECAUSE IT COULD MEET THE REQUIREMENTS OF RULE 23 IN A DIFFERENT CONCEPT, WHEN A SETTLEMENT WAS PROPOSED, THAN IT MIGHT HAVE BEEN REQUIRED TO DO WERE THE CASE TO BE TRIED. AND I THINK THAT BECAME ALMOST A GIVEN IN FEDERAL JURIS PRUDENCE.

THE GENERAL MOTORS AND GEORGINE DECISIONS FROM THE THIRD CIRCUIT, OF COURSE, RENEWED THE CONTROVERSY, AND I THINK PRESENTED THE MOST COMPELLING ARGUMENTS THAT HAVE EVER BEEN PRESENTED FOR CONCERN ABOUT AND SKEPTICISM OVER THE SETTLEMENT ON THE CLASS.

THERE ARE CASES THAT CAN BE TRIED AS CLASS ACTIONS IN WAYS THAT MIGHT CHALLENGE THE MANAGEMENT CAPACITIES OF THE COURTS OR THE CREATIVITY OF COUNSEL, WERE THESE CASES REQUIRED TO BE TRIED AS CLASS ACTIONS POST CERTIFICATION.

SO I THINK THE ARGUMENT THAT A CLASS IS NO GOOD, IF IT IS NOT OBVIOUSLY TRIABLE ON ALL ISSUES AND IN ALL RESPECTS, HAS BECOME A RED HERRING. AND I THINK THE STATEMENT PRESENTED AT ITS MOST ELEGANT AND AT ITS MOST LOGICAL EXTREME IN GEORGINE PROVES THAT POINT.

THERE WERE WAYS, THERE ARE WAYS TO TRY CLAIMS AND ISSUES THAT WERE PRESENTED --

HONORABLE PAUL NIEMEYER: WHAT DOES GEORGINE PROVE?

MS. CABRASER: PARDON ME?

HONORABLE PAUL NIEMEYER: WHAT DOES GEORGINE PROVE?

MS. CABRASER: I THINK GEORGINE PROVES THAT THERE HAS BECOME -- GEORGINE PROVES THE POLARIZATION BETWEEN THE CONCEPTS OF THE SETTLEMENT CLASS AND THE TRIAL CLASS THAT I DON'T THINK REALLY EXISTS. AND I THINK THE ENACTMENT OF RULE 23(B)(4) WOULD PRESENT THE MIDDLE GROUND AND ENABLE COURTS TO REASONABLY CONSIDER HOW THE REQUIREMENTS OF RULE 23 ARE MET IN A PARTICULAR CASE.

I DO NOT HAPPEN TO AGREE WITH THE CONCLUSION IN GEORGINE, BUT THE CLAIMS PRESENTED FOR SETTLEMENT PURPOSES ONLY IN GEORGINE COULD NOT HAVE BEEN TRIED, AT LEAST IN PART, UTILIZING THE PROVISIONS OF 23(C)(4)(A) AND 23(C)(4)(B).

HONORABLE PAUL NIEMEYER: I GUESS THE QUESTION HANDED UP TO US AGAIN AND AGAIN, AND WE'VE HEARD A LOT OF PEOPLE ON THE (B)(4), AS YOU SAY, THAT'S PROBABLY THE ONE WE'VE HEARD THE MOST TESTIMONY ON, WHICH IS: WHERE IS THE CONSTRAINT, IF THE ATTORNEYS ARE NEGOTIATING AND IT'S IN BOTH THEIR INTERESTS TO MAKE THE CLASS AS LARGE AS POSSIBLE? THE PLAINTIFF ENDS UP REPRESENTING AN ENORMOUS CLASS NATIONWIDE, WHICH WOULD BE THE NORM, AND THE DEFENDANT BUYS PEACE NATIONWIDE. NOW, THE TWO PARTIES SIT IN THERE NEGOTIATING. THEY HAVE BEEN AT IT FOR QUITE AWHILE. THEY TRUST EACH OTHER; THEY'RE IN GOOD FAITH; AND THEY REACH A SETTLEMENT.

THE QUESTION IS NOW: YOU PRESENT THAT TO THE COURT, AND THE LITIGANTS BEFORE THE COURT HAVE NOW SAID, "WE'RE AT

PEACE. WE HAVE A SETTLEMENT." AND THOSE LITIGANTS ARE.

NOW, THE COURT SAID, "WELL, I HAVE TO WORRY ABOUT THE NATIONWIDE GROUP OF PEOPLE THAT WEREN'T AT THE TABLE. AND HOW DO I KNOW THAT THEY'RE ADEQUATELY PROTECTED IN THIS CASE, AND WHAT KIND OF HEARING DO WE CONDUCT TO PROTECT THEM?"

AND IF YOU EXTEND IT EVEN FURTHER, THAT, SUCH AS IN AHEARN AND GEORGINE, THE PEACE IS NOT JUST PEACE FOR CURRENT CASES; IT'S PEACE FOR ANYTHING ARISING OUT OF THIS PRODUCT FOREVER, THAT'S THE KIND OF PEACE THEY WANT, BOTH SIDES.

WHERE ARE THE CONSTRAINTS ANYMORE WHEN YOU HAVE A COURT SITTING THERE AND SAYING, "WELL, AS A PRACTICAL MATTER, OUR COURTS ARE GOING TO BE TOTALLY JAMMED IF WE HAVE TO DO THESE INDIVIDUALLY," AND THERE IS AN ENORMOUS INCENTIVE TO GO ALONG, IN SOME SENSE, IF THERE IS A FAIRNESS ABOUT IT, AND PROVIDE AN APPROVAL. AND WHAT WE CREATE IS A MONSTER THAT TOTALLY TWISTS THE SYSTEM, WHERE EVEN JUSTICIABILITY CAN GO OUT THE WINDOW, JURISDICTION GOES OUT THE WINDOW. WHERE ARE THE LIMITS?

YOU SAY WHERE THEY'RE IN GOOD FAITH AND THE APPROVAL PROCESS AND THE INTERVENORS, BUT IS THE TEMPTATION TOO GREAT? HAVE WE OPENED UP SOMETHING THAT'S EVEN WORSE FOR PEOPLE AFFECTED THAN THE PROCESS AS IT EXISTS IN ITS CURRENT FORM?

THAT'S A LONG QUESTION, AND IT SAYS A LOT, BUT I'M VERY INTERESTED IN THIS SETTLEMENT CONCEPT ON SOME KIND OF PHILOSOPHICAL BASIS, BECAUSE I THINK IT'S DIFFICULT. I THINK THE SUPREME COURT'S GOING TO ADDRESS IT, I HOPE, AND WE GET THAT

GUIDANCE. BUT WE'RE LEFT WITH AN ENORMOUS AMOUNT OF WORK DOWN IN THE THIRD CIRCUIT, BUT WITH SOME VERY SMART PEOPLE, PEOPLE IN GOOD FAITH. THERE WAS A LOT OF WORK PUT IN THERE. AND THEN YOU HAVE A VERY THOUGHTFUL THIRD CIRCUIT OPINION WHICH PUTS THE CASE AT ISSUE AND PRESENTS SOME OF THE PROBLEMS.

NOW, I'M NOT SURE ALL THESE PROBLEMS WERE FULLY ADDRESSED EVEN IN THE OPINION, BECAUSE OPINIONS TRY TO LEAVE IT AT A RULE LEVEL RATHER THAN THESE LARGER QUESTIONS THAT I'M PRESENTING TO YOU. AND IT'S SUGGESTING THAT, WELL, A RULES CHANGE WILL TAKE CARE OF ALL THIS. THEN WE'RE FACED WITH THE EVALUATION OF THE SETTLEMENT ITSELF, IF WE DON'T HAVE ANY KIND OF IDEA TO WHERE THIS IS GOING TO LEAD.

I'D BE INTERESTED IN HEARING WHETHER THERE IS ANY LIMIT TO THIS, AND WHETHER HUMANKIND CAN HANDLE THAT KIND OF TEMPTATION.

MS. CABRASER: I THINK THAT RULE 23(B)(4), PARTICULARLY IF ACCOMPANIED BY SUGGESTED GUIDELINES IN THE COMMITTEE NOTES, IN TERMS OF THE EVALUATION, BOTH OF SETTLEMENTS FOR FAIRNESS, ADEQUACY AND REASONABLENESS, AND THE EVALUATION OF SETTLEMENT CLASSES FOR COMPLIANCE WITH THE RULE 23(A) AND 23(B)(4) REQUIREMENTS WILL NOT MAKE THIS PROBLEM GO AWAY. IT WON'T SOLVE THE PROBLEM. JUDGES AND LAWYERS HAVE TO SOLVE THE PROBLEM. BUT 23(B)(4), WITH APPROPRIATE NOTES, WILL PROVIDE JUDGES AND LAWYERS WITH A TOOL THAT THEY DO NOT PRESENTLY HAVE.

WE HAVE A SITUATION RIGHT NOW WHERE A LOT OF THE

FRUSTRATION, THE CONFUSION, THE SKEPTICISM, THE CYNICISM, THE CONCERN, COMES FROM THE FACT THAT WE DO NOT HAVE A CLEAR-CUT RULE TO SERVE AS AN ANCHOR AND AS A BASIS FOR THE DEVELOPMENT OF PROCEDURES.

WE HAVE THE MANUAL FOR COMPLEX LITIGATION THIRD. THAT IS VERY HELPFUL. JUDGES IN FEDERAL AND STATE COURTS USE THAT. WE HAVE THE FACTORS THAT THE CIRCUITS HAVE ARTICULATED TO EVALUATE THE FAIRNESS, ADEQUACY AND REASONABLENESS OF SETTLEMENTS.

MR. SOL SCHREIBER: MS. CABRASER, IN YOUR PAPER, YOU SET OUT SUGGESTED GUIDELINES FOR THE ADVISORY NOTES. WOULD YOU SPEND A MOMENT OR TWO AND GIVE US SOME OF YOUR THOUGHTS ON THAT? BECAUSE AS I UNDERSTAND YOUR ARGUMENT, WE CAN HAVE THE NEW RULE, BUT WE NEED A BETTER ADVISORY. WHAT WOULD BE A BETTER ADVISORY?

MS. CABRASER: THAT WAS BASICALLY MY SUGGESTION, AND I CAN'T CLAIM ANY CREDIT FOR THAT AT ALL, BECAUSE THE FACTORS THAT I SET FORTH IN MY STATEMENT ARE LARGELY TAKEN IN SOME CASES ALMOST VERBATIM FROM THOSE SUGGESTED BY JUDGE SCHWARZER IN A RECENT ARTICLE ADDRESSING THE PROBLEM OF A BASIS FOR LEGITIMACY, PREDICTABILITY, JUSTICIABILITY, IN THE CONTEXT OF THE SETTLEMENT CLASS.

AND THESE ARE, IN MANY CASES, GUIDELINES THAT LAWYERS AND JUDGES FAMILIAR WITH THE PROCESS WORK WITH, BECAUSE THEY COME FROM VARIOUS CIRCUIT LAW ON APPROVAL OF CLASS SETTLEMENTS. BUT THEY ARE THE BASICS IN TERMS OF THE VALUE OF THE SETTLEMENT,

WHETHER PEOPLE SIMILARLY SITUATED ARE SIMILARLY TREATED, THE ADEQUACY OF NOTICE, WHICH BECOMES A REAL ISSUE IN THE UNUSUAL CASE OF THE FUTURE CLAIMS CLASS, WHICH WAS PRESENTED BY GEORGINE.

HONORABLE ANTHONY SCIRICA: COULD YOU COMMENT ON THAT? IT SEEMS TO ME THAT ONE OF THE SERIOUS CRITICISMS OF THE SETTLEMENT CLASS PROPOSAL IS PREDICATED ON THE IDEA THAT YOU REALLY CAN'T HAVE AN EFFECTIVE NOTICE. THAT IS, THERE IS GOING TO BE SKEPTICISM ABOUT THE EFFECTIVENESS OF THE NOTICE AND WHETHER THE OPT-OUT PROVISION REALLY MEANS ANYTHING IN SOME OF THESE CLASSES.

WHAT IS YOUR FEELING ON THAT, HAVING BEEN INVOLVED IN MANY OF THESE CASES?

MS. CABRASER: I THINK THE FAIRNESS AND THE ABILITY OF THE COURTS TO OBTAIN CLOSURE THROUGH SETTLEMENTS THAT ARE BOTH COMPREHENSIVE AND FAIR, COMES DOWN TO THE ADEQUACY OF NOTICE. THAT IS THE CHALLENGE.

I THINK THE GOOD NEWS IS, AS SOME RECENT SETTLEMENTS HAVE DEMONSTRATED, IT IS EASIER NOW TO GIVE GOOD NOTICE THAN EVER BEFORE. IT IS LESS EXPENSIVE; THERE ARE MORE MEDIA OUTLETS FOR NOTICE; THE PUBLIC IS ATTUNE TO AND INTERESTED IN CLASS ACTIONS.

YEARS AGO, A CLASS ACTION SETTLEMENT WOULD NEVER MAKE THE FRONT PAGE OF ANY PUBLICATION. NOW, VIRTUALLY EVERY PROPOSED CLASS ACTION SETTLEMENT OF ANY IMPORT TO ANY GROUP

OBTAINS IMMEDIATE, NOT ALWAYS ACCURATE, BUT IMMEDIATE, HIGH-LEVEL PUBLICITY.

AND FOR A PRICE, SOMETIMES A VERY HIGH PRICE IN TERMS OF DOLLARS, GOOD NOTICE CAN BE GIVEN. AND BECAUSE GOOD NOTICE CAN BE GIVEN, THE CONSTITUTION, THE CASE LAW, AND RULE 23 ITSELF SAY GOOD NOTICE MUST BE GIVEN.

SO I THINK THAT FROM THE STANDPOINT OF THE INTERESTS OF THE CLASS MEMBERS -- AND BY THE WAY, I THINK THAT SOMETIMES GETS FORGOTTEN. PUBLIC ADVOCATES, ACADEMICS, JUDGES, LAWYERS, THE INDUSTRY GROUPS, CONSUMER GROUPS, EVERYBODY GETS INVOLVED IN THESE CLASS ACTION SETTLEMENTS. AND SOMETIMES THE CLASS MEMBERS THEMSELVES AND WHAT THEY WANT AND WHAT THEY DESERVE AND WHAT THEY SHOULD HAVE GETS LOST.

IRONICALLY, THAT HAPPENS MOST OFTEN IN THE VERY LARGE CONSUMER CLASS ACTIONS, OR EVEN THE GEORGINE-TYPE CLASS ACTION, WHERE THE MEMBERSHIP IN THE CLASS IS SO LARGE THAT IT VIRTUALLY HAS BECOME A PUBLIC LITIGATION. AND EVERYONE'S INTERESTS GET HEARD FROM, SOMETIMES, EXCEPT THOSE OF THE CLASS MEMBERS, WHO WOULD SIMPLY LIKE TO HAVE A FAIR RECOVERY IN THEIR LIFETIMES.

HONORABLE JOHN L. CARROLL: MS. CABRASER, ALONG THAT LINE, DO YOU HAVE A VIEW OF 23(F), THE INTERLOCUTORY APPEAL?

MS. CABRASER: I DO. I HAVE A VERY STRONG VIEW, AND THAT IS, THAT IN THE PRESENT SYSTEM, APPELLATE REVIEW IS AVAILABLE WHEN NEEDED. WHEN A CLASS CERTIFICATION DECISION DOES BREAK NEW GROUND, DOES RAISE NEW ISSUES, IT'S BEEN MY EXPERIENCE

THAT DISTRICT COURTS HAVE BEEN READY AND WILLING TO CERTIFY THEIR OWN CLASS ACTION DECISIONS FOR INTERLOCUTORY APPELLATE REVIEW UNDER SECTION 1292(B).

THAT WAS DONE IN THE CASTANO CASE. AND WHERE COURTS ARE NOT, WHERE THERE REALLY IS A NEW ISSUE THAT NEEDS AND DESERVES IMMEDIATE APPELLATE REVIEW, THE PETITION FOR WRIT OF MANDATE HAS PROVEN TO BE EFFECTIVE.

THE RHONE-POULENC CASE CAME TO THE SEVENTH CIRCUIT ON A PETITION OF --

HONORABLE PAUL NIEMEYER: DON'T YOU THINK ALL OF THESE CASES THAT ARE GRANTED WRITS OF MANDAMUS HAVE PUSHED IT ABOUT AS FAR AS IT GOES INTO THAT WRIT, AND MAYBE BEYOND? IT'S AN ENORMOUS PRESSURE ON IT, BECAUSE IT'S A RARE WRIT AND SHOULD BE RESERVED FOR EXTRAORDINARY CIRCUMSTANCES.

AND IT'S NOW BECOMING THE MECHANISM OF CHOICE FOR REVIEW. AND AS EACH CASE DECIDES THESE UNDER MANDAMUS, IT'S GOING TO FORESEEABLY BECOME THE WAY THEY REVIEW IT. AND IF THE COURT WANTS IT, IT WILL TAKE IT; AND IF THE COURT DOESN'T WANT IT, IT WON'T TAKE IT. BUT ALL OF THESE OTHER CASES HAVE TAKEN IT, AND THE REQUIREMENTS OF MANDAMUS WILL ERODE.

MS. CABRASER: WELL, I DO AGREE WITH THOSE INVOLVED IN SOME OF THESE CASES. I WAS NOT INVOLVED IN RHONE-POULENC. BUT I DID AGREE IN THAT CASE THAT THE WRIT PETITION WAS BEING TAKEN VERY FAR, AND, OF COURSE, THE ARGUMENT ON THE PETITION FOR CERT. IN THAT CASE WAS THAT THE WRIT MECHANISM HAD NOT BEEN

APPROPRIATELY USED. SO THAT IS A CONCERN.

BUT I THINK THE TEMPTATION TO MAKE A NEW PROCEDURE AVAILABLE WHEN THERE IS CONCERN ABOUT OVERUSE OF AN EXISTING PROCEDURE MAY CREATE A MUCH LARGER PROBLEM THAN IT SOLVES. AND THAT JUST IS DUE TO THE ADVERSARY NATURE OF OUR SYSTEM.

I FIND IT VERY DIFFICULT TO COMPREHEND -- AND PERHAPS I DO NOT GIVE THE EXCELLENT LAWYERS WHO REPRESENT DEFENSE INTERESTS IN CLASS ACTIONS ENOUGH CREDIT -- I FIND IT VERY DIFFICULT TO COMPREHEND THAT THEY WILL HAVE THE SIGNIFICANT PERSONAL FORCE AND PERSONAL MAGNETISM TO PERSUADE A CLIENT THAT THIS IS NOT A CASE IN WHICH INTERLOCUTORY APPEAL FROM A CLASS CERTIFICATION DECISION IS WARRANTED, BECAUSE, AFTER ALL, IT'S ROUTINE.

SO MY CONCERN IS THAT THIS NEW MECHANISM WILL NOT ONLY BECOME OVERUSED, IT WILL BECOME USED IN EVERY CASE, INCLUDING SECURITIES ANTITRUST, CIVIL RIGHTS, EMPLOYMENT DISCRIMINATION CASES, IN WHICH THE JURIS PRUDENCE OF CLASS CERTIFICATION IS VERY WELL ESTABLISHED. CLASS CERTIFICATION DECISIONS RARELY PUSH BEYOND LAW OR CREATE NEW ISSUES THAT NEED IMMEDIATE APPELLATE REVIEW. IN THOSE CASES, THE CLASS MEMBERS VERY FREQUENTLY HAVE A COMPELLING NEED FOR PROMPT ADJUDICATION.

AND MY CONCERN IS: WE'RE ADDING COST AND DELAY AND WE'RE ADDING TO THE BURDEN OF THE APPELLATE COURTS --

MR. SOL SCHREIBER: YOU SUGGEST IN YOUR PAPER A MODIFICATION OF THE LANGUAGE. WHAT IS THE BASIS FOR THAT

MODIFICATION? ARE YOU SAYING, IN EFFECT, ONLY UNUSUAL CASES SHOULD GO UP? HOW DO YOU DESCRIBE THIS?

MS. CABRASER: WELL, IT IS DIFFICULT TO ARTICULATE A LIMITATION ON THAT, AS I'M SURE EVERYONE ON THE COMMITTEE KNOWS, HAVING WRESTLED WITH THIS RULE. AND MY SUGGESTION IS THAT THERE BE A LIMITATION OF RULE 23(F) TO CASES IN WHICH THESE NEW ISSUES, AT LEAST NOWADAYS, ARE MOST LIKELY TO ARISE. AND THAT'S THE MASS TORT AREA.

AND I THINK THAT IN THE COMMITTEE NOTES, WHICH IS THE MOST OBVIOUS PLACE, OR PERHAPS THE RULE ITSELF, THERE SHOULD BE AN EXPRESS RESTRICTION OF THE INTERLOCUTORY APPEAL PROCEDURE TO CLASSES THAT ARE NOT BROUGHT UNDER OTHER FEDERAL STATUTES.

SO, FOR EXAMPLE, A CASE IS BROUGHT UNDER THE FEDERAL SECURITIES LAWS, CASES BROUGHT UNDER THE SHERMAN ACT, CASES BROUGHT UNDER TITLE VII, WHICH ARE PRECISELY THE CASES THAT HAVE BEEN FEDERAL COURT BUSINESS FOR YEARS AND WHICH CLASS ACTION JURIS PRUDENCE IS ESTABLISHED, WOULD NOT HAVE THE RULE 23(F) PROCEDURE. THEY WOULD CONTINUE TO RELY ON THEIR 1292(B) INTERLOCUTORY APPEAL PROCEDURE OR THE PETITION FOR WRIT OF MANDATE.

AND IN THAT WAY, IF THERE IS A NEW AND STARTLING DEVELOPMENT IN CLASS ACTION LAW, LET'S SAY IN THE ANTITRUST FIELD, THAT COULD BE ADDRESSED THROUGH THE EXISTING PROCEDURES IN THE MASS TORT AREA, WHERE THE LAW IS STILL EVOLVING AND IS VERY VOLATILE AND IS VERY CONTROVERSIAL, ALTHOUGH I REALLY DO

PERSONALLY HAVE EXTREME RESERVATIONS ABOUT MAKING RULE 23(F) AVAILABLE TO ALL.

IF IT WERE TO BE MADE AVAILABLE, I THINK THAT IS WHERE, IF THERE IS A NEED, THE GREATEST NEED --

HONORABLE ANTHONY SCIRICA: OF COURSE, THE ADVISORY NOTE DOES CAUTION THE APPELLATE JUDGES IN THIS REGARD.

MS. CABRASER: I UNDERSTAND THAT IT DOES.

HONORABLE ANTHONY SCIRICA: AND I THINK THAT MOST APPELLATE JUDGES, BOTH ON AN INSTITUTIONAL BASIS AND PERHAPS AS A VISCERAL REACTION, DON'T LIKE INTERLOCUTORY APPEALS.

MS. CABRASER: I THINK THAT THAT IS VERY TRUE, IN MOST CASES. AND THAT IS A VERY HELPFUL COMMENT.

MY CONCERN IS THAT IT DOES NOT GO FAR ENOUGH. AND WE DO HAVE SITUATIONS, LIKE IT OR NOT -- AND THIS IS NOT THE FAULT OF THE INSTITUTIONS, AND IT'S CERTAINLY NOT THE FAULT OF THE JUDGES -- WE HAVE SOME CIRCUITS IN WHICH THE CIRCUIT MAY BOTH BE MOST LIKELY TO TAKE THE CASE ON, BECAUSE OF INTEREST, AND THAT CIRCUIT IS ONE OF THE MOST CONGESTED. SO FOR THE LITIGANTS --

HONORABLE PAUL NIEMEYER: I WON'T ASK YOU WHICH CIRCUIT YOU'RE TALKING ABOUT.

WELL, I THINK WE'VE ABOUT USED YOUR TIME AND OUR TIME.

HONORABLE DAVID F. LEVI: COULD I ASK ONE THING --

MR. THOMAS D. ROWE, JR.: -- ABOUT WHETHER IT SHOULD BE LIMITED TO CASES IN WHICH A SETTLEMENT IS ALREADY REACHED, (B)(4), PRESENTLY, SHOULD IT BE BROADENED?

MS. CABRASER: NO, I DON'T BELIEVE IT SHOULD BE SO LIMITED. AND HERE IS THE PROBLEM. I'LL TRY TO MAKE THIS POINT AS QUICKLY AS I CAN.

PERSONALLY, I HAVE THE GREATEST CONCERN ABOUT CASES THAT ARE SETTLED BEFORE THEY ARE BROUGHT. I THINK THEY ARE STILL RELATIVELY RARE. MOST OF US BRING CASES TO TRY CASES. WE WOULD LIKE TO SETTLE THE CASES THAT WE BRING TO TRY. BUT IF WE CAN'T SETTLE THEM, WE KNOW WE HAVE TO TRY THEM.

AND I THINK THAT (B)(4) IS BEST NOT RESTRICTED TO THE CASES THAT ARE MOST PROBLEMATIC. BECAUSE IT MAY DISCRIMINATE BETWEEN THE CASE THAT IS BROUGHT IN GOOD FAITH TO TRY AND THEN SETTLE BEFORE FORMAL CERTIFICATION, WHICH IS THE CASE THAT IS THE REAL CASE TO --

HONORABLE PAUL NIEMEYER: ALL RIGHT.

MS. CABRASER: THE ONE CONCERN I HAVE IS: WE BRING A CASE. IT'S LITIGATED FOR THREE YEARS. IT'S A CASE WE BROUGHT TO TRY, BUT WE'D LIKE TO SETTLE IT. THERE IS A CONCERN ABOUT WHETHER IT COULD BE TRIED, BUT WE KNOW IT COULD BE SETTLED.

AS WE'RE STRUGGLING WITH RULE 23 (B)(3), IN THE NEXT CIRCUIT, IN THE NEXT DISTRICT, OR IN SOME STATE, SOMEONE WHO HASN'T GONE THROUGH THAT PROCESS, DOESN'T KNOW HOW TO TRY THE CASE, DOESN'T KNOW THE CASE, PACKAGES A SETTLEMENT, AND THAT CASE COMES IN PRE-SETTLED AGAINST THE BENEFIT OF --

HONORABLE PAUL NIEMEYER: WE'VE HEARD TESTIMONY THAT THAT IS, IN FACT, OCCURRING. JUDGE CARR GAVE US AN INCIDENT

WHERE HE WAS WORKING WITH A CLASS, AND WHILE WORKING WITH THE CLASS ACTION, THE CASE WAS SETTLED IN THE STATE COURT.

MS. CABRASER: RIGHT. AND --

HONORABLE PAUL NIEMEYER: OKAY.

MS. CABRASER: -- WE WANT TO PREVENT THAT.

THANK YOU.

HONORABLE PAUL NIEMEYER: ALL RIGHT. JUSTICE TORBERT?

TESTIMONY OF C.C. TORBERT, JR.

MR. TORBERT: GOOD MORNING. THANK YOU FOR ALLOWING ME TO TESTIFY BEFORE THIS COMMITTEE. I'VE ENJOYED THE TESTIMONY SO FAR. I WOULD LIKE TO MAKE A FEW COMMENTS AT THE TAIL END, IF I HAVE TIME, ABOUT SOME OF THE DECISIONS MADE.

I VIEW THE WORK OF THIS COMMITTEE, ONE, FOR EFFICIENCY, BRINGING ALL IN FAIRNESS. AS I READ THE PAPERS AND SOME OF THE WRITTEN TESTIMONY, I THINK THAT'S WHAT YOU'RE ABOUT.

LET ME TELL YOU VERY QUICKLY: MY BACKGROUND IS 42 YEARS IN THE LAW, ABOUT HALF OF WHICH WAS IN PUBLIC SERVICE, AND THE OTHER HALF AS A PRIVATE PRACTITIONER. I'M A PRIVATE PRACTITIONER RIGHT NOW.

THE INTEREST, IN THOSE OF US WHO ARE PRINCIPALLY STATE COURT LITIGATORS, IS THAT AT LEAST IN ALABAMA, WE FOLLOW THE FEDERAL RULES. WE HAVE THE FEDERAL RULES. THEY DOVETAIL TOGETHER. WE ARE JUST AS INTERESTED IN WHAT YOU DO IN YOUR FEDERAL RULES AS WHAT WE WOULD DO BACK HOME. NOW --

HONORABLE PAUL NIEMEYER: WHY IS IT ALABAMA IS ON THE

FOREFRONT OF THIS? WE'VE HAD A LOT OF TESTIMONY --

MR. TORBERT: WELL, I WAS SAVING UP FOR THAT.

I LISTENED TO THE ORAL ARGUMENT, AND I HAVE MY OWN VIEW. AND I'M NOT A PARTY TO IT, AND THEREFORE, MY VIEW IS PRETTY GOOD. AND IT'S ABOUT THE SAME AS THE ONE THAT YOU'VE ESPOUSED. AND THAT IS, LIKELIHOOD, THE SPECULATION IS, BECAUSE OF JURISDICTION PROBLEMS, PROBABLY THAT WRIT WILL GET QUASHED AND THEREFORE, WILL NOT GIVE GUIDANCE TO US AS TO THE UNDERLYING MAIN ISSUE.

BUT THAT'S NOT THE ONLY CASE. YOU KNOW, WE BUMP AROUND WITH BMW VERSUS GORE AND TRY TO INSTRUCT THE NATION ON PUNITIVE DAMAGES. AND, GEE WHIZ, I WANTED TO MAKE THIS ASSERTION TO THIS COMMITTEE.

WHILE WE HAVE LIMITED BUT CURRENT AND UP-TO-DATE STATISTICS -- AND I WAS TRYING TO EQUATE THIS AS HOW MANY CLASS ACTIONS I'VE SEEN AT THE STATE COURT LEVEL WHILE I WAS ON THE BENCH -- VERY, VERY FEW, IN THE PAST EIGHT YEARS, THEY HAVE MUSHROOMED. THEY'VE ACCELERATED. THEY HAVE GONE UP, IF OUR STATS ARE RIGHT IN ALABAMA, IN TWO YEARS, FOUR- TO 500 PERCENT. THEY'RE TUCKED AWAY IN SMALL JURISDICTIONS.

ONE COMMENT EARLIER, THAT I'VE GOT ONE OVER THAT'S BEEN LANGUISHED AROUND FOR OVER A YEAR ON A 12(B)(6), A MOTION TO DISMISS, OR A JUDGMENT ON THE PLEADING, I'M NOT BEING CRITICAL; I'M JUST BEING FACTUAL.

SO, YES, WE SORT OF FURNISHED THE OPPORTUNITY IN

ALABAMA FOR IMPORTANT LEGAL DECISIONS. SO THAT'S WHERE I COME FROM.

I AM NOT --

HONORABLE JOHN L. CARROLL: IF JUSTICE TORBERT HAD BEEN CHIEF JUSTICE, WE WOULD NOT BE --

MR. TORBERT: THAT'S BECAUSE WE'RE FROM THE SAME NECK OF THE WOODS.

WELL, NOW, LET ME MAKE THIS --

HONORABLE PAUL NIEMEYER: THIS IS A NATIONAL HEARING.

MR. TORBERT: YES, SIR.

I'M NOT SURE THAT I KNOW WHERE WE'VE BEEN IN CLASS ACTIONS. WE CERTAINLY DON'T KNOW WHERE WE ARE GOING. AND I IMAGINE THAT WE REALLY DON'T KNOW WHERE WE ARE NOW IN CLASS ACTIONS.

IF YOU LOOK AT IT FROM THE HISTORICAL PERSPECTIVE, MY RECOLLECTION IS THAT THERE WAS A CAVEAT IN 1996 ABOUT THE INAPPROPRIATENESS OF CLASS ACTIONS IN MASS TORT, OR MASS ACCIDENTS, OR AIRLINE CRASHES. BUT I COULDN'T CRITICIZE THE EFFORTS OF THE JUDICIARY IN TRYING TO MANAGE THESE ACTIONS. SO IT'S JUST TROUBLESOME THAT YOU HAVE GOT TO MAKE YOUR DECISIONS AND MAKE YOUR RECOMMENDATIONS.

I'LL COMMENT ALSO IN PASSING WHERE THERE HAS BEEN CRITICISM OF THE PLAINTIFF BAR, THAT SURELY THERE ARE INSTANCES WHERE THE DEFENSE BAR TAKES ADVANTAGE OF A CLASS ACTION SITUATION TO BUY PEACE, PERHAPS NOT THE JUST SORT OF WAY, BUT IN

A SETTLEMENT SORT OF WAY, TO BUY THAT SORT OF PEACE. SO IT WORKS BOTH WAYS, TO BE FAIR.

I WANTED TO COMMENT ON ONLY TWO PARTS, AND ONE FROM ELIZABETH CABRASER, ON THE OTHER SIDE, AND THAT IS, INTERLOCUTORY APPEAL. MY VIEW IS THAT THAT WILL BE A USEFUL AMENDMENT AND A USEFUL DEVICE.

I WOULD PREFER, FROM A PERSONAL STANDPOINT, TO HAVE AN INTERLOCUTORY APPEAL ABOUT AMOUNT OF RIGHT, BUT THAT BRINGS ON CONSIDERATIONS THAT I'M NOT QUALIFIED TO REALLY MAKE A FIRM RECOMMENDATION. BUT IT IS IMPORTANT BECAUSE THE CLASS CERTIFICATION, IN MY VIEW, IS THE MAIN EVENT IN THAT PARTICULAR ACTION.

AND USUALLY, ONCE IT'S CERTIFIED -- MRS. CABRASER SAID THEY FILE ALL THESE ACTIONS AND THEY REALLY WANT TO TRY THEM. I SUBMIT TO YOU THAT THAT IS NOT OVERWHELMINGLY TRUE. IF YOU CAN GET A CLASS CERTIFICATION, IF THE PLAINTIFFS CAN GET A CLASS CERTIFICATION, THE LIKELIHOOD THAT THEN IT TURNS INTO SIMPLY: WHO IS THE BEST NEGOTIATOR? WHO IS THE BEST NEGOTIATOR?

AND AS TO REVIEW, WE HAVE THE SAME RULE OF REVIEW IN ALABAMA THAT YOU DO IN THE FEDERAL COURTS, AND THAT'S THE WRIT OF MANDAMUS.

AND I WOULD LIKE TO LEAVE WITH THE REPORTER, OR THE CLERK, SECRETARY, THE LATEST PRONOUNCEMENT IN ALABAMA ON A REVIEW ON MANDAMUS, AND THAT IS, EX PARTE GREENTREE, WHICH JUST CAME OUT IN NOVEMBER OF 1996, THAT DISCUSSES IN RATHER DETAIL,

OUR CASES AND OUR RULES ON THAT SORT OF REVIEW.

IT JUST MAKES SENSE TO ME, AND IT WOULD BE HELPFUL, IN MY JUDGMENT, TO SETTLE SOME OF THE LAW WITH RESPECT TO CLASS ACTIONS, TO HAVE THE INTERLOCUTORY REVIEW.

YES, SIR?

MR. SOL SCHREIBER: YOU SAY ALABAMA FOLLOWS THE FEDERAL RULES. HOWEVER, IN CERTIFICATION, AS I UNDERSTAND IT, YOU CAN FILE IN ALABAMA AND CERTIFY BEFORE YOU EVEN GET THE DEFENDANT TO KNOW THERE IS A CASE. CAN YOU GIVE ME SOME RATIONALE FOR THAT?

MS. TORBERT: NO, I CAN'T. BUT I CAN TELL YOU THIS.

MR. SOL SCHREIBER: I'M SORRY?

MR. TORBERT: I CANNOT GIVE YOU THE RATIONALE FOR THAT, BUT I WILL SORT OF TRY TO BE PREPARED FOR THAT, SO THAT I COULD SAY TO YOU, IN THIS COMMITTEE, THAT THAT IS NOT ENTIRELY SO, IN ALABAMA TODAY, ALTHOUGH I'VE HAD THE PERSONAL EXPERIENCE OF HAVING ONE FILED ON ONE DAY AND CONDITIONALLY CERTIFIED AT 9:00 O'CLOCK THE NEXT DAY. BUT I RATHER THINK THAT WE ARE GOING TO GET THAT STRAIGHTENED OUT, AND EX PARTE GREENTREE MAY HELP.

IT IS TRUE THAT THE COURT OF CIVIL APPEALS HAS SAID THAT YOU CAN'T REVIEW THAT MANDAMUS, BUT THAT DECISION WAS NOT CERTED TO THE ALABAMA SUPREME COURT. AND LATER DECISIONS INDICATE TO ME THAT THAT WILL NOT BE THE RULE FOREVER IN THE STATE.

SO, MY LAST COMMENT -- AND I SEE YOU MOVING AROUND IN

YOUR CHAIR, WHICH IS AN INDICATION THAT I NEED TO WRAP IT UP.

HONORABLE PAUL NIEMEYER: IS THAT THE CODE OF THE PROFESSION? I WASN'T AWARE OF IT.

(LAUGHTER.)

MR. TORBERT: THE "JUST AIN'T WORTH IT" RULE IS ANOTHER AMENDMENT THAT I WOULD LIKE TO SUBMIT THAT I FAVOR.

AND, JUDGE, I'D LIKE TO RESPOND TO ANY QUESTIONS, AND REQUEST TO BE ALLOWED TO SUBMIT MY WRITTEN COMMENTS BY FEBRUARY THE 15TH.

HONORABLE PAUL NIEMEYER: 15TH, RIGHT.

MR. TORBERT: THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH, JUSTICE.

PROFESSOR MILLER, ARE YOU READY AT THIS TIME?

TESTIMONY OF ARTHUR D. MILLER

MR. MILLER: GOOD MORNING, YOUR HONOR, MEMBERS OF THE COMMITTEE, REPORTER COOPER.

JOHN FRANK AND I ARE THE WORST KINDS OF WITNESSES. WE ARE OLD FOGIES. WE WERE PUT OUT TO PASTURE A LONG TIME AGO, AND WE REMINISCE A LOT.

FOR THOSE MEMBERS OF THE COMMITTEE THAT DON'T KNOW OF MY BACKGROUND, I SERVED AS THE REPORTER TO THIS COMMITTEE FOR A NUMBER OF YEARS, COURTESY OF CHIEF JUSTICE BURGER, AND THEN AS MEMBER OF THE COMMITTEE, COURTESY OF CHIEF JUSTICE RENQUIST.

BUT PERHAPS MY TRUE "CLAIM TO FAME," IN QUOTATION

MARKS, IS THAT I SAT NOT AS BENJAMIN KAPLAN'S FIRST JUDICIAL CLERK, BUT AS HIS ASSISTANT REPORTER. WE USED TO DRAFT RULE 23 IN THE BOWELS OF THE FERRY ON THE WAY TO MARTHA'S VINEYARD.

SO IF ANYBODY CAN CLAIM TO HAVE BEEN THERE AT CREATION, I WAS THERE AT CREATION. IF ANYONE CAN CLAIM TO TELL YOU WHAT WAS IN BEN'S MIND OR THE COMMITTEE'S MIND, JOHN COMES CLOSE, BUT I YIELD NOT TO JOHN. NOTHING WAS IN THE COMMITTEE'S MIND. AND ANYONE WHO TELLS YOU THAT WONDROUS THINGS WERE GOING ON WITH DIRECT RELEVANCE TO THE YEAR 1997, IT'S GOOD STORY TELLING. JUST PUT YOURSELF BACK IN 1960 TO '63. NOTHING WAS GOING ON. THERE WERE A FEW ANTITRUST CASES, A FEW SECURITIES CASES. THE CIVIL RIGHTS LEGISLATION WAS THEN PUTATIVE.

YOU DID NOT HAVE THE DUE PROCESS LEGISLATION; YOU DO NOT HAVE THE SAFETY LEGISLATION; YOU DID NOT HAVE THE ENVIRONMENTAL OR CONSUMER LEGISLATION. AND THE RULE WAS NOT THOUGHT OF AS HAVING THE KIND OF APPLICATION THAT IT NOW HAS.

THAT DOESN'T TELL YOU A THING ABOUT WHAT THE RULE SHOULD BE USED FOR. BUT YOU CAN'T BLAME THE RULE, BECAUSE WE HAVE HAD THE MOST INCREDIBLE UPHEAVAL IN FEDERAL SUBSTANTIVE LAW IN THE HISTORY OF THE NATION BETWEEN 1963 AND 1983, COUPLED WITH JUDICIALLY-CREATED DOCTRINES OF ANCILLARY AND PENDANT JURISDICTION, NOW CODIFIED IN THE SUPPLEMENTAL JURISDICTION STATUTE.

IT'S A NEW WORLD. IT'S A NEW WORLD THAT IMPOSES ON THIS COMMITTEE PROBLEMS OF ENORMOUS DELICACY. AND YOU'RE

SHOOTING AT A MOVING TARGET, AS I SAY IN MY WRITTEN REMARKS, AND SOFT MODIFICATION OF YOGI BERRA. IT'S DEJA VU ALL OVER AGAIN. WE HAD THIS DEBATE IN THE '70S ABOUT THE UTILITY OF THE CLASS ACTION. WE'RE HAVING IT AGAIN.

I WOULD URGE THE COMMITTEE TO THINK ABOUT A COUPLE OF THINGS THAT I WORRY ABOUT WHEN I LOOK AT THIS PROPOSAL. WE ALL SEE LIFE THROUGH OUR OWN EYES. WHEN I BECAME REPORTER IN THE LATE '70S, OUR BIG ATTACK WAS THE PRETRIAL PROCESS. WE STARTED THE MOVEMENT TO CHANGE DISCOVERY, GENTLY. WE STARTED THE MAGNIFICATION OF RULE 16 TO MOVE IT FROM AN EVE-OF-TRIAL CONFERENCE TO A FRONT-END MANAGEMENT TOOL.

I AM THE MASTER OF THE LAW OF UNINTENDED CONSEQUENCES, BECAUSE I AM ALSO THE AUTHOR OF FEDERAL RULE 11, IN ITS 1983 FORM. WE HAD TO DEAL WITH DISCOVERY ABUSE. I LOVE THAT WORD, "ABUSE."

SO LIKE DIOGENES WITH THE LAMP, I WENT OUT ACROSS THE COUNTRY AT BAR MEETINGS TO DISCOVER WHAT ABUSE WAS, IN THAT CONTEXT, FOR DISCOVERY; IN YOUR CONTEXT, FOR CLASS ACTION PURPOSES.

HONORABLE PAUL NIEMEYER: YOU MISSED OUR MEETING YESTERDAY. THAT WAS ON DISCOVERY.

MR. MILLER: THAT'S TRUE. DEJA VU ALL OVER AGAIN. THAT'S WATCHING A BAD MOVIE FOR THE UMPTEENTH TIME.

I CAN REPORT TO THE COMMITTEE I DISCOVERED WHAT ABUSE WAS. IT'S EASILY DEFINED. ABUSE IS WHAT YOUR OPPONENT IS DOING

TO YOU. SO WHEN YOU HEAR THESE WONDERFUL ANECDOTES ABOUT ABUSE OF CLASS ACTION, YOU CAN FIND JUST AS MANY ANECDOTES ON THE OTHER SIDE.

WHAT IS STUNNING ABOUT THE WAY WE PROCEED IN RULE REVISION, LESS SO TODAY THAN IN MY DAY, IS THAT WE DO IT WITH A TREMENDOUS ABSENCE OF EMPIRIC DATA. YOU CAN SEE EMPIRIC DATA COURTESY OF THE F.J.C. THE EMPIRIC DATA DOESN'T BEAR OUT THE ANECDOTE. THAT'S WORTH THINKING ABOUT.

THERE ARE STORIES OF ABUSE. I HAVE NO DOUBT ABUSE EXISTS. UNLIKE MANY OF MY ACADEMIC FRIENDS, AND CLOSER TO ERIC GREEN, I LIVE IN A REAL WORLD, TOO. I HAVE BEEN INVOLVED IN MORE THAN 50 CLASS ACTIONS IN THE LAST 20 YEARS. I'VE SEEN A LOT OF BAD STUFF. EMPIRICALLY, CAN YOU QUANTIFY IT? IS IT MEANINGFUL? IS IT AT THE FRINGE, AT THE PERIPHERY? I DON'T KNOW. I WOULD URGE THIS COMMITTEE NOT TO REACT TO CLAIMS OF ABUSE, GOOD STORIES.

SECOND, THE DAYS OF CHARLIE CLARK AND SIMPLIFIED FEDERAL RULES OF CIVIL PROCEDURE ARE OBVIOUSLY OVER. THAT WAS TWO-PARTY LITIGATION. THAT'S NOT MODERN LITIGATION.

BUT IT WAS ONE THING THE ORIGINAL DRAFTERS OF THE FEDERAL RULES OF CIVIL PROCEDURE, AND PROBABLY DOWN THROUGH THE '80S, THIS COMMITTEE ALWAYS TRIED TO DO, AND THAT IS: MINIMIZE LITIGATION POINTS. DO NOT ALLOW THE RULES, BY LAYERING AND LAYERING, TO CREATE CONTEXTS THAT SIMPLY INVITE LAWYER SQUABBLING.

MOTION PRACTICE. BE VERY CAREFUL WITH THAT INTERLOCUTORY APPEAL PROVISION. THAT IS AN ATTRACTIVE NUISANCE. PEOPLE ARE PEOPLE. IN SOME CIRCUITS, IT'S TWO YEARS. YOU KNOW THAT. THAT LEADS --

HONORABLE PAUL NIEMEYER: I'M NOT SURE I THINK WE DO KNOW THAT, BECAUSE THE PROCESS PARROTS 1292(B), TO SOME EXTENT. IT DOESN'T HAVE ITS STANDARD AND IT DOESN'T HAVE THE INPUT TO THE DISTRICT JUDGE. BUT THAT LEVEL IS, IN MOST OF OUR EXPERIENCES, IS A LEVEL THAT GETS TAKEN CARE OF IN A COUPLE WEEKS. IF THE COURT DETERMINES TO TAKE THE CASE, THEN YOU HAVE YOUR TWO YEARS OR WHATEVER.

MR. MILLER: THAT IS RIGHT.

HONORABLE PAUL NIEMEYER: BUT IF THE COURT DOESN'T DETERMINE TO TAKE THE CASE, IT'S AN INTERRUPTION, IT'S FILING A MOTION, AND I DON'T KNOW WHAT THE INCLINATION OF THE CIRCUITS WOULD BE TO TAKE THESE. WE'VE HAD MIXED COMMENTS ON THAT.

MR. MILLER: THAT IS A GREAT SAFETY VALVE. IF IT BECOMES AN ATTRACTIVE NUISANCE, THE WAY FEDERAL RULE 11 BECAME AN ATTRACTIVE NUISANCE, IN MANY PARTS OF THE COUNTRY, A NATURAL REACTION SETS IN, AND MAYBE IT'S A SELF-CORRECTION.

NOTICE, I AM NOT ARGUING AGAINST THE PROVISION. I'M JUST ARGUING FOR A CONSIDERABLE AMOUNT OF CAUTION, AND MAYBE CLOSE LOOKING AT ELIZABETH CABRASER'S SHAPING AND CONTAINING OF THE AVAILABILITY OF THAT INTERLOCUTORY APPEAL.

THAT REALLY LEADS ME TO A THIRD GENERALIZATION. THE

MANDATE OF THE STANDING COMMITTEE WAS TO LOOK AT MASS TORTS. YOU ARE WRITING A RULE THAT, IN THE NATURE OF RULE MAKING SINCE 38, IS WHAT THE YALEE'S CALL TRANSUBSTANTIVE, WHICH SIMPLY MEANS: THE RULE IS NOT LIMITED, AS WRITTEN, TO MASS TORT CASES. IT WILL APPLY TO ROUNDING-UP CASES, LIKE SANDEO, THAT MUCH-MALIGNED CASE OUT OF TEXAS, WHICH I HAPPENED TO HAVE PARTICIPATED IN.

YOU'RE WRITING A RULE THAT WILL CUT ACROSS THE CIVIL RIGHTS FIELD, THE CONSUMER FIELD, THE INSURANCE FIELD, AS WELL AS THE MASS TORT FIELD.

SO WHEN YOU SUGGEST A MECHANISM FOR POSSIBLE INTERLOCUTORY APPEAL, YOU'VE GOT TO KEEP IN MIND THAT THAT PROVISION WILL BE AVAILABLE ACROSS THE CLASS ACTION SPECTRUM, OR, YOU'VE GOT TO DO WHAT WE'VE NEVER DONE BEFORE, BUT MAYBE THE TIME HAS COME TO THINK ABOUT IT VERY SERIOUSLY, AND THAT IS: ABANDON PURE TRANSUBSTANTIVE RULES AND REALLY DO WRITE A MASS TORT RULE.

I'M NOT SUGGESTING YOU DO IT. I'M SUGGESTING, AT MOST, THE GOOD REPORTER, IF HE HASN'T DONE SO, WHICH I WOULD DOUBT, THINK ABOUT. IT'S A TREMENDOUS WRENCH WITH TRADITION, BUT TRADITION ONLY GOES SO FAR.

I WOULD ALSO URGE SOMETHING THAT SERVED WELL FROM THE MID-'70S ONLY, AND THAT IS: JUDICIAL DISCRETION, WHEN BESTOWED ON TALENTED, INNOVATIVE, AND CONSCIENTIOUS JUDGES, IS SOMETHING TO BE APPLAUDED, NOT SOMETHING TO BE CONSTRICTED. THE GREAT

GROWTHS, THE GREAT ADVENTURES, THE GREAT INNOVATIONS, HAVE COME FROM EXPERIMENTATION BY JUDGES LIBERATED AND ENCOURAGED TO EXPERIMENT, AND THEN CODIFIED AFTER THE EXPERIENCE BASE IS BUILT UP. THAT'S WHAT FEDERAL RULE 16 MEANS NOW. DON'T CONSTRICT THAT. TRUST IT.

I KNOW THIS IS NOT AN ERA IN WHICH TRUST COMES EASILY TO MANY PEOPLE, BUT I WILL -- MAYBE EVEN IT'S MY OWN EYESIGHT, MY OWN EXPERIENCE -- I WOULD TRUST DISTRICT JUDGES.

NOW, YOU KNOW, THAT TAKES YOU TO THE SETTLEMENT CLASS. MANY OF MY ACADEMIC COLLEAGUES HAVE WEIGHED IN VERY HEAVILY ON IT. IT SEEMS TO ME A PROPERLY CONSTRUCTED SETTLEMENT CLASS RULE THAT FOCUSES -- EITHER THROUGH THE NOTES OR THROUGH THE TEXT OR THROUGH THE MANUAL OR THROUGH THE JUDICIAL TRAINING THAT COMES OUT OF THE FEDERAL JUDICIAL CENTER -- THAT SIMPLY MATHEMATICALLY REDUCED THE POSSIBILITY OF ABUSE. WE HAVE DONE IT IN OTHER CONTEXTS. WE HAVE DONE IT EITHER THROUGH THE SANCTION RULES OR THE DISCIPLINARY RULES, OR THROUGH THE USE OF THIRD-PARTY AGENTS, THE GUARDIAN, SPECIALLY-APPOINTED COUNSEL.

THE POSSIBILITY OF ABUSE SHOULD NOT BE USED TO JUSTIFY THROWING THE BABY OUT WITH THE BATH WATER. WE NEED THAT SETTLEMENT CLASS AS A PRACTICAL, LATE 20TH CENTURY AMERICAN LITIGATION PHENOMENON. IT CAN BE A VERY POWERFUL FORCE FOR GOOD, WHEN CONSTRAINED, WHEN GUARDED. BUT THAT'S A PRODUCT OF EXPERIENCE.

THE ONE PROVISION -- AND THIS IS PHILOSOPHICAL, THIS

IS JUST PLAIN PHILOSOPHICAL; IT'S WHERE MY HEART IS -- THE (F) PROVISION, I THINK, IS PERNICIOUS. TO SAY TO PEOPLE, "YOU JUST AIN'T WORTH IT" IS A TERRIBLE MESSAGE FOR THE AMERICAN --

HONORABLE PAUL NIEMEYER: LET ME ASK YOU THE QUESTION I HAD ASKED SOMEONE ELSE EARLIER, AND MAYBE THE QUESTION FALLS ON ITS OWN WEIGHT. BUT IF THERE IS A GROUP OF CASES WHERE THEY REALLY ARE LAWYER-DRIVEN -- AND I THINK ALMOST EVERYBODY SEEMS TO THINK THERE ARE A FEW THAT JUST SHOULD NOT BE BROUGHT -- AND YET YOU WANT TO PRESERVE THE LEGITIMATE CLAIM OF THE INCENSED PEOPLE -- THERE IS A SMALL CLAIM -- WHO COULD NOT OTHERWISE BRING IT, HOW COULD YOU DISTINGUISH BETWEEN THE TWO IN WRITING?

MR. MILLER: I WOULD BE LYING IF I SAID ANYTHING OTHER THAN IT IS VIRTUALLY IMPOSSIBLE. IT IS VIRTUALLY IMPOSSIBLE. SANDEO IS A PERFECT ILLUSTRATION. THAT'S A CASE THAT WILL REWARD OR RETURN TO THE INSUREDS OF TEXAS ON AVERAGE $2, ASSUMING THEY CAN BE FOUND, GOING BACK IN TIME, WHICH IS VERY DIFFICULT. IT'S ALWAYS VERY DIFFICULT.

YOU COULD SAY, AS MAX BOOT SAYS, IT IS A LAWYER-DRIVEN CASE. SURE, IT'S A LAWYER-DRIVEN CASE. LAWYERS ARE NOT ELEEMOSYNARY INSTITUTIONS. I DON'T CARE WHICH SIDE OF THE V THEY'RE ON. AND THE WAY OUR PLAINTIFF ECONOMICS WORK, THEY'RE WORKING ON A CONTINGENCY, OR A COURT-AWARDED FEE.

HONORABLE PAUL NIEMEYER: OR WHEN THE LAWYERS' INTERESTS ARE SO MUCH ON THE SURFACE, THE WHOLE SYSTEM TAKES A HIT. AND MY QUOTE EARLIER -- MR. MOORE REFERRED TO MY QUOTE IN

THE WALL STREET JOURNAL -- WAS NOT TO SUPPORT WHAT WAS BEING SAID, BUT WAS REPORTING WHAT THE EDITORIALS ACROSS THE COUNTRY ARE TALKING ABOUT.

MR. MILLER: I KNOW. I KNOW.

HONORABLE PAUL NIEMEYER: AND THAT PERCEPTION IS DIFFICULT. AND THE QUESTION IS: HOW DO WE ADDRESS IT, IF WE ADDRESS IT AT ALL?

MR. MILLER: I'VE SEEN THIS IN THE CONTEXT OF ATTORNEY FEE AWARDS IN THE '70S. THAT WAS ONE OF THE MAJOR DEBATES WHEN I WROTE THAT FRANKENSTEIN MONSTER PIECE THAT I QUOTE.

SOMETIMES YOU HAVE TO TAKE THE HIT, YOUR HONOR. ARE WE MORE CONCERNED WITH MAX BOOT, CORPORATE AMERICA, JOE SIX-PACK, GOD BLESS HIM, OR THE SIX TO EIGHT MILLION INSUREDS OVER TIME IN THE STATE OF TEXAS WHO NOW ARE PROTECTED, NOT ONLY RETROSPECTIVELY, BUT PROSPECTIVELY, AGAINST SMALL-TIME CHEATING ON THEIR PREMIUMS. IT'S EASY FOR ME TO STAND HERE AND SAY TO YOU, "YOU TAKE THE HIT." IT'S MY PROFESSION, TOO. I'M TAKING THE HIT.

I THINK THAT ALL YOU CAN LOOK FOR IS A SET OF PRINCIPLES THAT TELL US THAT, "JUDGE, YOU'VE GOT TO WATCH OUT FOR THIS PHENOMENON. YOU'VE GOT TO USE YOUR WEAPONRY UNDER THE 12(B)(6), UNDER 56. YOU'VE GOT TO USE YOUR WEAPONRY UNDER RULE 16 TO MANAGE THAT CASE, CONTAIN IT, MOVE IT TO A DISPOSITION TRACT. IF YOU'VE GOT A SCENT, A HINT, A WHIFF, YOU'VE GOT TO GET THOSE LAWYERS INTO CHAMBERS AND LOOK THEM IN THE EYES, READ

THEM, FEEL THEM, STRANGLE THEM, IF NECESSARY."

IT WON'T WORK A HUNDRED PERCENT OF THE TIME; IT JUST WON'T. BUT NOTHING WORKS A HUNDRED PERCENT OF THE TIME. IF NEED BE, YOU USE COURT-APPOINTED ATTORNEYS TO PROTECT THIRD-PARTY INTERESTS.

THIS IS NOT EASY. IF THERE WERE A SILVER OR MAGIC BULLET OUT THERE, WE'D ALL BE LOADING OUR GUNS. IN A SENSE, THE SYSTEM HAS BEEN DEALT A VERY ROUGH HAND. BUT TO SAY TO PEOPLE, "WELL, SIX MILLION OF YOU HAVE BEEN CHEATED OUT OF A COUPLE OF BUCKS A YEAR," AND NOT INSIST ON DISCOURAGEMENT, NOT INSIST ON PROSCRIPTION AGAINST THE PRACTICE -- AND THOSE OF US WHO LIVE IN A RATHER AFFLUENT ENVIRONMENT, WE OFTEN DON'T UNDERSTAND THAT VERY OFTEN, UNINTENTIONAL GESTICULATIONS GO ON IN OUR SOCIETY, WHERE DEPENDENT AND DISADVANTAGED POPULATIONS GET PICKED ON AS IN, I BELIEVE, A VARIETY OF TELEPHONE PRACTICES.

MR. FRANCIS H. FOX: BACK IN 1963, ON THE MARTHA'S VINEYARD, IF YOU KNEW WHAT WAS GOING TO HAPPEN OVER THE NEXT 31 YEARS, WOULD YOU NOT HAVE RIPPED UP (B)(3) ENTIRELY AND TOLD BEN KAPLAN, "THIS JUST IS TOO MUCH TROUBLE. WE SHOULDN'T MANUFACTURE THIS"?

MR. MILLER: IN '63 I MIGHT HAVE SAID THAT, FRANCIS.

MR. FRANCIS H. FOX: OR WHENEVER IT WAS.

MR. MILLER: I WAS A YOUNG PUNK KID.

MR. FRANCIS H. FOX: CERTAINLY NOT.

MR. MILLER: KNOWING WHAT I KNOW IN 1997, ABOUT THE

COMPLEXITY OF OUR SOCIETY, ABOUT THE RISKS GENERATED IN OUR SOCIETY, ABOUT THE INEQUALITIES IN OUR SOCIETY, KNOWING THAT THE ADMINISTRATIVE PROCESS IS NOT AN EFFECTIVE FORM OF REMEDIATION, THE TEXAS DEPARTMENT OF INSURANCE WAS GOING TO DO NOTHING ABOUT THE ELICIT ROUNDING UP IN SANDEO, YOU'RE THE ONLY GAME IN TOWN.

MR. FRANCIS H. FOX: YOU THINK IT'S ALL BEEN WORTH IT; RIGHT --

MR. MILLER: ALL BEEN WORTH IT.

MR. FRANCIS H. FOX: -- LOOKING BACK ON IT?

MR. MILLER: MY GOD, IS THIS A THERAPY SESSION?

(LAUGHTER.)

MR. MILLER: FRANCIS, I DO BELIEVE IT'S BEEN WORTH IT. I HAVE BEEN IN ENOUGH CLASS ACTIONS INVOLVING A WIDE RANGE OF ENVIRONMENTAL CONSUMER FINANCING CASES. THIS MONSTROUS TAIL OF THE MASS TORT CANNOT BE ALLOWED TO WAG WHAT, FOR OVER 30 YEARS, WHEN IT HAS, IN A WIDE VARIETY OF CONTEXTS, FROM CIVIL RIGHTS TO CONSUMERS, BEEN A VERY POWERFUL SOCIAL INSTRUMENT.

MR. SOL SCHREIBER: PROFESSOR, SO I'M CLEAR ON THIS, THERE IS NO WAY, IN YOUR JUDGMENT, 23(B)(3)(F) ON CROSS BENEFIT CAN BE AMENDED, FOR EXAMPLE, USING AGGREGATE AS SUCH? IS THAT WHAT YOU'RE SAYING?

MR. MILLER: IF I START AS A PURIST, I WOULD SAY TO YOU: JUNK (F). JUNK IT. IT'S BAD PHILOSOPHY. IT'S BAD SOCIAL ENGINEERING.

I WOULD RATHER HAVE A COMMITTEE PROPOSAL THAT SAID:

IF THE INDICATED INDIVIDUAL RELIEF PER CLASS MEMBER IS UNDER $10, NO. I'D RATHER HAVE IT SURGICALLY CLEAN, BRIGHT LINE, THE WAY WE DRAW JURISDICTIONAL PRINCIPLES, THAN TO HAVE THIS -- FORGIVE ME -- LOOSEY-GOOSEY INQUIRY, WHICH IS A LITIGATION POINT OF MONUMENTAL PROPORTIONS, INTO: IS IT WORTH IT?

MAYBE YOU CAN DO IT THROUGH AN AGGREGATED. BUT FORGIVE ME. THIS IS WHERE THE ACADEMIC, I GUESS, TAKES OVER. IF CONGRESS GIVES PEOPLE A RIGHT, IT IS NOT, IT SEEMS TO ME, APPROPRIATE RULE MAKING TO QUALIFY THAT RIGHT BASED ON THE FACT THAT AN INDIVIDUAL'S STAKE IN THAT RIGHT IS NOT VERY HIGH. THAT'S NOT WHAT CONGRESS SAYS.

HONORABLE DAVID F. LEVI: HOW ABOUT AN OPT IN?

MR. MILLER: I GUESS, AGAIN, COMING FROM WHERE I COME, OPT IN, AT THE MOMENT -- MAYBE IT COULD PROPERLY BE ENGINEERED -- IS NOT EFFECTIVE. SOMEBODY EARLIER SAID THE INCENTIVE STRUCTURE ISN'T THERE.

LOOK, WE CAN'T IGNORE THE FACT THAT NO MATTER HOW WIDELY YOU DISTRIBUTE THE NOTICE, IN THIS ERA OF JUNK MAIL AND PEOPLE'S REACTION TO JUNK MAIL, AND PEOPLE'S REACTION TO ADVERTISING, THAT YOU ARE LIKELY TO GIVE EFFECTIVE ENOUGH NOTICE TO A WIDE PORTION OF YOUR CLASS MEMBERS SO THAT THEY CAN --

HONORABLE PAUL NIEMEYER: CAN THAT BE ARGUED THE OTHER WAY, TOO? WHAT YOU'RE DOING IS YOU'RE PRESUMING THAT EVERYBODY IS A LITIGANT AND WANTS TO BE A LITIGANT INSTEAD OF SAYING, "IF YOU WANT TO BE A LITIGANT, LET US KNOW."

MR. MILLER: NOW, THE SAFETY VALVE ON THAT SIDE IS THAT IF THEY DON'T WANT TO BE A LITIGANT, THEY'RE NOT GOING TO ASK FOR A DISTRIBUTION AT THE BACK END. I MEAN, THAT REMEDIATION, OR DISTRIBUTION OF THE REMEDY, IS A SERIOUS PROBLEM. BUT IT IS NOT A PROBLEM THAT SHOULD BE FED BACK INTO THE CERTIFIABILITY OF THE CLASS.

HONORABLE PAUL NIEMEYER: CAN'T YOU HAVE A REMEDY ON A GROUP OF PEOPLE WHO DON'T WANT TO BE LITIGANTS AND THEN YOU HAVE EITHER AN EXCESS OR -- MAYBE THESE PEOPLE IN TEXAS, HAD THEY BEEN ASKED: YOU HAVE BEEN CHEATED BY A ROUNDING-UP PROCESS FOR THE LAST FIVE YEARS, OR HOW MANY YEARS IT WAS, AND WE HAVE A LAWSUIT GOING WHICH WILL RECOUP THAT ROUNDING-UP AMOUNT. AND IF YOU'D LIKE TO PARTICIPATE, CHECK THE BOX AND DROP IT IN THE MAILBOX. IT WOULD BE INTERESTING TO KNOW HOW MANY WE GET BACK.

MR. MILLER: IT WOULD BE VERY INTERESTING. I SUSPECT THE NUMBER MIGHT BE LOW; IT MIGHT BE LOW. KEEP IN MIND THAT WE LIVE IN A COUNTRY IN WHICH LINGUISTIC FACILITY IS NOT EVENLY DISTRIBUTED. THE ABILITY OF PEOPLE --

HONORABLE PAUL NIEMEYER: NO. BUT IF WE PRESUME EVERYBODY IS A LITIGANT IN THE SOCIETY FOR EVERY WRONG, WE COLLAPSE UNDER OUR OWN DISPUTE RESOLUTION MECHANISM. AND PHILOSOPHICALLY, AT SOME POINT WE HAVE TO DECIDE WHAT ARE WE HERE ABOUT IN THE THIRD BRANCH? AND --

MR. MILLER: AGREED.

HONORABLE PAUL NIEMEYER: -- I THINK IT'S A DIFFICULT

QUESTION.

MR. MILLER: I THINK SO. IT'S AN UNBELIEVABLY DIFFICULT QUESTION.

I ALWAYS GO BACK TO JOE SNEED'S OPINION FOR THE NINTH CIRCUIT IN, IN RE: TELEPHONE OVERCHARGES, WHERE YOU HAD HOTEL COMPANIES PUTTING ON ELICIT CHARGES FOR PENNIES, WE'RE TALKING PENNIES, 16 CENTS A DAY. AND GOD BLESS HIM, HE'S A GREAT MAN, JOE SNEED. HE DECIDED THAT'S NOT WHAT THE JUDICIAL SYSTEM IS ALL ABOUT.

REASONABLE PEOPLE CAN DISAGREE ABOUT THAT. I AM ONE OF THOSE OLD FOGIES WHO BELIEVE IN THE THERAPEUTIC VALUE OF SAYING: EVEN IF YOU CAN'T DISTRIBUTE THE 19 CENTS, STOP THAT. STOP THAT NOW. DON'T DO IT TOMORROW. AND YOU OTHER GUYS OUT THERE WHO HAVE BEEN WATCHING THIS, YOU OTHER INSURANCE COMPANIES WHO HAVE BEEN THINKING ABOUT ROUNDING UP, STOP THINKING ABOUT IT, DON'T DO IT.

I KNOW, IT'S A CHEAP WORD, DETERRENCE, AND IT CAN'T BE QUANTIFIED. BUT IT HAS ALWAYS BEEN A RATHER FUNDAMENTAL ASPECT OF THE LITIGATION PROCESS, SO THAT WHAT HAPPENS IN CASE A MAY IMPACT B AND C AND D AND E. THOSE PEOPLE IN TEXAS WILL BE PROTECTED AGAINST ROUNDING UP.

THE PEOPLE IN GEORGIA HAD BEEN PROTECTED AGAINST CERTAIN CHARGES ON THEIR MOBILE HOME FINANCING BECAUSE OF A CLASS ACTION.

NOW, MAYBE THOSE ARE PETTY COSTS OF MODERN LIFE. IT'S

EASY FOR US TO SAY. NOT IF YOU'RE A GEORGIAN, WHO IS LIVING IN THAT MOBILE HOME; A FEW BUCKS MIGHT MAKE A DIFFERENCE.

IS THAT THE ROLE OF THE JUDICIAL SYSTEM, YOUR HONOR? YOUR GUESS IS AS GOOD AS MINE. ALL I KNOW IS: THE JUDICIAL SYSTEM --

HONORABLE PAUL NIEMEYER: PERHAPS NOT UNDER THE ONE-ON-ONE, AND MAYBE IT'S EVOLVING, AND MAYBE CONGRESS IS DEPENDING ON THAT ROLE. I DON'T KNOW. THEY START PASSING STATUTES WHICH INCORPORATE THE NOTION OF CLASS ACTION, AND WE END UP -- WHETHER WE LIKE IT, ONE WAY OR THE OTHER, YOU CAN'T PUT THE GENIE BACK IN THE BOTTLE.

AND SO, YOU KNOW, THE FOURTEENTH AMENDMENT EXCLUDES FREE SPEECH. YET, I CAN'T FIGURE OUT HOW DUE PROCESS TRANSLATES INTO FREE SPEECH. WE'RE THERE.

MR. MILLER: DO YOU THINK FREE SPEECH JUSTIFIES THE COSTS AND BURDENS OF CLASS LITIGATION?

HONORABLE PAUL NIEMEYER: I'M FOR FREE SPEECH.

MR. MILLER: SO AM I. I WONDER HOW THAT WOULD COME OUT UNDER (F).

HONORABLE C. ROGER VINSON: PROFESSOR, I'M CURIOUS. ARE YOU SAYING THAT THE AGGREGATION RULE OUGHT TO BE REPEALED? IF YOU HAVE THE POSSIBILITY OF AN AGGREGATE EFFECT OR AN INJUNCTION, THEN WE OUGHT TO ENTERTAIN THOSE CASES?

MR. MILLER: IF YOU ASK ME ABOUT SON AND SCHNEIDER (PHONETIC), PHILOSOPHICALLY, BECAUSE THAT'S ALL ANY OF US ARE

PROJECTING THIS MORNING ON ISSUES LIKE THAT, MY PERSONAL PHILOSOPHY SAYS: WHEN YOU CAN AGGREGATE INDIVIDUAL CLAIMS INTO THE MULTIMILLIONS, THAT SEEMS TO ME, AS A RATIONAL PERSON, THAT'S MORE THAN $75,000. AND IN THAT SENSE, I THINK SON AND SCHNEIDER, ALTHOUGH JUSTIFIABLE FROM A HISTORICAL OR TECHNICAL PERSPECTIVE, NOT GREAT POLICY, NOT GREAT POLICY.

HONORABLE C. ROGER VINSON: IF WE ELIMINATED THAT PROBLEM, WOULD THAT DEAL WITH THE STATE PROLIFERATION OF CLASS ACTIONS?

MR. MILLER: I THINK IT WOULD REATTRACT PEOPLE INTO THE FEDERAL COURTS, TO SOME DEGREE. BUT YOUR HONOR SPOKE ABOUT THE GENIE IN THE BOTTLE.

I THINK IN SOME STATES, THE GENIE IS OUT OF THE BOTTLE. I THINK WHAT WE'RE SEEING NOW IS SOME STATES BECOMING MORE COMFORTABLE WITH THE CLASS ACTION, UNDERSTANDING IT MAY NOT BE COMPLETELY A FEDERAL PHENOMENON, AND I THINK YOU'LL SEE MORE STATE CLASS ACTIONS.

I HONESTLY THINK THAT'S GOOD. I THINK THAT'S WHAT FEDERALISM IS ALL ABOUT. THEY'RE SPRINGING UP IN ALABAMA.

MR. SOL SCHREIBER: NATIONAL CONSEQUENCES?

MR. MILLER: YES. MY BELOVED FIRST CLEAR VICTORY IN THE UNITED STATES SUPREME COURT, THE SHUTZ (PHONETIC) CASE, WAS A NATIONAL CLASS, WITH ROYALTY.

STATES ARE HANDLING NATIONAL CLASSES. NOT MANY. I THINK THERE IS STILL A NATURAL JUDICIAL RESISTANCE AT THE STATE

LEVEL TO TAKE ON A CLASS OF NATIONAL PROPORTIONS. SHOULD CASTANO, THE TOBACCO CASE, NOW BE HANDLED ON A 50-STATE CLASS BASIS? IT'S NOT IRRATIONAL. I THINK THAT'S JUST ANOTHER SUBJECT IN WHICH MATURATION IS GOOD, A LITTLE PATIENCE, A LITTLE, LET'S WATCH IT.

HONORABLE PAUL NIEMEYER: WE HAVE AGENCY-TYPE LITIGATION, AND MAYBE THAT'S WHAT WE'RE BECOMING, AND MAYBE THAT'S WHAT WE HAVE TO HANDLE AS WE GET POPULACE.

MR. MILLER: IT'S IRONIC. ONE OF THE SUPPOSED PRESSURES OF THE CIVIL JUSTICE REFORM ACT -- AND IT WAS IN THE MINDS OF THE PEOPLE WHO REVISED RULE 16 IN '83, AND AGAIN IN THE '90S, IS A LINKING OF THE JUDICIAL PROCESS WITH THE ALTERNATIVE DISPUTE RESOLUTION PROCESS. WE DON'T GET OUR ARTICLE THREE DARNED UP ABOUT THAT. BECAUSE IT SEEMS LIKE LOGICAL THAT THERE SHOULD BE SUCH A RELATIONSHIP. AND --

HONORABLE PAUL NIEMEYER: DO YOU HAVE ONE QUESTION?

HONORABLE ANTHONY SCIRICA: YES. DO YOU HAVE ANY PROBLEMS WITH THE COMPETENCE OF THIS COMMITTEE TO DEAL WITH THE SETTLEMENT PROPOSAL, PARTICULARLY WHERE IT MAY INVOLVE --

MR. FRANCIS H. FOX: WHAT DO YOU MEAN, "COMPETENCE"?

HONORABLE PAUL NIEMEYER: USE A DIFFERENT WORD.

MR. MILLER: IS THIS A 2072 QUESTION OR I.Q. QUESTION?

HONORABLE ANTHONY SCIRICA: FRANCIS FOX IS EXCLUDED FROM THIS.

DO YOU SEE ANY PROBLEMS UNDER THE RULES ENABLING ACT

OR AUTHORITY?

MR. MILLER: I SEE PROBLEMS; YES, I SEE PROBLEMS. I THINK A REASONABLE PERSON COULD SAY THAT THE "AIN'T WORTH IT" CLASS PROVISION VIOLATES THE RULES ENABLING ACT. I THINK THAT A REASONABLE PERSON COULD SAY THAT (B)(4) VIOLATES THE RULES ENABLING ACT.

I THINK A PROPERLY CRAFTED PROVISION, (B)(4), FOR EXAMPLE, IN MY PAPER, I LIMIT MY REMARKS TO THE ASSUMPTION THAT THERE IS A WELL-FRAMED LITIGATION BEFORE THE COURT. THIS BACK-ROOM DEAL, "HEY, LET'S GET TOGETHER, START THE CLASS, AND THEN HERE'S THE SETTLEMENT," I MEAN, THAT'S A REAL ARTICLE 32072 PROBLEM.

BUT THAT LIES IN WRITING THE RULE PROPERLY, OR RELYING ON THE INHERENT GOOD SENSE OF DISTRICT JUDGES WORKING WITH COUNSEL UNDER THE CANONS OF ETHICS, WHATEVER THEY ARE NOW CALLED. I CERTAINLY WOULD LIMIT THE (B)(4) TO A SITUATION IN WHICH YOU HAVE AN ADVERSARY PROCEEDING, ANTERIOR TO ANY SETTLEMENT. BUT YOU'RE ON THE KNIFE'S EDGE.

I THINK MODERN RULE MAKING IS ALWAYS GOING TO KEEP THIS COMMITTEE ON THE KNIFE'S EDGE.

HONORABLE PAUL NIEMEYER: IT MAY BE THAT WAY. AND IT MAY BE THAT WE HAVE TO NOW ACT IN SOME KIND OF RELATIONSHIP WITH CONGRESS AND LESSEN THE TENSION, AND WITH THE GROUPS THAT WE'RE HEARING FROM.

I THINK IT'S EVEN VERY ENLIGHTENING, YOUR TESTIMONY.

I REALLY DO WANT TO THANK YOU ON BEHALF OF THE COMMITTEE, ESPECIALLY IN LIGHT OF YOUR HISTORY WITH US, TO HAVE YOU HERE.

WE'LL TAKE A SHORT RECESS AND THEN RESUME IN 15 MINUTES.

(RECESS TAKEN AT 10:32 A.M.)

(PROCEEDINGS RESUMED AT 10:54 A.M.)

HONORABLE PAUL NIEMEYER: MR. PREUSS. IS MR. PREUSS HERE?

ALL RIGHT. WE'RE GOING TO HEAR FROM YOU. LET'S RECONVENE. ALL RIGHT. WHENEVER YOU'RE READY.

TESTIMONY OF CHARLES F. PREUSS

MR. PREUSS: GOOD MORNING. MY NAME IS CHUCK PREUSS. I PRACTICE LAW HERE IN SAN FRANCISCO. THANK YOU FOR THE OPPORTUNITY TO SPEAK IN SUPPORT OF THE PROPOSED REVISIONS TO RULE 23 (B)(3).

MY REMARKS REFLECT MY PARTICIPATION IN THE EVALUATION OF THESE PROPOSED REVISIONS BY THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, OF WHICH I AM PRESIDENT-ELECT. THEY ALSO REFLECT MY PERSONAL EXPERIENCE, GATHERED OVER 20 YEARS IN THE DEFENSE OF MEDICAL PRODUCTS LIABILITY LITIGATION.

IN THE MEDICAL PRODUCTS ARENA, INDIVIDUALIZED INQUIRY INTO THE ISSUES OF MEDICAL CAUSATION AND PRODUCT LABELING ARE ITS DEFINING FEATURES: CAN A PARTICULAR PRODUCT CAUSE AN ADVERSE HEALTH EFFECT? DID IT IN THE PARTICULAR CASE WITH THE PARTICULAR PLAINTIFF? DID THE PRODUCT LABELING HAVE A WARNING

ABOUT THAT SPECIFIC EFFECT? AND IF SO, WAS THAT WARNING ADEQUATE? THESE QUESTIONS SHAPE THE UNIQUENESS OF EACH AND EVERY ONE OF THESE CASES.

EARLIER IN MY CAREER, CLASS TREATMENT IN THE AREA OF MEDICAL PRODUCTS LIABILITY WAS ALMOST NEVER SOUGHT AND VIRTUALLY NEVER GRANTED. IN RECENT YEARS, CLASS CERTIFICATION HAS BEEN PURSUED WITH INCREASING FREQUENCY AND INTENSITY, EVEN THOUGH THE 1966 ADVISORY COMMITTEE NOTES CONTAIN A STATEMENT THAT RULE 23(B)(3) IS NOT INTENDED FOR THE RESOLUTION OF MASS TORTS. MY ADVERSARIES IN THESE CASES ARE NO LONGER COLLEAGUES SOPHISTICATED IN THE AREA OF MEDICAL PRODUCTS LIABILITY, BUT, RATHER, CLASS ACTION SPECIALISTS.

OBTAINING CLASS CERTIFICATION HAS BECOME AN END IN ITSELF. FORM HAS PREVAILED OVER SUBSTANCE, AS COMPANIES FACED WITH CATASTROPHIC FINANCIAL LOSS AND THE PROSPECT OF RES JUDICATA ARE UNABLE TO RISK A TRIAL ON THE MERITS, REGARDLESS OF HOW MERITORIOUS THEIR DEFENSE MAY BE.

JUDGES, EVER MINDFUL OF THEIR CROWDED DOCKETS, HAVE FALLEN VICTIM TO THE APPARENT SIMPLICITY OF THE CLASS ACTION DEVICE TO DISPOSE OF WHAT THEY PERCEIVE WILL BE A MASSIVE INFLUX OF NEW CASES ON THEIR CALENDAR. THIS DISTURBING PATTERN HAS FOSTERED MORE CLASS ACTIONS AND LED TO THE PRECIPITOUS EROSION OF THE INTENT AND PURPOSE OF RULE 23(B)(3).

IN MY VIEW, NO MASS TORT BETTER ILLUSTRATES HOW THE THREAT OF CLASS CERTIFICATION COMPLETELY OVERSHADOWS THE INQUIRY

INTO THE MERITS OF PARTICULAR CLAIMS THAN THE BREAST IMPLANT LITIGATION.

HONORABLE JOHN L. CARROLL: LET ME ASK YOU A QUESTION, MR. PREUSS. I'VE HEARD MOST OF THE DEFENSE BAR SAY CONSISTENTLY THAT YOU CAN'T TRY THESE CASES. WHY CAN'T YOU TRY THEM IF YOU HAVE GOT ONE THAT'S ABSOLUTELY MERITORIOUS? WHY CAN'T YOU PUT A JURY IN THE BOX, WORK OUT WHATEVER HAS TO BE DONE IN TERMS OF THE CLASS, AND TRY IT?

MR. PREUSS: WELL, THE PROSPECT OF THE BREAST IMPLANT LITIGATION, IF YOU ADD UP ALL THE CLAIMS THAT HAVE BEEN PERMITTED UNDER THAT PROCESS, DEFEND EVERY CASE, AND WIN EVERY CASE, THERE IS NOT A COMPANY THAT IS DEFENDING THOSE CASES THAT CAN AFFORD TO DO THAT AT THIS TIME.

THE THREAT OF THE MASS CLASS, BEFORE YOU EVER GET INTO THE ISSUE OF THE MERITS OF THE CLAIM -- AND MY OBSERVATIONS ARE NOT AS A CLASS ACTION SPECIALIST. I WORK IN THE MEDICAL PRODUCTS AREA. AND WHEN CLASS ACTIONS ARE INTRODUCED INTO THAT INGREDIENT AND WHERE I THINK THE ISSUES ARE UNIQUE, IN TERMS OF LABELING, IN TERMS OF MEDICAL CAUSATION, THOSE, THE MERITS ARE OVERSHADOWED.

AND IN THE BREAST IMPLANT LITIGATION, IT'S ONLY NOW, AFTER ONE COMPANY HAS BEEN BROUGHT TO ITS KNEES AND IS IN BANKRUPTCY AND THREE OTHERS HAVE PAID HUNDREDS OF MILLIONS OF DOLLARS TO DEFEND THESE CLAIMS, IT'S ONLY NOW THAT WE GET A DECISION FROM OREGON THAT FINALLY ADDRESSES THE MERITS: CAN IT

CAUSE AND DID IT CAUSE IN A PARTICULAR PLAINTIFF.

AND YOU HAVE NOW EPIDEMIOLOGY EVERYWHERE FROM THE MOST PRESTIGIOUS INSTITUTIONS IN OUR COUNTRY THAT HAVE SHOWN THERE IS NO INCREASED RISK. AND HERE WE ARE WITH THAT SITUATION.

THERE IS NO QUESTION IN MY MIND THAT CLASS ACTIONS ARE APPROPRIATE TO PROTECT THE PUBLIC HEALTH, THE PUBLIC SAFETY, GENUINE CONSUMERS WITH REAL INJURIES. BUT I THINK THERE HAS BEEN A CLEAR ABUSE. AND I THINK IT CALLS FOR SOME CHANGES.

MR. SOL SCHREIBER: COUNSEL, IS IT YOUR POSITION THAT THERE HAS BEEN NO MEDICAL DEVICE CASE WHICH WOULD SETTLE A LEGITIMATE CLASS CASE?

MR. PREUSS: I HAVE NOT PARTICIPATED IN ONE THAT HAS SETTLED ON THE MERITS.

MR. SOL SCHREIBER: BUT YOU'RE FAMILIAR WITH ALL OF THEM; AREN'T YOU?

MR. PREUSS: THAT'S CORRECT, THAT IS MY POSITION.

MR. SOL SCHREIBER: AND BEING FAMILIAR WITH ALL OF THEM, IS IT YOUR POSITION THAT NONE OF THEM THAT HAVE BEEN SETTLED WERE WORTH SETTLING, AND IT WAS ONLY A THREAT TO BANKRUPTCY THAT CAUSED THE DEFENDANTS TO SETTLE?

MR. PREUSS: WELL, I THINK THAT THAT PROSPECT IN THE BREAST IMPLANT LITIGATION OBVIOUSLY WAS INFLUENCING --

MR. SOL SCHREIBER: I'M TALKING ABOUT LAB OR SPINAL CASES. HAVEN'T SOME OF THOSE BEEN LEGITIMATE CLASS ACTIONS?

MR. PREUSS: THOSE, IN MY VIEW, HAVE NOT BEEN SETTLED

ON THE MERITS, BUT RATHER, WITH THE THREAT OF LITIGATION TO THE COMPANY OVERALL.

I THINK THE PROPOSED CHANGES THAT HAVE BEEN PROPOSED BY THIS COMMITTEE WILL GO A LONG WAY TO HELPING THE SITUATION. I THINK THAT ARTICULATING THAT CLAIMS SHOULD STAND BY THEIR OWN, AN INDIVIDUAL SHOULD BE ALLOWED TO PURSUE THEM ON THEIR OWN, IS AN EXCELLENT REAFFIRMATION OF THE PREFERENCE FOR INDIVIDUAL ACTIONS. I THINK ALLOWING THE CASE TO DEVELOP BEFORE A DECISION IS MADE IS EXTREMELY IMPORTANT.

I WAS A PARTY TO A CLASS ACTION LITIGATION IN GUAM IN WHICH A CLASS WAS CERTIFIED ON THE TOXIC SUBSTANCE ISSUE BEFORE ANY DEFENDANT HAD APPEARED, BEFORE ANY INQUIRY AS TO WHETHER OR NOT THE PARTICULAR SUBSTANCE COULD HAVE CAUSED ANY INJURY WHATSOEVER, MUCH LESS THE INJURY THAT WAS BEING CLAIMED.

I THINK THAT BETTER CONSISTENCY AND MORE PREDICTABILITY, WHICH ARE DESIRABLE GOALS, WILL BE ACHIEVED BY (A), (B) AND (C) ON THE PROVISIONS. I THINK THAT THE COST/BENEFIT ANALYSIS, WHICH IS VERY ANALOGOUS TO WHAT A DOCTOR GOES THROUGH WHEN A DOCTOR PRESCRIBES, IS EXTREMELY HELPFUL TO THE CLASS ACTION PROCESS.

HONORABLE JOHN L. CARROLL: WOULD A DOLLAR CLAIM ON BEHALF OF A MILLION CONSUMERS SATISFY YOUR COST/BENEFIT ANALYSIS?

MR. PREUSS: I THINK I'D HAVE TO LOOK AT THE PARTICULAR CIRCUMSTANCES.

HONORABLE JOHN L. CARROLL: LET'S SAY THE TEXAS INSURANCE ROUNDING-UP CASE.

MR. PREUSS: THAT MAY BE APPROPRIATE. THAT MAY BE APPROPRIATE.

I THINK THE APPEAL IS A VERY VALUABLE TOOL. AND I THINK THAT THAT IS A NECESSARY TOOL AT THIS STAGE, UNTIL WE SEE HOW THESE PROPOSED CHANGES WORK OUT. THE CIRCUIT JUDGES CAN CERTAINLY EVALUATE THAT.

I APPLAUD THE EFFORT OF THIS COMMITTEE IN ALL THE WORK IT'S DONE, AND IT'S BEEN ENLIGHTENING TO HEAR THE LEVEL OF DISCUSSION HERE THIS MORNING, BY TRUE CLASS ACTION SPECIALISTS. CLASS ACTIONS HAVE AFFECTED MY PRACTICE, AND IT'S FOR THAT REASON THAT I WANTED TO SPEAK.

AND I THANK YOU FOR THE OPPORTUNITY TO ADDRESS YOU.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH, MR. PREUSS.

MR. SIMON, LEONARD SIMON? I THINK YOU RECEIVED ONE OF MY FIVE-MINUTE LETTERS; DID YOU?

MR. SIMON: I DID.

HONORABLE PAUL NIEMEYER: OKAY.

TESTIMONY OF LEONARD B. SIMON

MR. SIMON: IT'S PROBABLY GOOD I ONLY HAVE FIVE MINUTES, BECAUSE PROFESSOR MILLER SAID SOME OF THE THINGS THAT I INTENDED TO ADDRESS AND HE SAID THEM SO MUCH BETTER THAN ME THAT HAVING LESS TIME TO TRY AND FOLLOW IN HIS FOOTSTEPS IS PROBABLY

A BENEFIT RATHER THAN A HANDICAP.

MY NAME IS LEONARD SIMON. I PRACTICE IN SAN DIEGO, CALIFORNIA. I SPENT THE FIRST THIRD OF MY CAREER, ABOUT SEVEN OR EIGHT YEARS, DEFENDING COMPLEX LITIGATION, INCLUDING MANY CLASS ACTIONS OF THE KIND WE'RE TALKING ABOUT. I'VE SPENT THE LAST TWO-THIRDS OF MY CAREER, ABOUT 13 OR 14 YEARS, PRINCIPALLY PROSECUTING CLASS ACTIONS, AND I'VE SEEN MANY, MANY CLASS ACTIONS.

I THINK THE COMMITTEE IS ENGAGED, WITH DUE RESPECT, IN AN EFFORT TO THROW THE BABY OUT WITH THE BATH WATER. CLASS ACTIONS WORK EXCEPTIONALLY WELL IN THE AREAS OF ANTITRUST, CONSUMER LAW, AND SECURITIES LAWS. THE NOTION THAT SOMEONE COULD SERIOUSLY ASK PROFESSOR MILLER: IS RULE 23(B)(3) REALLY WORTH IT? SUGGESTS TO ME THAT THE MASS TORT CASES, OR THE MEDICAL DEVICE CASES, OR THE WHATEVER NEW CATEGORY OF CASES, MUST BE SKEWING OUR THOUGHTS SO MUCH THAT WE ARE MISSING THE OBVIOUS.

I REPRESENTED THE INVESTORS IN LINCOLN SAVINGS. THEY LOST $280 MILLION. THEY RECOVERED $245 MILLION. THAT CASE WAS UNLITIGATABLE IN ANY FASHION OTHER THAN IN A CLASS ACTION. AND THE NOTION THAT WE WOULD SERIOUSLY QUESTION WHETHER THE SYSTEM WORKS, WHETHER THE SYSTEM IS WORTH IT, WHEN LITTLE OLD LADIES IN ORANGE COUNTY, CALIFORNIA, WHO LOST THEIR LIFE SAVINGS, WHETHER THAT WAS $500 OR 5,000 OR $50,000, OUGHT TO HAVE THE RIGHT TO USE RULE 23 TO RECOVER FROM CHARLES KEATING, I WOULD SUGGEST

REALLY IS A QUESTION THAT ANSWERS ITSELF. THE SYSTEM WORKS FINE IN A CASE LIKE THAT.

THE SYSTEM WORKS FINE IN THE NASDAQ ANTITRUST CASE, IN WHICH BROKERAGE HOUSES ARE ALLEGED TO HAVE WIDENED THE SPREAD BETWEEN THE BID PRICE AND THE ASKING PRICE SO THAT SOMETHING IN THE RANGE OF THREE- OR $4 BILLION CHANGED HANDS THAT OUGHT NOT TO HAVE CHANGED HANDS. THE CASE HAS BEEN CERTIFIED BY JUDGE ROBERT SWEET IN THE SOUTHERN DISTRICT OF NEW YORK, AND IT WILL PROCEED TO A TRIAL, OR TO A SETTLEMENT. AND IT COULDN'T BE LITIGATED BY ANYONE. FIDELITY WOULDN'T BRING THAT CASE ON ITS OWN CLAIM.

THESE CASES HAVE BEEN MADE SO COMPLEX -- INDIVIDUAL CASES ARE SO COMPLEX AND SO EXPENSIVE THAT PEOPLE DO NOT LITIGATE CLAIMS, EVEN SUBSTANTIAL CLAIMS. SO THE QUESTION OF WHETHER CLASS ACTIONS ARE NEEDED, ARE NECESSARY, DOES RULE 23 WORK, I THINK IT DOES WORK.

SO THE QUESTION IS: DO THE PROPOSED CHANGES IMPROVE THINGS, OR DO THEY MAKE THINGS WORSE? AND AGAIN, WITH DUE RESPECT, I THINK THEY MAKE THINGS WORSE.

PROVISION (F), AS IN "FRANK," THE SMALL CLAIMS PROVISION, I THINK YOU CAN ATTACK ON ONE OF TWO BASES. YOU CAN ATTACK IT ON POLICY GROUNDS, AS PROFESSOR MILLER DID, AND SAY: SMALL CLAIMS ARE FINE. THAT'S WHAT RULE 23 IS ALL ABOUT.

AND I HAPPEN TO SHARE THAT VIEW, BUT I WOULD FOCUS MY ATTACK ON THE SECOND POINT, WHICH IS THAT THE RULE, AS WRITTEN,

IS UNMANAGEABLE. IT WOULD TAKE MORE TIME TO GET RID OF THE CASES THAT A GENTLEMAN WAS TALKING ABOUT, I BELIEVE THE GENTLEMAN FROM NISSAN, MORE TIME TO GET RID OF THE CASES WEIGHING THE COSTS AND BENEFITS OF THE CASE THAN IT WOULD TO GET RID OF THE CASES IN THE MANY CASES WE HAVE NOW, UNDER RULE 23, AS WRITTEN, RULE 12, AS WRITTEN, RULE 56, AS WRITTEN, AND RULE 11, AS WRITTEN.

AND THE NOTION THAT AT THE BEGINNING OF EVERY CLASS ACTION, YOU'RE GOING TO ENGAGE IN AN ACADEMIC DEBATE ABOUT WHETHER IT'S WORTH THE CANDLE IS SCARY, TO ME, HAVING DEFENDED THE CASES AND HAVING PROSECUTED THE CASES. THE CREATIVE MINDS OF THE LAWYERS ON BOTH SIDES WILL CONJURE UP ENORMOUS AMOUNTS OF USELESS MATERIAL, WHICH NEEDS TO BE STUDIED; AND JUDGES, WHO ARE HUMAN BEINGS, WILL COME TO UNBELIEVABLY INCONSISTENT DECISIONS, BECAUSE YOU'RE ASKING THEM A QUESTION BORDERING ON THE RELIGIOUS.

LOOK AT THE DEBATE OVER THE TWO DOLLAR ROUNDING UP. WHO KNOWS IS THAT WORTH IT? IS THAT WORTH IT TO DISTRICT JUDGE JONES? YEAH. DISTRICT JUDGE SMITH? NO. SO WE'RE GOING TO TAKE THE CASES UP ON INTERLOCUTORY APPEAL TO THE CIRCUITS. WE'RE GOING TO GRANT WRIT, AND THE SUPREME COURT WILL DECIDE $80 MILLION OF $2 ROUNDING UP IS WORTH IT. THAT IS, WITH ALL DUE RESPECT, A CRAZY WAY TO RUN A JUDICIAL SYSTEM, TO BE MAKING JUDGMENT CALLS LIKE THAT IN EVERY CASE.

MR. GOLDFARB CANDIDLY SAID THAT HE HAD DEFENDED A CASE

FOR CHRYSLER WHERE $500 CHANGED HANDS TO EACH VICTIM, AND HE THOUGHT IT WAS A GOOD CASE, IT WAS A REASONABLE CASE, NOT A FRIVOLOUS CASE, A CASE WORTH LITIGATING.

I THINK THAT'S A VERY CANDID ADMISSION FROM A GENTLEMAN ON THE OTHER SIDE OF THE V, AS PROFESSOR MILLER SAID. A $500 CASE, I WOULDN'T BET A PLUG NICKEL ON WINNING THE ARGUMENT IN FRONT OF THE AVERAGE DISTRICT JUDGE IN THIS COUNTRY THAT A $500 CASE IS WORTH THE CANDLE.

I DON'T KNOW THAT A THOUSAND DOLLAR CLAIM BY A LINCOLN SAVINGS LITTLE OLD LADY IN ORANGE COUNTY WOULD BE VIEWED AS WORTH THE CANDLE. JUDGE BILLGEE (PHONETIC) IN ARIZONA SPENT A TREMENDOUS AMOUNT OF HIS TIME OVER A FOUR-YEAR PERIOD ACTIVELY AND INTELLIGENTLY MANAGING THAT CASE TO A RESOLUTION, WHICH INCLUDED A JURY TRIAL.

SO THE CLAIM THESE CASES NEVER GO TO TRIAL, CAN'T BE TRIED, IS BUNK. OUR FIRM TRIES A LARGE CLASS ACTION A YEAR. WE HAD ONE TRIED, DAMAGES DISTRIBUTED, AFFIRMED BY THE NINTH CIRCUIT JUST A FEW MONTHS AGO. IT'S UP ON CERT. NOW. WE TRY ABOUT ONE A YEAR. WE'LL TRY THE NASDAQ CASE IF WE NEED TO; WE'LL TRY MOST OF LINCOLN SAVINGS IF WE NEED TO. MOST OF THE CASES SETTLE. THE FEDERAL JUDICIAL CENTER SAYS MOST LITIGATION SETTLES. SO THERE REALLY IS NO DIFFERENCE.

I THINK THAT THE SMALL CLAIMS PROVISION REALLY IS PROBABLY THE WORST PROVISION IN THESE PROPOSALS, BECAUSE IT ASKS DISTRICT JUDGES ACROSS THE COUNTRY TO MAKE A DECISION WITHOUT

STANDARDS, WITHOUT GUIDANCE, WITHOUT DATA, OR IT ELONGATES CASES THAT ALREADY NOW TAKE FIVE YEARS, ELONGATES THEM FOR A SIXTH YEAR OF DEBATING COSTS AND BENEFITS OF THE ACTION, TAKING DISCOVERY ON WHAT WOULD THE DEFENSE COSTS BE, WHAT ARE THE DAMAGES, HOW STRONG IS THE CASE.

NOW, I THINK THE TWO RULES I HATE THE MOST, I THINK I WOULD CALL SORT OF THE GOLDILOCKS PROVISION. IT CAN'T BE TOO SMALL, OR IT VIOLATES (F). BUT THE CLAIM, I GUESS, CAN'T BE TOO LARGE, OR WE HAVE A PROBLEM UNDER (A).

HONORABLE PAUL NIEMEYER: IT HAS TO BE JUST RIGHT.

MR. SIMON: JUST RIGHT. AND I REALLY DON'T KNOW. I'M NOT PLAYING GAMES. I DON'T KNOW WHAT THE COMMITTEE INTENDS ON (A). I'VE THOUGHT ABOUT IT, AND I'M NOT SURE WHETHER THE QUESTION OF WHETHER THERE ARE LARGE CLAIMANTS IS INTENDED TO KNOCK THE LARGE CLAIMANTS OUT OR TO KNOCK THE CASE OUT.

BUT IN EITHER CASE, IT IS ANOTHER UNFORTUNATE PROVISION. THERE ARE LARGE CLAIMANTS IN EVERY CLASS ACTION. AND IF THE LARGE CLAIMANTS WANT TO STAY IN, IT JUST BOGGLES MY MIND TO THINK OF WHY THE COMMITTEE WOULD SUGGEST THAT THE LARGE CLAIMANTS OUGHT TO BE DEFINED OUT OR THE CASE OUGHT TO BE UNCERTIFIED.

IF FIDELITY WANTS TO SIT BACK AND LET CLASS ACTION LAWYERS LIKE MYSELF PROSECUTE THE NASDAQ MARKET-MAKER ANTITRUST CASE AND THEY ARE SATISFIED WITH THAT RELATIONSHIP BETWEEN THE PLAINTIFFS' LAWYERS, THE DEFENSE LAWYERS, THE COURT AND A JURY,

WHY, WHY WOULD ANYONE THINK THAT FIDELITY SHOULD BE DEFINED OUT OF THAT CASE? THEY'VE GOT THE CLASS NOTICE. THEY CAN READ. THEY HAVE COUNSEL. THEY WILL UNDERSTAND IT BETTER THAN ANYONE, AND THEY WILL MAKE A CALCULATED JUDGMENT OF WHETHER THEY WANT IN OR THEY WANT OUT.

AND TO, AGAIN, CHALLENGE DISTRICT JUDGES ACROSS THE COUNTRY, TO TRY TO FIGURE OUT: WHAT DID THE COMMITTEE MEAN? DOES THIS MEAN THE LARGE GUYS ARE OUT? DOES THIS MEAN THE LARGE PEOPLE KILL THE CLASS, THAT IF THERE ARE 14.3 PERCENT OF THE CLAIMANTS WHO ARE LARGE CLAIMANTS AND IN THE AGGREGATE, THEY HOLD 51 PERCENT OF THE DAMAGES, THE CASE SHOULD BE REJECTED? I DON'T KNOW WHAT IT MEANS, AND I CANNOT THINK OF A MEANING OF IT WHICH WOULD BE PRODUCTIVE.

THIS REALLY LEADS ME TO MY LAST POINT, WHICH I'LL ATTEMPT TO WRAP UP WITH, WHICH IS THAT: IF ONE ASSUMES THERE ARE MODEST BENEFITS TO BE HAD FROM SUBPROVISION (F) OR SUBPROVISION (A), A POINT WHICH I DO NOT EVEN CONCEDE, I THINK THERE ARE NO BENEFITS. BUT IF THERE ARE SOME BENEFITS, LET ME SUGGEST THAT THEY ARE MODEST, AND THAT THEY ARE FAR OUTWEIGHED BY A COST/BENEFIT ANALYSIS OF THE ADDITIONAL LAYER OF LITIGATION QUESTIONS YOU ARE INJECTING INTO THE SYSTEM.

WE HAVE 30 YEARS OF JURISPRUDENCE UNDER RULE 23. PEOPLE REALLY DO UNDERSTAND WHAT'S A CERTIFIABLE CLASS, WHAT'S AN UNCERTIFIABLE CLASS, WHAT'S A CLOSE QUESTION, WHAT'S AN INTERLOCUTORY APPEAL, WHAT'S AN ABUSE, WHAT'S AN ETHICAL

VIOLATION, A FAIR SETTLEMENT, AND AN UNFAIR SETTLEMENT. OF COURSE, WE HAVE HUMAN BEINGS. WE HAVE GOOD AND BAD PLAINTIFFS' LAWYERS. WE HAVE DILATORY AND NONDILATORY DEFENSE LAWYERS. WE HAVE BRILLIANT AND NOT-SO-BRILLIANT JUDGES.

BUT THE SYSTEM IS UNDERSTANDABLE. AND IT IS TRULY SCARY TO THINK ABOUT FIDDLING WITH RULE 23(B)(3)(A) AND FIDDLING WITH RULE 23(B)(F) AND THEN ADDING AN INTERLOCUTORY APPEAL PROVISION, AND THEN SENDING US OUT TO LITIGATE CLASS ACTIONS. BECAUSE EVERY CASE LITIGATED WILL BE LITIGATED FROM THE STANDPOINT OF: IT'S A NEW BALL GAME. EVERYTHING HAS CHANGED. THE COMMITTEE REWROTE RULE 23. LOOK, THEY ADDED THREE WORDS HERE. TAKE ALL OF YOUR CASES FROM THE '70S, '80S AND THE EARLY '90S AND THROW THEM AWAY. WE HAVE A BRAND NEW SYSTEM.

YOU ARE ADDING UNCERTAINTY TO A SYSTEM WHICH REALLY DOES, BY AND LARGE, WORK IN THE AREAS WHERE IT HAS BEEN USED FOR DECADES, SECURITIES, ANTITRUST, AND CONSUMER LAW.

AND I WENT BACK AND LOOKED AT THE DOCUMENT THAT WAS CIRCULATED, AND IT REALLY DOES UNDERSCORE MY "BABY WITH THE BATH WATER" VIEW. THE DOCUMENT YOU CIRCULATED SAYS THAT: IN 1991, THE STANDING COMMITTEE WAS REQUESTED TO DIRECT THE ADVISORY COMMITTEE TO STUDY, QUOTE, "WHETHER RULE 23 SHOULD BE AMENDED TO ACCOMMODATE THE DEMANDS OF MASS TORT LITIGATION."

NOW, I THINK A FAIR READING OF THE SITUATION IS THAT WE HAD A SYSTEM THAT WORKED FOR SECURITIES AND ANTITRUST. THE SYSTEM IS BEING OVERBURDENED AND BEING PUSHED AND QUESTIONED

BECAUSE OF ITS APPLICATION TO MASS TORT CASES, WHICH PREVIOUSLY WERE VIEWED AS UNCERTIFIABLE.

WHEN I WAS A YOUNG LAWYER, THAT WAS SORT OF BLACK LETTER LAW. MASS TORT, NO CLASS. AND WHAT HAS HAPPENED IS THAT BECAUSE WE HAVE STRETCHED RULE 23 TO FIT MASS TORTS, AN AREA I DO NOT PRACTICE IN AND CLAIM NO EXPERTISE IN, WE ARE NOW THREATENED WITH LOSING THE UTILITY OF RULE 23 IN ITS CORE AREA. A THOUSAND INVESTORS OR A THOUSAND NASDAQ STOCK PURCHASERS SIMILARLY SITUATED WHO HAVE THE SAME CLAIM OUGHT TO HAVE THE USE OF RULE 23.

THANK YOU VERY MUCH FOR YOUR TIME.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. SIMON.

MR. WITT?

TESTIMONY OF SAMUEL B. WITT

MR. WITT: GOOD MORNING, YOUR HONOR. LADIES AND GENTLEMEN OF THE COMMITTEE, THANKS FOR A CHANCE TO OFFER MY OBSERVATIONS. THESE DON'T COME TO YOU FROM THE STANDPOINT OF EXPERIENCE AS A LITIGATOR OR EVEN AS AN EXPERT. I SPENT MY LIFE EVALUATING THE OPINIONS OF LITIGATORS AND EXPERTS AS A CLIENT. SO I WON'T HAVE THE JARGON QUITE RIGHT. I DON'T EVEN LOOK LIKE A LAWYER. SO FORGIVE ME FOR THAT THIS MORNING.

IN DALLAS, JOHN BIZNER (PHONETIC) CHALLENGED THE COMMITTEE TO FOCUS ON THE COMMONALITY PREREQUISITE FOR CERTIFICATION. AND I'D LIKE YOU TO GO BACK, IN YOUR COPIOUS SPARE TIME, AND LOOK AGAIN AT HIS VERY THOUGHTFUL PAPER, BECAUSE

HE MAKES SEVERAL POINTS, IT SEEMS TO ME, THAT BEAR FOCUS.

AND INCIDENTALLY, I THINK I HEARD MR. SIMON A MOMENT AGO SAY THAT RULE 23 SHOULDN'T APPLY IN AREAS WHICH ARE THE ATTENTION OF HIS PAPER, IN ANY EVENT. BUT HE MAKES THE POINT THAT THE ISSUE IS NOT WHETHER THEY ARE COMMON QUESTIONS, BUT WHETHER THE EVIDENCE NECESSARY TO ANSWER THOSE QUESTIONS CAN BE DETERMINED IN ANY EFFICIENT WAY. AND HE OFFERS YOU AN ADDITIONAL EVIDENTIARY PREREQUISITE FOR CERTIFICATION, WHICH I THINK MAKES EMINENT GOOD SENSE WHEN YOU CONSIDER THE BURDEN THAT HAS BEEN EMPHASIZED OVER AND OVER THAT IS PRESENTED BY DISPERSED MASS TORTS.

AND AT THE RISK OF BORING YOU, BUT TO KEEP THINGS MOVING ALONG, HE SAYS THAT YOU OUGHT TO ADD SOMETHING TO REQUIRE THAT THE EVIDENCE LIKELY TO BE ADMITTED AT TRIAL REGARDING THE ELEMENTS OF THE CLAIMS FOR WHICH CERTIFICATION IS SOUGHT IS SUBSTANTIALLY THE SAME AS TO ALL MEMBERS.

NOW, WHERE DOES THIS TAKE YOU? IT TAKES YOU OBVIOUSLY, AS I SAID, RIGHT AT THE QUESTION WHETHER OR NOT DISPERSED MASS TORTS BELONG IN THE SYSTEM AT ALL. AND I THINK THAT DESERVES AMPLE AND FURTHER DISCUSSION AS YOU GO ALONG.

FOUR COURTS OF APPEAL IN THE LAST TEN MONTHS SEEM TO THINK THAT THIS IS NOT THE PROCESS THAT SHOULD BE APPLIED. AND I THINK THAT WE NEED TO FOCUS, AGAIN, ON THAT.

ONE OF THE BIG PROBLEMS IN THIS AREA, OF COURSE, IS CAUSATION. IT'S ALL VERY WELL TO DETERMINE GENERAL CAUSATION IN

THE CONTEXT OF LIABILITY. BUT GENERAL CAUSATION DOES NOT DETERMINE THE SPECIFIC CAUSATION NECESSARY TO FIND AN INDIVIDUAL DEFENDANT RESPONSIBLE. AND THAT'S THE DEFECT IN THE SYSTEM THAT NEEDS TO BE FOCUSED.

NOW, LET ME MOVE ON TO TWO OR THREE OTHER SMALL BUT NO LESS SIGNIFICANT POINTS. AS SEVERAL HAVE SAID, OBVIOUSLY, JUDGE, YOU'RE NOT EITHER GOING TO LOCK IN OR LOCK OUT THE (B)(4) OPPORTUNITY UNTIL AMCHEM IS DECIDED. MY QUESTION FOR YOU IS WHETHER YOU REOPEN PUBLIC COMMENT AFTER THE SUPREME COURT GIVES US ITS THOUGHTS ON THAT, TO ALLOW THIS DEBATE TO GO FORWARD IN THE CONTEXT OF WHAT THEY'RE SAYING.

SECONDLY, AS FAR AS APPEALS ARE CONCERNED, TO QUOTE JUDGE HILL, THE FORMER CHIEF JUSTICE OF THE TEXAS SUPREME COURT: "THE SOONER THE BETTER." PLUS THE FACT, I THINK YOU'VE GOT TO REVISE YOUR NOTES TO TAKE AWAY THE SENSE THAT APPEALS SHOULD NOT BE GRANTED EXCEPT UNDER EXTRAORDINARY CIRCUMSTANCES.

MY COMMENT WAS THAT YOU NEED TO REMOVE THE PHRASE THAT APPEALS SHOULD BE GRANTED WITH RESTRAINT, AND YOU SHOULD ALSO REMOVE THE COMMENT THAT DISCOURAGING STAYS OF TRIAL PROCEEDINGS WHILE CERTIFICATION IS PENDING ON APPEAL SHOULD BE REMOVED.

THE BURDEN THERE, QUITE FRANKLY, ON DEFENDANTS AND ON PLAINTIFFS, IS NOT ONE THAT I THINK IS NECESSARY TO THE PROCESS.

NOW, FACTOR (F) HAS BEEN WELL ARGUED, AND I CAN ADD NOTHING TO THE DEBATE EXCEPT TO QUOTE BACK AT YOU JUDGE HIGGINBOTHAM'S PHRASES. THE QUESTION IS: SHOULD THE

CLASS COUNSEL AND REPRESENTATIVES BE ABLE TO CLAIM STANDING TO ENFORCE PUBLIC VALUES, ABSENT THE PRIVATE REMEDIAL BENEFIT THAT TRADITIONALLY JUSTIFIES PRIVATE ADVERSARY LITIGATION? I DON'T THINK SO, OBVIOUSLY. I THINK THERE IS A SPIN THERE THAT COULD, IN CERTAIN CONTEXTS, BE HELPFUL.

AND THAT BRINGS ME TO MY LAST POINT, COMMENTS ABOUT OPT-IN AS OPPOSED TO OPT-OUT. JOHN FRANK PRESENTED WHAT I THOUGHT WAS ONE OF THE MOST DELIGHTFUL, AMUSING, AND INSTRUCTIVE MEMORANDA ON THE POINT. HE MAKES A VERY GOOD SUGGESTION, AND THAT IS: IF YOU'RE GOING TO MAINTAIN AN (F) REQUIREMENT, WHY DON'T YOU JUST REQUIRE THOSE PEOPLE TO OPT IN. AND I THINK OTHERS HAVE MADE THE SAME POINT AT AN EARLIER POINT IN THE PROCESS.

BUT OPT-INS AND OPT-OUTS PRESENT SEVERAL CHALLENGES; THERE IS NO QUESTION ABOUT THAT. CONSIDER THE PROBLEM OF FUTURES, NOTIFICATION. SHOULD YOU APPLY A RES JUDICATA STANDARD FOR A WHOLE CLASS OF OPT-INS, AS IS USED FROM TIME TO TIME IN A MANDATORY SITUATION? SHOULDN'T YOU MAKE IT CLEAR THAT IF YOU HAVE AN OPT-IN CLASS, THAT THERE SHOULD BE NO OPPORTUNITY FOR A SEQUENTIAL CLASS, SO PEOPLE COULD JUST KIND OF PICK AND CHOOSE?

OBVIOUSLY, ONE WAY TO DO IT IS TO SIMPLY DIFFERENTIATE THE KIND OF CLAIMS THAT MIGHT BE APPROPRIATE FOR OPT-IN AND OPT-OUT, AND THAT, OF COURSE, IS JOHN FRANK'S APPROACH.

IT SEEMS TO ME THAT THE BENEFIT OF OPT-INS IS THAT IT PERMITS THE VALUE OF A CLASS ACTION FOR SETTLEMENT OR TRIAL

PURPOSES TO BE DETERMINED BASED ON REAL AND IDENTIFIABLE CLAIMS. AND THERE IS NO QUESTION ABOUT THE FACT THAT THAT WILL TAKE TIME AND RESOURCES. BUT AT THE END OF THE DAY, MY THOUGHT IS THERE WOULD BE FEWER IN NUMBER THAN THOSE THAT NOW WOULD BE EXPENDED IN THE TRADITIONAL APPROACH.

I THINK OPT-INS WOULD WORK FOR THE SAME REASON THAT (B)(3)(F) WOULD WORK, AND THAT IS, THE FEDERAL SYSTEM IS STRUCTURED TO PROCESS CASES OF A LEVEL OF RELATIVE SERIOUSNESS, WHICH IS MEASURED PRIMARILY IN DOLLAR VALUE, SO THAT THERE HAS TO BE A METHODOLOGY, IT SEEMS TO ME, FOR IDENTIFYING, EITHER THROUGH A JUDGE'S DISCRETIONARY EVALUATION OF COSTS AND BENEFITS, OR THE MEASURED DECISION OF A PLAINTIFF TO PARTICIPATE IN THE CASES THAT ARE APPROPRIATE FOR A CLASS.

THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. WITT.

MS. BIRNBAUM?

MS. BIRNBAUM: YOUR HONOR, CAN WE MAKE A SWITCH HERE? SOMEONE HAS TO MAKE AN AIRPLANE. JOHN MC GOLDRICK.

HONORABLE PAUL NIEMEYER: ALL RIGHT. WHY DON'T YOU COME FORWARD. THE WITNESS IS JOHN MC GOLDRICK.

TESTIMONY OF JOHN L. MC GOLDRICK

MR. MC GOLDRICK: THANK YOU FOR TAKING ME OUT OF ORDER. THANK YOU FOR THE OPPORTUNITY TO SPEAK ON THIS IMPORTANT SUBJECT.

FIRST, I BRING A PERSPECTIVE PERHAPS SOMEWHAT

DIFFERENT FROM SOME YOU HAVE HEARD. I AM A BUSINESSMAN FOR A SUBSTANTIAL PORTION OF MY LIFE NOW. I AM A SENIOR VICE-PRESIDENT OF BRISTOL-MYERS SQUIBB, AND I AM ALSO GENERAL COUNSEL.

BUT I ALSO SPENT THE BETTER PART OF 30 YEARS IN THE TRENCHES AS A CLASS ACTION LAWYER IN A VARIETY OF CLASS ACTIONS, MASS TORT, CONSUMER, SECURITIES, ANTITRUST. I HAVE BEEN IN WHAT AN EARLIER SPEAKER REFERRED TO AS "THE ROOMS." SOME OF MY COLLEAGUES ARE SURPRISED TO KNOW THAT I ACTUALLY HAVE BROUGHT SOME CLASS ACTIONS, AND I HAVE BEEN A CLASS REPRESENTATIVE. SO I'VE HAD SOME EXPERIENCE.

YOU'VE HEARD A LOT. YOU'VE HEARD A LOT OF ARGUMENT OVER A LONG TIME, AND I DON'T KNOW THAT I CAN BRING MAJOR NEW ARGUMENTS TO YOU. BUT I THOUGHT IN MY TIME, I MIGHT TRY TO ADDRESS THREE POINTS.

FIRST, FROM THE PERSPECTIVE OF THE CLIENT, WHAT IS THIS NOTION OF ABUSE THAT WE HAVE HEARD ABOUT. IS IT REAL? AND SECONDLY, JUST IN THE INTERESTS OF TIME, I'D TRY TO LIMIT MYSELF TO COMMENTS ON THE SETTLEMENT CLASS AND INTERLOCUTORY REVIEW.

PROFESSOR MILLER ALWAYS HAS A WONDERFUL APHORISM, AND I SHALL REMEMBER AND USE THE ONE THAT "ABUSE" IS WHAT THE OTHER PERSON IS DOING TO YOU. BUT I THINK THAT MAY DIMINISH SOMEWHAT THE IMPORTANCE OF THE POINT. CALL IT ABUSE, IF YOU WISH; CALL IT A SYSTEM NOT WORKING, IF YOU WISH. BUT I WOULD SUBMIT TO YOU THAT LARGE NUMBERS OF PEOPLE WITHIN AND WITHOUT THE PROFESSION,

AND PARTICULARLY CLIENTS, DEFENDANTS, BELIEVE THAT THE CLASS ACTION, WITH ALL ITS VIRTUES -- AND I AM ONE WHO BELIEVES IT HAS VIRTUES -- HAS BEEN ABUSED, IS NOT WORKING RIGHT. IT IS NOT WORKING IN A WAY THAT IS SOCIALLY SOUND OR FAIR.

I BELIEVE THAT WE CAN ROOT OUT THE PROBLEMS WITHOUT, IN THE PERHAPS OVERUSED PHRASE, "THROWING THE BABY OUT WITH THE BATH WATER." AND I BELIEVE THE AMENDMENTS BEFORE YOU ARE A GOOD FIRST STEP IN THAT DIRECTION. BUT I'D OFFER TWO OBSERVATIONS FROM THE PERSPECTIVE I'VE COME TO HAVE.

FIRST, I CANNOT OVEREMPHASIZE TO YOU BOTH THE REALITY AND THE PERCEPTION ON A WIDE RANGE OF AMERICAN COMPANIES THAT THE CLASS ACTION DEVICE IS BEING ABUSED. IT IS A QUESTION, AND IT WAS ADDRESSED EARLIER IN RESPONSE TO A QUESTION FROM JUDGE CARROLL, OF THE, WHAT I CALL THE IMPLACABLE ARITHMETIC IN A CERTAIN SEGMENT OF THESE CASES, NOT ALL.

SOL LIKES TO TRY TO CAST A CLOTH OVER EVERYTHING, AND IT DOESN'T FIT OVER EVERYTHING. BUT IN A SUBSTANTIAL SEGMENT OF CLASS ACTIONS, THERE IS THIS ARITHMETIC, AND IT IS THIS: EVEN IN A CASE WHERE THE RISK OF LOSING ON THE MERITS IS VERY LOW, FIVE PERCENT, TEN PERCENT, WHEN I PRACTICED LAW, AT LEAST I NEVER TOLD A CLIENT THAT THE CHANCES OF WINNING WERE HIGHER THAN 90 PERCENT.

BUT A CASE WHICH SHOULD BE WON, A LOW-RISK CASE, EVEN IN THAT CASE, IF YOU MULTIPLY BY TENS OF THOUSANDS, SOMETIMES MANY MORE, THE POTENTIAL RISK, AND YOU AGGREGATE IT, IT CREATES

AN EXPOSURE, MULTIPLY OUT YOUR COEFFICIENT OF RISK AGAINST YOUR TOTAL EXPOSURE, ADD IN DAMAGES, WHATEVER THEY MAY BE, WHICH IS VERY SUBSTANTIAL, IT TURNS A CASE, WHICH IS OFTEN PUT TO A JURY, OFTEN -- LET ME SPEAK AS I FEEL -- WITH HIRED GUN EXPERTS WHO DO NOT REPRESENT THE CENTER OF WHATEVER LEARNING IT IS THAT IS BEING ADDRESSED BY THE JURY -- THAT BECOMES A LOTTERY. AND WHEN BUSINESS PEOPLE LOOK AT THAT QUESTION, FACE THAT LAWSUIT, THE ACCOUNTING DEBITS AND CREDITS WILL PUSH ONE TO A HARVARD BUSINESS SCHOOL DECISION, WHICH IS: RANSOM IS THE SMART ANSWER. THAT'S WHAT THE WISE BUSINESS PERSON DOES, PAY THE RANSOM.

MR. THOMAS D. ROWE, JR.: SIR, TO WHAT EXTENT WILL THE ADDITION OF THE MATURITY FACTOR HELP THAT PROBLEM?

MR. MC GOLDRICK: IT HELPS. IT IS WISE. IT DOES NOT SOLVE THE PROBLEM, BECAUSE EVEN IN THE MATURE SITUATION, YOU STILL HAVE THE PROBLEM. THE ARITHMETIC IS THERE. THE ARITHMETIC MAY BE A LITTLE BIT BETTER HONED, BUT IT'S STILL THERE.

HONORABLE JOHN L. CARROLL: IS IT GENERALLY THE MASS TORT PROBLEM?

MR. MC GOLDRICK: MASS TORT IS THE WORST. I THINK YOU CAN PICK THAT UP IN ALL THE COMMENTS YOU'VE HEARD. THERE IS NO DOUBT IT'S THE MOST EGREGIOUS, BUT IT'S NOT ONLY THERE. THIS THING HAPPENS IN AN ANTITRUST CONTEXT. I'VE SEEN IT HAPPEN IN OTHER CONTEXTS.

NOW --

MR. SOL SCHREIBER: HOW DO YOU DECIDE, FOR EXAMPLE, YOU SAY YOU BROUGHT CASES FOR PLAINTIFFS, WHICH I'M VERY FAMILIAR WITH YOUR CAREER AND EMPLOY. BUT HOW DO YOU DECIDE WHICH IS THE CASE THAT'S GOOD AND WHICH IS THE CASE THAT'S BAD?

FOR EXAMPLE, I AGREE WITH YOU, MAYBE THE CLOTH IS TOO FAR. BUT WILL YOU SHRINK IT SO MUCH THAT IT WILL COVER NOTHING? WHAT I'M ASKING YOU, IN EFFECT, IS: WHY CAN'T THE DEFENDANT, IN THOSE CASES WHICH SEEM OUTRAGEOUS, BRING THE CLASS MOTION OR BRING THE RULE 11 MOTION, RULE 12 MOTION, 12(B)(6), MEETING BEFORE CERT.?

BECAUSE AS I UNDERSTAND IT, DEFENDANTS WOULD LIKE TO GET DISMISSALS, WHETHER OR NOT THEY'RE RES JUDICATA. WE DO AGREE THAT IF THE CASE IS DISMISSED BEFORE CERTIFICATION, IT WILL NOT HAVE RES JUDICATA EFFECT, BUT IT WILL, IN EFFECT, GET RID OF THE CASE. WHY DON'T WE --

MR. MC GOLDRICK: WOULD THAT WORK? IT IS DONE. IT IS DONE BY PEOPLE IN THIS ROOM ROUTINELY EVERY DAY.

BUT THE TRUTH IS: THE HURDLES FOR 12(B)(6), THE EXTENSIVE DISCOVERY THAT OFTEN WILL BE ENGENDERED, STILL PUTS ONE IN THAT POSITION. AND THAT'S THE REALITY OF IT.

AS A MATTER OF THEORY, JUDGE SCHREIBER (SIC), YES, THAT MIGHT HAPPEN. AS A MATTER OF THE EXPERIENCE, AT LEAST THAT I'VE HAD FOR 30 YEARS, IT DOESN'T HAPPEN. NOT MUCH, NOT ENOUGH. THAT WILL BE MY RESPONSE.

MR. SOL SCHREIBER: I WOULD GIVE YOU DOZENS OF

DISMISSALS. IN FACT, I THINK MY FIRM HAS EVEN HAD A FEW OF THEM, WHERE DISMISSALS HAVE OCCURRED JUST RIGHT FROM THE START OF A CASE.

MR. MC GOLDRICK: I THINK THAT IS A PATTERN WHICH IS A WONDERFUL PATTERN, AND I HOPE YOU'LL KEEP IT UP.

BUT IT'S NOT MERELY THE QUESTION OF THIS IMPLACABLE ARITHMETIC. THAT'S VERY POWERFUL AND IT'S VERY REAL. BUT LET'S SUPPOSE WE TAKE THE OTHER ATTITUDE. WE DO WHAT MAYBE JUDGE SCHREIBER (SIC) IS SUGGESTING, MAYBE WHAT JUDGE CARROLL IS SUGGESTING. WE FIGHT. AND WE DO DO THAT, "WE," COLLECTIVELY.

BUT IF WE DO THAT, WE USUALLY HAVE TO SPEND A VERY LONG PERIOD OF TIME WITH VERY HIGH TRANSACTION COSTS, WITH THE SAME LEVEL OF UNCERTAINTY AND THAT ARITHMETIC HOVERING. AND, THAT, TOO, IS NOT SOMETHING, IT SEEMS TO ME, IS RIGHT.

I WOULD SUGGEST THAT IN THIS SET OF CASES I'M TALKING ABOUT -- AND IT'S FAIRLY LARGE, YES, IT'S POPULATED MORE BY MASS TORT AND PRODUCT LIABILITY, BUT BY NO MEANS EXCLUSIVELY -- IN THAT SET, FAIR-MINDED PEOPLE REALLY SHOULD AGREE THAT THAT IS WRONG. IT SHOULD NOT HAPPEN.

NOW, HOW DO WE DEAL WITH THAT? YOU'VE HEARD THESE THINGS BEFORE FROM OTHERS BESIDE ME. BUT I WANT TO TELL YOU THAT I HAVE SAT, BOTH IN MY OWN SEAT AND AS A COUNSELOR TO THOSE WHO SIT IN THE BUSINESS PERSON'S SEAT, AND WATCHED OVER AND OVER PEOPLE FACE THAT ARITHMETIC, WHICHEVER WAY THEY COME OUT, WHETHER THEY SETTLE OR DECIDE TO THE DEVIL WITH IT, WE'LL FIGHT,

AND THERE IS A KIND OF BITTERNESS, A KIND OF FEELING AMONG THOSE PEOPLE THAT THE LEGAL SYSTEM IS SIMPLY NOT WORKING RIGHT. AND, I WOULD SUBMIT, I THINK TO THAT DEGREE, THEY ARE RIGHT.

BUT THERE ARE TWO PROBLEMS I'M POINTING OUT TO YOU. ONE IS THE SUBSTANTIVE PROBLEM: IS IT WORKING RIGHT? AND THE OTHER ONE IS A FAIRLY BROAD PERCEPTION AMONG SIGNIFICANT SECTORS THAT THE LEGAL SYSTEM IS UNFAIR.

MR. SOL SCHREIBER: EXCUSE ME, SIR. BUT IS IT THE DEFENDANT THAT'S CONCERNED; MORE BASICALLY, IS IT THE INSURANCE INDUSTRY THAT'S CONCERNED?

BECAUSE WE AGREE THAT IN MANY OF THESE CASES, THESE CASES ARE COVERED BY INSURANCE. IS IT REALLY THE DEFENDANT WHO'S SAYING, "THIS IS A HOLDUP" OR IS IT THE INSURER WHO'S SAYING, "WE'D BETTER GET OUT AT THIS POINT. OTHERWISE, WE'RE GOING TO HAVE TO GO THROUGH THREE LEVELS OF FURTHER INSURANCES"?

MR. MC GOLDRICK: WITH THE GREATEST RESPECT AS YOU KNOW I HAVE FOR YOU, ABSOLUTELY, IT IS THE DEFENDANT.

SURE, INSURERS CARE. BUT IN THE WORLD OF MOST BUSINESSES, OUR INSURANCE IS ULTIMATELY GOING TO COME BACK TO US. WE PAY INSURANCE PREMIUMS BASED UPON A RANGE OF FACTORS. AND THAT KIND OF INSURANCE ISSUE IS GOING TO COME BACK TO OUR POCKETBOOK AS WELL.

FURTHERMORE, LET US BE CLEAR. LARGE NUMBERS OF THESE KINDS OF CASES ARE NOT INSURED OR ARE NOT INSURED IN FULL. AND WE HAVE LOTS OF GOOD FIGHTS WITH OUR BROTHERS IN THE INSURANCE

INDUSTRY ABOUT THAT, BUT THAT DOES HAPPEN. SO I THINK THAT REALLY IS QUITE OFF THE MARK.

I DON'T WANT TO GO BEYOND MY TIME, AND I PROBABLY --

HONORABLE PAUL NIEMEYER: I THINK YOU'RE RIGHT ABOUT THERE.

MR. MC GOLDRICK: LET ME, IF I COULD, JUST SAY VERY QUICKLY, IN CLOSING, THREE QUICK THINGS.

FIRST OF ALL, DISCRETION, RESPECTFULLY, DOES NOT SOLVE THE PROBLEM, AND IT IS NOT MERELY A MATTER OF STATE COURTS; IT IS WITH SOME DIFFIDENCE THAT I SAY THIS TO THIS GROUP. BUT THERE ARE, IN THE FEDERAL JUDICIARY, PEOPLE WHO, REASONABLY CAVALIERLY, IT SEEMS TO ME, WILL CERTIFY, OR AT LEAST HOLD OUT THE THREAT OF CERTIFICATION AS A BLUDGEON. IT'S REAL.

THE SECOND POINT I WOULD MAKE IS WITH RESPECT TO CLASS SETTLEMENTS, YOUR SETTLEMENT RULE, IT SEEMS TO ME THAT THERE ARE VERY DIFFERENT PURPOSES FOR THE INITIAL CERTIFICATION, THE TRIAL CERTIFICATION, I SHOULD SAY, AND SETTLEMENT CERTIFICATION. THERE IS NO REASON WHY THEY SHOULD HAVE THE SAME STANDARDS. AND AS A PRACTICAL MATTER, IF YOU DON'T HAVE THAT, YOU'RE GOING TO HAVE DEFENDANTS AND PLAINTIFFS AND THE COURTS MARCHING TOGETHER, THROUGH LONG YEARS OF LITIGATION, THAT NOBODY WANTS OR NEEDS, WITHOUT THE AVAILABILITY OF THAT.

HONORABLE ANTHONY SCIRICA: IF IT WERE NOT THERE, WOULD IT ACT AS A DETERRENT TO PLAINTIFFS TO BRING SUITS THAT ARE NOT VERY SUBSTANTIAL?

MR. MC GOLDRICK: I DON'T BELIEVE SO. I HAPPEN TO THINK THAT IT IS THE LAW NOW, AND IT IS ONLY JUDGE BECKER AND HIS HARDY BAND, AND THERE IS SOME ADHERENTS, OF COURSE, WHO MAYBE THINK DIFFERENTLY. SO I THINK WE FELT THAT WAY, AND IT HASN'T DETERRED MUCH OF ANYTHING.

AND MY LAST POINT IS ON INTERLOCUTORY REVIEW, I WOULD ONLY CONFESS THAT I AM A BIG FAN OF INTERLOCUTORY REVIEW IN GENERAL, UNLIKE MY APPELLATE COURT FRIENDS. BUT I DO THINK, IN THIS INSTANCE, QUICK, NOT TERRIBLY STINGY REVIEW IS VERY SENSIBLE, BECAUSE MANY OF THESE CASES TURN ON WHETHER IT'S CERTIFIED OR NOT. IT IS THE ISSUE, AS SOMEONE ELSE SAID EARLIER.

I THANK YOU FOR YOUR TIME.

HONORABLE PAUL NIEMEYER: THANK YOU.

IS MR. ALDOCK IN THE ROOM?

MR. ALDOCK: YES, SIR.

HONORABLE PAUL NIEMEYER: ARE YOU PREPARED TO COME FORWARD AND TALK? I UNDERSTAND YOU HAVE A SCHEDULING PROBLEM, TOO.

MR. ALDOCK: I'M HAPPY TO COME NOW. I'M HAPPY TO LET MY COLLEAGUE GO FIRST, IF THAT WOULD BE HELPFUL.

HONORABLE PAUL NIEMEYER: WE'LL PULL YOU IN RIGHT UP BEHIND HER, THEN.

TESTIMONY OF SHEILA L. BIRNBAUM

MS. BIRNBAUM: YOUR HONORED MEMBERS OF THE COMMITTEE,

I THANK YOU FOR THIS OPPORTUNITY. I'VE GIVEN YOU WRITTEN REMARKS, AND I'M GOING TO TRY TO ANSWER SOME OF THE QUESTIONS I'VE HEARD FROM YOU THAT I THINK ARE OF CONCERN.

AND I'M GOING TO TRY TO ANSWER FROM MY PERSPECTIVE. I HAVE BEEN IN A LOT OF CLASS ACTIONS. I REPRESENT DEFENDANTS. I HAVE BEEN IN MANY OF THE MASS TORT CASES THAT YOU'VE READ ABOUT, AND I THINK I MIGHT BE ABLE TO GIVE YOU A PERSPECTIVE, AT LEAST FROM MY PERSPECTIVE, ANSWER SOME OF YOUR QUESTIONS.

JUDGE CARROLL, YOU ASKED A QUESTION: WHY CAN'T YOU TRY THESE CASES WHEN THEY HAVE NO MERIT? WELL, I CAN TELL YOU WHY. BECAUSE THE PLAYING FIELD CHANGES DRAMATICALLY WHEN THERE IS A CLASS CERTIFIED. ALL THE RULES ARE DIFFERENT.

IT'S NOT BECAUSE JUDGES ARE NOT COGNIZANT OF THE RULES. BUT IF YOU HAVE A DIFFUSED TORT ACTION, A MASS TORT, AND YOU HAVE REPRESENTATIVE PLAINTIFFS, AND LET'S SAY YOU'RE TRYING FIVE REPRESENTATIVE PLAINTIFFS, WHICH WE DID LAST YEAR IN THE KOPPLEY (PHONETIC) CASE, THE ONLY FEDERAL CASE THAT I KNOW THAT WAS A CLASS ACTION IN A MASS TORT THAT EVER WENT TO TRIAL. AND IT DIDN'T COMPLETE. IT WAS SETTLED WHILE THE TRIAL WAS GOING ON.

WHAT HAPPENED IN THAT CASE HAPPENS IN ANY CASE YOU'RE GOING TO TRY. YOU HAVE ACTIONS THAT OCCUR OVER PERIODS OF TIME. HOW DO THE RULES OF EVIDENCE GET APPLIED?

FOR EACH PLAINTIFF WHO MAY HAVE BEEN IN A DIFFERENT PERIOD OF TIME, WITH DIFFERENT FACTS IN A SINGLE TRIAL, MUCH OF

THE EVIDENCE WOULD NOT COME IN TO THAT PARTICULAR PLAINTIFF, THAT PARTICULAR CLAIM. EVERYTHING GETS MIXED TOGETHER. THERE IS NO WAY TO SEPARATE IT. EACH PLAINTIFF GETS CREDENCE TO EVERY OTHER PLAINTIFF ON THE CAUSATION ISSUE, IF THERE ARE FIVE OF THEM.

PEOPLE LOOK AT CLASS ACTIONS DIFFERENTLY. THEY RESPOND TO IT DIFFERENTLY. SO WHEN YOU SAY, "WHY CAN'T YOU TRY THESE CASES," BECAUSE STANDING BEHIND THOSE FIVE OR SIX, OR AN INDETERMINATE NUMBER, AND WHEN YOU START DOING WHAT JUDGE GOLDRICK SAYS INSIDE AND START CALCULATING THE CHANCES OF TRYING A CASE, NO MATTER WHAT THE MERIT, BECOMES A VERY CHANCY, DICEY THING. AND EVERYBODY IS WATCHING YOU, THE STOCK MARKET, THE MEDIA, ET CETERA.

SO THE PLAYING FIELD CHANGES WHEN YOU CERTIFY A CLASS. IT'S INEVITABLE; IT'S INNATE. YOU CAN'T HELP IT. WHAT CHARGE DO YOU GIVE IN A NATIONAL CLASS ON A MASS TORT?

OUR JUDGE THOUGHT HE WAS GOING TO GIVE 40(2)(A) FOR ALL THE CLASS MEMBERS. AND THEN WE FIND OUT LATER WHICH DATES DON'T ADAPT 40(2)(A), AND HE WAS GOING TO APPLY THE LAW OF THE JURISDICTIONS THAT THE REPRESENTATIVE PLAINTIFFS CAME FROM. SO THE JURY WOULD HAVE GOTTEN SIX SEPARATE CHARGES, BECAUSE THE LAW WOULD CHANGE FROM STATE TO STATE.

HONORABLE JOHN L. CARROLL: BUT THAT SHOULDN'T HAVE BEEN CERTIFIED.

MS. BIRNBAUM: THAT'S RIGHT.

I'LL TELL YOU ANOTHER PROBLEM. WE COULDN'T GET AN APPEAL. THE DISTRICT COURT WOULDN'T GRANT US A RIGHT TO APPEAL, AND WE MANDAMUSED HIM. BUT THE COURT SAID MANDAMUS IS AN EXTRAORDINARY REMEDY, WHICH COMES TO THE FACT THAT THE RIGHT TO APPEAL THE CLASS ACTION DECISION IS A PARAMOUNT RIGHT.

THE CIRCUIT COURTS ARE NOT GOING TO TAKE CASES THEY DON'T WANT. THERE ISN'T GOING TO BE THIS BIG RUSH. IF A CIRCUIT COURT DOESN'T WANT TO HEAR IT THEY'RE GOING TO LOOK AT THE PROBLEM AND THEY'RE GOING TO SAY, "GO HOME." AND IF THEY THINK YOU SHOULDN'T BE HERE, THEY CAN EVEN HAVE COSTS AGAINST YOU FROM THE OTHER SIDE.

MR. SOL SCHREIBER: WOULD YOU REQUIRE THE APPEALABILITY IN EVERY CLASS CERTIFICATION?

MS. BIRNBAUM: I WOULD. I WOULD THINK THAT THE PARTY SHOULD HAVE A RIGHT, WHEN CERTIFICATION OCCURS, TO GO UP AS A MATTER OF RIGHT.

BUT I'LL TAKE IT ON LEAVE TO APPEAL, BECAUSE MY JOB IS TO CONVINCE THE CIRCUIT COURT THAT THERE WAS ERROR BELOW HERE AND THAT THEY SHOULDN'T DO IT. MANDATORY WOULD BE BETTER. BUT AT LEAST: REMEMBER, THE DISTRICT COURT GETS INVOLVED IN THIS. THEY CAN'T HELP IT. I MEAN, IT'S NATURAL. IT'S NOT A BAD THING. SOME PEOPLE FEEL STRONGLY ONE WAY OR ANOTHER ON THIS ISSUE.

I WOULD RATHER HAVE THREE JUDGES EARLY ON DECIDE THIS ISSUE RATHER THAN ONE DISTRICT COURT JUDGE. SO I THINK THE

INTERLOCUTORY APPEAL IS RIGHT ON. IT SHOULD BE MORE --

MR. SOL SCHREIBER: DOESN'T THE COST OF SETTLEMENT INCREASE TREMENDOUSLY IF AN APPELLATE COURT AGREES THAT THE CERTIFICATION IS CORRECT?

MS. BIRNBAUM: NO. I THINK IF THAT'S THE CASE, YOU'RE OFF TO THE RACES AND YOU CAN KNOW WHERE YOU STAND.

BUT I THINK THAT WE'VE SEEN WHAT'S BEEN HAPPENING. MOST OF THE CIRCUIT COURTS THAT HAVE BEEN CONFRONTED WITH THESE CASES HAVE DECERTIFIED CLASSES, EITHER THROUGH MANDAMUS OR WHEN THEY'VE HAD THE RIGHT FOR LEAVE TO APPEAL.

MR. SOL SCHREIBER: BUT THESE ARE MASS TORT CASES.

MS. BIRNBAUM: I'M TALKING ABOUT MASS TORT CASES. I'M JUST CONCENTRATING MY REMARKS ON THAT. THAT'S WHAT I HAVE LIVED WITH FOR THE LAST TEN YEARS, AND THAT'S WHAT I KNOW. THAT'S WHERE I THINK THE MASS OF THE PROBLEM IS, AND I THINK THAT I'M SORT OF QUALIFIED FROM MY EXPERIENCE TO TALK ABOUT IT A LITTLE.

PROFESSOR ROWE, YOU ASKED A QUESTION ABOUT: SHOULD 23(B)(4) BE LIMITED SETTLEMENT CLASSES ONLY TO CASES WHERE A SETTLEMENT HAS BEEN REACHED?

I THINK THE ANSWER TO THAT IS YES. DON'T MAKE ANY MISTAKES ABOUT IT. PEOPLE JUST DON'T GO IN AND SETTLE CASES THAT ARE NOT REAL. THEY DON'T DO THAT. THEY MAY NOT BE CLASS ACTIONS THAT THEY'RE SETTLING. THEY'RE SETTLING AGGREGATED OR SINGLE CASES ALL OVER THE COUNTRY. YOU JUST DON'T GO IN AND SAY, "I WANT TO GIVE THE PLAINTIFF MONEY. I WANT TO GIVE THE

PLAINTIFFS' LAWYER MONEY."

YOU ARE FACING MAMMOTH LITIGATION. THEY MAY NOT BE CLASS LITIGATION. AND IF YOU DON'T HAVE THE ABILITY TO SETTLE GLOBALLY THIS MASS TORT LITIGATION, THEN YOU ARE CREATING PROBLEMS OF MAMMOTH PROPORTIONS.

I'LL GIVE YOU A PERFECT EXAMPLE. TOMMY WELLS AND I WERE IN A CASE TOGETHER, ONE OF THE FIRST MASS TORTS. AND THERE WAS A SITUATION OF DDT. I REPRESENTED A COMPANY WHO HAD A DDT PLANT IN THE 1960S. THERE WAS AN ALLEGATION THAT DDT WAS IN THE TENNESSEE RIVER AND PEOPLE ATE FISH FROM THE TENNESSEE RIVER AND THEY WERE INJURED AS A RESULT OF THAT.

SCIENCE, ZIPPO. NO SCIENCE ON THIS. BUT 1300 PEOPLE IN A SMALL TOWN IN ALABAMA BROUGHT AN ACTION, AND THAT CASE WAS SETTLED. IT WAS A CONSOLIDATED ACTION. IT WASN'T A CLASS ACTION. IT WASN'T SETTLED IN A CLASS ACTION. AND IN ONE WEEK, THERE WERE A THOUSAND NEW CLAIMS, AND IN THREE MONTHS, THERE WERE 10,000 NEW CLAIMS. AND THAT'S WHAT HAPPENS IF YOU TRY TO SETTLE THESE CASES WITHOUT HAVING THE ABILITY TO SETTLE THEM AS A CLASS.

AND WHEN WE DID IT THE SECOND TIME, TOMMY WELLS AND I, WE NEGOTIATED FOR WEEKS AND MONTHS. I'VE NEVER BEEN IN A NEGOTIATION WHERE THE PLAINTIFF HASN'T TRIED TO SQUEEZE THE LAST DOLLAR OUT OF THE DEFENDANT. AND WHEN THAT NEGOTIATION WAS OVER, WE WENT INTO THE CLASS AND ASKED THE JUDGE TO CERTIFY IT AS A SETTLEMENT CLASS. AND THERE WOULD NEVER BE ANY MORE CASES.

AND ARTHUR MILLER IS RIGHT. THAT'S WHAT MODERN LITIGATION IS UNFORTUNATELY ABOUT. THE CLASS ACTION SETTLEMENT RESOLVES THE MASS TORT. CLASS ACTIONS DON'T EXIST IN A VACUUM. THERE IS AGGREGATION THROUGH CONSOLIDATIONS; THERE IS M.D.L.; THERE IS CONSOLIDATED DISCOVERY. THERE ARE ALL THESE OTHER TECHNIQUES. BUT IF YOU DON'T ALLOW FOR THE ABILITY TO SETTLE CASES GLOBALLY WITH 23(B)(4), THEN YOU WILL HAVE MASS CHAOS ON YOUR HANDS IN THE COURTS.

AND 23(B)(4), JUDGE NIEMEYER, I DON'T THINK YOU'RE CREATING SOMETHING THAT DOESN'T EXIST EVERYWHERE BUT THE THIRD CIRCUIT, AT THE MOMENT. WE'VE SETTLED DOZENS OF CASES IN WHICH THERE WERE NO CLASSES IN WHICH WE SETTLE THEM AND GO IN AND HAVE A SETTLEMENT CLASS. NOTICE IS GIVEN. WE GIVE NOTICE BROADLY. WE WANT TO GIVE NOTICE BROADLY. WE WANT TO BIND PEOPLE. IF WE DON'T GIVE NOTICE BROADLY, PEOPLE WILL COME BACK AT US.

WE GO IN ONLY WHEN THERE ARE AGGREGATE PROBLEMS, AGGREGATE CASES IN THIS KIND OF THING.

HONORABLE PAUL NIEMEYER: IF THE SUPREME COURT CHOOSES TO MODIFY OR VACATE THE THIRD CIRCUIT'S INTERPRETATION OF RULE 23 -- I THINK THE THIRD CIRCUIT BUMPED OUT THE RULE 23 INTERPRETATION -- THEN YOU WOULD FEEL THERE WOULD BE NO NEED FOR (B)(4)?

MS. BIRNBAUM: IT MAY NOT BE IF THE SUPREME COURT SAYS: YOU HAVE TO LOOK AT THESE CASES THROUGH THE PRISM OF SETTLEMENT IF IT'S A SETTLEMENT CLASS, NOT TRIAL. AND THE

ISSUES, CHOICE OF LAW, PREDOMINANCE, REALLY DON'T APPLY. YOU STILL HAVE TO LOOK AT THE 23(A) REQUIREMENTS; YOU STILL HAVE TO SHOW IT'S A FAIR SETTLEMENT; YOU STILL, I THINK, WOULD HAVE TO SHOW THE ISSUES OF CONCERN YOU HAVE: IS THIS A CASE IN CONTROVERSY? THESE ARE ALL ISSUES THAT WILL HAVE TO BE DECIDED SEPARATE AND APART FROM THE NARROW ISSUE WHICH THE SUPREME COURT HAS TAKEN THIS CASE ON.

I'M NOT INVOLVED IN THE GEORGINE CASE. I REPRESENT NOBODY IN THE GEORGINE CASE. YOU KNOW, IT'S VERY EASY TO LOOK AT --

HONORABLE PAUL NIEMEYER: HOW DID YOU ESCAPE?

MS. BIRNBAUM: WELL, I WAS LUCKY. I HAVE A CLIENT WHO IS INVOLVED IN THE ASBESTOS CASES.

BUT WHEN YOU LOOK AT GEORGINE, YOU DON'T KNOW THE FACTS OF GEORGINE. YOU DON'T KNOW THE FACTS OF ASBESTOS. GEORGINE HAS BEEN SETTLED OVER A 20- TO 30-YEAR HISTORY OF SETTLEMENT. IT MAY BE A GOOD CLIENT --

HONORABLE ANTHONY SCIRICA: I WAS TRYING THOSE CASES IN THE EARLY '80S WHEN I WAS IN THE DISTRICT COURT.

MS. BIRNBAUM: AND THEY WERE TRIED IN THE EARLY '70S, TOO. AND THOSE CASES HAVE BEEN AROUND, AND THERE ARE 18, 19 COMPANIES WHO ARE IN BANKRUPTCY FROM ASBESTOS. AND MAYBE FROM A SOCIAL POLICY, THIS IS THE ONLY WAY THEY ARE GOING TO BE GUARANTEED ANY MONEY. AND IF WE LET THE SYSTEM KEEP GOING, THEY'RE NEVER GOING TO SEE ANY MONEY.

BUT THOSE ARE ISSUES FOR THE JUDGE WHO IS DECIDING THAT CASE. WE DON'T HAVE TO RING ANY MORE BELLS AND WHISTLES. THAT JUDGE HAS ALL OF THE RULES. HE CAN APPOINT SPECIAL MASTERS, HAVE HEARINGS. THERE ARE OBJECTIVES. THE SYSTEM HAS WORKED JUST THE WAY IT SHOULD WORK IN GEORGINE. AND IF IT GETS APPROVED AND IT GOES BACK AND THE THIRD CIRCUIT DOESN'T LIKE IT, THEY'LL SEND IT BACK SOME MORE, AND THOSE PEOPLE WILL RENEGOTIATE OR DO WHATEVER, BECAUSE THERE ARE SETTLEMENTS GOING ON EVERY DAY JUST LIKE THAT, NOT AS CLASSES. THEY'RE GOING ON AS AGGREGATED CASES.

HONORABLE ANTHONY SCIRICA: THE SETTLEMENTS ARE CONTINUING PRETTY MUCH ON THE SAME BASIS RIGHT NOW -- I GUESS MR. ALDOCK WILL TELL US THAT -- BUT WITHOUT THE JUDICIAL INTERVENTION.

MS. BIRNBAUM: RIGHT. AND MAYBE WITH JUDICIAL INTERVENTION, YOU CAN GET A FAIR OR MORE EQUITABLE RESPONSE. BUT DON'T THINK OF THIS AS A VACUUM.

WHEN ACADEMICS COME IN AND COMPLAIN ABOUT GEORGINE, THINK OF THE DOZENS OF CASES THAT ARE SETTLED IN WHICH THERE ARE MINOR OPT-OUTS, THERE ARE SOME OPT-OUTS, THERE ARE OBJECTORS. IF A CASE IS VALUABLE, IF THE SETTLEMENT IS A BAD SETTLEMENT, YOU CAN BE SURE THERE WILL BE VERY ACTIVE OBJECTORS WITH OTHER LAWYERS.

IN FACT, THE WALL STREET JOURNAL HAD A WHOLE ARTICLE ON LAWYERS THAT DO NOTHING BUT OBJECT NOW BECAUSE THEY GET FEES

FOR OBJECTING. THIS HAS BECOME A COTTAGE INDUSTRY OF OBJECTORS. SO I DON'T THINK THIS COMMITTEE HAS TO BE CONCERNED THAT THE SYSTEM IS NOT WORKING, THAT SOMEHOW UNFAIR SETTLEMENTS ARE GOING TO OCCUR, OR THAT THE DISTRICT COURTS AND THE CIRCUIT COURTS DON'T HAVE THE TOOLS TO HANDLE THAT.

ALL YOU ARE DOING, WITH 23(B)(4), IN MY OPINION, IS OVERRULING IN SOME WAY WHAT JUDGE BECKER DID IN GEORGINE.

MR. SOL SCHREIBER: SHEILA, LET ME ASK YOU: WOULD IT MAKE SENSE, HOWEVER, TO HAVE SOME EXPLICIT GUIDELINES IN THE ADVISORY NOTES SO THOSE JUDGES WHO ARE NOT AS SOPHISTICATED AS SOME OF THE ONES WHO HANDLE THESE CASES, WOULD HAVE A BETTER IDEA OF WHAT THE ROAD MAP SHOULD BE IN A SETTLEMENT?

MS. BIRNBAUM: I DON'T THINK YOU HAVE TO DO IT IN THE NOTES. THE MANUAL FOR COMPLEX LITIGATION DOES IT; PARTIES CAN TELL THEM. EACH OF THESE ARE DIFFERENT. EACH OF THESE SHOULD BE TREATED DIFFERENTLY. EACH JUDGE HAS TO LOOK AT THE FACTS OF AN INDIVIDUAL CASE TO SEE IF THE SETTLEMENT IS FAIR AND EQUITABLE AND JUST.

AND I HAVE NEVER BEEN IN A CASE WHERE THERE HAVEN'T BEEN WIDE-OPEN HEARINGS AND LOTS OF NOTICE AND LOTS OF PEOPLE AND SOME OBJECTORS.

AND THERE ARE THE APPELLATE COURTS. ARE WE TRYING TO SUGGEST THE DISTRICT COURT JUDGES AND THE CIRCUIT COURT JUDGES ARE SOMEHOW CLOSING THEIR EYES BECAUSE THEY WANT TO GET THESE CASES OFF THE CALENDARS SO THAT THEY'RE NOT INTERESTED? THEY

HAVE AN OBLIGATION TO THE CLASS. THEY ARE THERE TO PROTECT THE CLASS. I JUST DON'T BELIEVE THAT.

SO I THINK A LOT OF THIS ACADEMIC CRITICISM THAT HAS COME OF 23(B)(4) IS JUST TRYING TO FOCUS ON ONE CASE WITHOUT REALLY CONSIDERING WHAT'S HAPPENING GENERALLY.

MR. FRANCIS H. FOX: WELL, MR. GOLDFARB SAYS HE'S GOT TO WEAN CHRYSLER OFF THIS ADDICTIVE PRACTICE. AND I DON'T THINK HE WAS TALKING ABOUT HUGE LEGITIMATE KINDS OF INJURIES LIKE THAT. BUT YOU GO ON THE MAILING LIST. CASE AFTER CASE AFTER CASE, AND YOU KNOW WHAT THE JUDGE IS GOING TO DO. IS THERE NOT SOMETHING TO THAT POINT OF VIEW?

MS. BIRNBAUM: I THINK THE ANSWER TO THAT IS: APPLYING THE RULES, IN THE SITUATION WHERE THERE ARE DIVERSE ACTIONS, CLASSES SHOULDN'T BE CERTIFIED, AND WE'RE HELPING WITH THE MATURITY REQUIREMENT IN TORT CASES. I THINK THAT WILL HELP. I THINK CASTANO, THE FIFTH CIRCUIT, HAS DONE THAT; A LOT OF PEOPLE HAVE GONE ON TO IT. AND MAYBE "IT JUST AIN'T WORTH IT" WILL WEAN SOME PEOPLE OFF.

BUT MY CONCERN IS: THESE COURT CASES, EVEN WITHOUT CLASS ACTIONS, THAT NEED TO BE SETTLED GLOBALLY, YOU CANNOT TAKE THAT TOOL AWAY. IT'S JUST A TOOL. AND THAT'S WHY IT SHOULD ONLY BE USED WHEN THE PARTIES ARE PREPARED TO SETTLE THE CASE, BECAUSE IT IS ONLY THEN THAT THE DEFENDANT IS WILLING TO GIVE UP SOME OF THE DUE PROCESS RIGHTS THAT THEY MIGHT BE ASKING FOR TO GET THE GLOBAL RESOLUTION OF THE PROBLEM.

MR. SOL SCHREIBER: AND YOU MAKE NO DIFFERENCE BETWEEN THE CASE THAT'S SETTLED BEFORE IT'S FILED AS COMPARED TO THE CASE THAT'S FILED AND THEN SETTLED?

MS. BIRNBAUM: BUT IT'S NOT THE WAY IT WORKS IN PRACTICALITY. THERE ARE LOTS OF CASES. NO ONE GOES IN AND THERE IS NO LITIGATION AT ALL AND GOES IN AND SAYS, "OH, NOW I'D LIKE TO FILE THE CASE AND SETTLE IT."

YOU DON'T DO THAT. YOU GO IN BECAUSE THERE IS LITIGATION AND IT'S PENDING, AND IT'S PENDING IN LOTS OF PLACES, AND IT'S IN STATE COURTS AND FEDERAL COURTS. IT'S IN CONSOLIDATIONS AND AGGREGATIONS. IN SOME PLACES, WE ARE CONFRONTED WITH 8,000 CASES CONSOLIDATED FOR TRIAL. I MEAN, THAT'S NOT ANY BETTER THAN A CLASS ACTION.

I THANK YOU. I THINK I'VE MORE THAN USED UP MY TIME. I'D JUST LIKE TO ANSWER JUST ONE MORE QUESTION THAT CAME UP. YOU ASKED DR. MILLER ABOUT NATIONAL CLASSES IN STATE COURTS. I THINK WE'RE GOING TO FIND THEY'RE UNCONSTITUTIONAL. I DON'T THINK THAT A STATE COURT CAN BIND PLAINTIFFS IN OTHER JURISDICTIONS WHO DON'T WANT TO BE THERE, WHO GET NO INDIVIDUAL NOTICE, IN MOST INSTANCES.

MR. SOL SCHREIBER: HOW WILL YOU DISTINGUISH THE RECENT SUPREME COURT CASE AND THIS ONE?

MS. BIRNBAUM: I THINK THERE ARE -- LET ME JUST SUGGEST ONE THING THAT MAYBE NEEDS TO BE CONSIDERED, AND MAYBE IT NEEDS LEGISLATION. BUT I THINK NATIONAL CLASSES IN STATE

COURTS SHOULD BE REMOVABLE PER SE INTO THE FEDERAL SYSTEM.

AND YOU HAVE A LOT OF PROBLEMS IN THE STATE COURT CASES AND STATE CLASS ACTIONS THAT ARE GOING TO HAVE TO BE CONFRONTED, BECAUSE MORE AND MORE AS THE FEDERAL COURTS ARE TAKING A HARD LOOK AT THIS IN THE LAST YEAR, PEOPLE ARE TRYING TO GET THEIR RELIEF IN THE STATE COURTS. SO IT'S SOMETHING THAT WE'RE GOING TO ALL HAVE TO CONFRONT. THANK YOU SO MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH. WE APPRECIATE YOUR COMMENTS.

MR. ALDOCK, WE'LL HEAR FROM YOU NOW.

TESTIMONY OF JOHN ALDOCK

MR. ALDOCK: THANK YOU, YOUR HONOR. MY NAME IS JOHN ALDOCK. I'M WITH THE WASHINGTON, D.C. LAW FIRM OF SHEA & GARDNER. I HAVE, FOR THE LAST TEN YEARS, BEEN THE COUNSEL FOR THE CENTER FOR CLAIMS RESOLUTION, WHO ARE 20 COMPANIES IN THE ASBESTOS LITIGATION. I WAS DIRECTLY THE NEGOTIATOR IN GEORGINE. I WAS ONE OF THE ARCHITECTS OF GEORGINE. I AM LITIGATING GEORGINE IN THE COURTS. I AM PROUD OF ALL THREE OF THOSE THINGS.

I HAVE LITIGATED CLASS ACTIONS IN A VARIETY OF CONTEXTS, INCLUDING REPRESENTING ROCKWELL AND OTHER COMPANIES IN THE RADIATION CLASS ACTIONS. I PRIMARILY REPRESENT DEFENDANTS, BUT I REPRESENTED PLAINTIFFS IN CIVIL RIGHTS LITIGATION IN THE CLASS CONTEXT.

I THINK I'D LIKE TO MAKE SOME BRIEF POINTS. I'M GOING

TO CONFINE MYSELF TO MASS TORTS, AND I'M GOING TO CONFINE MYSELF TO THE SETTLEMENT CLASS ACTION POINT.

I HAVE, IN MY PAPER, ADDRESSED ANTITRUST SECURITIES AND WHATEVER. I DON'T THINK IT MATTERS. BUT I WANT TO, IN THE BRIEF TIME I HAVE HERE TODAY, ADDRESS MYSELF TO THE CONCERNS THAT I HAVE SPENT THE LAST FEW YEARS LITIGATING.

I THINK THERE ARE THREE FUNDAMENTAL POINTS TO BE MADE ABOUT SETTLEMENT CLASS ACTIONS. FIRST, FOR ALMOST 30 YEARS, SETTLEMENT CLASS ACTIONS HAVE BEEN AN INDISPENSABLE PART OF OUR JUDICIAL SYSTEM, AND THEY SIMULTANEOUSLY BENEFIT THE CLASS MEMBERS, THE DEFENDANTS, AND THE SYSTEM.

SECOND, THE SUPPOSED RISKS OF SETTLEMENT CLASSES ARE VASTLY OVERSTATED, AND THEY HAVE NOT BEEN NEWLY DISCOVERED BY THE PEOPLE WHO YOU'VE HEARD FROM IN THESE PROCEEDINGS OR BY THE NEW ACADEMICS, WHO HAVE FOUND NEWFOUND LIFE AFTER TESTIFYING IN GEORGINE AND BEING RULED AS NOT PERSUASIVE, AND WHO HAVE WRITTEN EXTENSIVELY AND HAVE ALL BEEN BEFORE YOU.

THE SUPPOSED PROBLEMS WITH SETTLEMENT CLASSES THAT I HAVE READ ABOUT WERE ALL IDENTIFIED BY JUDGE FRIENDLY AND JUDGE WISDOM IN THE EARLY CASES, IN BEEF INDUSTRIES AND IN WEINBERG. AND THEY RESOLVED THEM TO THEIR SATISFACTION. THEY IDENTIFY THEM; AND THEY ARE NOT NEW.

THIRD, AND MOST IMPORTANTLY, THE ALTERNATIVE MEANS FOR RESOLVING THESE CASES ARE MORE FLAWED FROM THE PERSPECTIVE OF CLASS MEMBERS THAN THE CLASS ACTION SETTLEMENT, NOT LESS.

NOW, THE OPPONENTS OF SETTLEMENT CLASSES HAVE SPENT A LOT OF TIME IN THE PAPERS THAT THEY FILED BEFORE YOU AND IN THE TESTIMONY, WITH THE THEORETICAL SHORTCOMINGS OF THE SETTLEMENT CLASS ACTION VEHICLE. BUT THEY HAVE ABSOLUTELY IGNORED -- AND I HAVEN'T HEARD ONE OF THEM SAY A WORD -- ABOUT THE SYSTEMIC FAILURE OF THE COURTS IN HANDLING THE MASS TORT PROBLEM, PARTICULARLY ASBESTOS. WHAT IS THE OTHER SIDE OF THE COIN, OR, AS ONE PANEL MEMBER HERE HAS SAID IN OTHER CONTEXTS: IF YOU'RE ASKED THE SCORE OF A GAME, IT DOESN'T DO ANY GOOD TO SAY IT'S 30. 30 TO WHAT? YOU HAVE TO KNOW WHAT THE ALTERNATIVES ARE.

JUDGE REED (PHONETIC) HELD FIVE WEEKS OF TRIAL, MULTIPARTY TRIAL WITH CROSS-EXAMINATION ALL DAY, 30 DEPOSITIONS, THOUSANDS OF PIECES OF PAPER, A WHOLE ROOM FULL OF OBJECTORS WHO WERE ALLOWED TO BE HEARD BY THE COURT, WHO HAD AN ACTIVE ROLE, BUT BASICALLY COUNSEL TABLE, OBJECTORS, ALL MILLIONAIRES IN THE ASBESTOS LITIGATION, ALL WELL FUNDED, ALL KNOWING EXACTLY WHAT THEY WERE DOING. THERE WAS NO LACK OF AN ADVERSARY SYSTEM IN THAT FIVE-WEEK TRIAL.

AND HE BASICALLY MADE FINDINGS AS TO WHAT'S THE TORT SYSTEM DOING WITH ASBESTOS WITHOUT THE CLASS, AND WHAT WOULD THE CLASS DO TO FIX IT? THAT WAS WHAT WAS ON TRIAL. WHAT WAS ON TRIAL WAS SUPERIORITY IN THE CONTEXT OF YOUR RULE.

AND WHAT DID HE FIND? ALL FINDINGS, DETAILED FINDINGS, NONE OF WHICH SEEM TO BE MENTIONED BY ANYBODY, INCLUDING THE THIRD CIRCUIT, BUT NONE OF THEM HAVE BEEN FOUND

CLEARLY ERRONEOUS, AND ALL OF THEM ARE IN JUDGE REED'S VOLUMINOUS OPINION.

AND I SHOULD SAY WE'RE NOT TALKING ABOUT ONE OF THE ACTIVISTS JUDGES WHO HAVE ACTED IN THIS AREA, YOU KNOW, IN THE MASS TORT AREA WHERE PEOPLE SAY, "WELL, THEY PUSH THE ENVELOPE. THEY GO TO THE END." THIS IS A CONSERVATIVE, STRAIGHTFORWARD TRIAL JUDGE, AS WE KNOW.

HONORABLE ANTHONY SCIRICA: I'LL TELL HIM THAT YOU SPOKE WELL OF HIM. I ALWAYS THOUGHT HE WAS A PROTEGE OF CHARLIE WEINER.

MR. ALDOCK: WHAT DID THE JUDGE FIND WHEN HE LOOKED AT THE TORT SYSTEM? HE FOUND THAT THE TRANSACTIONS COST MORE THAN THE RECOVERIES. HE FOUND THAT ATTORNEY FEES MAKE UP MORE THAN TWO-THIRDS OF THE AMOUNT. HE FOUND THAT THE CONTINGENCY FEES IN CASES THAT ARE NO LONGER CONTINGENT ARE 33 TO 40. HE WAS ACTUALLY WRONG. THEY ARE CLOSER TO 50. AND HE FOUND THAT THAT'S WHERE THE MONEY GOES.

HE FOUND IT TAKES MORE THAN THREE YEARS TO RESOLVE THE CASE, IN MOST JURISDICTIONS. HE FOUND THAT THE JURY VERDICTS ARE ERRATIC. HE CREDITED THE TRIAL JUDGE IN ASBESTOS IN PHILADELPHIA WHO SAID THAT THE SYSTEM FOR ASBESTOS IS MORE LIKE THE CASINOS OF ATLANTIC CITY THAN IT IS A JUDICIAL SYSTEM. PEOPLE WHO AREN'T SICK MAKE MILLIONS. PEOPLE WITH CANCER GET NOTHING. IT'S THE LUCK OF THE DRAW. IN THE SIMINO (PHONETIC) CASE, WHICH WAS A GREAT TRIAL TO DEAL WITH MATHEMATICALLY, THE

NONMALIGNANTS GOT MORE THAN THE LUNG CANCER. IT WAS ERRATIC. SIMILARLY SITUATED PEOPLE DO NOT GET TREATED THE SAME.

THERE IS NO PROTECTION FOR THE FUTURES. THERE HAVE BEEN 18 BANKRUPTCIES NOW OF MAJOR DEFENDANTS. THEY SETTLE THE CASES IN THE TORT SYSTEM FOR A FULL RELEASE. YOU'VE GOT YOUR PLEURAL PLAQUE, YOU GIVE YOUR FULL RELEASE. IF YOU GET CANCER, YOU HAVE BEEN SCREWED. YOU HAVE GIVEN IT ALL UP. 90 PERCENT OF THE CASES SETTLE THAT WAY. FORGET THE FACT THAT THERE WON'T BE ANY MONEY AFTER THE 18 BANKRUPTCIES, BECAUSE THERE WILL BE 18 MORE. THESE PEOPLE ARE GIVING UP THEIR FULL CLAIM IN THE TORT SYSTEM. THEY DON'T GET ANY COMEBACK RIGHTS FOR THE CANCER. THOSE ARE THE SICK PEOPLE.

NOW, MOST ASBESTOS CASES ARE NOT TRIED ON A CASE-BY-CASE BASIS. THE IDEOLOGICAL FIX OF THE BIPOLAR LITIGATION, WE'RE GOING TO TRY A CASE; THERE IS A LAWYER; AND HE'S GOT A CLIENT THAT HASN'T OCCURRED IN ASBESTOS FOR 20 YEARS. THAT'S JUST NOT THE WAY IT IS. AND SO WE CAN'T MEASURE BY THAT IDEOLOGY.

THE CASES ARE TRIED IN LARGE GROUP CONSOLIDATIONS, 9,000 IN BALTIMORE, 3,000 A POP IN WEST VIRGINIA; WE'RE NOW ON OUR THIRD ROUND, 3,000 A POP IN MISSISSIPPI. THAT'S THE WAY THEY GET TRIED. THEY AREN'T BROUGHT IN THE PLACES WHERE THE PEOPLE LIVE. 55,000 CLAIMS WERE FILED IN 1995. AT THE CREST OF THE LITIGATION, 20 YEARS AFTER, IT'S OVER 50,000 CLAIMS.

NOW, MOST OF THEM WERE FILED IN TEXAS. THEY'RE NOT

TEXANS. THE EXPOSURE WASN'T IN TEXAS. THEY JUST FILED IN TEXAS.

HONORABLE C. ROGER VINSON: CAN YOU TELL US WHY?

MR. ALDOCK: I THINK WE CAN ALL GUESS. BUT THE POINT IS --

HONORABLE JOHN L. CARROLL: I'M GLAD TO HEAR TEXAS MALIGNED.

MR. ALDOCK: HALF OF THEM WERE FROM ALABAMA, WHERE THE STATUTE'S RIGHT.

THE POINT IS: ASBESTOS LAWYERS DON'T HAVE CLIENTS ANYMORE. THEY HAVE INVENTORIES. THEY TALK ABOUT THEM AS THEIR INVENTORIES. THEY ARE RETAILERS AND WHOLESALERS. THE CASES BROUGHT IN TEXAS WERE BROUGHT TO A NORTH CAROLINA LAWYER, WHO HAS BROKERED THEM THREE TIMES, AND THEY'RE NOW BEING FILED IN TEXAS.

THE FEE IS BEING SHARED SO MANY TIMES, NOBODY EVEN KNOWS WHO IS GETTING IT. THE IDEA THAT THESE PEOPLE HAVE CLIENTS AND THAT THE CLIENTS ARE MAKING THE LITIGATION DECISIONS IS A FIX. THE MOST CONSCIENTIOUS ASBESTOS LAWYERS, AND THERE ARE SOME VERY GOOD ONES WHO TRY VERY HARD, CANNOT EMULATE THE BIPOLAR LITIGATION SYSTEM WHEN THEY HAVE 10,000 CLIENTS. IT CAN'T BE DONE. AND MOST DON'T TRY.

THEY ARE ALSO NOT SETTLED ONE AT A TIME. THEY ARE SETTLED IN GROUP SETTLEMENTS. THEY ARE SETTLED IN SETTLEMENTS OF HUNDREDS AND THOUSANDS. AND HOW ARE THEY SETTLED? THEY'RE

SETTLED WITH THE LAWYER. I DO NOT BELIEVE THE CLIENTS ARE OFTEN CONSULTED AT ALL. I BELIEVE THE CLIENTS OFTEN DON'T KNOW THEIR CASES ARE BEING SETTLED. AND HOW DOES IT WORK?

A CHECK IS WRITTEN TO THE PLAINTIFFS' COUNSEL FOR UMPTEEN MILLION DOLLARS. IF HE'S GOOD, HE GETS A BALL TEAM. IF HE'S NOT GOOD, HE DOES SOMETHING ELSE. MAYBE HE TAKES IT TO VEGAS, MILLIONS OF DOLLARS, ONE CHECK TO ONE LAWYER. THERE IS NO JUDICIAL SUPERVISION OF THE AMOUNT; THERE IS NO JUDICIAL SUPERVISION OF THE ALLOCATION; THERE IS NO JUDICIAL SUPERVISION OF THE FEE.

MR. SOL SCHREIBER: SHOULD THERE BE?

MR. ALDOCK: YES, ABSOLUTELY.

MR. SOL SCHREIBER: SHOULD THEY MAKE THAT PART OF IT --

MR. ALDOCK: THEY'RE NOT CLASS ACTIONS. THEY'RE IN STATE COURT. I'M JUST TELLING YOU WHAT THE SYSTEM IS THAT YOU'RE MEASURING WHAT YOU'RE DOING BY. I DON'T THINK YOU CAN DO MUCH ABOUT IT. SHOULD JUDGES DO SOMETHING ABOUT IT? ABSOLUTELY. SHOULD ALL THOSE THINGS BE DEALT WITH BY JUDGES? ABSOLUTELY. SHOULD THEY BE LOOKING AT CONTINGENCY FEES? WILL THEY? ABSOLUTELY NOT.

ONE MONTH AGO, A PLAINTIFFS' LAWYER IN PHILADELPHIA --

HONORABLE PAUL NIEMEYER: ARE YOU ABOUT NEAR THE END?

MR. ALDOCK: I AM.

ONE MONTH AGO, A PLAINTIFFS' LAWYER IN PHILADELPHIA

WAS INDICTED AND CONVICTED. HE WAS ACTUALLY SENTENCED BY JUDGE REED, IRONICALLY, A PHILADELPHIA LAWYER WHO TOOK MILLIONS OF DOLLARS IN GROUP SETTLEMENTS IN ASBESTOS AND JUST PUT IT IN HIS POCKET.

NOW, ONE CAN SAY, "WELL, THAT'S AN AMAZING THING." BUT THE AMAZING THING IS NOT THAT. THE AMAZING THING IS THAT NOBODY KNEW ABOUT IT FOR A LONG TIME. NO CLIENT KNEW ABOUT IT, NOTHING. IT WENT ON AND ON AND ON. ONE OF HIS PARTNERS REPORTED HIM BECAUSE HE DIDN'T GET HIS SHARE. INDIVIDUAL CONTROL OF THE LITIGATION BY THE LITIGANTS IS A FIX, AND WE SHOULD IGNORE IT.

THAT IS NOT WHAT'S HAPPENING. IN A SETTLEMENT CLASS ACTION, THE JUDGE HOLDS THE TRIAL; THE JUDGE LOOKS AT THE FEE. SIMILARLY SITUATED PEOPLE ARE HANDLED SIMILARLY. THAT IS A VIRTUE, NOT A VICE, THAT PEOPLE ARE TREATED THE SAME, FOR THE SAME INJURY, UNDER THE SAME CIRCUMSTANCES.

YOU CAN DO THAT IN A SETTLEMENT CLASS ACTION. CALL IT ADMINISTRATIVE JUSTICE; CALL IT WHATEVER YOU WANT. IT IS FAIR; IT HAS MORE PROTECTIONS; IT PROTECTS THE FUTURES. AND, OF COURSE, IT HAS TO DEAL WITH CASES IN CONTROVERSY. AND, OF COURSE, IT HAS TO DEAL WITH THESE OTHER ASPECTS OF THE JUDICIAL SYSTEM.

BUT WE DID GIVE NOTICE, AND THE FACT IS THAT THE NOTICE WAS ABOUT AS EXTENSIVE AS IT COULD EVER BE. AND THE PEOPLE ONLY HAD TO KNOW, NOT THAT THEY WOULD GET SICK, THEY HAD

TO KNOW WHETHER THEY WORKED OCCUPATIONALLY IN ASBESTOS IN THE HARD YEARS.

AND JUDGE REED FOUND AS A FACT THAT AFTER 20 YEARS OF BANKRUPTCIES, AND OSHA, AND ALL OF THE UNION ACTIVITY -- AND THE UNIONS HELPED US WITH THE NOTICE, GIVING OUT 6,000 PACKAGES -- THE PEOPLE WHO WORKED AS CARPENTERS AND IN THE SHIPYARDS, THE PEOPLE WHO WORKED IN ASBESTOS FOR YEARS, THEY KNOW THEY HAVE BEEN EXPOSED. THEY WORRY ABOUT IT; THEY WANT PEACE OF MIND. THAT'S ALL THEY NEEDED TO KNOW WITH THE NOTICE.

HONORABLE PAUL NIEMEYER: ALL RIGHT. THANK YOU. I APPRECIATE YOUR COMMENTS.

MR. ALDOCK: THANK YOU.

HONORABLE PAUL NIEMEYER: MR. STAMPER? IS MR. STAMPER HERE?

MR. STAMPER: YES, YOUR HONOR.

TESTIMONY OF JOHN W. STAMPER

MR. STAMPER: THANK YOU FOR THE OPPORTUNITY TO TESTIFY. I DID NOT RECEIVE ONE OF YOUR LETTERS, BUT I CAN TAKE A HINT, BECAUSE TWO OF MY PARTNERS AT O'MELVENY HAVE ALREADY TESTIFIED. I WILL LIMIT MYSELF --

HONORABLE PAUL NIEMEYER: YOU'VE GOT FIVE MINUTES.

MR. STAMPER: AND I WILL ADDRESS POINTS THAT I DON'T BELIEVE THEY DID ADDRESS, SPECIFICALLY, ON THE SETTLEMENT CLASS 23(B)(4) AND APPELLATE REVIEW, IF I HAVE TIME.

23(B)(4) IS, AS JUDGE LEVI SAID, HONEST. IT IS WHAT

COURTS AND PARTIES HAVE BEEN DOING AND WHAT, IN ALL PROBABILITY, THEY ARE GOING TO CONTINUE TO DO, BECAUSE IT'S PRACTICAL AND IT'S EFFICIENT, AND IT IS OFTEN NECESSARY AND DESIRABLE FOR EVERYONE TO RESOLVE CASES AT AN EARLY STAGE.

I THINK IT'S BETTER TO DO WHAT 23(B)(4) DOES, WHICH IS RECOGNIZE THAT, AND PROVIDE THAT THE REQUIREMENTS OF RULE 23 AREN'T TO BE IGNORED, BUT THEY ARE TO BE APPLIED IN THE CONTEXT OF A CASE THAT IS IN SETTLEMENT. AND I THINK THAT'S EXACTLY WHAT THE COURTS HAVE BEEN TRYING TO DO.

JUDGE NIEMEYER, EARLIER, YOU RAISED, I BELIEVE, CHOICE OF LAW AS AN EXAMPLE OF THE TYPE OF ISSUE AS TO WHICH WE HAVE TO DECIDE HOW DOES THAT GET HANDLED, AND IN THE SETTLEMENT CONTEXT. AND I WOULD THINK THAT THAT PROVIDES A GOOD EXAMPLE. A CHOICE OF LAW CAN BE IMPORTANT IN THE CERTIFICATION DECISION FROM THE STANDPOINT OF MANAGEABILITY.

ARE YOU GOING TO HAVE TO APPLY THE LAW OF MULTIPLE STATES? AND IF SO, IS THAT GOING TO RENDER THE CASE UNMANAGEABLE FOR TRIAL? AND THE COURT MAY LOOK AT IT AND DECIDE WHETHER THERE ARE REAL DIFFERENCES, WHETHER THEY CAN BE BROKEN INTO MANAGEABLE SUB-CLASSES FOR TRIAL, AND SO FORTH.

I WOULD SUBMIT THAT UNDER 23(B)(4), YOU COULD DO THE SAME THING, BUT FROM THE STANDPOINT OF SETTLEMENT, SAYING: ARE THESE CLASS MEMBERS ENTITLED TO HAVE DIFFERENT LAWS APPLIED? AND IF SO, ARE THE DIFFERENCES SUCH THAT IT MAKES A DIFFERENCE AS TO THE FAIRNESS OF THE SETTLEMENT TO ANY GROUP?

IT MAY WELL BE THAT WHILE THERE ARE DIFFERENCES AMONG THE LAWS, THE SETTLEMENT IS STILL FAIR AS TO ALL MEMBERS OF THE CLASS. IT MAY BE THAT YOU HAVE TO HAVE SUB-CLASSES THAT TAKE, FOR EXAMPLE, THE AVAILABILITY OF A PARTICULAR REMEDY IN CERTAIN STATES INTO ACCOUNT. BUT YOU CAN DO THAT IN THE CONTEXT OF THE SETTLEMENT AND RECOGNIZE THAT MANAGEABILITY FROM A TRIAL STANDPOINT WOULD BE A DIFFERENT QUESTION. BUT IT'S NOT ONE THAT YOU HAVE TO ANSWER.

SO WITH RESPECT TO THE CONCERNS THAT I UNDERSTAND HAVE BEEN EXPRESSED ABOUT WHETHER THERE ARE SUFFICIENT SAFEGUARDS, I THINK I CONCUR IN THE REMARKS OF SEVERAL OTHERS, AND I WOULD JUST MAYBE ADD A PRACTICAL NOTE.

I UNDERSTAND THAT THOSE CONCERNS ARISE, IN PART, FROM THE THEORY THAT DEFENSE COUNSEL HAS NO LEVERAGE -- OR, RATHER, PLAINTIFFS' COUNSEL HAS NO LEVERAGE, AND DEFENSE COUNSEL WILL, THEREFORE, BE ABLE TO BUY RES JUDICATA TOO CHEAPLY.

IT'S MY EXPERIENCE THAT PLAINTIFFS' COUNSEL KNOW WHAT THEY'RE SELLING, AND IF THERE IS A REAL VALUE TO THE POTENTIAL INDIVIDUAL CLAIMS THAT ARE OUT THERE, THE THREAT OF HUNDREDS OR PERHAPS THOUSANDS OF INDIVIDUAL CLAIMS GIVES PLAINTIFFS' COUNSEL REAL LEVERAGE. BEYOND THAT --

HONORABLE PAUL NIEMEYER: IT'S NOT A QUESTION OF LEVERAGE; IT'S A QUESTION OF WHETHER THERE IS ANY ADVERSARIAL ASPECT GOING ON THERE. BECAUSE IT SEEMS TO ME THE PLAINTIFF, IN THAT CIRCUMSTANCE, WANTS TO REPRESENT EVERYBODY, AND THE

DEFENDANT WANTS HIM TO REPRESENT EVERYBODY, AND THEY WANT TO CREATE A POT WHICH DOESN'T HAVE AS MUCH SCRUTINY AS YOU MIGHT IN SOME OTHER CONTEXT.

I'M NOT SUGGESTING THAT'S WHAT HAPPENS. BUT WE DID HEAR TESTIMONY FROM CHRYSLER HERE THAT'S EXACTLY WHAT'S HAPPENING.

MR. STAMPER: WELL, I SUPPOSE THAT THAT ARGUMENT, YOUR HONOR, WOULD GO PERHAPS TO ALL CLASSES, IN THAT IN ALL INSTANCES, WHETHER THEY COULD BE TRIED AS A CLASS OR NOT, THE PLAINTIFF WANTS TO REPRESENT THEM ALL AND THE DEFENDANT WANTS TO OPPOSE.

THE QUESTION I WAS ADDRESSING IS WHETHER, IN THE CONTEXT WHERE THE PLAINTIFF MAY HAVE DIFFICULTY GETTING THE CLASS CERTIFIED, THE PLAINTIFF IS WITHOUT LEVERAGE TO EXACT FAIR TERMS FOR THE CLAIMS THAT ARE ACTUALLY BEING COMPROMISED. AND I'M SUGGESTING THAT THE PLAINTIFFS' COUNSEL DOES, IN FACT, HAVE THAT LEVERAGE, AND DOES, IN FACT, USE IT.

BEYOND THAT, HOWEVER, I BELIEVE THAT THESE MATTERS ARE, IN FACT, BEING POLICED, AND THE RULE REALLY PROVIDES FOR THAT. THE COURTS, IN MY EXPERIENCE, ARE LOOKING AT THIS VERY CAREFULLY.

I JUST SETTLED A GROUP OF CASES THAT HAD BEEN CONSOLIDATED FOR MULTI-DISTRICT PURPOSES DOWN IN LOS ANGELES ON MONDAY. AND THE TRIAL COURT THERE DID, AS MANY DO, AND LOOKED VERY CAREFULLY AT IT, REQUIRED CERTAIN CHANGES THAT HE THOUGHT

WERE NEEDED TO MAKE SURE THAT THE CLASS WAS PROTECTED. THERE WERE OBJECTORS, WHO ALSO, OF COURSE, WERE THERE TO TRY TO MAKE SURE THAT THEIR INTERESTS ARE PROTECTED. AND THERE WERE OTHER PLAINTIFFS' LAWYERS WHO WOULD LIKE TO HAVE BROUGHT THESE CASES, ARGUING THAT THEY COULD GET A BETTER DEAL, AND ARGUING EVERY POSSIBLE SHORTCOMING TO THE COURT.

SO I THINK THESE THINGS ARE, IN FACT, AT LEAST IN MY EXPERIENCE, BEING POLICED. I THINK I --

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH.

ALL RIGHT. WE HAVE TWO PEOPLE FROM THE MORTGAGE BANKERS ASSOCIATION, MR. CUMBERLAND AND MR. WENTZ.

MR. WENTZ: IT'S ACTUALLY JUST ONE.

HONORABLE PAUL NIEMEYER: JUST ONE; OKAY.

TESTIMONY OF RICHARD WENTZ

MR. WENTZ: GOOD MORNING, OR GOOD AFTERNOON. MY NAME IS RICHARD WENTZ. I AM THE ASSISTANT GENERAL COUNSEL FOR COUNTRYWIDE HOME LOANS.

I AM SPEAKING TODAY ON BEHALF OF THE MORTGAGE BANKERS ASSOCIATION OF AMERICA. THE MORTGAGE BANKERS ASSOCIATION FORMED A COMMITTEE RECENTLY CALLED THE SUBCOMMITTEE ON CLASS ACTION REFORM, AND I HAVE BEEN CHAIRING THAT COMMITTEE. AND WHAT I WANTED TO DO WAS TAKE AN OPPORTUNITY TO EXPLAIN TO YOU A LITTLE BIT ABOUT HOW CLASS ACTIONS ARE AFFECTING OUR INDUSTRY.

YOU'VE HEARD A LOT ABOUT THE MASS TORT ISSUES; YOU'VE HEARD A LOT ABOUT PRODUCTS LIABILITY. BUT IN LISTENING TO THE

COMMENTS TODAY, OUR INDUSTRY REALLY HAS VERY DIFFERENT ISSUES, AND I'D LIKE TO SHARE THEM WITH YOU.

WE FEEL, OVER THE LAST FEW YEARS, OUR INDUSTRY HAS BECOME TARGETED BY A SMALL GROUP OF LAWYERS, A SMALL BUT GROWING GROUP OF LAWYERS WHO ARE BRINGING NUMEROUS CLASS ACTIONS AGAINST VIRTUALLY ALL OF OUR MEMBERS. OUR MEMBERS HAVE SHOWN PROBABLY A FIVE- TO TEN-FOLD INCREASE IN CLASS LITIGATION IN THE LAST THREE YEARS. IT'S REALLY BEEN A VERY REMARKABLE THING. WE'RE ALL TRYING TO FIGURE OUT HOW TO DEAL WITH IT.

THE CLASS ACTIONS THAT ARE BEING FILED TEND TO BE VERY ARCANE AND VERY TECHNICAL. THEY DO NOT INVOLVE WHAT PROFESSOR MILLER CALLED "CHEATING" AT ALL. WHAT THEY INVOLVE IS INTERPRETING A WHOLE ARRAY OF NEW FEDERAL STATUTES THAT GOVERN THE LENDING INDUSTRY. THESE STATUTES ARE VERY COMPLICATED. THE ADMINISTRATIVE AGENCY CHARGED WITH ENFORCING THEM ARE STILL TRYING TO FIGURE OUT WHAT THEY MEAN.

AND WHILE WE'RE ALL TRYING TO SORT THIS OUT, WE'RE GETTING BARRAGED BY A WHOLE BARGAIN OF LAWSUITS, ARGUING FOR ONE INTERPRETATION OR ANOTHER. THERE IS ALSO A LARGE ARRAY OF LAWSUITS THAT SIMPLY TRY TO REWRITE THE MORTGAGE CONTEXTS, TAKE WORDS OUT OF CONTEXT, AND THEY MAKE VERY TORTURED CONSTRUCTIONS.

RECENTLY, LAST NOVEMBER, A FEDERAL JUDGE IN TEXAS IN A CASE CALLED HINTON VERSUS FANNIE MAE, I THINK ACCURATELY SUMMARIZED OUR PERCEPTIONS OF WHAT'S GOING ON. THE JUDGE SAID: "THIS CASE IS THE LATEST CHAPTER IN A SERIES OF LAWSUITS ASKING

COURTS TO REWRITE MORTGAGES. HINTON'S LAWYERS MUST HAVE READ ABOUT THE CLAIM IN THE MONTHLY ISSUE OF "TORTS-R-US." KNOWING OF THE PENDENCY AND RESOLUTION OF SEVERAL OTHER SUITS, THEY BROUGHT THIS ACTION FOR HINTON AND ALL OTHERS SIMILARLY SITUATED. LURED BY THE EXPECTATION OF LUCRATIVE CLASS ACTION FEES, CARELESS ABOUT FACTS AND LAW, THESE LAWYERS ROAM AROUND THE COUNTRY IMPOSING COSTS ON THE PARTIES DEFENDING AND ON THE ECONOMIES AS A WHOLE. IN THESE CASES, YOU CAN SEE VIVIDLY THE PRICE WE PAY, AS A NATION, FOR THE INVALUABLE BENEFIT OF AN OPEN SYSTEM OF COURTS."

THESE ACTIONS ARE SUPPOSEDLY BROUGHT TO BENEFIT THE CONSUMERS. WE'VE HEARD A NUMBER OF CONSUMER ADVOCATES SPEAK TO YOU TODAY. BUT OUR CONSUMERS DON'T FEEL THEY HAVE BEEN ALL THAT BENEFITED.

THERE IS A WHOLE BODY OF LAW AND A WHOLE ELABORATE FRAMEWORK TO DEAL WITH OPTING OUT OF CLASSES, AND THE GENERAL PURPOSE TO BE ABLE TO OPT OUT IS SO YOU CAN PRESERVE YOUR CLAIM AND BRING IT INDIVIDUALLY. THAT IS NOT WHY PEOPLE OPT OUT OF CLASS ACTIONS IN THE MORTGAGE INDUSTRY.

WHAT I'D LIKE TO DO IS BRIEFLY READ A FEW LETTERS FROM PEOPLE WHO RECEIVED CLASS NOTICES, RECENT CLASS NOTICES THAT WENT OUT CONCERNING COUNTRYWIDE. AND I ASSURE YOU, I HAVE HUNDREDS OF SIMILAR LETTERS. I JUST TOOK A SAMPLE OF THEM.

MR. SOL SCHREIBER: COUNSEL, DO YOU HAVE ANY LETTERS CONDEMNING YOU FROM ANY OF THE PEOPLE, THE MORTGAGEES?

MR. WENTZ: WE HAVE GOTTEN COMPLAINT LETTERS, CERTAINLY. IN CONNECTION WITH CLASS ACTIONS, NO --

MR. SOL SCHREIBER: HAVE YOU BROUGHT THOSE LETTERS, TOO, THE ONES THAT COMPLAIN ABOUT YOUR ACTIVITIES?

MR. WENTZ: NO.

MR. SOL SCHREIBER: YOU JUST BROUGHT YOU ONES THAT APPLAUD YOU.

MR. WENTZ: NO. I BROUGHT YOU LETTERS THAT WE'VE RECEIVED IN CONNECTION WITH CLASS ACTION, WHICH TEND BE SMALL, VERY PETTY ISSUES. AND OUR BORROWERS REALIZE THAT THEY ARE SUCH AND THAT THEY TEND TO BENEFIT THE PLAINTIFF LAWYERS.

I HAVE RECEIVED NO LETTERS IN CONNECTION WITH CLASS NOTICES THAT SAY THAT THIS IS A WONDERFUL THING, THANK YOU VERY MUCH; YOU GUYS DID A TERRIBLE JOB.

"DEAR SIRS:

I WISH TO BE EXCLUDED FROM THE ABOVE-CITED CASE, WHICH STRIKES ME AS BOTH FRIVOLOUS AND YET ANOTHER EXAMPLE OF THE MISUSE OF CLASS ACTIONS WHICH ENRICH THE ATTORNEYS AT THE EXPENSE OF BOTH THE DEFENDANT AND THE SO-CALLED MEMBERS OF THE CLASS."

MR. SOL SCHREIBER: WHAT CASE IS THAT IN?

MR. WENTZ: THIS LETTER IS IN A CASE CALLED SWEDBERGH.

MR. SOL SCHREIBER: AND HOW MANY CLASS MEMBERS ARE THERE?

MR. WENTZ: CLASS MEMBERS?

MR. SOL SCHREIBER: RIGHT.

MR. WENTZ: I DON'T REALLY RECALL. BUT THERE ARE TENS OF THOUSANDS.

MR. SOL SCHREIBER: TENS OF THOUSANDS. HOW MANY LETTERS DID YOU GET UP TO NOW?

MR. WENTZ: THIS CLASS NOTICE JUST WENT OUT A WEEK AGO.

MR. SOL SCHREIBER: HOW MANY HAVE YOU RECEIVED?

MR. WENTZ: HOW MANY HAVE I RECEIVED OPTING OUT? I'VE RECEIVED PROBABLY ABOUT 30 OF THEM SO FAR.

AND LET ME EXPLAIN, THOUGH, THAT LETTERS TO OPT OUT OF A CLASS ARE USUALLY SENT TO THE CLASS PLAINTIFFS' ATTORNEYS, WHICH IS WHAT HAPPENED HERE.

MR. SOL SCHREIBER: THEY ARE FILED WITH THE COURT.

MR. WENTZ: IN THIS SETTLEMENT, THE ONES THAT I HAVE BEEN INVOLVED IN, THE LETTERS ARE SENT TO THE PLAINTIFFS' ATTORNEYS. I ONLY GET COPIED ON ONES WHERE THE BORROWERS --

HONORABLE PAUL NIEMEYER: WHY DON'T WE JUST RECEIVE YOUR TESTIMONY.

MR. WENTZ: THANK YOU. ANOTHER EXAMPLE:

"DEAR LAWYER:

"WE ASSUME THAT YOU HAVE GUESSED BY NOW THAT WE ARE REQUESTING (NO, DEMANDING) THAT OUR NAMES BE REMOVED FROM THIS ACTION. WE DO NOT IN ANY WAY CONDONE FRIVOLOUS LAWSUITS SUCH AS THESE. THIS IS ONE

OF THE THINGS THAT IS WRONG WITH THIS COUNTRY TODAY. THIS IS WHY INSURANCE AND EVERYTHING ELSE COST US SO MUCH.

"YES, WE COULD GO ALONG WITH IT AND MAYBE GET BACK A FEW MEASLY DOLLARS WHILE YOU GET RICH. AND THE NEXT TIME WE GO TO FINANCE A HOME, IT WILL COST US MORE THAN WE GOT BACK IN ORDER TO SUPPLY YOU WITH AN INCOME."

"DEAR LAWYER:

"I WISH TO EXCLUDE MYSELF FROM THIS CASE.

"COUNTRYWIDE PROVIDED ME WITH THE BEST SERVICE OF ANY MORTGAGE LENDER I HAVE EVER DONE BUSINESS WITH...

"I HOPE THE JUDGE STICKS YOU FOR COUNTRYWIDE'S BILLS. MOREOVER, I BELIEVE YOU NOW OWE ME 32 CENTS FOR POSTAGE, 8 CENTS FOR THIS PIECE OF PAPER AND ENVELOPE, AND $25 FOR THE TIME I HAVE BEEN FORCED TO SPEND TO GET MYSELF EXCLUDED FROM THIS TRANSPARENT CASE.

"THIS KIND OF EXTORTION HIGHLIGHTS PERFECTLY WHAT IS WRONG WITH OUR LEGAL SYSTEM."

ONE MORE.

"DEAR LAWYER:

"WE WISH TO BE EXCLUDED FROM THIS ACTION BECAUSE FROM THE INFORMATION WE RECEIVED IT APPEARS TO BE FRIVOLOUS LITIGATION. 'PLAINTIFFS ASSERT THAT LENDER

DISCLOSED CERTAIN CLOSING CHARGES IN THE WRONG CATEGORY IN THEIR TRUTH IN LENDING DISCLOSURE FORMS.' THIS IS CAUSE FOR A LAWSUIT?

"WE ARE DISMAYED THAT OUR SYSTEM ALLOWS FOR SUCH ACTION. IT APPEALS TO PEOPLE'S GREED TO GO ALONG WITH YOUR LITIGATION BECAUSE THEY MAY GET SOMETHING IN THE DEAL. WHO CARES IF A BIG COMPANY LIKE COUNTRYWIDE HAS TO PAY? THEY GOT A LOT OF MONEY FROM US, RIGHT?

"WELL, NO, IT'S NOT RIGHT. WE WERE TREATED FAIRLY BY COUNTRYWIDE, AND WE ARE PLEASED WITH THEIR SERVICE OF OUR LOAN. IT IS IN CONSUMERS' BEST INTEREST TO KEEP GOOD COMPANIES IN BUSINESS."

THE POINT I'M TRYING TO MAKE IS THAT CONSUMERS ARE ALSO VERY IRRITATED WITH WHAT'S GOING ON. AND PARTICULARLY ON THESE LOW DOLLAR AMOUNTS, $50 OR LESS CASES.

AND THERE IS ALSO A VERY LARGE COST ASSOCIATED WITH THESE CLASS ACTION CASES, WHICH IS ALSO RECOGNIZED BY OUR BORROWERS. LENDERS, LIKE OTHER BUSINESSES, TRY TO MAKE A PROFIT ON THEIR LOANS, AND THEY SET THEIR PRICES BASED ON SOME MARGIN OVER THE COSTS. AND WHEN THE COSTS ARE INCREASED, THROUGH THE COSTS OF DEFENDING AGAINST THESE TYPES OF CLASS ACTION LAWSUITS, IT ENDS UP CAUSING HIGHER INTEREST RATES, WHICH MAKES IT MORE EXPENSIVE FOR AMERICANS TO BUY HOMES.

FOR ALL THESE REASONS, THE MORTGAGE BANKERS ASSOCIATION OF AMERICA STRONGLY ENDORSES THE ENACTMENT OF THE

SUBSECTION (B)(3)(F), REQUIRING THE COURT TO CONSIDER WHETHER THE PROBABLE RELIEF TO THE CLASS MEMBER JUSTIFIES THE ECONOMIC BURDENS OF CLASS LITIGATION.

WE ALSO ENDORSE ADDING THE NEW SUBSECTION (F), WHICH PROVIDES FOR THE RIGHT TO AN INTERLOCUTORY APPEAL. HOWEVER, WE URGE THAT YOU RETHINK THE PROPOSED COMMENT IN THE NOTE THAT STATES THAT THAT SHOULD BE GRANTED WITH RESTRAINT. YOU'VE HEARD FROM A NUMBER OF OTHER SPEAKERS TODAY. I'M NOT GOING TO REPEAT WHAT THEY HAVE TO SAY ABOUT HOW THE CLASS CERTIFICATION DECISION IS REALLY ONE OF THE KEY DECISIONS IN THE WHOLE CASE.

I'D ALSO LIKE TO POINT OUT ONE OTHER REASON WHY INTERLOCUTORY APPEALS SHOULD BE ENCOURAGED. WE ARE FREQUENTLY SUED BY MANY LAWYERS ON THE SAME ISSUE, ALL AT THE SAME TIME. AND A LENDER IS IN THE POSITION OF HAVING TO FIGHT CLASS CERTIFICATION IN MANY DIFFERENT FORUMS. AND AS YOU KEEP FIGHTING CLASS CERTIFICATION, AND AS YOU DEFEAT IT, IT DOESN'T PROVIDE ANY PROTECTION FROM THE NEXT LAWYER DOWN THE ROAD WHO WANTS TO GO AHEAD AND SAY, "WELL, IT SHOULD BE GRANTED. I'M GOING TO TRY A DIFFERENT JUDGE."

IT WOULD BE VERY HELPFUL TO BE ABLE TO GET SOME APPELLATE RULES. EVEN IF THE APPELLATE RULINGS ARE NOT CONTROLLING, THEY'RE LIKELY TO HAVE A LOT MORE WEIGHT AND A LOT MORE AUTHORITY THAN THE TRIAL COURT RULINGS. THAT WOULD BE ANOTHER ADDITIONAL RULING THAT REMOVE THE LANGUAGE THAT CAUTION IS RESTRAINED.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH.

MR. JOHNSON, DO I UNDERSTAND YOU HAVE A SCHEDULING PROBLEM THIS AFTERNOON?

ALL RIGHT. WHY DON'T WE TAKE YOU AT THIS POINT.

TESTIMONY OF JAMES J. JOHNSON

MR. JOHNSON: THANK YOU, YOUR HONOR.

YOUR HONOR, AND MEMBERS OF THE COMMITTEE, I'M JIM JOHNSON. I'M THE GENERAL COUNSEL OF PROCTER AND GAMBLE, IN CINCINNATI, OHIO. I HAVE BEEN WITH PROCTER ESSENTIALLY ALL MY CAREER, EXCEPT FOR A CLERKSHIP, AND HAVE BEEN IN ESSENTIALLY ALL PARTS OF THE COMPANY'S LEGAL BUSINESS, AND DIRECTLY ON THE BUSINESS SIDE, AS WELL.

I DO NOT PURPORT TO BE A SCHOLAR ON THE ISSUES OF CLASS ACTION. IN FACT, I CANNOT EVEN HOLD MYSELF OUT AS A PRACTITIONER. AS A GENERAL COUNSEL, THE ISSUES THAT I GET INVOLVED WITH FROM A CLASS ACTION STANDPOINT ARE ISSUES OF STRATEGY, ARE ISSUES OF WHETHER OR NOT WE ARE GOING TO PAY THE BILL. AND SO THAT THE PERSPECTIVE THAT I'D LIKE TO BRING TO THE COMMITTEE IS ONE OF SOME OF THE DYNAMICS THAT OCCUR ON THE PRACTICAL SIDE OF THE CLASS ACTION ISSUE.

WHAT I'D LIKE TO DO IS DISCUSS TWO EXAMPLES THAT PROCTER AND GAMBLE WAS INVOLVED WITH. FRANKLY, THEY ARE A LITTLE BIT LIKE THE GOLDILOCKS METAPHOR, ON THE ONE HAND. WE HAVE WHAT IS ESSENTIALLY A CASE WITH VERY NARROW LEGAL ISSUES, WITH VERY SMALL INDIVIDUAL DAMAGES, BUT POTENTIALLY ASTRONOMICAL

CLASS SIZE. AND ON THE OTHER HAND, WE HAVE -- AND THAT IS OUR IVORY SOAP CASE, WHICH I'LL EXPLAIN TO YOU.

AND ON THE OTHER HAND, WE HAVE A MASS TORT CASE. SOME OF YOU MAY REMEMBER THIS VERY UNFORTUNATE EXPERIENCE OF PROCTER AND GAMBLE AND TOXIC SHOCK SYNDROME AND OUR REVOLUTIONARY RELY TAMPONS. THAT WAS NOT A CLASS ACTION, BUT FOR REASONS I WILL EXPLAIN, I THINK IT FULLY SUPPORTS ONE OF THE PROPOSALS OF THIS COMMITTEE DEALING WITH MASS TORTS.

FIRST, LET ME, BEFORE I GET INTO THE ADVERTISING LABELING ISSUE WITH IVORY SOAP, I'D LIKE TO GIVE A LITTLE BACKGROUND, BECAUSE IT ADDRESSES A KEY ISSUE THAT THE FIRST SPEAKER SPOKE OF, AND THAT IS: WHAT ABOUT THE CONSUMER? WHO IS PROTECTING THE CONSUMER, PARTICULARLY IN THE AREA OF THE $1 CLAIM?

THE PERSPECTIVE IS: THERE IS, IN MANY INDUSTRIES, AND CERTAINLY OUR INDUSTRY, A LOT OF THINGS THAT GO ON BEHIND THE SCENES THAT ADDRESS LEGAL ISSUES WHEREBY THE CONSUMER IS THE ULTIMATE BENEFICIARY. AND LET ME JUST TAKE ADVERTISING.

WE HAVE ABOUT SIX LEVELS OF LEGAL CHALLENGES THAT OCCUR IN THE ADVERTISING AREA. FIRST, ABOUT 50 PERCENT OF OUR PRODUCTS ARE CONTROLLED BY THE FDA, SO THAT CLAIMS ARE, IN EFFECT, DICTATED EITHER BY THEIR GUIDELINES OR REGULATIONS.

SECOND, AND MOST IMPORTANT, VIRTUALLY ALL OF THE ADVERTISING IS REVIEWED BY OUR COMPETITORS, AND WE REVIEW OUR COMPETITORS. THERE IS AN ELABORATE CHALLENGE SYSTEM WITH THE

NATIONAL ADVERTISING DIVISION, THE BETTER BUSINESS BUREAU, LITIGATION, ET CETERA.

THIRD, THE NETWORKS REVIEW THE ADVERTISING, BECAUSE THEY ARE LEGALLY RESPONSIBLE.

AND FOURTH, IN EACH CASE, WHERE A CONSUMER CALLS DISAPPOINTED WITH OUR PRODUCTS BECAUSE IT DID NOT MEET A PERFORMANCE EXPECTATION, WE GIVE THE CONSUMER HIS OR HER MONEY BACK.

IN EFFECT, THEN, THERE IS A MULTI-LEVEL REGULATORY SYSTEM THAT OCCURS IN THE ADVERTISING AREA, THAT, FRANKLY, MANY PEOPLE MIGHT NOT APPRECIATE. THEY WOULD HAVE NO REASON TO, TO SEE WHAT'S REALLY GOING ON.

IN THAT CONTEXT, IN 1993, WE HAD A CLASS ACTION FILED AGAINST US CLAIMING THAT OUR IVORY SOAP SLOGAN, THAT IT'S 99 AND 44/100S PERCENT PURE WAS MISLEADING; AND, IN ADDITION, THAT CERTAIN OTHER PRODUCTS THAT WERE ACTUALLY DETERGENT-BASED PRODUCTS, WHICH WERE CALLED "BAR SOAP" IN THE COMMERCIALS OR ON ADVERTISING, ACTUALLY CONTAINED DETERGENTS.

THE RESULT OF THAT CASE WAS, TO SIMPLIFY, RECOGNIZING THE TIME CONSTRAINTS, IS THAT THE ISSUES WITH RESPECT TO THE SOAP PRODUCTS WERE CONTROLLED BY AN FDA REGULATION, AND WE, INDEED, GOT SUMMARY JUDGMENT ON IT.

THE ISSUE ON THE IVORY 99 AND 44/100S PERCENT PURE CLAIM WAS A FACTUAL ISSUE. IN FACT, IVORY IS A HUNDRED PERCENT PURE SOAP. THE REASON THAT WE SAY 99 AND 44/100S PERCENT IS

THAT IN 1882, CONTAMINANTS IN AN UNSOPHISTICATED MANUFACTURING PROCESS GOT IN. BUT OBVIOUSLY, WE'RE NOT GOING TO SAY OUR PRODUCT IS A HUNDRED PERCENT PURE, GIVEN THE STRENGTH OF THAT PARTICULAR TRADEMARK.

NOW, I'M FACED WITH THE DECISION OF WHAT WE'RE GOING TO DO WITH A LAWSUIT, THAT, IN EFFECT, IS FACTUALLY-BASED, THAT WE HAVE NO BASIS FOR A SUMMARY JUDGMENT, BUT THE CLASS CONSISTED OF ALL U.S. IVORY SOAP PURCHASERS, WHICH ARE APPROXIMATELY A HUNDRED MILLION PEOPLE. IN THAT CONTEXT, THE CASE CANNOT BE LITIGATED.

I THINK THERE WAS A VERY GOOD DESCRIPTION OF THE MATH OF WHAT OCCURS. EVEN IF YOU HAVE A 80 PERCENT, 90 PERCENT CERTAINTY THAT YOU'RE TELLING YOUR MANAGEMENT IN TERMS OF THE MERITS OF THE CASE, YOU SIMPLY CANNOT TRY A CASE WITH A HUNDRED MILLION PLAINTIFFS. AND AS A CONSEQUENCE OF THAT, THIS CASE WAS SETTLED; AND UNFORTUNATELY, THE COMPANY SPENT OBVIOUSLY CONSIDERABLE AMOUNTS OF TIME, AND UNFORTUNATELY, NOT AN INSIGNIFICANT AMOUNT OF MONEY, BOTH IN THE SETTLEMENT AND IN THE DEFENSE OF THE CASE.

THE RELY CASE, I THINK, IS ON THE OTHER END OF THE SPECTRUM. AND WHAT OCCURRED THERE IS TOXIC SHOCK SYNDROME. WE HAD A NEW PRODUCT, A HIGHLY ABSORBENT MATERIAL. TOXIC SHOCK SYNDROME WAS IDENTIFIED. NO ONE KNEW WHAT THE CAUSATION WAS, AND THERE WAS A GREAT VAST NUMBER OF SYMPTOMS ASSOCIATED WITH IT. WE WITHDREW THE PRODUCT FROM THE MARKET, AND IMMEDIATELY, A

CLASS ACTION LAWSUIT WAS FILED IN CALIFORNIA. THAT CLASS, FORTUNATELY, WAS DELAYED, AND INDIVIDUAL LAWSUITS PROCEEDED IN THE INTERIM. WE HAD THREE SEPARATE DECISIONS.

IN ONE DECISION, OUR PRODUCT WAS FOUND TO HAVE CAUSED TOXIC SHOCK AND NO DAMAGES WERE AWARDED. IN A SECOND DECISION, OUR PRODUCT WAS FOUND TO HAVE CAUSED TOXIC SHOCK SYNDROME AND $300,000 WERE AWARDED. IN THE THIRD CASE, OUR PRODUCT WAS FOUND TO HAVE NO RELATIONSHIP TO TOXIC SHOCK WHATSOEVER.

BASED UPON THOSE THREE RULINGS, WE WENT BACK TO THE COURT IN THE CLASS ACTION CERTIFICATION ISSUE AND RECEIVED A DECISION THAT, GIVEN THE DISPARITY OF THE RESULTS THAT ACTUALLY OCCURRED IN ACTUAL TRIALS, THE CASE WAS INAPPROPRIATE FOR CLASS STATUS.

ULTIMATELY, APPROXIMATELY 800 INDIVIDUALIZED CLAIMS WERE SETTLED OVER THE COURSE OF THE NEXT SIX TO SEVEN YEARS WITH INDIVIDUAL PLAINTIFFS, WITH A VARIETY OF CLAIMS RELATING TO RELY AND TO TOXIC SHOCK SYNDROME.

THE POINT I WANT TO MAKE WITH RESPECT TO THIS IS: HAD THAT CLASS BEEN CERTIFIED, IN THE ABSENCE OF ACTUAL EXPERIENCE, WE HAD VIRTUALLY EVERY WOMAN USING TAMPONS, HAD TRIED RELY, WE HAD OVER ONE BILLION THAT WERE SOLD TO THE PUBLIC, AND WE HAD A DISEASE THAT HAD NO PARAMETERS, NO CLEAR PARAMETERS, RANGING FROM FEVERS TO BLISTERS TO HIGH TEMPERATURE, AND, IN SOME CASES, EVEN DEATH.

THAT CASE COULD NOT BE TRIED. THAT CASE WOULD, IN A

CURRENT ENVIRONMENT, HAVE TO BE SETTLED ON SOME BASIS. AND I, BASED ON THAT EXAMPLE, URGE THE COMMITTEE TO GO FORWARD WITH THE MATURITY PROPOSAL, AS IS CURRENTLY CONTEMPLATED. BECAUSE CERTAINLY IT PROVIDES REAL-WORLD EXPERIENCE FOR THESE KINDS OF CASES.

I HAVE THREE CONCLUSIONS. ONE IS: I THINK IN THE CURRENT ENVIRONMENT, THE CLASS ACTION LAW, IN EFFECT, HAS MOVED FROM PROCEDURE TO SUBSTANCE IN SOME CASES. BY THAT, I MEAN IT IS OUTCOME-DETERMINATIVE. DEPENDING ON THE BREADTH OF THE CLASS, THE NATURE OF THE CLAIMS, MANY CASES, NOT ALL, MANY CASES CANNOT BE LITIGATED.

SECONDLY, I BELIEVE THE CLASS ACTION LITIGATION IN THE CURRENT SITUATION ACTUALLY CREATES LITIGATION. IT CREATES LITIGATION, AGAIN, BACK TO THE MATH POINT. BECAUSE IF THE POTENTIAL DAMAGES ARE LARGE ENOUGH, IT JUSTIFIES PLAINTIFFS' COUNSEL ACTING RATIONALLY TO BRING CASES THAT HAVE LITTLE MERIT, BECAUSE THEY RECOGNIZE THAT THE POTENTIAL UPSIDE IS SO LARGE.

AND FINALLY, I BELIEVE, IN THE CURRENT ENVIRONMENT, THAT CLASS ACTION LITIGATION IS UNFAIR BECAUSE, WITH THE OPT-OUT PROVISION, THE RELATIVELY LOOSE APPROACHES ON COMMONALITY, IN EFFECT, YOU DO NOT HAVE LITIGATION IN THE ORDINARY SENSE OF A PLAINTIFF AND A DEFENDANT EACH DEALING WITH THEIR LEGAL RIGHTS AND THEIR LEGAL DEFENSES.

FINALLY, I URGE THIS COMMITTEE TO ADOPT AN OPT-IN PROCEDURE, AS HAS BEEN RECOMMENDED BY OTHER SPEAKERS.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH, MR. JOHNSON.

MR. JOHNSON: THANK YOU.

HONORABLE PAUL NIEMEYER: I UNDERSTAND WE HAVE TWO MORE SCHEDULING PROBLEMS I'M GOING TO ACCOMMODATE, AND THEN WE'RE GOING TO TAKE OUR LUNCH BREAK. THE TWO ARE MR. SUTTERFIELD AND MR. GREENBAUM. WE'LL TAKE THEM IN THAT ORDER. AND HEARING NO OBJECTION TO THAT, WE'LL PROCEED THAT WAY.

TESTIMONY OF JAMES R. SUTTERFIELD

MR. SUTTERFIELD: THANK YOU, YOUR HONOR. AND I WON'T BELABOR THE POINT.

I'M JIM SUTTERFIELD, FROM NEW ORLEANS. I WANT TO THANK THE COMMITTEE FOR ALLOWING ME TO BE HERE.

HONORABLE PAUL NIEMEYER: YOU KNOW THAT ALABAMA IS NOT FAR.

MR. SUTTERFIELD: IT'S NOT FAR, AND I HAVE A FEW CASES I'VE HANDLED IN ALABAMA, GENERALLY, ONLY THOSE RUN-OF-THE-MILL BAD-FAITH INSURANCE CLAIMS, NOT ANYTHING INTERESTING LIKE CLASS ACTIONS. BUT I WANT TO THANK YOU FOR ALLOWING ME TO BE HERE TODAY.

I HAVE BEEN PRACTICING LAW JUST ABOUT 30 YEARS, JUST ABOUT AS LONG AS RULE 23 HAS BEEN AROUND, AND IT'S KIND OF AWE-INSPIRING TO BE ABLE TO ACTUALLY DO SOMETHING, OR MAYBE PERHAPS HAVE SOME INPUT INTO THE FEDERAL RULE THAT YOU HAVE BEEN

PRACTICING UNDER FOR A LONG TIME. SO I THANK YOU FOR THIS OPPORTUNITY.

I'M A MEMBER OF THE INTERNATIONAL ASSOCIATION OF INSURANCE DEFENSE COUNSEL, AND WE HAVE A COMMITTEE CALLED THE CLASS ACTIONS OF MULTIPARTY LITIGATION COMMITTEE, OF WHICH I CHAIR. THIS COMMITTEE HAS ONLY BEEN AROUND FOR ABOUT -- ACTUALLY, THIS IS ABOUT THE SECOND YEAR THAT WE'VE HAD IT. AND THE REASON WE HAVE IT IS BECAUSE CLASS ACTIONS HAVE BECOME SUCH A MAJOR PART OF THE BUSINESS OF OUR CLIENTS, AND THEREFORE, OF OURSELVES.

AS A RESULT OF THAT, WE HAVE FORMED OUR OWN COMMITTEE, AND I AM HERE TODAY NOT REALLY ON MY OWN BEHALF, BUT ON BEHALF OF THE NATIONAL ASSOCIATION OF DEFENSE COUNSEL, TO PROVIDE THEIR VIEW. THEIR VIEW IS THAT TAKEN AS A PACKAGE, WE ARE PREPARED TO AND WE DO SUPPORT THE ENTIRETY OF THE PROPOSED REVISION, WITH THE CAVEAT THAT QUITE FRANKLY, IT'S NOT WHAT WE WOULD HAVE DREAMED UP OURSELVES, AND FURTHER, THAT WITH THE UNDERSTANDING THAT WE DO SUPPORT IT AS AN ENTIRE PACKAGE. I AM NOT SO SURE THAT WE WOULD SUPPORT CERTAIN SECTIONS OF IT, WERE THERE NOT OTHER SECTIONS --

HONORABLE PAUL NIEMEYER: DID YOU AND MR. PREUSS GET TOGETHER? DIDN'T WE HAVE MR. PREUSS HERE THIS MORNING?

MR. SUTTERFIELD: IT SAYS MR. PREUSS IS ON BEHALF OF THE INTERNATIONAL ASSOCIATION. HE WAS HERE ON HIS OWN BEHALF.

HONORABLE PAUL NIEMEYER: YOU'RE SPEAKING ON BEHALF OF

THE ASSOCIATION?

MR. SUTTERFIELD: I'M SPEAKING ON BEHALF OF THE ASSOCIATION, YES.

WITHOUT WHAT WE COMMONLY CALL BIG (F) AND LITTLE (F), I'M NOT CERTAIN WE WOULD SUPPORT ANY OF IT, BUT, QUITE FRANKLY, TAKEN TOGETHER, WE CAN SUPPORT THE ENTIRE PACKAGE. WE THINK MORE NEEDS TO BE DONE. WE BELIEVE IT IS A STEP IN THE RIGHT DIRECTION. AND WE BELIEVE THAT IT DOES IMPROVE THE SYSTEM THAT WE HAVE, PARTICULARLY, IN VIEW OF THE ABILITY TO SEEK, ALBEIT, DISCRETIONARY, A REVIEW BY THE COURT OF APPEAL.

THERE IS ONLY ONE POINT THAT I WOULD LIKE TO MAKE OTHER THAN THAT, AND THAT IS, THE THING ABOUT MATURITY. I WOULD LIKE TO SEE, IF POSSIBLE, SOME WAY TO TIGHTEN IT UP A BIT. I'VE TALKED TO THREE DIFFERENT LAWYERS, ALL OF WHOM ARE EXPERIENCED LAWYERS, AND THEY HAD THREE DIFFERENT ANSWERS TO WHAT IT MEANT.

ONE IS THE MATURITY OF THE TYPE OF LITIGATION, I.E., IS THE BODY OF INFORMATION THAT'S BEEN A SYMBOL THROUGH THE LITIGATION PROCESS SUCH THAT WE NOW KNOW WHAT WE'RE TALKING ABOUT, I.E., BREAST IMPLANT CASES.

THE OTHER ONE IS THAT: WELL, IS THIS ONE WHERE THERE IS CLASS ACTIONS THAT HAVE ALREADY BEEN FILED AND SOMEONE ELSE WANTS TO BRING IN ANOTHER CLASS ACTION BECAUSE THEY'D LIKE TO GET IN ON THE THING AS WELL?

AND THE THIRD ONE IS -- AND THIS ONE IS KIND OF CLOSE TO HOME, BECAUSE I PRACTICE LAW IN THE CHEMICAL BELT, AND MOST

OF OUR CLASS ACTIONS INVOLVE CHEMICAL RELEASES OR AN OCCASIONAL EXPLOSION OR THIS, THAT AND THE OTHER, WHERE EVERYONE FROM ALL OVER COMES IN AND FILES LAWSUITS, IT MAKES THEM FALL OFF BRIDGES WHILE THEY'RE FISHING, AND THIS, THAT AND THE OTHER. IN ONE COMMUNITY DOWN THERE, I WAS DEFENDING A CLASS ACTION INVOLVING AN EXPLOSION AT A FERTILIZER PLANT THAT RELEASED SOME AMMONIA IN THE AIR; AND AT THE SAME TIME, THERE WERE THREE OTHER THINGS THAT HAD OCCURRED WHERE THERE WERE CHEMICAL RELEASES OF ONE SORT OR THE OTHER. AND THE SAME PARTIES WERE THE REPRESENTATIVE PARTIES OF FOUR DIFFERENT LAWSUITS, ALL CLAIMING RESPIRATORY INJURIES FROM THESE INCIDENTS.

NOW, QUITE FRANKLY, ONLY ONE OF THEM WAS IN FEDERAL COURT, WHICH EVENTUALLY WAS REMANDED; THE OTHERS WERE ALL IN THE STATE COURT. BUT IS THAT ALSO NOT AN IDEA OF WHAT COULD BE MEANT BY "MATURITY"? SO I THINK THE COURTS ARE GOING TO HAVE DIFFICULTY IN DETERMINING EXACTLY WHAT YOU MEAN BY "MATURITY" UNLESS YOU BEEF IT UP. AND PERHAPS SOMETHING IN THE COMMENT WOULD WORK.

ON THE OTHER HAND, I REMEMBER THE '66 COMMENT THAT SAID THAT RULE 23 WAS NORMALLY NOT APPROPRIATE FOR MASS TORTS. AND THAT'S WHY WE'RE HERE TODAY.

THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH, MR. SUTTERFIELD.

ALL RIGHT. THE LAST PERSON THIS MORNING WILL BE

MR. GREENBAUM.

TESTIMONY OF JEFFREY J. GREENBAUM

MR. GREENBAUM: THANK YOU, YOUR HONOR, FOR GIVING ME THE OPPORTUNITY TO APPEAR HERE TODAY AND FOR ACCOMMODATING MY SCHEDULE. I KNOW IT'S BEEN A LONG MORNING, AND I HOPE I DON'T DETAIN YOU TOO MUCH FURTHER.

I PRACTICE LAW IN NEWARK, NEW JERSEY, WITH THE SILLS, CUMMIS FIRM. I ALSO HAPPEN TO BE CO-CHAIRMAN OF THE RULE 23 COMMITTEE OF THE ABA SECTION OF LITIGATION, CLASS ACTION AND THE ROOT OF SUITS COMMITTEE. THAT COMMITTEE WAS FORMED IN 1991, AND SINCE THAT TIME, I HAVE DONE A GREAT AMOUNT OF WORK IN CLOSELY MONITORING THE WORK OF THIS COMMITTEE.

I SPEAK, HOWEVER, TODAY, ONLY EXPRESSING MY OWN VIEWS, WHICH, OF COURSE, HAVE BEEN GREATLY INFLUENCED BY THE VIEWS OF MANY PRACTITIONERS THAT I HAVE LEARNED DURING THE COURSE OF THIS EXPERIENCE.

HONORABLE PAUL NIEMEYER: ARE WE GOING TO RECEIVE THE VIEWS OF THE ABA RULE 23 COMMITTEE?

MR. GREENBAUM: WELL, YOUR HONOR, WE NEED AUTHORIZATION FROM THE ABA, THE BIG ABA. AND SO FAR, THAT HAS BEEN --

HONORABLE PAUL NIEMEYER: THERE IS NO CHANCE --

MR. GREENBAUM: -- DECLINED, BUT WE ARE HOPING THAT IN THE FIRST WEEK OF FEBRUARY, THAT THE DIFFERENT SECTIONS WILL BE ABLE TO RESOLVE THEIR VIEWS AND WE WILL BE ABLE TO GIVE AN ABA

REPORT BEFORE FEBRUARY 15. SO WE ARE OPTIMISTIC OF THAT.

HONORABLE PAUL NIEMEYER: ALL RIGHT.

MR. GREENBAUM: I PERSONALLY SUPPORT ALL OF THE CHANGES AS VERY POSITIVE STEPS FORWARD IN THE CLASS ACTION PRACTICE. I WANT TO ADDRESS MYSELF TO JUST SEVERAL.

FIRST, INTERLOCUTORY APPEAL. I BELIEVE THIS IS A VERY IMPORTANT CHANGE THAT HAS BEEN LONG IN THE MAKING. AND AS MANY OF YOU MAY KNOW, IT HAS BEEN TAKEN FROM THE 1985 ABA SECTION OF LITIGATION RECOMMENDATION, WHICH CAME OUT OF A VERY RESPECTED COMMITTEE OF PRACTITIONERS ON BOTH THE PLAINTIFFS AND DEFENSE SIDE. AND I BELIEVE THERE WAS ALSO ONE JUDGE, A JUDGE BY THE NAME OF JUDGE POINTER, WHO SAT ON THAT COMMITTEE AS WELL.

I BELIEVE THAT RECOGNIZES THE CRITICAL NATURE OF THE CLASS CERTIFICATION DETERMINATION. WE'VE HEARD THIS MORNING THAT IT IS THE BALL GAME, THAT IT IS OUTCOME-DETERMINATIVE. AND WITHOUT ANY OPPORTUNITY TO GET REVIEW OF THAT, MANY TIMES PEOPLE ARE FACED IN AN INSURMOUNTABLE POSITION OF BEING REQUIRED TO SETTLE.

SINCE 1995, WITH THE EXPANDING USE OF THE CLASS ACTION DEVICE ON MASS TORTS, THE PRESSURE HAS EVEN BECOME GREATER. BUT THE NEED WAS STILL THERE IN 1985. AND I WOULD NOT ACCEPT THE VIEW EXPRESSED EARLIER BY, I BELIEVE JUDGE SCHREIBER, THAT WE SHOULD LIMIT THIS MAYBE TO JUST MASS TORTS. I BELIEVE IT'S IMPORTANT. IT'S IMPORTANT IN THE SECURITIES AREA AND ANTITRUST AREAS. THERE ARE INJUSTICES THAT ARE OCCURRING WHERE YOU CAN'T

GET APPEAL AND YOU CAN'T GET A REVIEW.

MR. SOL SCHREIBER: COUNSEL, COULD YOU TELL ME WHY IT WAS REJECTED?

MR. GREENBAUM: IT WAS NOT REJECTED IN 1985. THE ADVISORY COMMITTEE CONSIDERED IT AT THAT TIME AND DECIDED THAT 20 YEARS EXPERIENCE WAS NOT YET ENOUGH. THEY WANTED TO LET FURTHER EXPERIENCE DEVELOP WITH CLASS ACTIONS.

THERE WERE A NUMBER OF OTHER SUGGESTIONS MADE AS WELL BY THE ABA COMMITTEE AT THAT TIME, WHICH FOUND ITS WAY INTO THE 1991 DRAFT THAT WAS CONSIDERED BY THE ADVISORY COMMITTEE. I BELIEVE THERE WERE VERY SOUND REQUIREMENTS IN THOSE PROVISIONS THEN, AND I BELIEVE THAT IT'S NOTEWORTHY THAT THIS ONE SECTION HAS BEEN ADOPTED -- NOT ADOPTED, BUT INCORPORATED, IN EVERY ADVISORY COMMITTEE DRAFT THAT HAS EMANATED SINCE MAY 1991, INCLUDING THE ORIGINAL ONE AND IN EVERY ONE SINCE. AND I THINK WITH GOOD REASON. I THINK IT'S AN IMPORTANT PROVISION, ONE LONG IN THE OFFING, AND ONE THAT IS VERY IMPORTANT TO PRACTITIONERS IN ACHIEVING JUSTICE.

I DO, HOWEVER, DISAGREE, AS EXPRESSED BY SOME PEOPLE THIS MORNING, WITH THE COMMENTS THAT ON THE ONE HAND, SEEK TO TAKE AWAY WHAT THE LANGUAGE OF THE RULE GIVES ON THE OTHER. AND THERE ARE THREE SPECIFIC ASPECTS OF THAT THAT I HAVE A PROBLEM WITH.

THE FIRST IS THE SECTION THAT TALKS ABOUT IT BEING GRANTED WITH RESTRAINT. THE APPELLATE COURTS KNOW WHICH CASES

THEY'RE GOING TO HEAR. AND I DON'T THINK WE NEED TO SAY, "DON'T REALLY GRANT THESE A LOT."

HONORABLE JOHN L. CARROLL: WHAT ABOUT THE ARGUMENT, THOUGH, THAT IF WE DON'T INCLUDE THAT LANGUAGE, EVERY TIME A TITLE VII CASE IS CERTIFIED, IT WILL GO UP, EVERY TIME A REGULAR ROUTINE IS CERTIFIED, IT WILL GO UP?

MR. GREENBAUM: WELL, YOUR HONOR, I DON'T THINK THEY WILL GO UP REPEATEDLY. THEY MIGHT, IN THE INITIAL SENSE, UNTIL PEOPLE GET A SENSE FOR WHAT THE COURTS ARE GOING TO GO. BUT I THINK THEY WILL GET THAT SENSE.

IN NEW JERSEY, WE HAVE AN INTERLOCUTORY APPEAL RULE BY LEAVE OF COURT ON ANY INTERLOCUTORY APPEAL MOTION. AND GRANTED, IT MAY BE FIVE PERCENT OF THE CASES. AND YOU DON'T MAKE SUCH AN APPEAL UNLESS YOU REALLY THINK YOU HAVE A SHOT AT GETTING IT GRANTED. SO I THINK THAT THAT WILL WORK ITSELF OUT. AND I DON'T THINK THAT'S GOING TO BE A PROBLEM.

AND ALSO I HAVE A PROBLEM WITH THE LANGUAGE THAT SAYS IT WILL ALMOST ALWAYS BE DENIED WHEN IT TURNS ON CASE-SPECIFIC MATTERS.

WELL, I BELIEVE THE COURTS ARE IN THE BUSINESS OF ACHIEVING JUSTICE. AND IF THERE MAY NOT BE A WEIGHTY LEGAL ISSUE, BUT AN APPELLATE COURT CAN BE CONVINCED THAT THERE WAS AN ERRONEOUS APPLICATION OF FACTS, I BELIEVE THAT'S WHAT THE APPELLATE COURTS ARE THERE FOR, TO HELP IN ACHIEVING JUSTICE, ESPECIALLY IN A SITUATION WHERE YOU'RE NOT GOING TO GET ANOTHER

SHOT, WHERE THE PRESSURE ON SETTLEMENT IS TOO GREAT IF YOU LOSE THE CLASS CERTIFICATION BATTLE. THE CASES USUALLY SETTLE AT THAT POINT. SO THIS IS REALLY YOUR ONLY REDRESS. INDIVIDUAL JUSTICE, I BELIEVE, IS IMPORTANT AS WELL.

AND FINALLY, I BELIEVE IT'S UNWISE TO BE ENCOURAGING DISTRICT COURTS TO BE EXPRESSING THEIR OPINION ON APPEALABILITY. I BELIEVE THIS REINTRODUCES WHAT'S PROVEN TO BE AN INSURMOUNTABLE HURDLE IN THE 1292 CERTIFICATION PROCEDURE, WHICH WE NOW HAVE; AND I DON'T SEE WHY, AFTER ELIMINATING IT, WE'D WANT TO BE GOING BACK IN THAT DIRECTION BY PUTTING IN THAT NOTE IN THE COMMENT.

HONORABLE ANTHONY SCIRICA: WHY WOULDN'T IT BE BENEFICIAL TO THE COURT TO HAVE THE REASONS OF THE DISTRICT JUDGE?

MR. GREENBAUM: I BELIEVE THAT THE DISTRICT JUDGE WILL, IN MANY INSTANCES, EXPRESS HIS VIEWS ON THE LAW IN HIS OPINION ITSELF, AND HE MAY VERY WELL OFFER HIS VIEWS ON WHETHER THIS IS A CLOSE ISSUE AND SHOULD BE APPEALED.

BUT I THINK WHAT MOST LAWYERS HAVE HAD PROBLEMS WITH IS TRYING TO CONVINCE A JUDGE THAT HAS RULED AGAINST HIM THAT THIS IS AN ISSUE THAT SHOULD GO UP NOW. AND I THINK A LOT OF JUDGES MAY NOT SEE THAT CLEARLY, AND I THINK YOU SHOULD ALLOW THREE OBJECTIVE PEOPLE TO MAKE THAT DECISION. THEY HAVE THE WRITTEN OPINION OF THE TRIAL JUDGE, AND I DON'T THINK WE NEED TO ASK FOR HIS ADVICE ON THE APPEALABILITY. I THINK THAT'S ONE OF

THE PROBLEMS WITH THE 1292(B) CERTIFICATION PROCEDURE, WHICH REALLY HAS NOT BEEN AN EFFECTIVE MECHANISM FOR APPEALING THESE TYPES OF CASES.

HONORABLE PAUL NIEMEYER: OKAY.

MR. GREENBAUM: FINALLY, AS A TECHNICAL POINT, THE TIME SHOULD NOT JUST RUN FROM THE DETERMINATION, BUT I THINK THE RULE SHOULD BE INCLUDED TO ALSO INCLUDE A TIME FOR RECONSIDERATION, BECAUSE IF THERE IS A MISTAKE THAT A JUDGE MADE AND YOU WANT TO POINT IT OUT TO HIM, YOU SHOULDN'T FEEL THAT YOU HAVE TO RUN UP TO THE APPELLATE COURT, WHEN THE JUDGE MAY BE ABLE TO CORRECT IT. AND THEREFORE, THE TIME SHOULD RUN FROM THE ACTUAL DENIAL OF THE RECONSIDERATION, IF THAT'S APPLIED FOR AS WELL. AND I DON'T THINK THAT WOULD ELONGATE THE TIME PERIOD IN ANY SIGNIFICANT RESPECT.

MY REPORT MAKES A NUMBER OF TECHNICAL COMMENTS. I WOULD LIKE TO JUST TOUCH BRIEFLY ON THE (F) FACTOR AND ON THE (B)(4). (B)(4), I SUPPORT. IT RECOGNIZES EXISTING PRACTICE. I BELIEVE THAT YOU NEED TO BE ABLE TO SETTLE CASES, AND I ALSO BELIEVE IT WILL ADD TO THE HONESTY OF THE SYSTEM, BECAUSE CASES WILL STILL BE SETTLED, WHETHER YOU HAVE (B)(4) OR NOT. AND WHAT YOU WILL HAVE IS DEFENSE COUNSEL WHO ARE IN A VERY DIFFICULT POSITION OF HAVING TO FIGHT LIKE HELL TO AVOID CERTIFICATION, AND THEN THEY REACH A SETTLEMENT SAYING, "OH, WHAT WE WERE TELLING YOU BEFORE, THAT DOESN'T REALLY MEAN ANYTHING."

IT'S REALLY NOT A PROBLEM. I THINK THIS RESTORES SOME

HONESTY INTO THE SYSTEM, ALLOWS IT TO BE HANDLED IN A WAY WHERE IT CAN BE SEPARATELY FOCUSED UPON, AND I THINK IT'S A GOOD THING.

IN ADDITION, I BELIEVE THAT THE COMMITTEE HAS IT RIGHT WHEN IT SAYS THAT THIS SHOULD NOT BE USED FOR CASES WHERE A SETTLEMENT HAS NOT YET BEEN AGREED TO, BECAUSE I THINK THERE IS AN EFFECT BY A DISTRICT JUDGE SAYING, "YOU KNOW WHAT? THIS IS A REAL PROBLEM. IT'S A BIG CASE. I KNOW YOU HAVE DEFENSES TO CLASS CERTIFICATION, BUT I'M GOING TO CERTIFY IT CONDITIONALLY JUST FOR SETTLEMENT PURPOSES SO YOU GO OUT IN THE ROOM AND YOU SEE WHETHER YOU CAN CERTIFY IT."

AND I THINK A DEFENDANT IN THAT SITUATION WILL SAY, "GEE, HOW AM I GOING TO NOW CONVINCE HIM THAT THIS IS NOT APPROPRIATE FOR CLASS CERTIFICATION, IF YOU DON'T AGREE TO A SETTLEMENT?" SO I THINK THAT THE COMMITTEE HAS THE RIGHT BALANCE ON THAT ONE.

THE (F) FACTOR, ON THE BALANCING TEST. I BELIEVE WE HAVE A SERIOUS PROBLEM WHERE THERE IS A PUBLIC DISRESPECT FOR THE JUDICIAL SYSTEM. AND I THINK THAT'S, IN PART, ARISEN FROM THESE COUPON SETTLEMENT CASES, THE $2 RECOVERY CASES. WHAT DO PEOPLE READ ABOUT IN THE PAPERS? WHAT DO THEY THINK OF LAWYERS IN THE COURT SYSTEMS WHEN THEY HEAR ABOUT THESE CASES? AND I THINK IT'S INCUMBENT UPON ALL LAWYERS TO SUPPORT PROVISIONS WHICH TRY TO ELIMINATE THESE ABUSES AND TRY TO IMPROVE THE PERCEPTION OF THE PRACTICING BAR.

NOW, THE ISSUE, THEN, IS --

HONORABLE JOHN L. CARROLL: IS IT POSSIBLE YOU'RE OVERSTATING THE PUBLIC CONCERN? AREN'T WE IN A TIME WHEN THE PUBLIC, GENERALLY, DOESN'T LIKE ANYTHING ABOUT GOVERNMENT?

MR. GREENBAUM: I THINK THE PUBLIC DOESN'T LIKE THINGS ABOUT LAWYERS, AND I THINK IT'S CASES LIKE THIS THAT ARE HELPING TO CONTRIBUTE TO THAT PROBLEM, AND I THINK WE HAVE TO DEAL WITH IT.

MR. SOL SCHREIBER: ARE YOU SAYING THAT YOU DON'T THINK THE COURT SHOULD APPROVE PIPELINE CASES? ISN'T THAT DIFFERENT FROM BOND CASES?

MR. GREENBAUM: I'M SORRY?

MR. SOL SCHREIBER: DOESN'T A WARRANT, IN A SECURITY MATTER, HAVE A VALUE, PER SE, WHILE A COUPON CASE HAS NO VALUE?

MR. GREENBAUM: WARRANTS HAVE VALUE. I'M NOT CRITICIZING A WARRANT, PER SE. I'M CRITICIZING SMALL SETTLEMENTS WHERE PEOPLE READ ABOUT IT IN THE PAPER AND SAY, "THIS IS JUST FOR THE LAWYERS."

AND I CAN GIVE A PRIME EXAMPLE. I RECENTLY RECEIVED A NOTICE THAT I AM ONE OF THE POTENTIAL CLAIMANTS IN A CLASS THAT WAS RECENTLY SETTLED FOR $425,000. THERE ARE ONE MILLION POTENTIAL CLAIMANTS. AND I WAS TOLD THAT THE WAY THIS IS GOING TO WORK, THE ATTORNEYS' FEES I THINK WERE A HUNDRED THOUSAND DOLLARS, AND THE WAY IT'S GOING TO WORK IS MORE THAN A HUNDRED THOUSAND PEOPLE FILE CLAIMS, THEY WILL USE A LOTTERY, AND THE

LUCKY 100,000 WINNERS WILL GET $4.25. SO, AS A MATTER OF ACADEMIC INTEREST, I WENT TO MY BASEMENT TO PULL OUT WHAT I NEEDED FOR MY PROOF OF CLAIM TO ENTER THIS LOTTERY. I DON'T KNOW HOW MANY OTHERS WILL, AND I FRANKLY DON'T THINK IT ADDS RESPECT FOR THE JUDICIAL SYSTEM OR MY PROFESSION OR YOUR PROFESSION.

MR. SOL SCHREIBER: ISN'T IT TRUE THAT THOSE CASES THAT HAVE SETTLED FOR VERY SMALL AMOUNTS ARE USUALLY CASES WHERE THE PLAINTIFF KNOWS HE'S GOING TO GET DISMISSED AND, IN EFFECT, GOES TO THE DEFENDANT AND SAYS, "LOOK, I'LL BUY THE CASE. WE WON'T GIVE THE CLASS VERY MUCH. WE'LL GET A FEE, AND THAT'S HOW WE'LL RESOLVE THE CASE."

ISN'T THAT THE WAY THE REAL WORLD WORKS WHEN YOU GET THESE EIGHT-CENT CASES WHERE THE TRUE VALUE IS NOT 30 MILLION, BUT IT'S 400,000? ISN'T THAT SO?

MR. GREENBAUM: WELL, IT, MANY TIMES, IS A DIFFERENCE OF OPINION ON WHAT THE TRUE VALUE OF THE CASE IS. AND MANY TIMES, IT'S ONLY -- I MEAN, THAT'S WHY I THINK THE PROVISION IS GOOD BY GIVING THE DISTRICT COURT A CHANCE TO INQUIRE INTO THESE MATTERS, BECAUSE I THINK THERE ARE DIFFERENCES OF OPINION ON WHAT THE REAL CASE IS. AND I DON'T THINK YOU CAN SAY, "WELL, THAT'S JUST THE LOW-END CASES."

THERE ARE A LOT OF REAL CASES. SURE, THERE ARE A LOT OF REAL CASES, AND I THINK IN THOSE CASES, THE DISTRICT JUDGE WILL FIND THAT THE BURDENS TO THE SYSTEM WILL NOT BE OUTWEIGHED

BY THE PROBABLE BENEFITS TO THE INDIVIDUALS. AND THAT'S WHY I THINK THE DISCRETION IS IMPORTANT.

HONORABLE PAUL NIEMEYER: I THINK WE'LL HAVE TO END AT THIS POINT. I DO APPRECIATE RECEIVING YOUR TESTIMONY.

MR. GREENBAUM: THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: I HAVE BEEN ADVISED BY THE UNITED STATES MARSHALS THAT WE SHOULD NOT BE MAKING CELLULAR TELEPHONE CALLS IN THIS BUILDING ABOVE THE 15TH FLOOR. THE EXPLANATION FOR THAT WAS NOT GIVEN TO ME. IT MAY BE SOMETHING ELECTRONIC. SO IF YOU HAVE ONE OF THESE LITTLE FLIP PHONES AND WANT TO MAKE A CALL, I'M TOLD TO GO BACK TO THE 15TH FLOOR OR LOWER. IS THAT THE MESSAGE?

WE'LL TRIM THE LUNCH HOUR A LITTLE BIT. WE'RE GOING TO RESUME AT 1:45.

(LUNCH RECESS TAKEN AT 12:50 P.M.)

(PROCEEDINGS RESUMED AT 1:47 P.M.)

HONORABLE PAUL NIEMEYER: MILES RUTHBERG, ARE YOU HERE?

MR. RUTHBERG: YES, SIR.

HONORABLE PAUL NIEMEYER: I THINK WE OUGHT TO CONTINUE WITH YOU. WE'RE GOING TO RESUME OUR AFTERNOON SESSION ON THIS.

TESTIMONY OF MILES N. RUTHBERG

MR. RUTHBERG: THANK YOU, YOUR HONOR. IT'S A PLEASURE TO APPEAR BEFORE THE COMMITTEE TODAY.

MY NAME IS MILES RUTHBERG, I'M A PARTNER AT

LATHAM & WATKINS IN LOS ANGELES. I HAVE LITIGATED MANY SECURITIES CLASS ACTIONS AND ANTITRUST CLASS ACTIONS, AND IN THE LAST COUPLE OF YEARS, HAVE BEEN INVOLVED REPRESENTING ONE OF THE SETTLING DEFENDANTS IN THE BREAST IMPLANT CLASS SETTLEMENT IN FRONT OF JUDGE POINTER, SO I HAVE MORE RECENTLY BECOME ACQUAINTED WITH THE COMPLEXITIES OF MASS TORT CLASS LITIGATION, SOME OF WHICH HAVE BEEN REFERRED TO THIS MORNING.

I DID SUBMIT WRITTEN COMMENTS TO THE COMMITTEE EARLIER THIS WEEK, AND I HEARD ALL THE COMMENTS THIS MORNING, AND I WILL TRY VERY HARD NOT TO JUST REPEAT EITHER ONE OF THOSE.

HONORABLE PAUL NIEMEYER: ACTUALLY, I PROBABLY SHOULD HAVE INTRODUCED THE AFTERNOON SESSION WITH THE NOTION THAT, FIRST OF ALL, WE HAVE FOUND THE TESTIMONY VERY USEFUL, VERY THOUGHT PROVOKING, AND WE WILL CONSIDER IT ALL. WE HAVE HEARD A LOT OF THE ARGUMENTS. PARTICULAR EXAMPLES, WE OBVIOUSLY HAVEN'T HEARD ABOUT. AND WE'RE ALSO INTERESTED IN YOUR VIEWS AS TO WHAT POSITION TO SUPPORT.

I'M SAYING THIS ALL AS A PRELUDE TO THE NOTION THAT THE TIME IS SHORT, AND WE'RE GOING TO TRY TO GET EVERYBODY FIT IN. I HATE TO LEAVE TWO MINUTES FOR THE LAST GUY, THOUGH. SO WITH THAT SAID -- YOU JUST PROMPTED IT -- PLEASE CONTINUE.

MR. RUTHBERG: THANK YOU, YOUR HONOR. I APPRECIATE THAT. WHAT I'LL TRY TO DO IS JUST RESPOND TO A COUPLE OF THINGS THAT CAME UP THIS MORNING.

FIRST, I WAS INTERESTED TO HEAR PROFESSOR MILLER SAY

THAT REALLY, THE BIG ISSUES HERE ARE NOT NEW. I HAD THE PRIVILEGE OF GOING TO PROFESSOR MILLER'S LAW SCHOOL IN THE MID-'70S AND SPENT A LONG TIME DRAFTING A 200-PAGE ARTICLE ON CLASS ACTIONS CALLED "DEVELOPMENTS IN THE LAW OF CLASS ACTIONS," AND I WAS FOOLISH ENOUGH TO LOOK BACK AT THAT THIS WEEK TO SEE WHAT HAD CHANGED OR NOT IN 20 YEARS. AND, FIRST OF ALL, SOMEHOW WE WERE WRITING IN A DIFFERENT LANGUAGE THAT I DON'T RECOGNIZE ANYMORE NOW THAT I HAVE BEEN IN PRACTICE FOR A LONG TIME.

BUT PUTTING ASIDE THE TRANSLATION DIFFICULTIES, I DO AGREE WITH PROFESSOR MILLER THAT, IN FACT, THE BIG ISSUES THAT WE'RE FACING TODAY ARE ISSUES THAT WERE IDENTIFIED IN THE '70S. THEY ARE NOT NEW ISSUES.

CLASS ACTIONS ARE DIFFICULT AND CONTROVERSIAL, PRECISELY BECAUSE THEY HAVE A GREAT SUBSTANTIVE IMPACT. THEY'RE A PROCEDURAL DEVICE, BUT THEY IMPACT SUBSTANCE A GREAT DEAL. MOST FUNDAMENTALLY, THEY ALLOW CLAIMS TO BE BROUGHT THAT OTHERWISE COULDN'T BE BROUGHT, AND THAT HAS AN IMPACT, INDEED.

MORE DISTURBINGLY -- AND I THINK THIS IS REALLY AT THE ROOT OF THE DEFENSE BAR'S CONCERNS ABOUT CLASS ACTIONS -- COURTS HAVE BEEN, I THINK, INCREASINGLY TEMPTED, OVER THE LAST 20 YEARS, TO SOMETIMES IGNORE THE ELEMENTS OF THE UNDERLYING SUBSTANTIVE CLAIMS, OR TO SEE COMMON ISSUES WHERE THERE REALLY AREN'T SUFFICIENT COMMON ISSUES TO JUSTIFY A CLASS. AND WHEN THAT HAPPENS, THAT HAS SUBSTANTIVE IMPACT, BECAUSE, INSTEAD OF TRYING A CASE WITH ALL THE ELEMENTS THAT CONGRESS HAS LAID OUT,

THE CASE THREATENS TO GO TO TRIAL FOCUSING ONLY ON A PIECE OF THE CLAIM, AND THAT DISTORTS THE SUBSTANTIVE LAW.

THAT'S NOT A NEW ISSUE. BUT WHAT IS NEW, I THINK, IS THE FACT THAT COURTS HAVE USED THE CLASS ACTION DEVICE IN THE MASS TORT AREA, FOR EXAMPLE, IN WAYS THAT WERE NOT INTENDED AND WHICH DO DISTORT THE LAW; AND IN MY EXPERIENCE, COURTS ALSO, SOMETIMES, DISTORT THE ELEMENTS OF THE UNDERLYING OFFENSES IN SECURITIES CASES AND ANTITRUST CASES AS WELL.

THE SECOND THING I OBSERVED, LOOKING BACK 20 YEARS, IS THAT WE WERE VERY CONCERNED BACK THEN ABOUT THE FAIRNESS OF SETTLEMENT CLASSES. IT WAS SORT OF A NEW DEVICE BACK THEN, BUT ALREADY INCREASINGLY ACCEPTED. BUT THERE WAS CONCERN ABOUT: HOW IS IT THAT YOU PROTECT THE DIFFERENT INTERESTS THAT ARE REFLECTED IN A CLASS, PARTICULARLY WHEN PLAINTIFFS' LAWYERS AND DEFENSE LAWYERS ARE IN AGREEMENT?

AND EVEN THEN, PEOPLE WERE TALKING ABOUT GUARDIANS AD LITEM, SUB-CLASSIFYING, AND SO FORTH. AND I REALLY THINK THAT THE CONCLUSION THEN EQUALLY APPLIES NOW, WHICH IS THAT: SETTLEMENT CLASSES ARE A NECESSARY THING AND A GOOD THING IF, BUT ONLY IF, THEY ARE ACTIVELY AND PROPERLY SUPERVISED. AND THAT TAKES A LOT OF WORK, UNFORTUNATELY, ON THE PART OF THE COURT. AND THERE IS REALLY NO PANACEA, AND THERE IS NO AVOIDING THE FACT THAT THE COURT HAS TO SPEND A GREAT DEAL OF TIME IF A CLASS ACTION, ESPECIALLY IN A LARGE COMPLEX CASE, IS GOING TO BE FAIR.

I DO SUPPORT THE AMENDMENTS THAT THE COMMITTEE HAS PROPOSED; AND INDEED, I STRONGLY SUPPORT THEM. I DO THINK, THOUGH, IN SEVERAL RESPECTS THAT I'VE IDENTIFIED IN MY WRITTEN SUBMISSION, THAT THE COMMENTS UNDERCUT THE TEXT. AND I'D LIKE TO TRY TO ADDRESS THOSE, VERY BRIEFLY.

FIRST, ON THE APPEAL PROVISION, IN SOME WAYS, THAT'S THE EASIEST AND IN SOME WAYS THE MOST IMPORTANT PROVISION IN THIS WHOLE PACKAGE. I SAY THAT BECAUSE THE SCRUTINY OF AN APPEAL IS, IN MY JUDGMENT, THE BEST WAY TO ELIMINATE SOME OF THE ABUSES THAT WE'VE HEARD ABOUT THIS MORNING IN TERMS OF CLASSES BEING CERTIFIED, WHERE REALLY THEY SHOULDN'T BE. AND I DO KNOW, UNFORTUNATELY, FROM MY OWN EXPERIENCE, THAT SOMETIMES, VERY FINE FEDERAL JUDGES GIVE IN TO THE TEMPTATION TO STRETCH AND CERTIFY A CLASS PRECISELY BECAUSE IT HAS THE EFFECT OF ENCOURAGING A DEFENDANT TO SETTLE.

BACK IN THE '70S, BY THE WAY, IT WAS THE PLAINTIFFS' BAR THAT WANTED CLASS DECISIONS TO BE APPEALABLE, BECAUSE BACK THEN, IT WAS SAID THAT DENYING A CLASS WAS THE DEATH NAIL OF LITIGATION, AND IT WAS IMPORTANT TO HAVE AN APPEAL. AND I POINT THAT OUT ONLY BECAUSE I REALLY DO THINK THAT THE AMENDMENT IS FAIR; IT'S EVEN-HANDED. IT ACTUALLY, IN THE LONG RUN, WILL HELP CURB ABUSES, IN EFFECT, ON BOTH SIDES OF THE LEDGER, AND IT HELPS KEEP THE TRIAL JUDGES ON THE STRAIGHT AND NARROW.

I THINK THAT THE ARGUMENTS AGAINST THE PROVISION DON'T CARRY ANY WEIGHT. I THINK IT IS VERY SIMILAR IN STRUCTURE TO

THE CURRENT INTERLOCUTORY APPEAL SYSTEM. IT JUST ELIMINATES HAVING TO GET CERTIFICATION FROM THE VERY JUDGE WHO MAY HAVE MADE A WRONG DECISION. SO I STRONGLY SUPPORT IT.

I THINK THE APPELLATE COURTS WILL BE ABLE TO EXERCISE THEIR DISCRETION EFFICIENTLY AND QUICKLY. THE PROVISION RECOGNIZES THE NEED NOT TO DELAY CASES BY SAYING THERE IS NO STAY. AND I REALLY THINK THE ARGUMENTS AGAINST, AS I SAY, DON'T CARRY ANY WEIGHT.

I WOULD RECOMMEND DELETING THE COMMENTS WHICH, IN EFFECT, SHAPE THE COURT OF APPEALS' DISCRETION BY SAYING THAT THE DEVICE SHOULD BE USED RARELY, MODESTLY, ET CETERA. I THINK THE APPELLATE COURTS HAVE PLENTY INCENTIVE TO TAKE CARE OF THEMSELVES, JUST LIKE THE TRIAL COURTS DO.

(B)(4) I'M STRONGLY IN SUPPORT OF. I'VE LIVED WITH ONE OF THE MAJOR SETTLEMENT CLASSES IN THE COUNTRY. I SEE ITS VALUE; I SEE ITS CHALLENGES. AND AS I SAID EARLIER, I THINK THAT THE REAL KEY WITH SETTLEMENT CLASSES IS SUPERVISING THEM PROPERLY. BANNING THEM OR DISALLOWING THEM IS NOT THE ANSWER. I PERSONALLY THINK IT'S A GOOD IDEA TO HAVE (B)(4) IN THE RULE, WHATEVER THE SUPREME COURT RULES, BECAUSE I THINK IT'S HELPFUL TO JUDGES TO SEE THAT AUTHORITY THERE. IF THE SUPREME COURT WERE TO AFFIRM THE THIRD CIRCUIT, IT WOULD BE ESSENTIAL, IN MY VIEW, TO AMEND THE RULE. BUT EVEN IF THE COURT REVERSES, WHICH IS WHAT I EXPECT --

HONORABLE PAUL NIEMEYER: IS THAT GOOD STYLE?

MR. RUTHBERG: SIR?

HONORABLE PAUL NIEMEYER: IS THAT GOOD STYLE, FOR OUR COMMITTEE TO REVERSE THE SUPREME COURT A SHORT TIME AFTER IT RULES?

MR. RUTHBERG: OH, I THINK THAT THE SUPREME COURT IS ONLY RULING ON WHAT THE RULE IS NOW, AND I THINK WE ALL KNOW THAT THIS COURT IS VERY LITERALIST, SIR. AND IF THE COURT WERE TO AFFIRM THE THIRD CIRCUIT, IN MY VIEW, IT WOULD BE ONLY BECAUSE SOMEBODY WOULD CARRY THE DAY WITH THE ARGUMENT THAT SOMEHOW, THE PLAIN LANGUAGE OF THE RULE DOESN'T SAY THIS, AND THEREFORE, IT'S NOT AUTHORIZED.

AND IF THAT'S THE WAY THE COURT GOES, THEN I THINK IT LEAVES THIS COMMITTEE FREE TO CHANGE THE RULE. BUT FRANKLY, I THINK THE RULE ALREADY AUTHORIZES IT, AND I THINK IT'S LIKELY THE COURT WILL FIND THAT. AND EVEN IF IT DOESN'T, I THINK IT'S A GOOD IDEA TO CALL IT OUT SPECIFICALLY, HAVE NOTES ON IT, ET CETERA.

MR. THOMAS D. ROWE, JR.: BUT WHAT YOU'RE SAYING ABOUT SUPERVISION OF THE SETTLEMENT, DO YOU THINK THAT IT WOULD BE HELPFUL TO TRY TO ADD ANYTHING, PERHAPS, IN 23(E), ON GUIDANCE, LIKE JUDGE SCHWARZER'S ARTICLE, OR DO YOU THINK THAT'S WELL ENOUGH HANDLED BY FEDERAL CASE LAW?

MR. RUTHBERG: I THINK IT'S BETTER LEFT TO CASE LAW. I THINK THAT HAVING SEEN CLASS ACTIONS IN A VARIETY OF KINDS OF CASES NOW, THE KINDS OF DEVICES THAT ONE USES REALLY MAY DIFFER

QUITE A BIT. I MEAN, SUB-CLASSES MAY WORK IN ONE CONTEXT AND BE A VERY BAD IDEA IN OTHERS. GUARDIANS AD LITEM AND SPECIAL MASTERS WORK IN ONE CONTEXT, NOT IN ANOTHER. I THINK THE REAL KEY IS TO MAKE SURE THE JUDGE IS ACTIVELY INVOLVED. AND A COMMENT TO THAT EFFECT I THINK WOULD BE APPROPRIATE.

FINALLY, THE AMENDMENTS TO (A), (B) AND (F) HAVE BEEN ARGUED VEHEMENTLY FROM BOTH SIDES OF THE BAR. AND I MUST SAY I HEARD MR. SIMON SAY THIS MORNING THAT HE REALLY DOESN'T WANT THEM, BECAUSE HE THINKS IT WILL UNDERCUT CLASS ACTIONS TOO MUCH.

I'M A LITTLE WORRIED THAT THE WAY THE NOTES READ RIGHT NOW, IT WILL ACTUALLY ENCOURAGE JUDGES TO CERTIFY CLASS ACTIONS IN SITUATIONS WHERE INDIVIDUAL ACTIONS COULD NOT BE BROUGHT. I CAME TO THIS COLD AND READ THE COMMENTS AND THOUGHT, "GEE, THIS IS GOING TO GIVE A LOT OF ENCOURAGEMENT TO LAWYERS AND JUDGES TO CERTIFY CASES THAT AREN'T CERTIFIED NOW."

SO I WOULD ACTUALLY SUBMIT THAT THE COMMENTS NEED TO BE CLARIFIED TO MAKE CLEAR THAT COMMON ISSUES STILL NEED TO PREDOMINATE, MOST IMPORTANTLY. THE CASE NEEDS TO BE MANAGEABLE, IMPORTANTLY. AND THEN, TRUE, IF YOU CAN'T BRING AN INDIVIDUAL ACTION, THEN THAT'S A BASIS FOR A CLASS ACTION. BUT THAT, ALONE, IS CERTAINLY NOT ENOUGH. AND I, PERSONALLY, WOULD RATHER SEE THOSE AMENDMENTS NOT MADE THAN MADE WITH COMMENT THAT SUGGEST THAT CLASS ACTIONS ACTUALLY SHOULD BE USED MORE BROADLY THAN THEY ARE NOW.

WITH THAT, I THINK I'LL SIT DOWN, UNLESS THERE ARE ANY

QUESTIONS.

HONORABLE PAUL NIEMEYER: ALL RIGHT. THANK YOU.

MR. RUTHBERG: THANK YOU.

HONORABLE PAUL NIEMEYER: MR. ROUNSAVILLE?

TESTIMONY OF STUART BAIRD

MR. BAIRD: MR. CHAIRMAN, MY NAME IS STUART BAIRD. MR. ROUNSAVILLE IS THE GENERAL COUNSEL OF WELLS FARGO. HE WAS HERE THIS MORNING WHEN HE WAS SCHEDULED TO SPEAK, BUT HE HAS AFTERNOON COMMITMENTS; AND ONE OF THE DISADVANTAGES OF HAVING YOUR OFFICE IN SAN FRANCISCO IS HE HAS TO MEET THEM.

HONORABLE PAUL NIEMEYER: WELL, IF HE HAD SPOKEN UP, I WOULD HAVE ACCOMMODATED HIM.

MR. BAIRD: I ACTUALLY PARTICIPATED VERY FULLY IN THE PREPARATION OF HIS COMMENTS, WHICH ARE BEFORE THE GROUP. AND I WOULD JUST LIKE TO MAKE A FEW POINTS.

I AM THE MANAGER OF LITIGATION AT WELLS FARGO, AND I HAVE BEEN FOR THE LAST FIVE YEARS.

HONORABLE C. ROGER VINSON: WHAT WAS YOUR NAME AGAIN?

MR. BAIRD: STUART BAIRD, B-A-I-R-D.

I HAVE BEEN PRINCIPALLY RESPONSIBLE FOR RESOLVING THE CLASS ACTION LITIGATION AGAINST THE BANK, WHICH HAS PROBABLY ACCOUNTED FOR OVER HALF OF THE ENTIRE LITIGATION EXPENSES OF THE BANK DURING THAT PERIOD.

DURING THAT PERIOD, WE HAVE HAD APPROXIMATELY 30 CLASS ACTIONS FILED AGAINST THE BANK. THERE ARE CURRENTLY 19 PENDING.

THE TREND IS DEFINITELY UPWARD. THERE WAS THREE NEW ACTIONS FILED IN '94; THERE WAS FIVE IN '95; AND THERE WAS 11 IN 1996.

WE, OF COURSE, GOT ALL KINDS OF CLASS ACTIONS, BUT THE VAST MAJORITY ARE ACTIONS WHICH ARE FILED IN THE NAME OF THE RETAIL CONSUMER ALLEGING THAT A PARTICULAR CHARGE IS UNLAWFUL, FOR ONE REASON OR ANOTHER; FOR EXAMPLE, THE CREDIT CARD LATE FEE, A PORTION OF THE FIRST-PLACE AUTO INSURANCE PREMIUM, A PORTION ON THE PREMIUM CHARGED FOR COLLATERAL PROTECTION ON A HOMEOWNERS LOAN, RESIDENTIAL ESCROW FEES, A BAD CHECK FEE ON GROUNDS IT'S UNCONSCIONABLE.

IN OUR VIEW, THESE CASES ALL HAVE THE FOLLOWING TRAITS IN COMMON: THE CHARGES WERE FULLY DISCLOSED TO THE CONSUMER; THE IDENTICAL CLAIM HAS BEEN ASSERTED BY THE CLASS ACTION BAR AGAINST MANY OTHER FINANCIAL INSTITUTIONS.

AND TO ILLUSTRATE HOW SOMETIMES THESE CASES EVOLVED, WE'VE ATTACHED TO MR. ROUNSAVILLE'S COMMENTS A LETTER OF SOLICITATION ONE OF OUR CUSTOMERS BROUGHT IN TO US FROM A CLASS ACTION ATTORNEY, WHICH IS A MASS MAILING, ASKING IF THEY WOULD BE INTERESTED IN BEING A PLAINTIFF.

THE LIABILITY STANDARDS ARE VERY VAGUE, MAKING SUMMARY DISPOSITION VERY DIFFICULT. THE CHARGES ARE THAT THE CONTRACT DOES NOT AUTHORIZE A PORTION OF THE CHARGE, OR THE CHARGE IS UNCONSCIONABLE OR IT EXCEEDS COST, AND THE LAW DOES NOT DEFINE COST. SO THERE IS NO WAY OF GETTING SUMMARY RESOLUTION OF THESE CLAIMS.

THEY ARE ALL VERY CERTIFIABLE BECAUSE THE CHARGE IS TO ALL OUR CUSTOMER BASE. SO WE HAVE VERY FEW OCCASIONS IN THESE CASES WHERE WE CAN EFFECTIVELY CHALLENGE CERTIFICATION.

SO INSTANTLY, WHAT HAPPENS IS WE HAVE A CHARGE, A DOLLAR, $5, WHATEVER IT IS, SPREAD OVER MILLIONS OF CUSTOMERS WHO HAVE PAID IT. THE STATUTE OF LIMITATIONS PERIOD IS USUALLY A MINIMUM OF FOUR YEARS. AND SO ALL OF A SUDDEN, YOU'RE LOOKING AT A MULTIMILLION DOLLAR LAWSUIT ATTACKING SOME FEE.

USUALLY, AGAIN, IT'S COMMON THAT WE HAVE NOT RECEIVED SIGNIFICANT CUSTOMER COMPLAINTS ABOUT THESE FEES. INDEED, WE GET MORE COMPLAINTS FROM CUSTOMERS COMPLAINING ABOUT THE DE MINIMUS DISTRIBUTIONS THEY GET AS A RESULT OF THE SETTLEMENT THAN WE TYPICALLY HAVE GOTTEN ABOUT THE FEE, WHEN IT WAS IN PRACTICE.

TO GIVE YOU AN EXAMPLE OF HOW THESE CASES WORK IN THE REAL WORLD, AND I CAN'T EMPHASIZE TOO STRONGLY HOW IMPORTANT IT IS TO APPRECIATE HOW THE CLASS ACTION PROCESS REALLY WORKS. WE HAVE HAD FIVE CLASS ACTIONS DIRECTED AT VARIOUS CHARGES THAT OUR CREDIT CARD CUSTOMERS PAY. THE AVERAGE DISTRIBUTION TO CLASS MEMBERS, AS A RESULT OF THE RESOLUTION OF THESE FIVE CASES, HAS BEEN $9.07. THOUSANDS OF CHECKS HAVE BEEN --

HONORABLE C. ROGER VINSON: SEVEN OR 70?

MR. BAIRD: SEVEN, $9.07. THOUSANDS OF CHECKS, PROBABLY TENS OF THOUSANDS, HAVE BEEN FOR LESS THAN $5. THE TOTAL COST OF ADMINISTERING THESE CASES, NOT INCLUDING

ATTORNEYS' FEES, HAS BEEN $1.7 MILLION. THE TOTAL ATTORNEYS' FEES PAID BY THE BANK TO PLAINTIFFS' ATTORNEYS HAS BEEN $9.4 MILLION. THE BANK'S OWN ATTORNEYS' FEES HAVE BEEN IN EXCESS OF FIVE MILLION.

MR. THOMAS D. ROWE, JR.: AND WHAT HAVE BEEN THE TOTAL DAMAGES AWARDED AND PAID?

MR. BAIRD: 14 MILLION, FIVE CASES.

IN ADDITION TO THE --

HONORABLE PAUL NIEMEYER: YOU MEAN IN THAT CASE --

MR. BAIRD: IT WAS FIVE CASES, YOUR HONOR.

HONORABLE PAUL NIEMEYER: IN THOSE FIVE CASES, IF YOU ADD UP THE ATTORNEYS' FEES FROM BOTH SIDES AND THE ADMINISTRATIVE COSTS, IT ROUGHLY IS EQUIVALENT TO THE AGGREGATE OF CHARGES?

MR. BAIRD: RIGHT.

MR. THOMAS D. ROWE, JR.: AND THE PLAINTIFFS' ATTORNEY FEES ARE COMING OUT OF THE RECOVERY OR IN ADDITION?

MR. BAIRD: THEY ARE IN ADDITION.

HONORABLE JOHN L. CARROLL: IS THE PROBLEM THE CLASS ACTION OR THE PROBLEM WHICH UNDERLIES THE CLASS ACTION?

MR. BAIRD: I'D HAVE TO SAY, YOUR HONOR, THAT IT'S THE CLASS ACTION, BECAUSE NOBODY WOULD SUE US FOR $9.

HONORABLE JOHN L. CARROLL: BUT YOU VIOLATED THE LAW.

MR. BAIRD: BUT, YOUR HONOR, YOU KNOW WHAT THE LAW IS, IF I MIGHT ADDRESS. THE LAW IN CALIFORNIA IS THAT ONE CANNOT

CHARGE A CREDIT CARD LATE FEE WHICH EXCEEDS THE COST, OR AT LEAST THAT'S WHAT'S EVOLVED TO BE THE LAW AFTER ALL THIS LITIGATION, WHICH HAS BEEN PRETTY MUCH CONSTANT SINCE 1986.

AND THE LAW DOES NOT DEFINE COST. IF YOU HIRE A BIG SIX ACCOUNTING FIRM TO TELL YOU WHAT THE COSTS ARE, THEY WILL CHARGE YOU AN ENORMOUS COST AND TELL YOU THAT IT'S VERY VARIABLE. IS IT MARGINAL COST? IS IT FULLY ALLOCATED COST? THE LAW GIVES NO GUIDANCE ON THIS.

TO THE STANDARD IS VERY VAGUE. YES, I THINK THE LAW IS UNWORKABLE. AND INDEED, AS A RESULT OF ALL THIS LITIGATION, THE CALIFORNIA LEGISLATURE HAS PASSED A BILL WHICH REGULATES THE FEE TOO LATE, I MIGHT ADD, BECAUSE CALIFORNIA NO LONGER HAS A CREDIT CARD ISSUER OF ANY MAJOR CONSEQUENCE, BECAUSE THEY'VE ALL LEFT THE STATE, PRECISELY BECAUSE OF THIS LITIGATION, WHICH IS REALLY QUITE REGRETTABLE WHEN YOU THINK THAT IT WAS RIGHT HERE IN SAN FRANCISCO THAT THE VISA CARD AND THE MASTERCARD, AS WE NOW KNOW IT, STARTED IN THE 1960S, THE BANK OF AMERICA CARD, WHICH EVOLVED INTO VISA, AND THE CALIFORNIA BANKERS ASSOCIATION, WHICH HAS EVOLVED INTO MASTERCARD. SO WHERE THE CREDIT CARD INDUSTRY STARTED, IT NO LONGER EXISTS BECAUSE OF THESE CLASS ACTIONS.

FOR ALL OF THESE REASONS, THE BANK STRONGLY SUPPORTS (B)(3)(F). AND WHILE WE SUPPORT ALL OF THE PROPOSALS YOU'RE CONSIDERING AND WOULD, INDEED, URGE OTHERS, I JUST WANTED TO FOCUS BRIEFLY ON THAT PROVISION.

WE THINK THE RULE IS FINE, BUT WE THINK THE COMMENTS COULD BE STRENGTHENED. AND WE HAVE ATTACHED A REDLINED VERSION OF THE COMMENTS TO RULE (B)(3)(F) WITH SOME SUGGESTIONS. AND BASICALLY, WE FIND THE EFFORT TO DEFINE THE DIFFERENCE BETWEEN THOSE CLAIMS WHICH ARE BELOW AN ACCEPTABLE THRESHOLD AND THOSE WHICH ARE ABOVE ARE A LITTLE -- THE LANGUAGE IS A LITTLE INCONSISTENT, SPEAK OF CLAIMS WHICH ARE TRIVIAL OR SLIGHT, AS OPPOSED TO CLAIMS WHICH ARE SIGNIFICANT. WE THINK THIS WILL JUST CREATE CONFUSION ITSELF AND WOULD SUGGEST THAT THE LANGUAGE BE CONSISTENT AND JUST USE THE TERMS "THOSE CLAIMS WHICH ARE SIGNIFICANT" AND "THOSE WHICH ARE NOT SIGNIFICANT."

SECONDLY, ONE OF THE FEW THINGS THAT I AGREED WITH PROFESSOR MILLER ABOUT THIS MORNING WAS HIS RECOMMENDATION THAT THE COMMITTEE GIVE A SPECIFIC THRESHOLD AND MORE CONCRETE GUIDANCE. HE SUGGESTED $10; WE WOULD SUGGEST $300.

MR. FRANCIS H. FOX: HOW MUCH?

MR. BAIRD: 300. AND THE REASON WHY WE THINK 300 IS, ON BALANCE, THE COST OF THE CLASS ACTION PROCESS, IT'S JUST NOT WORTH IT TO SOCIETY, TO THE JUDICIARY, AND PROBABLY, MOST IMPORTANTLY, TO THE CLASS MEMBERS, IF THEY DON'T HAVE A CLAIM THAT EXCEEDS THAT, GIVEN THE HUGE EXPENSES, THE COERCIVE EFFECTS OF CLASS ACTION LITIGATION.

MR. SOL SCHREIBER: COUNSEL, DO YOU PUT ANY WEIGHT ON THE ISSUE OF DETERRENCE RATHER THAN FEES?

MR. BAIRD: WITH ALL RESPECT, AND I'VE SPENT SOME TIME

READING THE HISTORY OF RULE 23 AS WE NOW KNOW IT. I DO NOT SEE THE PURPOSE OF RULE 23 BEING A PENAL STATUTE. AND I DO NOT THINK IT'S APPROPRIATE TO CONSIDER IT TO BE A PENAL STATUTE, IF ONLY FOR THIS REASON: PENAL STATUTES ARE BEST LEFT TO THE DELIBERATIONS OF THE LEGISLATURE, WHICH CAN CONSIDER ALL THE PROS AND CONS, THE MARKET IMPACT OF LITIGATION, ET CETERA. NO LEGISLATURE WOULD PASS AS A PENALTY FOR A CONSUMER PROTECTION VIOLATION WHAT IT TYPICALLY COSTS TO DEFEND A CLASS ACTION.

SO I THINK THE CLASS ACTION DEVICE IS AN EXTRAORDINARILY INEFFICIENT AND UNWISE METHOD OF PENALIZING THE DEFENDANT IN THOSE CASES WHICH, ADMITTEDLY, PROVIDE NO BENEFIT TO THE CLASS MEMBER.

I THINK THE COMMITTEE SHOULD BE FOCUSED ON THE BENEFITS TO THE CLASS. AND IF IT DOESN'T HAVE BENEFITS TO THE CLASS, I DON'T THINK IT SHOULD BE JUSTIFIED ON GROUNDS THAT IT PROVIDES SOME PUNISHMENT. RULE 23 IS A VERY IMPERFECT DEVICE FOR PUNISHING.

HONORABLE JOHN L. CARROLL: BUT IN TERMS OF YOUR OWN PRACTICE, YOU CHANGED IT AFTER YOU SETTLED THE CLASS?

MR. BAIRD: YOUR HONOR, WHEN THE CREDIT CARD LATE FEE STARTED IN CALIFORNIA, THE HIGHEST MARKET CHARGE WAS $5. IT WAS THREE- TO $5. IT'S NOW, BY STATUTE, 15. IN THE MARKETPLACE, MANY CREDIT CARDS ARE AT $20.

THERE IS AN ENORMOUS DIFFERENCE BETWEEN ACTIONS ON A CLASS BASIS, WHICH SEEK TO PROSPECTIVELY ENJOIN WRONGDOING, AND

THOSE WHICH RETROACTIVELY SEEK TO RECOVER DAMAGES, BASED UPON A STANDARD THAT A DECISION MAKER, AT THE TIME, COULD HAVE NO GUIDANCE BY.

AND SO WE STRONGLY ENCOURAGE, AS AN ALTERNATIVE TO (B)(3), DAMAGE ACTIONS FOR THESE CONSUMER WRONGS THAT HAVE DE MINIMUS DISTRIBUTIONS, A PROSPECTIVE CLAIM THAT, IF THERE IS SOME WRONGDOING IN THE MARKETPLACE, CAN BE ENJOINED, AND THE DECISION MAKER CAN MAKE DECISIONS WITH SOME GUIDANCE.

MR. SOL SCHREIBER: WHY DIDN'T YOU ACCEPT AGGREGATE AS A FAIR WAY? THAT IS, IF THERE ARE A MILLION BANK CUSTOMERS AND THE CLAIM IS $15, POTENTIALLY THAT'S A $15 MILLION CLAIM. WHY IS IT THAT YOU DON'T SAY, INSTEAD OF $300 A CLAIM, SAY, LOOK TO THE AGGREGATE, AND IF IT'S SUFFICIENTLY LODGED, THEN THAT WOULD BE THE APPROPRIATE WAY OF HANDLING THE CASE?

MR. BAIRD: WELL, WITH ALL RESPECT, THE AGGREGATION NUMBER, WHICH DOES DRIVE THESE THINGS BECAUSE OF THE IMPLACABLE MATH YOU HEARD ABOUT THIS MORNING, DISTORTS THE PROCESS, I THINK, IN A VERY UNWISE FASHION, FOR THE VERY REASONS YOU SAID. IF YOU'RE A GENERAL COUNSEL OF A DEFENDANT AND YOU'RE FACED WITH A HUNDRED-MILLION-DOLLAR CLAIM, REGARDLESS OF ITS MERITS, REGARDLESS OF ITS MERITS, YOU PRETTY MUCH, IF THE PLAINTIFFS' LAWYER CALLS UP AND WANTS TO SETTLE FOR FIVE PERCENT OF THAT, YOU PROBABLY HAVE TO DO IT. AND THE PLAINTIFFS' ATTORNEY WILL STILL GET HIS MILLIONS.

MR. SOL SCHREIBER: BUT IF A PERSON HAS A $15 MILLION

CLAIM AND THERE ARE A MILLION BANK CUSTOMERS AND NOTHING IS DONE ABOUT IT, ISN'T THE BANK, THEORETICALLY, GETTING AWAY WITH A $15 MILLION ACTIVITY?

MR. BAIRD: WITH ALL RESPECT, WE'RE NOT TALKING ABOUT BEING ABLE TO ACT IN A WRONGFUL FASHION AND NOT HAVING ANYTHING DONE ABOUT IT. THERE ARE MANY THINGS THAT CAN BE DONE TO ADDRESS WRONGDOING BY A CORPORATE DEFENDANT IN OUR CULTURE.

ONE OF THEM IS WE'RE SUPPOSED TO HAVE FAITH IN THE FREE MARKET SYSTEM, WHICH REGULATES ITSELF. BUT BEYOND THAT, IF LITIGATION IS THE ISSUE, THERE IS THIS PROSPECTIVE RELIEF, WHICH IS MUCH MORE EFFICIENT, NOT --

HONORABLE PAUL V. NIEMEYER: ALL RIGHT. I THINK YOU'VE ABOUT RUN OUT OF TIME.

MR. BAIRD: THANK YOU, CHAIR.

MR. FRANCIS H. FOX: I HAVE ONE QUESTION, PLEASE.

YOU DO PROPOSE AN INJUNCTION SECTION --

MR. BAIRD: NO. IT'S CURRENTLY THE LAW.

MR. FRANCIS H. FOX: I'M SORRY. WHAT?

MR. BAIRD: I BELIEVE IT'S CURRENTLY IN THE RULE.

MR. FRANCIS H. FOX: WHICH SECTION?

MR. BAIRD: (B)(2); IS IT NOT?

MR. FRANCIS H. FOX: YOU DIDN'T THINK THERE SHOULD BE A NEW ONE.

MR. BAIRD: RIGHT.

MR. FRANCIS H. FOX: I UNDERSTAND.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH, MR. BAIRD.

MR. BAIRD: THANK YOU.

HONORABLE PAUL NIEMEYER: MR. RINGWOOD, IS HE HERE?

TESTIMONY OF STEPHEN B. RINGWOOD

MR. RINGWOOD: GOOD AFTERNOON, YOUR HONORS, MEMBERS OF THE COMMITTEE. MY NAME IS STEVE RINGWOOD, AND I COME TO YOU IN MY CAPACITY AS SENIOR LITIGATION COUNSEL FOR KAISER ALUMINUM, WHERE I HAVE, FROM AN IN-HOUSE VANTAGE POINT, OVERSEEN AND MANAGED THEIR LITIGATION DOCKET FOR APPROXIMATELY 24 YEARS. I AM NOT A CLASS ACTION LAWYER; I'M NOT EVEN A TRIAL LAWYER. I'M AN IN-HOUSE OVERSEER THAT GETS IN ON STRATEGY DECISIONS AND WHAT HAVE YOU.

BUT I WANTED TO GIVE YOU THE PERSPECTIVE OF A COMPANY THAT BELIEVES IT IS BEING FACED WITH A PERPETUAL STREAM OF MASS TORTS FROM MYRIAD DIRECTIONS OUT THERE IN A SITUATION THAT'S OUT OF HAND. KAISER'S LITIGATION EXPERIENCE WITH CLASS ACTIONS AND OTHER CLAIMS AGGREGATION DEVICES STEMS LARGELY FROM TWO DIFFERENT STRAINS OF PRODUCT LIABILITY CASES THAT WE HAVE BEEN FACED WITH FOR ABOUT 15 YEARS. IT'S A PLYWOOD CASE THAT DATES BACK TO OUR HISTORY, WHEN WE WERE FAR MORE DIVERSIFIED THAN WE ARE NOW, HAVING TO DO WITH AGRICULTURAL CHEMICALS AND ASBESTOS.

THE PLYWOOD CASES CURRENTLY NUMBER IN THE TENS OF THOUSANDS, AND MY DEFENSE AND SETTLEMENT EXPENSE COSTS TO DATE ARE IN THE TENS OF MILLIONS OF DOLLARS.

THE ASBESTOS CASES NUMBER OVER A HUNDRED THOUSAND, AND MY COMPARABLE COSTS TO DATE ARE OVER A HUNDRED MILLION DOLLARS.

THESE CLAIMS ARE SEEMINGLY ENDLESS. THEY'RE STAGGERINGLY EXPENSIVE. I'D BE THE FIRST TO ADMIT TO YOU THAT THE VAST MAJORITY OF THEM ARE NOT BONA FIDE CLASS ACTIONS THAT FIT NEATLY WITHIN ANY NICHE OF RULE 23 THAT YOU'RE HERE HEARING DEBATE ON TODAY. TO THE CONTRARY, WE HAVE HAD OUR BONA FIDE CLASS ACTION EXPERIENCES AND HAVE HANDLED THEM, BUT THEY ARE ATYPICAL. FAR MORE --

HONORABLE PAUL NIEMEYER: THERE ARE SO MANY CLASS ACTIONS INVOLVED IN ASBESTOS, WHAT CONTROL IS THERE THAT SOMEBODY DOESN'T JOIN TWO OR THREE CLASSES?

MR. RINGWOOD: THERE IS NONE. THEY DO OR COULD, BUT --

HONORABLE PAUL NIEMEYER: THEORETICALLY, WE HEARD A LOT OF TESTIMONY IN THE CLASS ACTIONS, AND WE HEARD EVEN INSTANCES WHERE THE CHECK GOES TO THE ATTORNEY AND HE, THEN, ALLOCATES TO AN UNDESCRIBED LIST OF PEOPLE MONIES.

WHY COULDN'T YOU JUST KEEP RECYCLING THOSE PEOPLE? I MEAN, IT'S AN ENORMOUS FRAUD, BUT...

MR. RINGWOOD: LET'S PUT IT THIS WAY. I'M NOT SURE THAT KIND OF FRAUD, IF AND AS IT SURFACES, WOULD SHOCK ME ANYMORE.

I AM HERE IN SUPPORT OF THE IMPORTANT IMPROVEMENTS TO RULE 23, BECAUSE I BELIEVE ANY GRADUAL SLIPPAGES IN THE

ENFORCEMENT OF THAT RULE HAVE CONTRIBUTED TO VAST INCREASES IN THE USE OF MASS TORT AGGREGATE OF TECHNIQUES AT THE FEDERAL AND STATE COURT LEVEL, ESPECIALLY IN THE STATE COURTS.

FROM MY PERSPECTIVE, FROM KAISER'S PERSPECTIVE, RULE 23 AMOUNTS TO A MUCH-NEEDED AFFIRMATION THAT DISPERSED MASS TORT CLAIMS ARE GENERALLY INAPPROPRIATE FOR AGGREGATION AT TRIAL, NO MATTER WHAT PROCEDURAL RULE IS STRAINED TO JUSTIFY THE CLASS OR THE CONSOLIDATION.

GIVEN THE TENDENCY OF THE STATE COURTS TO PATTERN THEIR OWN PROCEDURAL RULES AFTER THE FEDERAL MODEL, I REALLY BELIEVE THAT THE CHANGES WE CONTEMPLATE TODAY, IF IMPLEMENTED OVER THE LONG RUN, WOULD EVENTUALLY DISCOURAGE UNFAIR MASS TORT CONSOLIDATIONS IN THE VARIOUS STATES. AND EVEN IF THEY DON'T, EVEN IF THE AMENDMENTS ULTIMATELY DIDN'T HAVE THAT SALUTARY EFFECT THAT I WAS HOPING FOR, THEN SUBSECTION (B)(4), THE SETTLEMENT CLASS CODIFICATION, WOULD AT LEAST PRESERVE THE ONLY JUDICIALLY-AVAILABLE SAFETY VALVE, SHORT OF THE BANKRUPTCY CODE, ON THE HARMFUL EFFECTS OF RAMPANT CLAIMS AGGREGATION.

I SEE (B)(4) AS A NECESSARY CONFIRMATION OF A USEFUL, LONGSTANDING PRACTICE. I THINK WE NEED TO GET OVER THE DOUBT THAT THE THIRD CIRCUIT'S TWO DECISIONS HAVE CAST ON THAT PRACTICE.

THE BOTTOM LINE TO ME IS THAT WITHOUT THE ABILITY TO SETTLE ON A CLASS-WIDE BASIS THE MYRIAD DISPARATE CLAIMS THAT ARE FREQUENTLY AGGREGATED IN TODAY'S COURTS, CORPORATIONS ARE

LEFT WITH HUGE, UNFAIR TRANSACTIONAL COSTS, EITHER AT TRIAL OR IN SETTLING CLAIMS WITHOUT MERIT, THAT THEY WOULD NOT OTHERWISE HAVE SETTLED, BUT THAT BY VIRTUE OF THE MERITS' MASKING EFFECT OF THE AGGREGATION PROCESS, COMPRISE THE MAJORITY OF THE CLAIMS.

I THINK THAT BOTH CLASS MEMBERS AND DEFENDANTS ALIKE NEED THE PROTECTION AFFORDED BY SETTLEMENT CLASSES. CLASS MEMBERS ARE BETTER PROTECTED THAN THEY WOULD BE IN A LITIGATION CLASS. MORE IS KNOWN UP FRONT, CAN BE EVALUATED IN THE CONTEXT OF A FAIRNESS HEARING, SCRUTINY IN THE CERTIFICATION PROCESS. FOR MY MONEY, THE DEFENDANTS GET A PREDICTABILITY, A MANAGEABILITY OF THEIR ULTIMATE LIABILITY, WITH SIGNIFICANTLY REDUCED WASTEFUL TRANSACTION COSTS.

SO I WANT TO CONFINE MY COMMENTS TO SECTION (B)(4), BECAUSE I THINK FROM KAISER'S STANDPOINT, THAT IS THE MOST KEY SECTION, ALTHOUGH I HAVE HEARD AND WE GENERALLY CONCUR WITH THE ARGUMENTS IN FAVOR OF THE OTHER IMPROVEMENTS TO RULE 23.

I GUESS I WOULD CLOSE BY CHARACTERIZING THE AMENDMENTS THAT WE'RE HERE TODAY TO TALK ABOUT AS A COMMENDABLE START. WE RECOGNIZE THAT A FULL SOLUTION TO THE CLAIMS AGGREGATION ABUSES THAT HAVE BECOME AN UNFORTUNATE HALLMARK OF MASS TORT LITIGATION WOULD INCLUDE PRE-EMPTIVE LEGISLATION AND WHAT HAVE YOU. BUT THE IMPORTANCE OF THE RULE CHANGES THAT WE'RE LOOKING AT TODAY CAN'T BE OVERSTATED.

I APPLAUD THE COMMITTEE FOR ITS FOCUS ON THESE INITIAL STEPS, WHICH I FERVENTLY HOPE WILL LEAD TO MASS TORT REFORM DOWN

THE ROAD, AND I THANK YOU VERY MUCH FOR LISTENING TO MY VIEW.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH.

MR. MONTGOMERY, IS HE HERE?

MR. MONTGOMERY: YES, SIR.

TESTIMONY OF WILLIAM A. MONTGOMERY

MR. MONTGOMERY: GOOD AFTERNOON. I AM VICE-PRESIDENT AND GENERAL COUNSEL OF STATE FARM INSURANCE COMPANIES. IT ALSO HAPPENS THAT I AM A CLASSMATE OF PROFESSOR MILLER'S, BUT I DECLINE TO CHARACTERIZE MYSELF AS AN OLD FOGY.

BEFORE JOINING STATE FARM, I HAD ABOUT 30 YEARS OF EXPERIENCE REPRESENTING CORPORATE DEFENDANTS IN VARIOUS KINDS OF CLASS ACTIONS, INCLUDING SMALL CLAIMS AND CONSUMER CLASS ACTIONS. I SUPPORT ALL OF THE AMENDMENT THAT THE COMMITTEE HAS PROPOSED, AND I ESPECIALLY ENDORSE THE ADDITION OF RULE 23 (B)(3)(F), WHICH I HAVE BEEN CALLING FACTOR (F). I CALL IT FACTOR (F) IN MY WRITTEN STATEMENT.

STATE FARM IS THE LARGEST WRITER OF AUTO AND HOMEOWNERS INSURANCE IN THE UNITED STATES, AND IS A LEADING WRITER OF LIFE INSURANCE. ITS SIZE MAKES THE COMPANY A TARGET FOR CLASS ACTIONS BY A VARIETY OF PLAINTIFFS' LAWYERS. AND, OF COURSE, THEY ALLEGE HUGE COLLECTIVE DAMAGES. THEY HAVE BEEN RISING. THE ACTIONS FILED AGAINST US HAVE BEEN RISING. IN THE EARLY 1990S, WE HAD JUST A HANDFUL. AT THE PRESENT TIME, WE HAVE OVER 50 CLASS ACTIONS PENDING AGAINST THE COMPANY. MOST OF THESE CASES ARE CONSUMER CLASS ACTIONS, COMPLAINING ABOUT

PRACTICES SAID TO AFFECT A BROAD GROUP OF STATE FARM POLICY HOLDERS INVOLVING SMALL AMOUNTS PER CLAIM.

I BELIEVE FACTOR (F) WOULD BE A CONSTRUCTIVE STEP TOWARD ADDRESSING THE DRAIN THAT THIS LITIGATION PRACTICES UPON, NOT ONLY THE DEFENDANTS, BUT ALSO THE JUDICIAL SYSTEM. AS MANY HAVE ALREADY TESTIFIED, MOST OF THESE CASES, JUST ABOUT ALL OF THEM, GET SETTLED. BUT MOST OF THESE SETTLEMENTS ARE OF LITTLE INTEREST TO A LARGE PROPORTION OF THE CLASS, AND MOST MEMBERS OF THE CLASS RECEIVE NOTHING AS A RESULT OF THE SETTLEMENT.

CONSUMER CLASS ACTION SETTLEMENTS TYPICALLY EMPLOY A CLAIMS PROCEDURE, UNDER WHICH EACH CLASS CLAIMANT WHO COMES FORWARD IS ENTITLED TO A SPECIFIC PAYMENT, OR A PAYMENT DETERMINED BY SOME FORMULA THAT'S PROVIDED IN THE SETTLEMENT AGREEMENT.

SO WHILE ALL DEFINED CLASS MEMBERS ARE BOUND BY THE JUDGMENT, IF THEY DON'T OPT OUT, ONLY THOSE WHO SUBMIT CLAIMS RECOVER UNDER THE SETTLEMENT. AND EVEN WHERE VERY EXTENSIVE INDIVIDUAL AND PUBLISHED NOTICE IS GIVEN, AND EVEN WHERE THE CLAIMS PROCEDURE IS SIMPLE AND ROUTINE, VERY, VERY FEW, IN OUR EXPERIENCE, OF THESE CLASS MEMBERS, COME FORTH AND SUBMIT CLAIMS.

WHY IS THAT SO? OF COURSE, I DON'T KNOW FOR CERTAIN, BUT I WOULD SAY THAT A FAIR PRESUMPTION IS THAT THE MATTERS COMPLAINED ABOUT ARE SIMPLY INSIGNIFICANT TO THE CONSUMERS ON WHOSE BEHALF THE CASE IS BROUGHT. THE PRIMARY BENEFICIARIES OF

MOST CONSUMER CLASS ACTIONS ARE CLASS COUNSEL, WHO NORMALLY ARE REWARDED WITH ATTORNEYS' FEES THAT ARE FAR OUT OF PROPORTION TO THE TOTAL AMOUNT THAT IS ACTUALLY RECOVERED BY THE CLASS MEMBERS.

I KNOW THE FEDERAL JUDICIAL CENTER SEEMS TO HAVE REACHED THE OPPOSITE CONCLUSION, BUT I RESPECTFULLY SUBMIT THAT THAT STUDY IS NOT SUPPORT FOR SUCH CONCLUSION. THEY SAY THAT THEY DID NOT CONSIDER THE NUMBER OF ACTUAL CLAIMS THAT CLASS MEMBERS ASSERTED TO RECOVER SETTLEMENT FUNDS. THERE IS NO BASIS. THERE IS NO WAY THEY COULD REACH A CONCLUSION THAT'S CONTRARY TO WHAT I HAVE FOUND IS THE REALITY IN THESE CASES.

NOW, I UNDERSTAND THAT AT LEAST A MAJORITY OF THE ADVISORY COMMITTEE HAS DETERMINED THAT THE CENTRAL PURPOSE OF FACTOR (F) IS TO FOCUS ON THE INDIVIDUAL CLAIMS BEING AGGREGATED AND TO WEIGH THE PROBABLE RELIEF TO THOSE INDIVIDUAL CLAIMANTS AGAINST THE FINANCIAL AND ADMINISTRATIVE BURDENS OF THE LITIGATION.

I CERTAINLY AGREE WITH THIS DIRECTION. HOWEVER, I WOULD URGE THE COMMITTEE TO CLARIFY AND REINFORCE THIS PURPOSE IN THE COMMENTARY. THERE ARE CERTAIN PORTIONS OF THE DRAFT COMMENTARY THAT TEND TO UNDERCUT IT; AND INDEED, I WOULD SAY TEND TO CONTRADICT IT. SO, FOR THAT REASON, I HAVE MADE RECOMMENDATIONS FOR MODIFICATIONS TO THE DRAFT NOTE, AND THEY ARE SET FORTH WITH SPECIFICITY IN MY WRITTEN STATEMENT.

MY FIRST RECOMMENDATION DEALS WITH THE PASSAGE AND THE

GENERAL INTRODUCTION ON PAGE 46, WHICH TOUTS CLASS LITIGATION, THAT IS TO SAY, SMALL CLAIM LITIGATION, AS ONE OF THE MOST IMPORTANT ROLES IN THE VITAL CORE OF RULE 23(B) LITIGATION. FOR THE REASONS I HAVE GIVEN, I REALLY THINK THIS APOTHEOSIS OF SMALL CLAIMS CLASS LITIGATION IGNORES REALITY. AND I WOULD DELETE THAT ENTIRE SECTION. THERE IS ABOUT EIGHT OR NINE LINES IN THAT PAGE 46 THAT I WOULD SIMPLY DELETE.

IF YOU DO NOT CHOOSE TO DELETE IT, I'VE MADE SOME SUGGESTIONS FOR REVISION. I ALSO HAVE SEVERAL SUGGESTIONS FOR REVISING THE COMMENTARY ON PAGE 50, ALL OF WHICH IS SET FORTH IN MY WRITTEN STATEMENT.

FIRST, THE COMMENTARY SHOULD ENCOURAGE THE COURT TO CONSIDER WHETHER THE DEFENDANT OR ANY REGULATORY AGENCY HAS ALREADY RECEIVED A SUBSTANTIAL NUMBER OF INDIVIDUAL COMPLAINTS CHALLENGING THE PRACTICE AT ISSUE, WHETHER THE DEFENDANT HAS ALREADY TAKEN CURATIVE STEPS ON ITS OWN, AND WHAT RELATIONSHIP, IF ANY, THE CLASS REPRESENTATIVE HAS TO THE PLAINTIFFS' COUNSEL.

NOW, HERE I'M REALLY SUGGESTING THAT THE TEST NOT SIMPLY BE THE DOLLAR AMOUNT, WHETHER IT'S $2 OR $300 OR WHATEVER, BUT THAT THERE BE OTHER STANDARDS TO DETERMINE THE BURDENS AND THE INDIVIDUAL RELIEF THAT'S POSSIBLE WITH A CLASS ACTION. THERE ARE ALTERNATIVES. A CLASS ACTION ISN'T THE ONLY ONE.

THE FIRST PARAGRAPH ON PAGE 50 SHOULD ALSO BE REVISED TO MAKE CLEAR THAT FACTOR (F) IS TO BE CONSIDERED WHETHER OR NOT

THE CLAIMS ARE TRIVIAL. TRIVIAL IS A VALUE-LADEN WORD WHICH WOULD UNDERCUT THE WEIGHING PROCESS THAT THE COURT IS BEING ASKED TO UNDERTAKE. A BETTER WORD, I THINK, HERE, WOULD BE "SMALL."

MOREOVER, THE LAST SENTENCE IN THIS PARAGRAPH SHOULD BE DELETED BECAUSE IT SUGGESTS THAT FACTOR (F) WILL PRECLUDE CLASS CERTIFICATION ONLY IN THE RARE CIRCUMSTANCE WHERE LACK OF CLASS MEMBER INTEREST AND ONLY TRIVIAL RELIEF ARE NEAR CERTAINTIES. IF THAT WERE THE TEST, THERE WOULD BE HARDLY ANY POINT FOR FACTOR (F) AT ALL.

ANOTHER TROUBLING PORTION OF THE DRAFT NOTE IS THE SECOND PARAGRAPH ON PAGE 50, SUGGESTING THAT THE PUBLIC VALUES OF ENFORCING LEGAL NORMS ARE RELEVANT TO FACTOR (F).

HONORABLE JOHN L. CARROLL: MR. MONTGOMERY, YOU HEARD A LOT OF DISCUSSION ABOUT THE TEXAS ROUNDING CASE. AND IN YOUR OPINION, IN YOUR VIEW, 23(B)(3)(F) SHOULD PREVENT THAT KIND OF CASE FROM GOING FORWARD?

MR. MONTGOMERY: PROBABLY. THERE WAS A COMMENT MADE THIS MORNING THAT THE REGULATORS WOULD DO NOTHING.

MY UNDERSTANDING, OR AT LEAST THE DEFENDANTS SAID, IN THE PUBLIC PRESS, I BELIEVE, THAT THE REGULATORS HAD ALREADY SAID SOMETHING, AND THAT THE ROUNDING THAT THEY HAD ENGAGED IN WAS AS A RESULT OF REGULATORY ADVICE. AND FRANKLY, THAT'S THE KIND OF THING THAT COMES UP IN OUR CASES, TOO.

SO, WHERE THERE IS THAT KIND OF -- IF THAT'S TRUE, AND

I DON'T KNOW ONE WAY OR THE OTHER -- BUT WHERE THERE IS THAT KIND OF REGULATORY INVOLVEMENT, THAT'S THE KIND OF CASE WHICH I THINK IS NOT APPROPRIATE, OR AT LEAST THE COURT SHOULD CONSIDER THAT FACTOR IN DETERMINING WHETHER IT'S APPROPRIATE FOR CLASS ACTION TREATMENT.

CERTAINLY, I THINK THE DOLLAR AMOUNT IS RELEVANT. I'M NOT SAYING IT'S NOT RELEVANT. MY PRESENTATION TODAY IS REALLY TO URGE YOU TO INCLUDE OTHER CONSIDERATIONS.

WITH RESPECT TO THE PUBLIC VALUES FOR ENFORCING LEGAL NORMS, THE ADVISORY COMMITTEE, I UNDERSTAND, HAS ALREADY CONSIDERED AND REJECTED A PROPOSED FACTOR, MAKING REFERENCE TO THE PUBLIC INTEREST IN LITIGATION. THE COMMITTEE'S MINUTES EXPLAIN THIS DECISION AS A REFLECTION THAT RULE 23(B)(3) IS AN AGGREGATION DEVICE THAT SHOULD FOCUS ON THE INDIVIDUAL CLAIMS BEING AGGREGATED. SO I THINK THERE IS A MISMATCH TO TALK ABOUT PUBLIC VALUES IN THE COMMENTARY, AND I'VE SUGGESTED SOME LANGUAGE TO RESOLVE THAT.

A CLOSELY RELATED ISSUE IS WHETHER A COURT'S WEIGHING OF THE POTENTIAL BENEFITS OF A CLASS ACTION UNDER FACTOR (F) SHOULD CONSIDER ITS DETERRENT VALUE. HERE, I WILL ANSWER JUDGE SCHREIBER'S QUESTION.

AND I BELIEVE THAT, AGAIN, THE LANGUAGE IN THE MINUTES ON THAT SUBJECT IS APPROPRIATE, THAT THE RULE SHOULD NOT BE SOMETHING TO AUTHORIZE A ROVING COMMISSION TO ENFORCE A LAW AGAINST WRONGDOERS. AND, INDEED, I THINK FOR IT TO DO SO WOULD

EXCEED THE COMMITTEE'S POWER, OR AT LEAST THE COURT'S POWER UNDER THE RULES ENABLING ACT.

A FINAL POINT REGARDING FACTOR (F), AS A RESPONSE TO THOSE WHO HAVE ARGUED THAT IF IT IS ADOPTED, THE COURT SHOULD BE ENCOURAGED TO WEIGH THE LIKELY COSTS OF LITIGATION AGAINST THE AGGREGATE CLAIMS, CLAIMED DAMAGES OF THE CLASS. IF THE COURT MERELY LOOKS TO THE AGGREGATE CLAIM DAMAGES, HOWEVER, IT WILL IGNORE THE LEVEL OF INTEREST OF MOST OF THE PROPOSED CLASS, AND CONSEQUENTLY MAY GROSSLY OVERESTIMATE THE ACTUAL BENEFIT OF A CLASS ACTION TO A LARGE PROPORTION OF THE INDIVIDUAL CLASS MEMBERS.

ANOTHER IMPORTANT RULE CHANGE IS FACTOR (A), OR THAT IS TO SAY, RULE 23(B)(3)(A). AND IT SEEMS TO ME THAT THERE SHOULD BE A MODIFICATION TO THAT RULE TO FURTHER INCLUDE THE CONSIDERATION OF THE ABILITY OF INDIVIDUAL CLASS MEMBERS WITH SMALL CLAIMS TO PURSUE RELIEF THROUGH ALTERNATIVE MECHANISMS.

FOR EXAMPLE, IN CLAIMS BROUGHT AGAINST COMPANIES LIKE OURSELVES, IN OUR HEAVILY REGULATED INDUSTRY, THE POSSIBILITY FOR INVOKING THE AID OF A REGULATORY AGENCY SHALL BE AT LEAST CONSIDERED. SOMEONE SAID THIS MORNING THAT THAT'S FUTILE, AND IT'S POINTLESS. THAT SHOULD BE EVALUATED. I'M NOT SAYING THAT THAT WOULD BE AUTOMATIC. IT SHOULD BE A CONSIDERATION.

AND LIKEWISE, WHERE A DEFENDANT HAS EITHER ALREADY UNDERTAKEN SOME FORM OF CURATIVE ACTION, OR HAS INDICATED AT THE VERY INCEPTION OF THE CASE A WILLINGNESS TO DO THAT, THE

DEFENDANT SHOULDN'T BE CAUGHT IN THE CLASS ACTION TRAP. THESE CASES, MANY OF THEM HAVE WHAT I CALL A "GOTCHA FACTOR." IT'S LIKE A GAME.

SOMEONE MENTIONED THIS THIS MORNING. IF YOU ALREADY RECOGNIZE THAT YOU MAY HAVE A PROBLEM THAT NEEDS CURING, REGARDLESS OF WHETHER YOU GET SUED OR NOT, ONCE YOU UNDERTAKE TO CURE THAT PROBLEM, BOOM, YOU GET SUED. WHERE DOES THE MONEY GO? WELL, AS I'VE SAID, IT GOES MOSTLY TO THE PLAINTIFFS' ATTORNEYS, WHO JUST -- I DON'T THINK THEY SAY IT OUTLOUD, BUT UNDERNEATH THEIR BREATH, THEY'RE SAYING "GOTCHA."

IN CONCLUSION, I DON'T WANT TO REPEAT MYSELF, BUT I WOULD LIKE TO REEMPHASIZE, FIRST OF ALL, IT'S A FACT THAT IN THESE KINDS OF CASES, MOST CLASS MEMBERS DON'T RECOVER ANYTHING. AND SECOND OF ALL, IT'S VERY IMPORTANT FOR THE COMMITTEE TO HAVE THE COMMENTARY BE CONSISTENT AND ADEQUATELY REFLECT WHAT IS THE REAL PURPOSE OF THIS FACTOR (F).

I MEAN, AS I SAY, I AGREE WITH WHAT I UNDERSTOOD THE MAJORITY TO HAVE VOTED ON LAST YEAR. I HOPE THAT THAT DIRECTION REMAINS. BUT THE NEXT STEP WOULD BE TO MAKE SURE THAT WE DON'T HAVE THIS -- SOMEONE CALLED IT LOOSEY-GOOSEY APPROACH THAT I THINK IS PRESENTLY SUGGESTED BY THE COMMENTARY. IT SHOULD BE CLEARLY STATED AS TO HOW THE COURT SHOULD APPLY THIS FACTOR.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. MONTGOMERY.

MR. MONTGOMERY: THANK YOU.

HONORABLE PAUL NIEMEYER: MR. GOLDBERG, JOE GOLDBERG,

IS HE HERE?

MR. GOLDBERG: YES, SIR.

TESTIMONY OF JOSEPH GOLDBERG

MR. GOLDBERG: GOOD AFTERNOON, MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. MY NAME IS JOSEPH GOLDBERG. I'M A LAWYER FROM ALBUQUERQUE, NEW MEXICO. I AM A LAWYER FOR 29 YEARS. I HAVE BEEN IN PRIVATE PRACTICE FOR TEN YEARS.

MY PRIVATE PRACTICE IS LARGELY WHAT IS CALLED COMPLEX COMMERCIAL LITIGATION. IT IS MADE UP OF PRIMARILY REPRESENTING PLAINTIFFS IN CLASS ACTIONS. THE CLASS ACTIONS THAT I ENGAGE IN AS A COUNSEL ARE ABOUT THREE-QUARTERS TO 80 PERCENT PRICE-FIXING CLASS ACTIONS. I DO SOME SECURITIES LAW CLASS ACTIONS. AND IN CANDOR, I'LL TELL YOU THAT I HAVE VERY LITTLE, OR NO EXPERIENCE, REALLY, IN TOXIC TORT CLASS ACTIONS OR OTHER TYPE OF TORT CLASS ACTIONS.

AT THIS LATE DATE, THIS LATE HOUR, THERE IS VERY LITTLE THAT I'M GOING TO SAY TO YOU THAT YOU HAVEN'T HEARD ALREADY. I'VE SUBMITTED A WRITTEN STATEMENT. I'LL TELL YOU THAT MY WRITTEN STATEMENT SAYS THAT I OPPOSE, ON THE BASIS OF MY EXPERIENCE, THE PROPOSED CHANGES OF 23(B)(3)(F), 23(B)(3)(A), AND 23(F). AND THE REASONS I STATED IN MY WRITTEN STATEMENT YOU'VE HEARD, AND I'VE HEARD NOW MANY TIMES. I'M GOING TO TELL YOU JUST A LITTLE BIT ABOUT MY EXPERIENCE, AND THEN I'M GOING TO GET OUT OF HERE AND MOVE ON.

I HAVE BEEN THE LEAD COUNSEL IN SEVERAL VERY LARGE

PRICE-FIXING CLASS ACTIONS; I'M PRESENTLY THE LEAD COUNSEL IN THE COMMERCIAL EXPLOSIVES CLASS ACTIONS THAT ARE CONSOLIDATED IN THE DISTRICT OF UTAH. AND I WAS ONE OF THE LEAD COUNSEL IN THE SPECIALTY STEEL PRICE FIXING ACTION IN HOUSTON. I AM THE LEAD COUNSEL IN A SECURITIES LAW CLASS ACTION IN THE EASTERN DISTRICT OF NEW YORK AGAINST THE PHILIP MORRIS COMPANIES. FROM MY EXPERIENCE, RULE 23, IN THE AREAS THAT I PRACTICE, WORKS REMARKABLY WELL. IT HAS A WELL DEVELOPED BODY OF LAW THAT YIELDS PREDICTABLE RESULTS. THE CLASSES THAT GET CERTIFIED SHOULD BE CERTIFIED; THE CLASSES THAT DON'T GET CERTIFIED LARGELY SHOULDN'T BE CERTIFIED.

RECENTLY, I HAVE HAD AN EXPERIENCE WITH INTERLOCUTORY APPEALS. I'M OPPOSED TO YOUR PROPOSED RULE 23(F). IN THE PHILIP MORRIS CASE, WE FILED THAT CASE. THE CHIEF JUDGE OF THE EASTERN DISTRICT OF NEW YORK DENIED THE DEFENDANTS' MOTIONS TO DISMISS AND DENIED A RULE 1292(B) CERTIFICATE ON THAT, THEN TRANSFERRED THE CASE TO A NEWLY-APPOINTED JUDGE, WHO CERTIFIED THE CLASS. PHILIP MORRIS ASKED FOR A 1292(B) CERTIFICATE ON THE CLASS CERTIFICATION DECISION. THIS IS A SECURITIES FRAUD CLASS ACTION.

THE JUDGE DENIED THE CERTIFICATE ON 1292(B). PHILIP MORRIS THEN FILED A MANDAMUS PETITION IN THE SECOND CIRCUIT, SAYING THAT THIS SECURITIES FRAUD CLASS ACTION WAS THE LARGEST SECURITIES FRAUD CLASS ACTION IN THE HISTORY OF THE WORLD, THAT THIS LAWYER FROM ALBUQUERQUE, NEW MEXICO, AND HIS

CLIENT WERE GOING TO BANKRUPT THE PHILIP MORRIS COMPANIES. AND THE SECOND CIRCUIT CALLED FOR BRIEFING. WE BRIEFED THE CASE. IT WAS IN THE SECOND CIRCUIT FOR 11 MONTHS.

DURING THAT PERIOD OF TIME, PHILIP MORRIS ISSUED ITS ANNUAL REPORT. IT STATED WHAT LITIGATION WAS ARRAYED AGAINST IT; IT IDENTIFIED THIS CASE, WHICH IS LAWRENCE AGAINST THE PHILIP MORRIS COMPANIES, AND THEN STATED THAT IT DIDN'T ANTICIPATE THAT THE LITIGATION WOULD HAVE ANY MATERIAL EFFECT ON THE COMPANIES.

THE SECOND CIRCUIT DENIED THE MANDAMUS PETITION AFTER TEN MONTHS, AFTER FULL BRIEFING. IT WAS VERY EXPENSIVE FOR THE PARTIES, FOR PHILIP MORRIS, FOR US. IT CERTAINLY WAS A MATTER FOR THE COURTS, BOTH IN THE DISTRICT COURT AND IN THE COURT OF APPEALS, IN TERMS OF WASTING PRECIOUS JUDICIAL RESOURCES. I SUGGEST TO YOU, MEMBERS OF THE COMMITTEE, THAT ENCOURAGING, WHICH IS THE STATED PURPOSE AND INTENT OF YOUR PROPOSED RULE 23(F), ENCOURAGING INTERLOCUTORY APPEALS I THINK IS ONLY GOING TO ADD TO CLOGGING THE COURTS.

THERE IS A MECHANISM AVAILABLE FOR INTERLOCUTORY APPEALS RIGHT NOW. PEOPLE ARE USING THE INTERLOCUTORY APPEALS.

MR. FRANCIS H. FOX: WAS THE OPINION FROM THE SECOND CIRCUIT BASED ON THE MENTIONS OF MANDAMUS, OR DID THEY GET INTO THE MERITS OF THE APPEAL?

MR. GOLDBERG: THE OPINION WAS VERY SHORT, YOUR HONORS. AFTER A LARGE BRIEFING, IT SAID THAT THE JUDGE HAD NOT

ABUSED HIS DISCRETION, WHICH WAS THE STANDARD ON MANDAMUS.

WITH RESPECT TO (F), THE PROPOSED 23(B)(3)(F), MY POSITION, VERY SIMPLY, IS THAT AT LEAST IN THE AREAS THAT I PRACTICE, IS NOT A SIGNIFICANT PROBLEM. THE FACT OF THE MATTER IS THAT THE SUGGESTION -- AS THE COLLOQUY TODAY HAS SUGGESTED THE PROPOSED REMEDY TO WHAT I THINK IS LARGELY A NON-PROBLEM -- I THINK IS NOT GOING TO WORK. AS I UNDERSTAND IT, VIRTUALLY ALL CLASS ACTIONS ARE GOING TO BE THEN SUBJECT TO SCRUTINY.

AND EVEN IN THE PRICE-FIXING CLASS ACTION THAT I'M INVOLVED IN, IF YOU TAKE THE INDIVIDUAL RECOVERY AND BALANCE IT AGAINST THE ENORMOUS COSTS OF THE LITIGATION, AND THERE ARE ENORMOUS COSTS TO THE LITIGATION, WHAT IS THE RESULT GOING TO BE? I DON'T THINK IT'S THE INTENDMENT OF THE PROPOSED CHANGES TO ESSENTIALLY ELIMINATE ALL CLASS ACTIONS, ALL PRICE FIXING CLASS ACTIONS, ALL SECURITIES LAW CLASS ACTIONS. BUT I DON'T SEE THAT PROPOSED CHANGE MAKES THE TYPE OF FINE DISTINCTIONS, EVEN IF THERE WERE -- AND RECOGNIZING TRIVIAL IS A VALUE-RELATED TERM -- EVEN IF THERE WERE ENOUGH TRIVIAL CASES TO WARRANT A CONCERN, I DON'T SEE HOW THIS PROPOSED CHANGE IS REALLY GOING TO AFFECT IT.

AGAIN, THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. GOLDBERG.

GERSON SMOGER.

MR. SMOGER: THANK YOU, YOUR HONOR.

TESTIMONY OF GERSON SMOGER

MR. SMOGER: MY NAME IS GERSON SMOGER. I PRACTICE LAW IN DALLAS, TEXAS, AND I ALSO HAVE OFFICES IN OAKLAND, CALIFORNIA, AND IN ST. LOUIS, MISSOURI. I'M VICE-CHAIR OF THE LEGAL AFFAIRS COMMITTEE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, WHICH IS A BAR ASSOCIATION WITH 55,000 MEMBERS WHO, FOR THE MOST PART, BUT NOT EXCLUSIVELY, REPRESENT PLAINTIFFS IN PERSONAL INJURY, CIVIL RIGHTS, EMPLOYMENT, AND ENVIRONMENTAL LITIGATION; THE DEFENSE IN CRIMINAL CASES; AND EITHER SIDE IN COMMERCIAL AND FAMILY LITIGATION.

I HAVE BEEN ASKED BY ATLA PRESIDENT, HOWARD TWIGGS, TO APPEAR AT THIS HEARING AND GIVE THE POSITION OF ATLA ON THE PROPOSED AMENDMENTS TO RULE 23.

I HAVE A LONGSTANDING EXPERIENCE IN THE PRACTICE IN MASS TORTS. I WAS LEAD COUNSEL IN THE TIMES BEACH, MISSOURI, TOXIC POLLUTION LITIGATION. I ALSO REPRESENTED EIGHT MILLION VETERANS, INCLUDING THE DISABLED AMERICAN VETERANS OF VIETNAM, VETERANS OF AMERICA, AND THE AMERICAN LEGION, IN AN ATTEMPT TO REVERSE THE CLASS ACTION FINDINGS IN THE AGENT ORANGE LITIGATION, WHICH WAS A CASE THAT WENT UP TO THE SUPREME COURT CALLED IVY.

ESSENTIALLY -- AND THIS IS AFTER A GREAT DEAL OF DEBATE WITHIN THE ORGANIZATION AND AFTER VERY CAREFUL CONSIDERATION -- ATLA IS OPPOSED TO THE PROPOSED AMENDMENTS TO RULE 23 AND HOPES THEY WILL NOT BE ADOPTED. AND I SAY THAT BECAUSE OBVIOUSLY, THERE ARE MEMBERS OF ATLA WHO ARE THE

PLAINTIFFS' ATTORNEYS IN SOME OF THE VERY CASES THAT WE ARE OPPOSING.

AND ATLA'S OPPOSITION WAS INITIALLY CONVEYED IN A LETTER FROM OUR IMMEDIATE PAST PRESIDENT, PAMELA LIAPAKIS, TO THE STANDING COMMITTEE LAST JUNE, WHICH BASED ITS ARGUMENTS ON AN EXISTING POLICY ON MASS TORTS AND SEVERAL CONCERNS ABOUT THE CONSTITUTIONAL RIGHTS TO THE TRIAL BY JURY. WHILE ATLA FELT THESE CONCERNS WERE NOT SUFFICIENTLY ADDRESSED UNDER THE EXISTING RULE 23, THE PROPOSED AMENDMENT SERVED TO ABRIDGE THAT RIGHT EVEN MORE, ESPECIALLY THE PROPOSED SECTION 23(B)(4).

THE FOLLOWING THE PROPOSED SECTIONS, THE ATLA BOARD OF GOVERNORS MET AND INITIATED A POLICY WHICH WE HAVE ATTACHED AS EXHIBIT B IN MY WRITTEN STATEMENT. THE POLICY, WHILE RECOGNIZING SOME USEFUL BENEFITS OF CLASS ACTION, ALSO RECOGNIZES THAT CLASS ACTIONS HAVE THE POTENTIAL TO SEVERELY UNDERMINE THE IMPORTANT VALUE OF THE RIGHT TO TRIAL BY JURY.

ATLA POLICY EXPRESSES SUPPORT FOR MEANINGFUL OPT-OUT RIGHTS IN CLASS ACTIONS, THE RIGHT TO TRIAL BY JURY, AND THE INJURED VICTIMS' RIGHT TO CONTROL THE FATE OF THEIR OWN LITIGATION. IT GENERALLY OPPOSES ADJUDICATIONS OF THE RIGHTS OF FUTURE CLAIMANTS THROUGH SETTLEMENT CLASSES, THE INAPPROPRIATE USE OF LIMITED FUND CLASSES, PERMITTING JUDGES TO SPECULATE ABOUT THE LIKELY SUCCESS ON THE MERITS OF PROPOSED CLASS ACTIONS WHILE ENTERTAINING MOTIONS FOR CERTIFICATION, AND SPECIAL APPEAL PROCEDURES FOR CLASS ACTIONS.

IN MY EXPERIENCE, THE OBJECTIONS AND THE POSITION OF ATLA IS WELL-FOUNDED. WHAT WE HAVE IS A SITUATION IN MASS TORTS WHERE CLASS ACTIONS OFTEN BIND CLASS MEMBERS WHO ARE DEPRIVED OF TRUE NOTICE, AND WE'VE HAD ARTIFICE OF WHAT WE CALL ACTUAL OR ADEQUATE NOTICE. I'M TALKING ABOUT TRUE NOTICE, WHERE SOMEBODY REALLY KNOWS. AND IF WE'RE TALKING IN THE MASS TORT SENSE, WE CAN OFTEN BE TALKING ABOUT WHAT ARE CATASTROPHIC INJURIES. THESE ARE NOT MINOR INJURIES. WE'RE TALKING ABOUT PEOPLE THAT HAVE LIFE-THREATENING INJURIES AND THEY ARE DEPRIVED OF TRUE NOTICE, AND THEY ARE DEPRIVED OF TRUE OPPORTUNITIES. AND I CAN GIVE AN ILLUSTRATIVE EXAMPLE, WHICH WAS IN THE IVY CASE.

IN VIETNAM, SERVICEMEN SERVED, ESSENTIALLY, BETWEEN 1966 AND 1972. THE FIRST ACTION WAS BROUGHT IN 1978. AND THEY WERE CONSOLIDATED IN BROOKLYN, NEW YORK, AND THEN THEY WERE CERTIFIED AS A 23(B)(3) CLASS WITH OPT-OUT RIGHTS IN 1983. THE DEADLINE FOR OPTING OUT WAS MAY 1ST, 1984. NOW, THESE WERE PEOPLE EXPOSED BETWEEN '66 AND '72. OUR OPT-OUT DEADLINE IS 1984. AND IN DEALING WITH THE SCIENCE, THAT'S WHY I'M MAKING THIS REFERENCE.

SIX DAYS LATER, SIX DAYS AFTER CERTIFICATION, THE NAMED REPRESENTATIVE PLAINTIFFS AND THEIR ATTORNEYS SETTLED THE ACTION FOR WHAT WAS DESCRIBED BY THE SECOND CIRCUIT AS NUISANCE VALUE, WHICH WOULD GET $3200 FOR THE VALUE OF SOMEBODY THAT DIED.

NOW, CAPTAIN IVY DID NOT KNOW ABOUT THIS, LIVED IN

RURAL TEXAS, HAD NEVER HEARD ABOUT THIS, HAD NO INTEREST IN IT, BECAUSE HE HAD NO INJURIES. AND THE FACT IS THAT CANCER LATENCY, AS MOST OF US KNOW, HAS A MEAN LATENCY IN ESSENCE OF 20 YEARS. WELL, CAPTAIN IVY, IN THAT LATENT PERIOD, GOT CANCER. HE THEN DIED IN 1988. AND HE WAS TOLD THAT HIS ACTION HAD BEEN SETTLED IN 1984.

OF INTEREST IS THAT IT WAS NOT UNTIL 1991 THAT CONGRESS ENACTED PUBLIC LAW 102-4 TO CONDUCT A COMPREHENSIVE REVIEW AND EVALUATION OF THE AVAILABLE SCIENTIFIC AND MEDICAL INFORMATION REGARDING THE HEALTH EFFECTS OF AGENT ORANGE, AND THAT PURSUANT TO THAT REVIEW, THE NATIONAL ACADEMY OF SCIENCES' INSTITUTE OF MEDICINE DETERMINED THAT THREE TYPES OF CANCER WERE CAUSED BY AGENT ORANGE, UNKNOWN UNTIL 1991. AND THOSE THREE, NOW THAT THERE WAS SUFFICIENT LATENCY TO JUDGE, WERE NON-HODGKIN'S LYMPHOMA, SOFT TISSUE SARCOMA, AND HODGKIN'S DISEASE, WITH SUGGESTIVE EVIDENCE OF PROSTATE CANCER, RESPIRATORY CANCERS, AND MULTIPLE MYELOMA.

THE BILL FOR THOSE CANCERS IS NOT BEING PAID BY THE MANUFACTURERS OF AGENT ORANGE; IT IS BEING PAID BY THE TAXPAYER AND THE GOVERNMENT, BECAUSE THOSE CLAIMS ARE NOW BEING BROUGHT TO THE VETERANS ADMINISTRATION. AND THAT WAS THE RESULT OF A 1984 SETTLEMENT FOR A LATENCY THAT WAS OF VERY SHORT DURATION.

WE RECOGNIZE THAT A CLASS ACTION GIVES THE DEFENDANT AN OPPORTUNITY TO CAP THEIR RISKS. IT OFFERS THE COURTS A CHANCE TO DEAL WITH, MORE EFFICIENTLY, THOUSANDS OF CASES. AND

CERTAINLY, IT OFFERS CLASS COUNSEL THE ABILITY TO SETTLE AND HAVE EXTRAORDINARY ENTICEMENTS IN THE AMOUNT OF ATTORNEY FEES THEY CAN SETTLE THE CLASSES FOR IN MASS TORT SITUATIONS.

HOWEVER, WHAT IS MISSED, AND THE CONSTRAINT OF THAT SYSTEM, IS THE KNOWLEDGE OF WHO'S ACTUALLY BEING REPRESENTED AND WHO'S ACTUALLY INJURED. AND WHEN THAT PERSON IS MISSING, IN A MASS TORT SENSE, IT PUTS AN AWFUL LOT OF WEIGHT AND BURDEN ON THE POOR.

BECAUSE THE ONE THAT IS NORMALLY TO JUDGE WHAT A FAIR SETTLEMENT IS, FOR WHAT WE ARE TALKING ABOUT ARE VERY SERIOUS INJURIES, IS USUALLY THE VICTIM. AND THE VICTIM IS OUT OF THIS PLAY. HE'S NO LONGER A CONSTRAINT, AND THE ALTERNATIVE TO THE VICTIM HAVING ANY CONTROL AT ALL IS THAT WE NOW HAVE SOMETHING CALLED THE REPRESENTATIVE PLAINTIFFS.

NOW, THE REPRESENTATIVE PLAINTIFFS OFTEN ARE THE FIRST PEOPLE WHO WALK THROUGH AN ATTORNEY'S DOOR. THEY ARE PEOPLE WHO ARE COMPLIANT WITH THE TERMS OF THE SETTLEMENT, OR THEY WERE SELECTED RANDOMLY OUT OF A HAT. AND I WANTED TO READ AN EXAMPLE OF A DEPOSITION I TOOK OF A REPRESENTATIVE PLAINTIFF IN A CASE OF 50,000 PEOPLE. THERE WAS TWO REPRESENTATIVE PLAINTIFFS CHOSEN. ONE WAS THE REPRESENTATIVE, SUPPOSEDLY, FOR THE ABSENT CLASS, AND ONE WAS THE REPRESENTATIVE FOR THE PEOPLE THAT ACTUALLY FILED CLAIMS. AND THIS IS THE DEPOSITION THAT I TOOK OF THE REPRESENTATIVE FROM THE ABSENT CLASS, AND I'M GOING TO READ SOME SECTIONS OF IT.

"ME AND MY SON WE WAS IN THE TRUCK. MY WIFE AND DAUGHTER WAS AT HOME.

"Q. AND YOU WERE BOTH EXPOSED IN THE TRUCK?

"A. YES.

"Q. WHAT ATTORNEY DID YOU CONTACT?

"A. I GUESS..." --

AND I WILL LEAVE THE NAME OF THE FIRM OUT.

"OBJECTION. DON'T GUESS. ONLY IF YOU KNOW. THAT'S HIS ATTORNEY.

"Q. DO YOU KNOW WHY SHE CHOSE TO CALL THAT FIRM? PICK ONE; THERE IS LOT OF THEM?

"A. THERE IS A LOT OF LAWYERS; PICK ONE.

"Q. SO NO PARTICULAR REASON?

"A. NO PARTICULAR REASON WHY.

"Q. DO YOU KNOW IF A LAWSUIT WAS EVER FILED FOR YOUR FAMILY?

"OBJECTION, IF YOU KNOW.

"I REALLY CAN'T. IT'S HARD FOR ME TO SAY.

"Q. DO YOU KNOW WHAT A REPRESENTATIVE PLAINTIFF IS?

"A. YEAH.

"Q. AND WHAT'S THAT?

"A. A PERSON THAT REPRESENTS A GROUP OF PEOPLE.

"Q. DO YOU KNOW WHAT THEY DO IN REPRESENTING A GROUP OF PEOPLE?

"A. THEY STAND UP FOR THE GROUP OF PEOPLE.

"Q. AND WHO IS THE GROUP OF PEOPLE?

"A. I DON'T KNOW. IT'S A BIG GROUP, DEPENDING ON WHAT GROUP YOU'RE TALKING ABOUT.

"Q. DO YOU KNOW IF YOU REPRESENT OTHER PEOPLE IN THIS CASE?

"A. YES, I DO.

"Q. WHO DO YOU REPRESENT?

"A. I REPRESENT -- THERE IS A WORD FOR IT. I CAN'T REMEMBER IT. BUT I REPRESENT A GROUP OF PEOPLE THAT'S NOT BEING REPRESENTED BY AN ATTORNEY.

"Q. DO YOU CONSIDER YOURSELF BEING REPRESENTED BY AN ATTORNEY?

"A. OH, YES.

"Q. DO YOU KNOW WHY YOU'RE REPRESENTING A GROUP OF PEOPLE?

"A. SOMEBODY GOT TO DO IT.

"Q. NOW, WHEN YOU GOT THAT COPY OF THE SETTLEMENT AGREEMENT, DID YOU READ IT?

"A. YES.

"Q. DO YOU KNOW WHAT A CLASS ACTION IS?

"A. UH-HUH, YES.

"Q. WHAT IS IT?

"A. A GROUP OF PEOPLE INVOLVED IN A LAWSUIT WITH A BUNCH OF LAWYERS.

"Q. DO YOU KNOW ANYTHING ELSE ABOUT WHAT A CLASS ACTION IS? THE PERSON IS REPRESENTING 50,000 PEOPLE.

"A. JUST A BUNCH OF LAWYERS SUING FOR THE SAME THING. INSTEAD OF GOING OUT, YOU JUST DO IT TOGETHER.

"Q. DO YOU KNOW WHAT A CLASS IS?

"A. THIS COULD BE A CLASS.

"Q. SORT OF LIKE GOING INTO A ROOM AND TEACHING SOMEBODY?

"A. A ROOM WITH TABLE AND CHAIRS."

HONORABLE DAVID F. LEVI: THIS IS A POINT AT THE FOREFRONT, RIGHT, ADEQUACY OF THE REPRESENTATIVES?

MR. SMOGER: IT'S ADEQUACY, BUT IT COMES INTO THE QUESTION OF THE SETTLEMENT CLASS, BECAUSE THE REPRESENTATION, WHEN WE GET TO THE LEVEL OF SETTLEMENT CLASS, WE'RE PUTTING MUCH MORE POWER IN THE INDIVIDUAL ATTORNEY TO SETTLE THAT CASE AND THE COURTS TO MONITOR THAT.

AND I'M ONLY USING THAT AS AN EXAMPLE TO SAY THAT WE'RE NOT EVEN LOOKING AT THE ADEQUACY REPRESENTATION IN TERMS OF THESE INDIVIDUALS. I THINK THAT THAT'S ALMOST LOST IN THE PROCEEDING, THAT THE REAL QUALITY OF THE REPRESENTATIVE PLAINTIFFS IS NOT VIEWED AT ALL, AND NOBODY EVEN GIVES CONSIDERATION TO THAT, AND THEN WE'RE ASKING SOMEBODY TO MAKE DECISIONS ON BEHALF OF AN ENORMOUS NUMBER OF VICTIMS WHO ARE HURT.

MR. SOL SCHREIBER: HOW WOULD YOU RESOLVE IT?

MR. SMOGER: WELL, ONE, I WOULDN'T GO TO 23(B)(4).

NOW, THE SECOND QUESTION IS --

MR. SOL SCHREIBER: YOU MEAN YOU DON'T THINK 23(B)(4) CAN EVER WORK IN A MASS TORT?

MR. SMOGER: NO, I DON'T.

MR. SOL SCHREIBER: AND YOU THINK THERE ARE 50,000 VETERANS THAT HAVE CLAIMS, AND EACH ONE OF THOSE CLAIMS SHOULD BE LITIGATED INDIVIDUALLY; IS THAT WHAT YOU'RE SAYING?

MR. SMOGER: YES. I THINK THAT THE PURPOSE -- AND WE'RE -- I THINK WE'VE TURNED THE CLASS ACTIONS ON THEIR HEAD, IN A WAY, BECAUSE WE'VE LOOKED AT THEM EFFICIENTLY, FOR EFFICIENT SOLUTIONS. BUT WE'RE SAYING WE DON'T WANT SMALL CASES. AND THE PURPOSE OF CLASS ACTIONS WAS PRECISELY TO DEAL WITH SMALL CASES WHERE SOMEBODY COULDN'T GET INDIVIDUAL REPRESENTATION.

BUT THOSE VETERANS THAT HAVE CANCER, IF THERE IS 50,000 OF THEM THAT HAVE --

MR. SOL SCHREIBER: YOU MADE ALL THOSE ARGUMENTS TO THE COURT OF APPEALS AND THE SUPREME COURT AND THEY TURNED YOU DOWN; DIDN'T THEY?

MR. SMOGER: INDEED, THEY DID. AND THEY, IN FACT, WROTE THAT THE EFFICIENT RESOLUTION, THAT IT'S IN SOCIETY'S INTEREST, AND THE EFFICIENT RESOLUTION OUTWEIGHS THE INDIVIDUAL RIGHTS. I DON'T THINK THAT'S THE CASE. AND I DON'T THINK ATLA THINKS THAT'S THE CASE.

MR. SOL SCHREIBER: WELL, IF YOU HAD 50,000 DRUG CASES AND YOU HAD 50,000 ASBESTOS CASES AND YOU HAD 50,000 CONSUMER CASES, WHERE ARE YOU GOING TO TRY THEM, IN WHAT COURTS?

MR. SMOGER: WELL, FIRST OF ALL, 99 PERCENT OF THOSE CASES WON'T TRY IN ANY COURT.

MR. SOL SCHREIBER: WHY WOULDN'T THEY BE TRIED? WHY WOULD THE DEFENDANT WANT TO SETTLE THEM IF THEY KNOW THEY WOULD NEVER COME TO TRIAL?

MR. SMOGER: IN MOST CASES, THE DEFENDANT SETTLES. ARE YOU SAYING IS THERE A POSSIBILITY OF TRIAL? YES.

MR. SOL SCHREIBER: HOW IS THERE A POSSIBILITY OF TRIAL?

MR. SMOGER: ARE THERE SITUATIONS WHERE JUDICIAL MANAGEMENT HAS ALLOWED HUNDREDS OF CLAIMS TO BE TRIED TOGETHER? YES. ULTIMATELY, THAT'S A MASS TORT, WHICH IS DIFFERENT THAN A CLASS TORT.

NOW, AM I OPPOSED TO AGGREGATION OF CLAIMS AND AGGREGATION OF DISCOVERY? ABSOLUTELY NOT. BUT THE ONE THING THAT HAS TO HAPPEN IN A MASS TORT SETTING RATHER THAN A CLASS TORT SETTING IS, AT THE END OF THE DAY, THE ATTORNEY HAS TO GO TO THOSE INDIVIDUAL CLIENTS WITH SERIOUS INJURIES AND SAY, "IS THIS A GOOD SETTLEMENT, AND IS THIS WHAT YOU WANT?"

NOW, MOST PEOPLE WORKING THROUGH THAT PROCESS WOULD PROBABLY AGREE. BUT THEY ARE CONTROLLING THE FATE OF LITIGATION THAT IS VERY SIGNIFICANT TO THEIR LIVES. IT MIGHT NOT BE THAT

THE NINE CENTS THAT SOMEBODY IS TALKING ABOUT OR THE $9 HAS A SIGNIFICANT EFFECT ON THEIR LIVES. BUT DYING OF CANCER OR DEATH CERTAINLY DOES. AND THAT'S A DECISION WE SHOULDN'T TAKE OUT OF THE --

MR. SOL SCHREIBER: WHEN WAS THERE EVER A CASE SETTLED WHERE A CANCER VICTIM GOT NINE CENTS?

MR. SMOGER: IN THE AGENT ORANGE CASE, IF THEY DIED, THEY GOT AN AVERAGE OF $3,000.

MR. SOL SCHREIBER: AS YOU KNOW, I KNOW SOMETHING ABOUT IT, BEING THE SPECIAL MASTER ON DISCOVERY ON AGENT ORANGE. THERE WAS A SERIOUS QUESTION, AND THERE STILL IS A SERIOUS QUESTION, AS TO WHETHER THE CLAIMANTS HAD A CLAIM.

NOBODY HAS COME FORTH AND SAID THAT THE AGENT ORANGE VICTIMS NOW HAVE CLAIMS. IT'S THE MONEY THAT IS COMING FROM THE GOVERNMENT IS THEIR RECOGNITION THAT THERE WERE PEOPLE THAT POSSIBLY SUFFERED DURING THE WAR, AND THEY SHOULD BE COMPENSATED BY THE GOVERNMENT.

MR. SMOGER: YES. BUT --

MR. SOL SCHREIBER: NOBODY HAS EVER MADE A FINDING THAT THE DEFENDANTS WERE LIABLE. IN FACT, ISN'T IT TRUE THE JUDGE DISMISSED THE CASE ON SUMMARY JUDGMENT FOR ALL THE OPT-OUTS?

MR. SMOGER: IF WE GET TO THE DETAILS, IT'S TRUE THAT THE GOVERNMENT DEFENSE CONTRACTOR WAS THE REASON THAT THEY WERE DISMISSED. BUT BOYLE LATER REVERSED THE GOVERNMENT CONTRACT

DEFENSE THAT WAS USED IN THAT COURT, SO IT WOULDN'T STAND TODAY IF IT WAS CURRENTLY PRESENTED.

IT'S ALSO TRUE THAT NO CASE WAS TRIED TO DETERMINE WHETHER THE CLAIMS WERE VIABLE BECAUSE THEY WERE ALL SETTLED AS PART OF THIS CLASS ACTION.

HONORABLE PAUL NIEMEYER: I THINK THAT'S --

MR. SMOGER: BUT THAT DIGRESSES, I THINK.

HONORABLE PAUL NIEMEYER: I APPRECIATE YOUR TESTIMONY. THANK YOU VERY MUCH.

MR. SMOGER: THANK YOU.

HONORABLE PAUL NIEMEYER: MR. ANDERSON, BRIAN ANDERSON.

TESTIMONY OF BRIAN C. ANDERSON

MR. ANDERSON: THANK YOU, YOUR HONOR, MEMBERS OF THE COMMITTEE. I AM THE FOURTH O'MELVENY & MYERS ATTORNEY TO SPEAK TO THIS --

HONORABLE PAUL NIEMEYER: I'M NOT SURE THE FIVE-MINUTE RULE EVEN APPLIES TO YOU.

MR. ANDERSON: YOU MIGHT WANT TO LIMIT ME TO TWO AND A HALF MINUTES.

HONORABLE PAUL NIEMEYER: ALL RIGHT. I'LL HOLD YOU TO THAT.

MR. ANDERSON: I WILL ONLY MAKE TWO POINTS, AND THEN PERHAPS IF THERE IS TIME, I'D LIKE TO RESPOND TO A COUPLE POINTS THAT WERE MADE EARLIER.

FIRST, ON THE PROPOSED RULE 23(F), THE INTERLOCUTORY APPEAL RULE, ONE OF THE THINGS THAT I THINK RECOMMENDS THIS RULE IS THAT THERE ARE INCONSISTENT CLASSIFICATION DECISIONS OUT THERE AMONG THE FEDERAL COURTS, SUCH THAT SKILLED COUNSEL CAN CITE A CASE FOR PRETTY MUCH ANY PROPOSITION.

AND AS A NUMBER OF PEOPLE HAVE MENTIONED THIS MORNING, POST-TRIAL REVIEW OF A CLASSIFICATION DECISION IS NOT A LOGICAL STEP EITHER FOR PLAINTIFFS OR FOR DEFENDANTS.

SEVERAL COMMENTATORS, INCLUDING MS. CABRASER THIS MORNING, INDICATED THAT A NEW RULE TO FACILITATE INTERLOCUTORY APPEALS IS NOT NECESSARY BECAUSE THERE ARE OTHER ROUTES AVAILABLE AND THEY'RE PERFECTLY ADEQUATE.

BUT WITH PROFESSOR MILLER'S THOUGHTS IN MIND ABOUT DISCOURAGING ANECDOTAL EVIDENCE AND GOING TO EMPIRICAL EVIDENCE, WHAT I THOUGHT I'D DO, AND WHAT I DID AFTER THE LAST SESSION OF THIS COMMITTEE, WAS CRANK UP THE LEXIS MACHINE AND ACTUALLY SEE FOR MYSELF HOW MANY TIMES THERE HAVE BEEN INTERLOCUTORY APPEALS OF CLASS CERTIFICATION RULINGS IN THE DISTRICT COURTS. AND I PICKED THE LAST TEN YEARS BECAUSE, AS IT TURNS OUT, WHEN YOU DO THESE LEXIS SEARCHES, YOU GET A LOT OF CASES, AND YOU START HAVING TO WEED THEM OUT BECAUSE THEY ARE NOT REALLY CLASS ACTION DECISIONS, AND THEY MERELY REFERENCE OTHER CASES. AND SO IT'S A FAIRLY LARGE AMOUNT OF WORK. BUT WE DID THE NUMBERS, AND THEY'RE ATTACHED TO MY PRESENTATION.

HONORABLE PAUL NIEMEYER: DOES THIS INCLUDE 1292(B)

AND MANDAMUS?

MR. ANDERSON: IT DOES.

HONORABLE PAUL NIEMEYER: AND WHAT OTHER THINGS, THOSE TWO?

MR. ANDERSON: THOSE ARE IT. I LOOKED AT THOSE TWO.

AND THE TOTAL NUMBER I FOUND OVER A TEN-YEAR PERIOD WAS 18. THERE ARE 15 SUCCESSFUL INTERLOCUTORY APPEALS OF CLASS CERTIFICATION DECISIONS PURSUANT TO THE 1292(B) DEVICE. AND THERE WERE THREE SUCCESSFUL WRITS OF MANDAMUS TO THE COURTS OF APPEAL UNDER THAT PROCESS.

AND THE WRIT OF MANDAMUS PROCESS, I THINK THE WORD HAS GOTTEN OUT TO THE CLASS ACTION BAR ON BOTH SIDES OF THE TABLE THAT THE WRIT OF MANDAMUS DEVICE IS NOT A TERRIBLY SUCCESSFUL DEVICE BECAUSE OVER THAT TEN-YEAR PERIOD, ONLY 11 TIMES THAT I COULD FIND PEOPLE EVEN ATTEMPTED TO DO THAT. AND AS I SAY, IT WAS SUCCESSFUL ON ONLY THREE OCCASIONS.

HONORABLE ANTHONY SCIRICA: DO YOUR FIGURES SHOW DISPOSITION TIME?

MR. ANDERSON: THEY DON'T SHOW DISPOSITION TIME, NO. BUT ACTUALLY, MY FIGURES SHOW A LOT OF OTHER INTERESTING INFORMATION, SUCH AS WHO BROUGHT THE PETITION AND WHAT HAPPENED. AND I WANT TO COMMENT ON THAT FOR A MINUTE.

BUT THE POINT I WANT TO MAKE IS: WE HAVE 18 INTERLOCUTORY APPEALS OR CLASS CERTIFICATION RULINGS IN A TEN-YEAR PERIOD. AND ACCORDING TO NEWBERG ON CLASS ACTIONS,

THERE HAVE BEEN ALMOST 900 CLASS CERTIFICATION DECISIONS IN THE FEDERAL DISTRICT COURTS IN THE LAST TEN YEARS. SO WHAT WE ARE TALKING ABOUT IS LESS THAN TWO PERCENT OF THE TIME CAN A LITIGANT OBTAIN INTERLOCUTORY REVIEW OF THESE DECISIONS.

MR. SOL SCHREIBER: HASN'T THAT CHANGED, COUNSEL, IN THE LAST TWO YEARS? WHEN YOU LOOK AT ALL THE IMPORTANT CASES, I MEAN, THE ONES THAT SET NEW PRECEDENTS, AREN'T THOSE CASES THAT HAVE BEEN REVIEWED AND HAVE BEEN ACCEPTED?

MR. ANDERSON: ACTUALLY, I LOOKED AT THAT AS WELL. SIX OF THE 18 INTERLOCUTORY REVIEWS, INTERESTINGLY ENOUGH, CAME LAST YEAR.

MR. SOL SCHREIBER: YES.

MR. ANDERSON: SO, YES, LAST YEAR WAS A VERY BIG YEAR FOR INTERLOCUTORY REVIEWS, AND THERE ARE SOME VERY BIG KEY CASES THAT WE CITE. THE ARGUMENT HAS BEEN MADE THAT THAT'S IT, THAT'S DONE, THAT SUGGESTS THAT THERE IS THIS GREAT TREND. OTHER PEOPLE HAVE SUGGESTED THAT MAYBE WE OUGHT NOT TO BE USING THE WRIT OF MANDAMUS DEVICE THIS EASILY. THAT'S NOT REALLY WHAT IT IS FOR.

AND SO I THINK THE INTERLOCUTORY REVIEW DEVICE, WHERE THE DISTRICT JUDGE DOES NOT HAVE TO CERTIFY THE QUESTION AND THE LITIGANT DOES NOT HAVE TO SAY TERRIBLE THINGS, FRANKLY, ABOUT THE DISTRICT JUDGE'S MOTIVES OR INTELLIGENCE, IS A MORE APPROPRIATE WAY TO GO.

AND I WANT TO ALSO SAY THAT THIS FACILITATING

INTERLOCUTORY REVIEW OF THESE DECISIONS IS NOT MERELY A PRO-DEFENSE MOVE, AS HAS BEEN SUGGESTED. A NUMBER OF THESE EFFORTS WERE ACTUALLY MADE BY PLAINTIFFS WHO WERE SEEKING INTERLOCUTORY REVIEW OF THE DENIALS OF CLASS CERTIFICATION DECISIONS. SO I THINK IT WOULD HELP.

MR. THOMAS D. ROWE, JR.: DO YOU REMEMBER WHAT THE SUCCESSFUL NUMBER WAS?

MR. ANDERSON: YEAH. OF THE 15 SUCCESSFUL 1292(B) APPEALS, THREE OF THOSE WERE BROUGHT BY PLAINTIFFS, PLAINTIFFS WHO WERE APPEALING DENIALS. I THINK THERE WAS AN ADDITIONAL ONE THAT WAS BROUGHT BY INTERVENORS. BUT THREE OF THEM WERE BROUGHT BY UNSUCCESSFUL PLAINTIFFS.

AND OF THE 11 PETITIONS FOR WRIT OF MANDAMUS, FOUR OF THEM WERE BROUGHT BY PLAINTIFFS.

HONORABLE DAVID F. LEVI: WHAT ABOUT REVERSALS?

MR. ANDERSON: THEY DIDN'T ALL END IN REVERSAL. THE THREE SUCCESSFUL WRITS OF MANDAMUS WERE ALL REVERSING CLASS CERTIFICATION.

THE SECOND THING I WANT TO TALK ABOUT WAS THE PROPOSED MATURITY FACTOR, AND MORE PARTICULARLY, THE ADVISORY COMMITTEE NOTES THAT UNDERLIE THAT.

THE SENSE I GET OF THE MATURITY FACTOR -- AND THERE WAS SOME COMMENT EARLIER TODAY ABOUT WHAT EXACTLY IS THIS DESIGNED TO DO, BUT IT SEEMS TO ME WHAT IT IS DESIGNED TO DO IS TO GET DISTRICT COURT JUDGES TO LOOK AT WHAT HAS HAPPENED IN

INDIVIDUAL TRIALS OF SIMILAR CLAIMS, IN ORDER TO GET A SENSE, BROADLY SPEAKING, OF WHETHER THESE ARE THE KINDS OF CLAIMS THAT ARE WELL SUITED TO CLASS ADJUDICATION.

IT SEEMS TO ME A VERY IMPORTANT THING FOR A DISTRICT COURT JUDGE TO LOOK AT IN THAT REGARD IS THE TYPE OF EVIDENCE THAT WAS ACTUALLY PRESENTED AT THOSE INDIVIDUAL CLAIMS. WAS THE DISPOSITIVE EVIDENCE INVARIABLY EVIDENCE THAT RELATED SOLELY TO THE INDIVIDUAL CLAIMANT, YOU KNOW, FACTS PERTINENT TO THE INDIVIDUAL CLAIMANT, IN WHICH CASE, ARGUABLY, THIS IS NOT A GOOD CANDIDATE FOR A CLASS ACTION; OR WAS THE EVIDENCE PRIMARILY RELEVANT TO THE DEFENDANT; WAS IT GENERALIZED EVIDENCE, THE SAME EVIDENCE WAS PRODUCED TIME AND TIME AGAIN, IN WHICH CASE MAYBE THIS IS A GOOD ISSUE FOR CLASS CERTIFICATION.

ALTHOUGH I THINK THE ADVISORY COMMITTEE NOTES HINT AT THIS, I THINK IT WOULD BE BETTER TO BE MORE EXPLICIT ABOUT THIS INQUIRY. SEVERAL PEOPLE HAVE SUGGESTED THAT A CLASS-WIDE PROOF REQUIREMENT, WHICH IS REALLY WHAT I'M TALKING ABOUT HERE, BE INCORPORATED WITHIN THE RULE ITSELF. AND I DON'T KNOW WHETHER THE COMMITTEE INTENDS TO DO THAT OR NOT. BUT I WOULD SUGGEST THAT A GOOD SECOND STEP, SHOULD IT NOT CHOOSE TO DO THE FIRST, WOULD BE TO AT LEAST INCORPORATE THE CLASS-WIDE PROOF REQUIREMENT INTO THE ADVISORY COMMITTEE NOTES RELATING TO THE MATURITY FACTOR.

AND SO, THEREFORE, I WOULD PROPOSE THAT AT THE END OF THE CURRENT DISCUSSION, THERE BE INCLUDED THE FOLLOWING

LANGUAGE, QUOTE:

"IN ADDITION, IF EXPERIENCE LITIGATING SIMILAR CLAIMS ON AN INDIVIDUAL BASIS DEMONSTRATES THAT THE EVIDENCE LIKELY TO BE ADMITTED AT A PROPOSED CLASS TRIAL REGARDING THE ELEMENTS OF THE CLAIMS FOR WHICH CERTIFICATION IS SOUGHT IS NOT SUBSTANTIALLY THE SAME AS TO ALL CLASS MEMBERS, CLASS CERTIFICATION WOULD NOT BE APPROPRIATE. CONVERSELY, IF SUCH EXPERIENCE SHOWS THE CLASSWIDE PROOF OF THE ELEMENTS OF THE CLAIMS CAN BE PRESENTED, THEN CLASS CERTIFICATION MAY BE WARRANTED."

MR. SOL SCHREIBER: WOULD YOU SEPARATE THAT BETWEEN LIABILITY AND DAMAGES? WOULDN'T THERE BE A UNIVERSALITY OF A SPECIFIC CLAIM ON LIABILITY, BUT THEN THE DAMAGES WOULD BE SEPARATE AND RETURN TO STATES, AS SUCH?

MR. ANDERSON: WELL, I MEAN CERTAINLY THERE IS A LOT OF DOCTRINE OUT THERE THAT SAYS YOU CAN BIFURCATE A CLASS ACTION AND DEAL WITH DAMAGES SEPARATELY, SO LONG AS THE FUNDAMENTAL ISSUES OF WHETHER THE DEFENDANT IS LIABLE TO EACH AND EVERY CLASS MEMBER IS ONE THAT CAN BE PROVEN BY CLASS-WIDE EVIDENCE. BUT I THINK MOST OF THE ISSUES THAT WE DEBATE GO TO THAT FORMER ISSUE.

LET ME MAKE TWO VERY QUICK POINTS.

HONORABLE PAUL NIEMEYER: YOU'RE ABOUT FOUR TIMES BEYOND WHAT YOU SAID YOU WERE GOING TO BE, AND YOU'RE TWICE

BEYOND WHAT YOU ARE ALLOWED.

BUT GO AHEAD. YOU HAVE ONE MORE MINUTE.

MR. ANDERSON: OKAY. I CAN DO THIS IN A MINUTE.

NUMBER ONE, IF SOMEBODY SAID TODAY: CAN WE DEAL WITH THE STATE COURT CLASS ACTION PROBLEM? AND THE ANSWER IS: IN A WAY, NO, BECAUSE YOU DEAL WITH FEDERAL LAW.

BUT THERE ARE MANY STATES OUT THERE THAT LOOK TO RULE 23 FOR GUIDANCE, AND, INDEED, LOOK TO FEDERAL DISTRICT COURT DECISIONS INTERPRETING RULE 23 FOR GUIDANCE. AND INDEED, WHEN YOU FILE CLASS CERTIFICATION FOR BRIEFS IN STATE COURT, YOU INVARIABLY CITE THESE FEDERAL COURT DECISIONS. SO TO THE EXTENT THIS PANEL IMPROVES RULE 23, I THINK IT CAN HAVE SOME MODEST EFFECT IN THE STATE COURTS.

AND FINALLY, I WANT TO RESPOND TO MR. MOORE'S POINT THIS MORNING. HE QUOTED MY COLLEAGUE TALKING ABOUT THE CASE DOWN IN FLORIDA, IN WHICH FORD, MY CLIENT, SUPPOSEDLY RECALLED THESE VEHICLES SOLELY AT THE PRESSURE OF THE PLAINTIFFS' LAWYERS.

THAT IS NOT WHAT HAPPENED. IT INSTIGATED AN INVESTIGATION OF THIS ISSUE. PURSUANT TO THAT INVESTIGATION, AND PURSUANT TO THAT INVESTIGATION ONLY, FORD MOTOR COMPANY RECALLED CERTAIN VEHICLES.

PLAINTIFFS' LAWYERS HAD NOTHING TO DO WITH THAT DECISION, ALTHOUGH THERE WAS A PUTATIVE CLASS ACTION PENDING AT THAT TIME. THEY WERE NOT INVOLVED. THE PRESSURE FROM THE CASE

DID NOT INDUCE FORD TO ANNOUNCE THE RECALL.

WE ANNOUNCED THE RECALL, AND WITHIN A MATTER OF DAYS, WE GOT THE PHONE CALLS FROM PLAINTIFFS' LAWYERS SAYING, "I LEARNED ABOUT YOUR RECALL THE OTHER DAY IN THE NEWSPAPER. I THINK IT'S A GREAT RECALL. BY THE WAY, YOU KNOW AND I KNOW THAT YOU WOULDN'T HAVE RECALLED THE VEHICLES BUT FOR MY LAWSUIT. AND, THEREFORE, I'M WILLING TO SETTLE MY LAWSUIT, BUT I WANT SEVERAL HUNDRED THOUSAND DOLLARS IN ATTORNEYS' FEES IN ORDER TO DO THAT."

WE SAID, "FORGET IT. WE'RE NOT GOING TO DO THAT. YOU HAD NOTHING TO DO WITH THIS. WE'RE NOT GOING TO PAY YOU OFF."

SEVERAL WEEKS LATER, THE PLAINTIFFS' LAWYER FILED A MOTION IN THE STATE COURT DOWN IN FLORIDA SEEKING TO ENJOIN FORD FROM GOING FORWARD WITH A RECALL THAT IT HAD PROMISED THAT IT WOULD DO. AND FORTUNATELY, THE JUDGE THERE DENIED THAT MOTION.

BUT I THINK TO THE EXTENT THAT WE'RE TALKING ABOUT CONCEPTS OF PRIVATE ATTORNEYS IN GENERAL, I THINK WE NEED TO KEEP SITUATIONS LIKE THAT IN MIND.

THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH.

ALL RIGHT. MR. KLEIN?

TESTIMONY OF ROBERT DALE KLEIN

MR. KLEIN: GOOD AFTERNOON, JUDGE NIEMEYER, MEMBERS OF THE COMMITTEE. IF YOU WOULD INDULGE ME A PERSONAL NOTE TO JUDGE NIEMEYER, I BRING YOU GREETINGS FROM YOUR FORMER

COLLEAGUES ON THE RULES COMMITTEE OF THE COURT OF APPEALS OF MARYLAND, WHERE WE'RE DOING OUR BEST TO FOLLOW IN YOUR FOOTSTEPS. IT'S GOOD TO KNOW THAT ONE OF OUR OWN HAS DONE SO WELL.

HONORABLE PAUL NIEMEYER: YOU CAN RETURN OUR GREETINGS IN THE INTERESTS OF FEDERAL/STATE RELATIONS.

MR. KLEIN: OKAY. I'M NOT HERE ON BEHALF OF THE COMMITTEE TODAY, BUT YOUR FRIENDS DID SAY "HI."

MEMBERS OF THE COMMITTEE, MY NAME IS ROBERT KLEIN, AND I SPEAK TO YOU TODAY FROM THE PERSPECTIVE OF ONE WHO SPENT THE LAST 20 YEARS REPRESENTING DEFENDANTS IN PRODUCT LIABILITY ACTIONS, NOT ONLY IN MY HOME STATE OF MARYLAND, BUT BY VIRTUE OF VARIOUS NATIONAL COORDINATION RESPONSIBILITIES FOR DIFFERENT CLIENTS. I HAVE BEEN INVOLVED IN PRODUCTS CASES PRETTY MUCH FROM SEA TO SHINING SEA.

I RISE TODAY TO SUPPORT THE COMMITTEE'S AMENDMENTS TO RULE 23. I'M GOING TO FOCUS MY COMMENTS PARTICULARLY ON (B)(4), BUT I HAVE FOLLOWED YOUR PROGRESS. I HAVE, IN FACT, ATTENDED, AS AN OBSERVER, MOST OF YOUR COMMITTEE MEETINGS ON THIS SUBJECT.

AND JUDGE CARROLL, ALABAMA HAS TAKEN ON THE CHIN OF IT LATELY, BUT THANK GOODNESS YOU MET IN TUSCALOOSA, BECAUSE I WOULD HAVE NEVER HAD THOSE RIBS AT DREAMLAND.

HONORABLE JOHN L. CARROLL: I MAY NOT NECESSARILY SHARE THAT VIEW.

MR. KLEIN: AS I SAID, I'D LIKE TO FOCUS ON (B)(4).

BUT SO YOU UNDERSTAND WHERE I'M COMING FROM, I'D LIKE TO TALK ABOUT THE BIGGER PICTURE IN WHICH I SEE (B)(4) PLAYING OUT. AND SO IF YOU WOULD BEAR WITH ME FOR A MOMENT, I WILL GET TO THAT POINT.

I UNDERSTAND THAT THE FOCUS OF TODAY'S MEETING IS, TECHNICALLY SPEAKING, RULE 23. BUT RULE 23 DOES NOT OPERATE IN A VACUUM.

ALSO, MUCH OF WHAT I AM TALKING ABOUT TODAY, FRANKLY, IS HAPPENING IN STATE COURTS, AS WELL AS FEDERAL COURTS. AND DUE TO WHAT I'LL CALL THE TRICKLE-DOWN THEORY OF JURISPRUDENCE THAT SOME HAVE ALLUDED TO HERE TODAY, WHAT YOU DO HAS RAMIFICATIONS FAR BEYOND THE CONFINES OF FEDERAL COURTS AND FEDERAL JURISPRUDENCE. MANY COURTS PATTERN THEIR RULES AND THE WAY THEY INTERPRET THEIR RULES ON WHAT IS DONE IN THE FEDERAL COURTS.

IT'S NO SECRET TO ANYONE HERE THAT THE AGGREGATION OF CLAIMS FOR TRIAL IN THE MASS TORT ARENA, WHICH IS WHAT I KNOW -- I'M NOT A SECURITIES LAWYER; I DON'T PRETEND TO HAVE THAT PERSPECTIVE. I WOULD BE THE FIRST TO ADMIT THAT WHERE YOU STAND OFTEN DEPENDS ON WHERE YOU SIT. I SIT IN A QUAGMIRE OF MASS TORT LITIGATION, AND THAT CERTAINLY COLORS MY VIEWS. AS A TOOL OF SETTLEMENT COERCION, RULE 23 IS NOT THE ONLY THING THAT'S OUT THERE. MOST OF THE CLAIMS AGGREGATION DEVICES THAT WE FACE, AND WHICH REALLY CAUSE ME TO STAND UP IN FAVOR OF (B)(4), ARE RULES OTHER THAN RULE 23.

RULE 42 CONSOLIDATIONS, AND IT'S IN BOTH FEDERAL AND STATE COURTS, FRANKLY, BRING ALL OF THE DOWNSIDES OF CLASS ACTIONS UNDER 23 WITH NONE OF THE PROTECTIONS, IF YOU'RE A DEFENDANT, OR, FOR THAT MATTER, IF YOU'RE A MEMBER OF THE PLAINTIFF GROUP.

MANY COURTS, TOO MANY COURTS, EMPLOY OTHER AGGREGATIVE TECHNIQUES, SUCH AS MASSIVE CONSOLIDATED TRIALS, TRIALS WHERE VERDICTS OF A FEW SUPPOSEDLY ILLUSTRATIVE OR REPRESENTATIVE -- AND I USE THOSE TERMS IN QUOTES -- PLAINTIFFS -- THESE ARE NOT CLASS ACTIONS -- NONETHELESS, ARE EXTRAPOLATED ACROSS THOSE WHO STAND IN THE WINGS.

THESE ARE CLAIMS OF MASKING DEVICES. WE SEE SERIAL TRIALS WHERE, IF YOU'RE A DEFENDANT, YOU HAVE A JUDGMENT RENDERED AGAINST YOUR PRODUCT. IN THE NEXT CASE, YOU HAVE COLLATERAL ESTOPPEL APPLIED, NOTWITHSTANDING THE FACT THAT ALONG THE WAY, YOU ALSO HAVE VERDICTS IN YOUR FAVOR.

CAN RULE 23 SOLVE THIS? OF COURSE IT CAN'T. HOWEVER, (B)(4) DOES HELP ADDRESS AND PROVIDE A WAY OUT FOR CORPORATE DEFENDANTS WHO HAVE TO DEAL WITH THIS MESS DAY-IN AND DAY-OUT, BECAUSE THE SLIPPERY SLOPE HAS BEEN SLID DOWN UPON.

RULE 23, IN TERMS OF ITS INTERPRETATION IN STATE AND FEDERAL COURTS, OVER A PERIOD OF TIME, HAS SLIPPED DOWNWARD. IT'S BECOME MORE RELAXED. I DO FIND THE CASES OF CASTANO, FOR EXAMPLE, OR RHONE-POULENC, A REFRESHING BREATH OF FRESH AIR. BUT THOSE ARE STRICTLY IN THE CLASS CONTEXT.

AND IF YOU THINK THAT THE THRESHOLD OR THE BAR FOR CLASS ACTIONS UNDER RULE 23, BE IT FEDERAL OR STATE VERSIONS OF THE RULE, HAS SLIPPED, LET ME TELL YOU, THE THRESHOLD FOR CONSOLIDATING CASES FOR MASS TRIALS HAS SLIPPED BELOW THE HORIZON OF DUE PROCESS FAIRNESS IN TOO MANY COURTS IN THIS COUNTRY.

SO, THE FACT IS THAT WHAT I'LL CALL THE HORSE OF MASS TORT CLAIMS AGGREGATION FOR TRIAL, THAT HORSE IS OUT OF THE BARN. I HOPE THAT WITH SOME OF THE AMENDMENTS THAT YOU'VE PROPOSED FOR 23, YOU AT LEAST SEND A MESSAGE THAT MAYBE SOMEBODY OUGHT TO PUSH THE HORSE BACK TOWARDS THE BARN. AND IF YOU CAN'T DO THAT, AT LEAST (B)(4) WILL HELP A DEFENDANT FACED WITH SOME OF THE ABUSES IN THIS AREA, OF CORRALLING THE LITIGATION STAMPEDE.

I CALL THESE NON-RULE 23 AGGLOMERATIONS OF CASES PSEUDO CLASSES. AND, IN FACT, THEY EFFECTIVELY BECOME THAT. AND IF YOU CAN'T STOP THEM, WE CAN, AT LEAST, MARSHAL THE DAMAGE THESE THINGS CAN CAUSE BY THE AVAILABILITY OF (B)(4).

MR. SOL SCHREIBER: COUNSELOR, HOW DO YOU DO THAT IF MOST OF THESE (B)(4) SETTLEMENTS PROBABLY HAVE OPT-OUT PROVISIONS? WOULDN'T THE PEOPLE WHO ARE PART OF THE AGGREGATE CASES BE INSTRUCTED BY THEIR LAWYERS TO OPT OUT SO THEY CAN CONTINUE THE CASES?

MR. KLEIN: WELL, WE DON'T LIVE IN A PERFECT WORLD, JUDGE.

BUT I WOULD ANSWER YOUR QUESTION THIS WAY: WHEN A PERSON DOES OPT OUT, YOU KNOW WHO HAS OPTED OUT; YOU KNOW HOW MANY PEOPLE HAVE OPTED OUT. AND SO FROM THE STANDPOINT OF MANAGEMENT PREDICTABILITY, CALCULABILITY, MARKETABILITY, SEC FILINGS, THE FINANCIAL MARKETS, ET CETERA, YOU CAN, AT LEAST, PUT A NUMBER ON IT AND BE CAREFULLY SURE THAT THE NUMBER IS REAL. (B)(4), FRANKLY, IN MY VIEW, MERELY REAFFIRMS THAT'S ALREADY BEING DONE, AND IT REAFFIRMS ECONOMIC REALITY AND NECESSITY.

RIGHT NOW, I SPENT MOST OF MY TIME ON AIRPLANES ENGAGED IN, I GUESS, IN ANOTHER ERA WOULD HAVE BEEN SHUTTLE DIPLOMACY. I'M TRYING TO PUT TOGETHER AROUND THE COUNTRY A PATCHWORK QUILT OF MINI ADMINISTRATIVE SETTLEMENTS, IF YOU CAN, BECAUSE I CAN'T DO IT IN ONE FELL SWOOP. THE JURISPRUDENCE RIGHT NOW IS UP IN THE AIR. IT'S LIKE BEING IN ONE OF THESE CARNIVAL GAMES WHERE YOU GOT THE GOPHERS AND YOU GOT THE CLUB, AND YOU'RE TRYING TO BEAT ONE DOWN. AS SOON AS YOU THINK YOU GOT THE LID DOWN OVER HERE, ANOTHER ONE POPS UP.

THE PLAINTIFF FIRMS WHO ARE BRINGING THESE ARE DOING QUITE WELL, AND I'M NOT BEING CRITICAL OF DOING WELL. BUT WHAT WE'RE FACED WITH IS THEIR JUNIOR PEOPLE IN THESE FIRMS ARE SPINNING OFF AND OPENING THEIR FIRMS. SO AS SOON AS YOU THINK YOU GOT A DEAL OVER HERE, THERE IS ANOTHER LAWYER THAT USED TO BE OVER HERE NOW POPS UP HERE ON THEIR OWN REPRESENTING ANOTHER GROUP OF CLAIMANTS. IT'S IMPOSSIBLE, IN ANY PRACTICAL SENSE, TO

PIECE THIS THING TOGETHER WITHOUT A TOOL LIKE (B)(4). THAT'S WHY I'M HERE TODAY, PRIMARILY.

THE OTHER THINGS THAT I MENTIONED IN MY WRITTEN SUBMISSION ARE LAUDATORY AS WELL. I THINK THEY HELP GET US BACK TO THE PHILOSOPHY, IF YOU WILL, OF THE '66 COMMITTEE NOTE THAT SAYS ORDINARILY, RULE 23(B)(3) IS NOT SUITABLE FOR MASS ACCIDENTS.

WHILE THEY MAY NOT HAVE CONTEMPLATED MASS TORTS BACK IN '66, I THINK THE ARGUMENT THAT IF IT DOESN'T APPLY TO A PLANE CRASH, IT SURE DOESN'T APPLY TO MASS TOXIC LITIGATION, I THINK WE'RE ON A LONG JOURNEY HERE. I THINK THIS IS THE FIRST STEP.

I APPLAUD THE COMMITTEE'S LEADERSHIP IN TAKING A STEP.

THANK YOU.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. KLEIN.

MR. KOHN?

TESTIMONY OF STEVEN M. KOHN

MR. KOHN: GOOD AFTERNOON, YOUR HONOR, MEMBERS OF THE COMMITTEE. I'M STEVEN KOHN. I PRACTICE IN OAKLAND, CALIFORNIA, WITH THE LAW FIRM OF CROSBY, HEAFEY, ROACH & MAY. IT'S A PLEASURE TO BE HERE THIS AFTERNOON, AND I HAVE BEEN HERE SINCE 8:00 O'CLOCK THIS MORNING AND HAVE ENJOYED THE DIALOGUE VERY MUCH, AND I THINK I'VE LEARNED A LOT. I WILL DO MY BEST NOT TO REPEAT THE REMARKS OF OTHERS AND THE COMMENTS OF OTHERS.

I WOULD LIKE TO SAY THAT I ENDORSE ALL OF THE AMENDMENTS. I PARTICULARLY WOULD LIKE TO ENDORSE THE COMMENTS

MADE BY MR. PREUSS AND MR. MC GOLDRICK THIS MORNING. MY PRACTICE HAS LARGELY BEEN DEDICATED TO THE DEFENSE OF DEFENDANTS IN MASS TORT LITIGATION OVER THE PAST 20 YEARS. AND WITH THAT EXPERIENCE IN MIND, I'D LIKE TO OFFER JUST A FEW COMMENTS WITH RESPECT TO THAT LITIGATION AND ITS SUITABILITY FOR CLASS ACTION TREATMENT.

FIRST, LET ME SAY THIS. AT LEAST IN MY EXPERIENCE, THE CLAIMS THAT I'VE HANDLED HAVE BEEN LARGE, COMPLEX CLAIMS, WHERE I HAVE FOUND PLAINTIFFS WHO HAD ABSOLUTELY NO DIFFICULTY SECURING REPRESENTATION ON A CONTINGENT-FEE BASIS. AND FOR THAT MATTER, I CERTAINLY ENDORSE THE PROVISIONS OF THE AMENDMENTS THAT ASKS THE DISTRICT COURTS TO LOOK TO THE AVAILABILITY OF LITIGATION OUTSIDE THE CLASS FOR THE CLASS MEMBERS. I THINK COMPETENT COUNSEL ARE CERTAINLY AVAILABLE TO REPRESENT CLAIMANTS IN MASS TORT LITIGATION ON AN INDIVIDUAL BASIS. AND THE VEHICLE OF A CLASS ACTION IS UNNECESSARY FROM THAT PERSPECTIVE.

THERE HAVE BEEN COMMENTS ABOUT THE MATURITY PROVISIONS OF (B)(3)(C). AND I WOULD LIKE TO ADD WHAT MY EXPERIENCE MAY CONTRIBUTE.

IT'S MY OPINION THAT IN A MASS TORT SETTING, PARTICULARLY IN PHARMACEUTICALS AND MEDICAL DEVICE LITIGATION, WHERE A LOT OF MY EXPERIENCE HAS BEEN, THAT ONE OR TWO OR EVEN THREE TRIALS, INDIVIDUAL TRIALS, IS USUALLY INSUFFICIENT TO FLUSH OUT THE COMPLICATED, SCIENTIFIC ISSUES THAT ARE INVOLVED IN THESE CASES. AND FOR THAT MATTER, IT MAY TAKE DOZENS OF

TRIALS.

AND I THINK IF YOU LOOK AT THE DES LITIGATION, WHERE THERE WERE DOZENS OF TRIALS, THE BREAST IMPLANT LITIGATIONS, WHERE THERE HAVE BEEN DOZENS OF TRIAL RECENTLY, I THINK YOU'LL SEE THAT THE WISDOM THAT IS GLEANED FROM THOSE DOZENS OF TRIALS IS VERY HELPFUL TO THE COURT IN FERRETING OUT EXACTLY WHAT ISSUES ARE COMMON AND WHICH ISSUES ARE UNIQUE.

WHAT I HAVE FOUND IS THAT A MASS TORT LITIGATION MAY OFTEN BE INSTITUTED BY THE FLIMSIEST SCIENTIFIC EVIDENCE, A CASE SUPPORT, AN ANIMAL STUDY, SOMETHING THAT IS TOTALLY UNPROVEN IN THE PEER-REVIEWED SCIENTIFIC LITERATURE. AND IT TAKES A PERIOD OF TIME, SOMETIMES TWO, THREE, FOUR YEARS, AS WE'VE SEEN CERTAINLY IN THE BREAST IMPLANT LITIGATION, FOR TRUE SCIENCE TO CATCH UP WITH JUNK SCIENCE.

IF A CLASS GETS CERTIFIED EARLY ON, BEFORE THE THEORIES OF LIABILITY ARE REALLY DEVELOPED AND BEFORE THE DEFENSES CAN BE DEVELOPED, I THINK THAT DOES A GREAT INJUSTICE TO THE DEFENDANTS. THE RECENT RULE 104 HEARINGS BY JUDGE JONES IN OREGON WERE REALLY THE PRODUCT OF FOUR YEARS OF THE EMERGENCE OF A BODY OF SCIENCE, EPIDEMIOLOGICAL STUDIES IN THE BREAST IMPLANT LITIGATION THAT ALLOWED THOSE VERY COMPLICATED AND VERY LENGTHY 104 HEARINGS TO GO FORWARD THAT RESULTED IN A DECISION THAT I THINK WILL ULTIMATELY BE A LANDMARK DECISION IN TERMS OF THE BREAST IMPLANT LITIGATION.

BUT THE POINT IS: HAD A CLASS BEEN CERTIFIED AND HAD

THERE BEEN A LIABILITY TRIAL EARLY ON, THAT POTENTIALLY WOULD HAVE HAD COLLATERAL ESTOPPEL EFFECT THAT WOULD HAVE HAD DEVASTATING RESULTS AND VERY DIFFERENT RESULTS THAN IF SUCH A TRIAL WERE TO TAKE PLACE TODAY. AND THAT'S TRUE, I THINK, IN OTHER MASS TORT LITIGATION AS WELL.

THE PROCESS OF HAVING INDIVIDUAL TRIALS, I BELIEVE, ALSO ALLOWS BOTH SIDES TO EVALUATE THE LITIGATION FOR PURPOSES OF SETTLEMENT. BREAST IMPLANT CASES, OTHER KIND OF PHARMACEUTICAL PRODUCTS LIABILITY CASES, FOR THE MOST PART, GET SETTLED AT ONE POINT OR ANOTHER. BUT THE SETTLEMENT PROCESS IS VERY DIFFERENT IN A SITUATION WHERE THERE HAS BEEN A NUMBER OF TRIALS AND BOTH SIDES ARE ABLE TO EVALUATE HOW CASES ARE LIKELY TO COME OUT AFTER THOSE TRIALS TAKE PLACE, AS OPPOSED TO THE SITUATION WHERE A CLASS GETS CERTIFIED.

AND I'M PERSONALLY INVOLVED IN ONE RIGHT NOW. A NATIONWIDE CLASS HAS BEEN CERTIFIED INVOLVING A PHARMACEUTICAL PRODUCT, WHERE THERE HAVE BEEN NO INDIVIDUAL TRIALS. AND THERE, THERE IS ENORMOUS PRESSURE, AS MR. MC GOLDRICK SAID, ON THE DEFENDANTS TO SETTLE BEFORE ANYBODY REALLY KNOWS WHAT THE TRUE LIABILITY PICTURE IS. AND SO THE POINT OF MY COMMENTS ARE: YOU CANNOT TRY THESE CASES IN A FACTUAL VACUUM.

AND JUST TO RESPOND TO ONE OF THE QUESTIONS THAT WAS RAISED A FEW MINUTES AGO: ARE THESE CASES SUITABLE FOR BIFURCATION? CAN YOU BIFURCATE OUT A DISCRETE ISSUE AND THEN HAVE THE REST OF THE INDIVIDUAL ISSUES BE LITIGATED

INDIVIDUALLY? MY ANSWER TO THAT IS: GENERALLY, NO, THAT THERE IS SO MUCH OVERLAP BETWEEN LIABILITY, PROXIMATE CAUSE, COMPARATIVE FAULT, BREACH OF A WARRANTY IN THESE CASES THAT THERE REALLY IS NO EFFECTIVE WAY, GENERALLY SPEAKING, TO BIFURCATE.

I, TOO, APPLAUD THE ENERGY AND THE EFFORT OF THE COMMITTEE. AND I THANK YOU VERY MUCH FOR THE TIME.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. KOHN.

MR. PICKETT?

TESTIMONY OF DONN P. PICKETT

MR. PICKETT: GOOD AFTERNOON. THANK YOU. MY NAME IS DONN PICKETT. YOU SHOULD HAVE SOME WRITTEN COMMENTARY FROM ME, WHICH I DEFER TO. I WOULD LIKE TO SPEAK AS TO THREE OF THE SPECIFIC PROPOSALS, HOWEVER, IN MY TIME HERE.

IF I COULD, I WOULD LIKE TO START WITH SUBDIVISION (C), WHICH, AT LEAST AS TO THE COMMENTARY I REVIEWED THAT YOU'VE RECEIVED, YOU'VE GOTTEN LITTLE COMMENT ON. I THINK YOU'RE DOING MORE GOOD THERE THAN YOU MAY THINK AND THAT THE COMMITTEE NOTES REFLECT. AND, BY THE WAY, I AM HERE IN SUPPORT OF THE AMENDMENTS AS THEY ARE.

HONORABLE DAVID S. DOTY: DO YOU GENERALLY REPRESENT PLAINTIFFS OR DEFENDANTS?

MR. PICKETT: DEFENDANTS, GENERALLY.

THE AFFIRMATION OF THE "AS SOON AS" LANGUAGE I THINK IS EXTREMELY HELPFUL. THE PROBLEM HAS BEEN, IN SOME OF THE

CASES THAT I HAVE BEEN INVOLVED WITH, "AS SOON AS" LANGUAGE HAS BEEN A DEVICE USED BY PLAINTIFFS' ATTORNEYS TO ADVANCE THE CRITICAL CERTIFICATION DETERMINATION TO A PREMATURE LEVEL, SUCH THAT IN SOME CASES IN WHICH I HAVE BEEN INVOLVED, AN ALLEGATION BY THE PLAINTIFF TURNS INTO AN ASSUMPTION BY THE COURT WHICH SUPPORTS THE CERTIFICATION. AND IT'S ONLY AS CERTAIN OF THE FACTORS ARE FLESHED OUT THAT IN A SUBSEQUENT DECERTIFICATION MOTION, YOU CAN REACH THE REAL NUB OF THE ISSUE.

MR. SOL SCHREIBER: IS THAT REALLY TRUE, COUNSELOR?

MR. PICKETT: YES.

MR. SOL SCHREIBER: IT'S BEEN MY IMPRESSION --

MR. PICKETT: YES. I'VE ALWAYS BEEN TAUGHT TO ANSWER YOUR HONOR'S QUESTIONS. AND THE ANSWER IS YES.

HONORABLE PAUL NIEMEYER: NO ONE IS UNDER OATH TODAY, BUT WE ACCEPT IT.

MR. SOL SCHREIBER: IT'S BEEN MY IMPRESSION THAT PLAINTIFFS DON'T WANT IMMEDIATE CERTIFICATION BECAUSE THEN, IF THEY'RE CERTIFIED, THEY HAVE TO SEND OUT NOTICE. AND NOTICE IS AN EXTRAORDINARILY EXPENSIVE PROPOSITION.

MOST PLAINTIFFS, IN MOST CASES, WOULD RATHER HAVE THE COURT DELIBERATE FOR MONTHS OR YEARS, AND THEN MAYBE THERE WILL BE A SETTLEMENT, AND THE COST OF THE NOTICE WOULD BE PICKED UP BY THE SETTLEMENT.

MR. PICKETT: NOT MY EXPERIENCE. THE PLAINTIFFS' COUNSEL THAT I HAVE BEEN ACROSS THE TABLE FROM ARE VERY WELL

FINANCED. THE COST OF NOTICE IS NOT A DETERRENT TO THEM. THE ADVANTAGE IN CERTIFICATION IS ENORMOUS. AND THOSE FACTORS DON'T WEIGH AT ALL IN THE WAY THAT YOU SUGGEST.

THE CASE I COMMENT UPON IN MY COMMENTARY IS ONE IN WHICH THE COURT, IN CERTIFYING A NATIONWIDE CLASS, CONCEDED THAT SHE DID NOT FEEL THAT THE ALLEGATIONS WOULD BE PROVEN, TRUE, BUT FELT COMPELLED BY THE "AS SOON AS" LANGUAGE TO MAKE THE DETERMINATION VERY EARLY ON. INDEED, THAT DETERMINATION WAS MADE WITHIN MONTHS OF FILING OF THE COMPLAINT, WITHIN FOUR MONTHS OF THE FILING OF THE COMPLAINT.

SO I THINK YOU ARE DOING A LOT OF GOOD. AND MY POINT IS THAT I SUPPORT IT. I THINK THE COMMITTEE NOTES PERHAPS RELEGATE THAT CHANGE TO A MORE MINOR CHANGE, BUT I WOULD TELL YOU THAT I THINK IN MY EXPERIENCE, IT'S IMPORTANT.

WITH A FULLER RECORD, A BETTER RECORD, AND MORE DELIBERATIVE, IN MANY CASES, DECISION, I THINK THE PROPOSAL WITH RESPECT TO SUBDIVISION (F) MAKES MORE SENSE THAN EVER. AND LET ME SIMPLY SAY THERE THAT I THINK THE BEAUTY OF THE PROVISION, THE BEAUTY OF IT IS ITS NEUTRALITY. IT LEAVES TO THE APPELLATE COURTS PURE DISCRETION TO ACCEPT AN APPEAL OR NOT.

AND THAT IS WHAT'S THE PROBLEM WITH THE CURRENT SITUATION, WHETHER BY MANDAMUS OR, I THINK MORE POPULARLY, CERTIFICATION UNDER 1292(B), THERE ARE PERIPHERAL ISSUES WHICH GET IN THE WAY OF WHETHER THE SIMPLE QUESTION CAN BE ANSWERED BY THE APPELLATE COURT: IS THIS A DECISION WHICH WILL ADVANCE THE

LAW WHICH SHOULD BE DECIDED NOW? AND WITH A NEUTRAL DISCRETIONARY RULE, WE WILL GET THAT.

WHAT I FEAR AND WHAT I URGE YOU TO CONSIDER OR RECONSIDER ARE NOTES THAT YOU'VE INCLUDED IN THE COMMENTARY WHICH TAKE AWAY FROM THAT NEUTRALITY, AND WILL BE USED, I ASSURE YOU, BY COUNSEL FOR YEARS TO COME TO ARGUE TO AN APPELLATE COURT THAT ITS DISCRETION SHOULD NOT BE UNINCUMBENT. AND SPECIFICALLY, ON PAGE 56 OF THE COMMENTS, THE REFERENCE THAT THE EXPANSION OF THE APPELLATE OPPORTUNITIES ARE MODEST, THEY REFERENCE TO 1292 THAT THE COURT OF APPEALS' DISCRETION IS AS BROAD AS UNDER SECTION 1292(B), WHICH I THINK IS DIRECTLY CONTRARY TO THE RULE ITSELF THAT YOU PROPOSE.

AND FINALLY, YOUR STATEMENT AT THE END OF THE FIRST PARAGRAPH ON 56 THAT THE PERMISSION ALMOST ALWAYS WILL BE DENIED WHEN THE CERTIFICATION DECISION TURNS ON CASE-SPECIFIC MATTERS OF FACT AND DISTRICT COURT DISCRETION, I THINK THOSE WEIGH THE -- I DON'T THINK YOU WANT TO PREJUDGE THAT. I DO THINK YOU WANT TO LEAVE IT TO THE APPELLATE COURT, AND I DO THINK, FOR EXAMPLE, THAT DISTRICT COURT DISCRETION NOTWITHSTANDING, CASE-SPECIFIC MATTERS OF FACT THAT RELATE TO ANY OF THE RELEVANT FACTORS, NOTWITHSTANDING THE APPELLATE COURT, SHOULD BE UNENCUMBERED BY THOSE NOTES.

FINALLY, I'D LIKE TO ADDRESS --

HONORABLE ANTHONY SCIRICA: IS IT IMPLIED IN THAT WHEN IT'S REALLY A CLOSE DECISION ON THE FACTS, THE APPELLATE COURT

IS PROBABLY GOING TO DEFER TO THE DISTRICT COURT?

MR. PICKETT: OH, SURE. AND I'M SURE THAT WILL HAPPEN 99.9 PERCENT OF THE TIME.

WHAT I FEAR, THOUGH, IS THAT YOU KNOW HOW THOSE NOTES ARE USED, IN PRACTICALITY. AND I GUESS THE LESS WOULD BE MORE, IN THIS CASE, TO LEAVE IT PURELY TO THE DISCRETION OF THE COURT. AND THERE ARE FACT-SPECIFIC ISSUES THAT THE APPELLATE COURT MAY TAKE UP, FOR EXAMPLE, WITH RESPECT TO SOME OF THESE FACTORS THAT WE'VE BEEN ADDRESSING TODAY.

HONORABLE ANTHONY SCIRICA: BUT I WONDER: I THINK IN A CASE LIKE THAT, I JUST DON'T THINK THAT THE APPELLATE COURT IS GOING TO BE DETERRED FROM TAKING THE CASE BECAUSE OF SOMETHING IN THE COMMITTEE NOTE IF THEY THINK IT'S AN IMPORTANT ISSUE. AND EVEN THOUGH IT'S FACT-SPECIFIC, THEY'RE GOING TO TAKE IT.

MR. PICKETT: AGAIN, I THINK YOU'RE RIGHT.

I DO THINK, THOUGH, THAT YOU GET INVOLVED IN SIDE DEBATES, IF YOU WILL, WHICH I THINK HAS BEEN THE PROBLEM WITH 1292(B). AND I JUST WOULD NOT WANT TO INVENT SIDE ISSUES.

HONORABLE PAUL NIEMEYER: THE BETTER MODEL FOR THE 23(F) MIGHT BE A CERTIORARI.

MR. PICKETT: YES. I THINK THAT'S AN EXCELLENT SUGGESTION.

HONORABLE PAUL NIEMEYER: WELL, IT MAY BE THERE ALREADY. BECAUSE AS YOU KNOW, 1292(B) HAS A SPECIFIC STANDARD.

MR. PICKETT: BUT IT'S ALSO ENCUMBERED BY THE FACT

THAT IT WOULD BE A --

HONORABLE PAUL NIEMEYER: -- CONTROLLING ISSUE OF LAW.

MR. PICKETT: -- CONTROLLING ISSUE OF LAW, YES.

FINALLY, LET ME ADDRESS, IF I MAY, 23(B)(3)(A), THAT FACTOR, WITH RESPECT TO THE PRACTICALITY OF INDIVIDUAL CLASS MEMBERS TO PURSUE CLAIMS.

I THINK THERE IS A REAL VALUE IN ALLOWING REAL LITIGANTS TO PURSUE THEIR CLAIMS IN THE COURTS. THAT VALUE OUGHT TO BE LISTED AS A FACTOR TO BE CONSIDERED. THE VALUE IS ACCOUNTABILITY TO THE ATTORNEYS. THE CLIENTS HAVE A SAY AND CONTROL THE LITIGATION. THE VALUE IS THAT WHEN REAL PARTIES MAKE REAL LITIGATION DECISIONS, THEY OFTEN COME OUT IN A WAY THAT I THINK IS BETTER FOR THE OVERALL RESOLUTION OF THE DISPUTE.

AND I WOULD LEAVE YOU ONLY WITH AN EXAMPLE OF MY OWN, IN WHICH I REPRESENT THE EASTMAN KODAK COMPANY, A CASE IN WHICH A BILLION-DOLLAR CLASS NATIONWIDE WAS CERTIFIED OF PURCHASERS OF HIGH-VOLUME, HIGH-SPEED COPIERS. THESE ARE COPIERS THAT TYPICALLY COST A HUNDRED THOUSAND DOLLARS, UP TO $500,000.

IN THE CLASS WERE INCLUDED SCORES OF FORTUNE 500 COMPANIES, BASICALLY EVERYONE WHO HAS A XEROX COPIER OR SOME OTHER HIGH-VOLUME COPIER. THOSE FORTUNE 500 COMPANIES HAD CLAIMS WHICH, AS TO MANY OF THEM, THAT INDIVIDUALLY TOTALED OVER A MILLION DOLLARS. WE POINTED THAT OUT TO THE DISTRICT COURT. THE DISTRICT COURT REJECTED THAT AS A FACTOR BECAUSE IT WAS NOT

LISTED AMONG THE RULE 23 FACTORS. THAT'S AS GOOD AN EXAMPLE AS I CAN GIVE YOU OF THE NEED TO PUT IN FACTOR (A).

HONORABLE PAUL NIEMEYER: THANK YOU. ALL RIGHT, MR. PICKETT.

WE'LL TAKE A MID-AFTERNOON RECESS, ABOUT 15 MINUTES. WE'LL RESUME AT 3:45.

(RECESS TAKEN AT 3:30 P.M.)

(PROCEEDINGS RESUMED AT 3:45 P.M.)

HONORABLE PAUL NIEMEYER: MR. JAMES ROETHE? IS MR. ROETHE HERE?

WE'RE GOING TO RESUME.

WE'LL CONTINUE WITH YOU, IF WE CAN GET OUR BACK-BENCHERS QUIET.

MR. ROETHE: ALL RIGHT. IS THE BACK BENCH QUIET?

HONORABLE ANTHONY SCIRICA: NOT FOR LONG.

HONORABLE PAUL NIEMEYER: PLEASE PROCEED.

TESTIMONY OF JAMES N. ROETHE

MR. ROETHE: GOOD AFTERNOON, MEMBERS OF THE COMMITTEE. MY NAME IS JIM ROETHE. I'M THE GENERAL COUNSEL OF BANK OF AMERICA AND THE HOLDING COMPANY, BANK OF AMERICA CORPORATION. I APOLOGIZE FOR MY VOICE. I HOPE I MAKE IT THROUGH. I'M SUFFERING FROM THE END OF A COLD.

I DID PREPARE SOME REMARKS. I'M NOT SURE IF THEY HAVE BEEN CIRCULATED. I DID LEAVE COPIES HERE FOR YOU. I DON'T INTEND TO GO THROUGH THOSE IN FULL, BUT I WILL TRY TO HIT ON A

COUPLE OF POINTS THAT WE'VE MADE, MANY OF WHICH HAVE BEEN MADE TO YOU, AT LEAST THIS AFTERNOON. I WASN'T ABLE TO BE HERE THIS MORNING.

BANK OF AMERICA HAS BEEN THE BRUNT OF A NUMBER OF CLASS ACTIONS. IN 1996, WE WERE INVOLVED IN 65 CLASS ACTIONS, COSTING ATTORNEYS' FEES OF APPROXIMATELY $18.5 MILLION. MANY OF THOSE CLASS ACTIONS WERE STILL PENDING AT THE END OF THE YEAR, AND I'M SURE THAT THE TOTAL FEES INVOLVED IN THE CASES WILL GO UP SUBSTANTIALLY.

MOST OF THOSE CASES AREN'T THE KIND OF MASS TORT CASES YOU HAVE BEEN HEARING ABOUT FROM MANY OF THE SPEAKERS. THEY'RE PRIMARILY CONSUMER CLASS ACTIONS, SECURITIES CLASS ACTIONS, EMPLOYMENT CLASS ACTIONS, ET CETERA, ET CETERA. NONETHELESS, WE HAVE MANY OF THEM.

I PERSONALLY HAVE BEEN INVOLVED IN DEFENSE LITIGATION FOR APPROXIMATELY 25 YEARS, 20 OR SO YEARS BEFORE JOINING BANK OF AMERICA. I FIND CLASS ACTIONS, THE CLASS ACTION PROCESS, TO BE ABUSED, AND I FIND IT TO BE COERCIVE TO DEFENDANTS, AS HAVE MANY OF THE OTHER SPEAKERS. I DO, THEREFORE, BELIEVE THAT THE PROPOSED AMENDMENTS THAT YOU HAVE PUT FORTH ARE A GOOD FIRST STEP IN TRYING TO ELIMINATE SOME OF THAT ABUSE.

HONORABLE PAUL NIEMEYER: WE'VE HEARD A LOT OF THE FIRST-STEP NOTION. AND YOU MAY KNOW WE HAD A LOT OF DIFFERENT DISCUSSIONS OVER THE LAST THREE OR FOUR YEARS IN COMMITTEE, TRYING TO LOOK AT WHAT MIGHT BE APPROPRIATE TO ADDRESS VARIOUS

PROBLEMS WITHOUT DESTROYING THE PROCEDURAL BENEFITS.

WHAT WOULD BE INTERESTING TO ME TO KNOW IS THAT EVERY ONE OF YOU THAT HAS USED THAT PHRASE THAT WE'VE TAKEN A FIRST STEP, WHAT THE SECOND STEP WOULD BE.

MR. ROETHE: YEAH.

HONORABLE PAUL NIEMEYER: AND MAYBE THIS IS NOT THE APPROPRIATE FORUM FOR THAT, SINCE WE HAVE PROCEDURES ON BOARD. BUT WE HAVE HAD SUGGESTIONS IN TWO AREAS THAT DO NOT INVOLVE SPECIAL PROPOSALS HERE.

ONE IS WE'VE HAD A LOT OF COMMENT EARLIER, AT LEAST, THAT THE NOTICE ASPECT IS NOT ADEQUATELY TAKEN CARE OF, THAT CLASS ACTION NOTICES ARE TOO COMPLEX. THEY END UP IN THE WASTEBASKET. MOST PEOPLE DON'T UNDERSTAND THEM.

THE OTHER AREA WE'VE HAD COMMENT ABOUT IS WHETHER WE HAVE OPT-IN OR WE LINK THAT (F) FACTOR TO OPT IN IN CLASS ACTIONS. WE HAVE NO PROPOSAL ON THE TABLE FOR THAT. WE HAVE RECEIVED COMMENTARY.

AND I DON'T WANT TO EXPAND THIS HEARING INTO SOMETHING UNCONTROLLED WITHOUT BOUNDARIES. BUT, IF THERE WAS AN OBVIOUS SECOND STEP, HOW WOULD THAT FIT IN?

MR. ROETHE: RIGHT. I HAD A COUPLE OF THINGS THAT WE PROPOSED AND ARE INCLUDED IN THE MATERIAL THAT YOU WILL.

I'LL JUST GIVE YOU MY COMMENTS ON NOTICE. I THINK THE NOTICES THAT COME OUT ARE REALLY SORT OF ABSURD. AS A LAWYER, I RECEIVE THESE NOTICES AT MY HOME ABOUT CLASS ACTIONS THAT I AM

SUPPOSEDLY A MEMBER OF, AND I HAVE TROUBLE FIGURING OUT WHAT IT'S ALL ABOUT. IT TAKES ME TWO HOURS, THREE HOURS.

HONORABLE PAUL NIEMEYER: I ALREADY SHARED THE COMMENT THAT I HAD TROUBLE WITH THEM AND TOSSED THEM IN THE BASKET. AND I SHOWED A VIEWPOINT ON THAT AND I DON'T INTEND TO. BUT IF YOU INCREASE THE NOTICE, YOU CAN GET INTO THE PROBLEM WE'VE HAD WITH THE SEC LAWS. SO THEN THEY SAY, "OKAY, TAKE ALL THE HIGH-RISK FACTORS AND THROW THEM ON COVER," OR SOMETHING LIKE THAT.

MR. ROETHE: OF COURSE, THE SEC IS NOW STARTING TO MOVE TOWARD EASY-READING PROSPECTUSES.

HONORABLE PAUL NIEMEYER: IT'S A PROBLEM. IT'S A GENERAL PROBLEM, AND I DON'T KNOW IF WE CAN ADDRESS IT IN THIS CONTEXT. BUT IT'S A RECOGNIZED PROBLEM THAT, WHEN ONE OF THOSE NOTICES GOES INTO A HOME WHERE IT'S NOT READILY UNDERSTANDABLE, THAT PRESENTS A BIT OF A PROBLEM.

MR. ROETHE: WE ARE OFF THE BEATEN TRACK A BIT, BUT I'M CONFIDENT THAT WE CAN PREPARE NOTICES THAT WOULD BE ABOUT HALF THE LENGTH AND SAID THE SAME THING, IF WE REALLY TRIED, AS WE ARE DOING, I THINK, NOW, IN THE FILINGS WITH THE SEC, IN PROXY STATEMENTS.

ON THE OPT-IN/OPT-OUT, YOU KNOW, I'M NOT REALLY PREPARED TO ADDRESS THAT. I'VE SEEN SOME MATERIAL ON OPT-IN/OPT-OUT.

HONORABLE PAUL NIEMEYER: I JUST USED THAT AS AN EXAMPLE, BECAUSE WE HAVE HAD SOME SUGGESTIONS ON THAT.

MR. ROETHE: RIGHT. ONE OF THE AREAS THAT I WOULD RECOMMEND THAT YOU CONSIDER IS THIS IDEA OF AN ADDITIONAL REQUIREMENT IN RULE 23(B)(3), WHICH WOULD REQUIRE A FOCUS ON THE EVIDENCE.

NOW, IT MAY BE IMPLICIT IN THE (B)(3) REQUIREMENTS THAT THE COURT WILL LOOK AT THE EVIDENCE. BUT I'VE FOUND IN PRACTICE THAT MANY TIMES, THERE ARE SORT OF TYPES OF ISSUES THAT ARE PUT IN, ALMOST IN PLATITUDE FORM, WHICH ARE THE ELEMENTS OF THE OFFENSE, WHICH ARE, SUPPOSEDLY, COMMON. BUT WHEN YOU REALLY LOOK AT THE EVIDENCE, WHEN YOU LOOK AT THE PROOF THAT'S GOING TO HAVE TO BE ELICITED AT TRIAL, YOU FIND THAT IT'S GOING TO BE INDIVIDUALIZED PROOF.

AND I REALLY THINK THAT JUDGES TOO OFTEN SLIDE OVER THAT, WHEN THEY'RE FACED WITH A MASSIVE CLASS ACTION. IT'S EASY TO CERTIFY A CLASS WITHOUT GIVING CONSIDERATION TO THE PROOF. AND I THINK THAT IF YOU PUT INTO 23(B)(3) A THIRD REQUIREMENT, THAT THE EVIDENCE LIKELY TO BE ADMITTED AT TRIAL REGARDING THE ELEMENTS OF THE CLAIM FOR WHICH CERTIFICATION IS SOUGHT IS SUBSTANTIALLY THE SAME AS TO ALL THE CLASS MEMBERS, IT WOULD FOCUS THE ATTENTION OF THE COURTS ON THAT ELEMENT, AND I THINK IT WOULD BE A PRODUCTIVE ENDEAVOR.

WITH RESPECT TO THE QUESTION OF THE COST VERSUS THE BURDENS -- THIS IS (B)(3)(F) -- WE ARE VERY SUPPORTIVE OF THIS NEW PROVISION. I AM A BIT CONCERNED WITH SOME OF THE COMMENTARY IN THE NOTE, WHICH SEEMS TO LIMIT THE VALUE OF THE PROPOSAL

ITSELF TO CASES WHICH MAY INVOLVE ONLY A FEW DOLLARS.

NOW, WE ARE PROPOSING, IN OUR PAPER, THAT CONSIDERATION BE GIVEN TO A BRIGHT-LINE APPROACH IN WHICH SOME DE MINIMUS AMOUNT WOULD BE AUTOMATICALLY NOT SUITABLE FOR CLASS CERTIFICATION. I'M NOT SURE WHAT THAT NUMBER WOULD BE. MAYBE A HUNDRED DOLLARS, MAYBE $50.

PEOPLE WILL CRITICIZE THE BRIGHT-LINE APPROACH AS BEING UNFAIR IN CERTAIN CIRCUMSTANCES. MY OWN VIEW IS THAT THE BRIGHT-LINE APPROACHES HAVE THE BENEFIT OF EASE OF ADMINISTRATION. THEY CAN GIVE RISE TO INEQUITIES FROM TIME TO TIME. HOWEVER, I THINK THAT WE'VE FOUND THAT EXPERIENCE HAS SHOWN US, OVER THE LAST 30 YEARS, THAT CLASS ACTIONS ARE NOT ALWAYS EQUITABLE, AND THEY'RE VERY OFTEN INEQUITABLE, AND THAT THE INDIVIDUALS WHO ARE SUPPOSED TO GET THE RELIEF DO NOT GET THE RELIEF. IT GOES TO THE ATTORNEYS.

MR. SOL SCHREIBER: COUNSEL, YOU KEEP SAYING THAT. BUT ALL THE FIGURES AND ALL THE STATISTICS ON CLASS ACTIONS INDICATE THAT MAYBE 18 TO 20 PERCENT GOES TO THE ATTORNEY. WHERE DO YOU GET THE FIGURES? WHERE DO YOU GET THE SUPPORT THAT ALL THE MONEY GOES TO THE LAWYERS WHEN THE FEDERAL JUDICIAL CENTER AND OTHER STUDIES SHOW THAT THE FIGURE IS ABOUT 18 TO 20 PERCENT?

MR. ROETHE: WELL, YOU KNOW, I LOOK AT MY OWN EXPERIENCE, AND I LOOK AT SOME CASES THAT WE HAVE RESOLVED FOR THE BANK OF AMERICA, IN WHICH, WHEN YOU REALLY LOOK AT THE NET

OUT-OF-POCKET COST THAT WE ARE PAYING TO SETTLE A CLASS ACTION, CLOSE TO TWO-THIRDS OF THE AMOUNT IS GOING TO PAY THE LAWYERS.

AND THE NUMBERS I'M TALKING ABOUT ARE SETTLEMENTS, PERHAPS, IN THE EIGHT-, $9 MILLION RANGE WITH SIX OF THAT GOING TO PAY THE LAWYERS; THREE OF IT GOING TO PAY CLASS MEMBERS; AND THEN OTHER TYPES OF RELIEF, WHICH IS REALLY, WHAT I CALL PHANTOM RELIEF BEING PUT FORWARD TO THE COURT AS RELIEF.

AND IT'S TRUE THAT WHAT IS SAID TO THE COURT IS TRUE, BUT WE KNOW THAT THE WAY THINGS WORK IN REAL LIFE, THAT MANY OF THESE PEOPLE ARE NOT GOING TO MAKE CLAIMS, AND WE KNOW THE LAW OF AVERAGES HOW MANY OF THEM ARE NOT GOING TO DO IT. AND IT'S A BIT COMPLEX FOR ME TO GO INTO AT THE MOMENT. BUT WE FIGURE OUT AND CAN DETERMINE THE NET LOSS TO US, AND WHEN IT ALL COMES DOWN TO THE BOTTOM LINE, TWO-THIRDS OF THE MONEY IS GOING TO THE ATTORNEYS, AND ONE-THIRD IS GOING TO THE CLASS.

I LOOK AT ANOTHER CASE, THE CASE THAT WAS SPOKEN OF BRIEFLY HERE, WELLS FARGO CASE THAT WAS A CLASS ACTION INVOLVING CREDIT CARD APR RATES, AN ANTITRUST CASE INVOLVING ALLEGED CONSPIRACY AMONGST THE FIVE BIGGEST CALIFORNIA BANKS. $55 MILLION WAS PAID IN SETTLEMENT BY FOUR OF THE BANKS, NOT BANK OF AMERICA. WE CHOSE NOT TO SETTLE. I PERSONALLY RECEIVED A CHECK FOR LESS THAN A DOLLAR.

NOW, I DON'T KNOW WHAT OF THAT 55 MILLION WENT TO THE LAWYERS. POSSIBLY IT WAS LESS THAN HALF, LESS THAN A QUARTER. MAYBE IT WAS 15 MILLION OUT OF 55. BUT I ONLY GOT 25 CENTS.

AND I CONSIDER THAT MOST OF THE MONEY GOING TO THE LAWYERS, EVEN THOUGH PERHAPS AS MUCH AS 30 MILLION WENT TO THE CLASS MEMBERS, NOT MUCH OF IT WENT TO ANYBODY INDIVIDUALLY. AND THOSE ARE THE KIND OF THINGS THAT I'M REALLY DEALING WITH.

AND BY THE WAY, BANK OF AMERICA TRIED THAT CASE, AND WE GOT A DEFENSE VERDICT. AND SO I THINK EVEN THOUGH THERE WAS 700 --

MR. SOL SCHREIBER: YOU HAVE SETTLED BIG CLASS ACTIONS FOR 50 OR A HUNDRED MILLION BACK A FEW YEARS AGO; HAVEN'T YOU?

MR. ROETHE: NO.

MR. SOL SCHREIBER: YOU NEVER HAD A BIG CLASS ACTION --

MR. ROETHE: NOT FOR ANYTHING NEAR THAT, NO.

MR. SOL SCHREIBER: 40 MILLION?

HONORABLE PAUL NIEMEYER: ALL RIGHT. LET'S RECEIVE TESTIMONY.

MR. ROETHE: SO I'M SUGGESTING THAT CONSIDERATION BE GIVEN AS A NEXT STEP TO SOME KIND OF A DE MINIMUS NUMBER, BELOW WHICH THERE WOULD BE A BRIGHT LINE.

MR. SOL SCHREIBER: ARE YOU IN FAVOR OF VOLUNTARY SETTLEMENTS?

MR. ROETHE: SETTLEMENTS, YES.

MR. SOL SCHREIBER: YOU ARE?

MR. ROETHE: I MEAN, I THINK THAT THE PROVISION THAT YOU PROVIDED FOR IN (B)(4) IS SOMETHING THAT WE OUGHT TO HAVE

AVAILABLE. AND I THINK THAT IF A DEFENDANT FEELS THAT IT'S APPROPRIATE TO NEGOTIATE AND REACH RESOLUTION WITH RESPECT TO A SETTLEMENT, THEY OUGHT TO BE ABLE TO DO THAT.

AND I'M CONCERNED ABOUT THE NOTES THAT SUGGEST, IN THE SETTLEMENT CONTEXT, THAT YOU MAY HAVE TO MEET ALL OF THE REQUIREMENTS OF 23(A) AND 23(B)(3), ALBEIT IN THE CONTEXT OF A SETTLEMENT AS OPPOSED TO IN THE CONTEXT OF A CASE GOING FORWARD TO TRIAL, IN ORDER FOR THE (B)(4) CLASS TO BE ACCEPTED.

I WOULD SUGGEST TO YOU THAT YOU SHOULD BE ABLE TO HAVE A SETTLEMENT CLASS EVEN IF YOU CAN'T REALLY SAY --

HONORABLE PAUL NIEMEYER: -- THAT THAT'S APPROPRIATE?

WE MAY NOT HAVE DRAFTED IT PROPERLY, AND WE'RE GOING TO HAVE TO LOOK AT IT. I THINK THE INTENT WAS THAT A SETTLEMENT BE SATISFIED, THE REQUIREMENTS OF (A), AND THAT THE (B) FACTORS BE WEIGHED. I THINK THAT'S THE INTENT.

MR. ROETHE: WHAT I WOULD LIKE TO SEE SOME CERTAINTY ON IS THAT IF A DEFENDANT CHOOSES TO NEGOTIATE AND SETTLE, THAT IF THAT SETTLEMENT FALLS THROUGH, THERE IS NOT SOME ADMISSION OR PRESUMPTION RAISED THAT A CLASS IS APPROPRIATE.

YOU KNOW, I HAD A FEW THINGS TO SAY ABOUT THE INTERLOCUTORY APPEALS, BUT IT'S NOT VERY CRITICAL, AND I THINK IT'S INCLUDED IN THE MATERIAL. I'D BE HAPPY TO ANSWER ANY QUESTIONS.

HONORABLE PAUL NIEMEYER: WE APPRECIATE RECEIVING YOUR COMMENT. THANK YOU VERY MUCH.

MR. ROETHE: THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: ALL RIGHT. MR. PLATT, IS HE HERE?

TESTIMONY OF CLYDE PLATT

MR. PLATT: GOOD AFTERNOON. MY NAME IS CLYDE PLATT. I'M ONE OF THE PARTNERS IN HAGENS & BERMAN, A SEATTLE, WASHINGTON, FIRM, WHOSE LITIGATION PRACTICE CONCENTRATES IN SECURITIES AND CONSUMER ANTITRUST CLASS ACTIONS.

I'M SPEAKING TO YOU THIS AFTERNOON IN PLACE OF MY PARTNER, STEVE BERMAN. HE SUBMITTED HIS STATEMENT EARLIER THIS WEEK BUT WAS ORDERED TO APPEAR AT A HEARING IN CHICAGO TODAY.

HONORABLE C. ROGER VINSON: COULD YOU TELL US YOUR NAME, AGAIN?

MR. PLATT: YES. CLYDE PLATT, P-L-A-T-T. AND I THANK THE COMMITTEE FOR ITS FORBEARANCE FOR ALLOWING ME TO SPEAK IN MR. BERMAN'S STEAD.

I WILL TAKE JUST A FEW MOMENTS TO ADDRESS WHAT I BELIEVE TO BE ONE OF THE MOST IMPORTANT PROVISIONS, THAT IS, THE COST/BENEFIT ANALYSIS OF WHAT'S BEEN DEEMED FACTOR (F). I HAVE READ AND REREAD THE DRAFT AND THE NOTE, ASKING MYSELF THE OBVIOUS QUESTION, WHAT'S INTENDED, AND WHAT'S THE LIKELY EFFECT OF THIS PROVISION. IS IT A FACTOR THAT SERVES THE RULE 23(B)(3) SUPERIORITY DETERMINATION, OR IS IT ACTUALLY MORE AKIN TO A 23(A) THRESHOLD REQUIREMENT?

AND I THINK THE LATTER MAY BE THE CASE. I FEAR IT'S

THE CASE. AND NOT JUST BECAUSE OF SOME NEW PROVISION THAT PEOPLE ARE GOING TO FOCUS ON AS THEY LOOK AT THIS PACKAGE. THE PRESENT RULE 23(B)(3) DETERMINATION, AS I READ IT, PRESUMES THAT THERE IS ANOTHER WAY TO LITIGATE A CASE WHEN COURTS ASK THE QUESTION WHETHER THE CLASS IS SUPERIOR TO OTHER AVAILABLE METHODS FOR THE FAIR AND EFFICIENT ADJUDICATION OF THE CONTROVERSY.

IN THE CASE OF SMALL- TO MEDIUM-SIZED CLAIMS, HOWEVER, THERE IS A VIRTUAL CERTAINTY THAT THERE IS NO ALTERNATIVE METHOD FOR ADJUDICATION. AND THAT CONFLICT, I FEAR, IS GOING TO CAUSE THE NEW REQUIREMENT TO BE VIEWED MORE AS A THRESHOLD REQUIREMENT THAN A SUPPLEMENTARY FACTOR. AND IN THAT SENSE, THIS NEW PROVISION IS MORE OF A REVOLUTION THAN THE MODEST RESTRICTION SPOKEN TO IN THE COMMITTEE'S NOTE.

AND FOR THE SAME REASONS THAT OTHERS HAVE DISCUSSED, I'M FEARFUL THAT MERITORIOUS CASES, SUCH AS CASES THAT MY FIRM HAS BEEN INVOLVED IN, WILL BECOME FORFEIT TO THE NEW RULE. IN MY FIRM'S EXPERIENCE, ONE AREA WHERE CLASS ACTIONS HAVE BEEN USEFUL IS IN POLICING CONSUMER TRANSACTIONS. WE'VE BEEN INVOLVED IN A VARIETY OF LITIGATIONS TO RECOVER ILLICIT BILLINGS, IN SEVERAL CIRCUMSTANCES. I'D LIKE TO ADDRESS A COUPLE OF THOSE.

ONE GROUP OF CASES THAT WE'VE LITIGATED, WE REFER TO IT AS THE HEALTH CARE CO-PAYMENT CASES. MANY HEALTH CARE PLANS PROVIDE OR REQUIRE THE INSURED TO CO-PAY 20 PERCENT OF THE

CHARGES BILLED BY MEDICAL PROVIDERS. SOME INSURERS NEGOTIATE DISCOUNTS WITH PROVIDERS, BUT THEY CHARGE THEIR INSUREDS 20 PERCENT OF THE UNDISCOUNTED AMOUNTS, IN VIOLATION OF ERISA, AND IN VIOLATION OF PLAN DOCUMENTS. AS A RESULT, THOUSANDS OF CONSUMERS PAID MORE THAN 20 PERCENT OF THEIR HEALTH CARE BILL. THESE PRACTICES LITERALLY REAPED MILLIONS OF DOLLARS FOR THE INSURERS, ALTHOUGH INSUREDS WITH SMALL MEDICAL BILLS MAY HAVE ONLY BEEN OVERCHARGED SMALL AMOUNTS.

THIS PRACTICE CAME TO LIGHT BECAUSE AN OLDER WOMAN IN SEATTLE, WASHINGTON, WAS MISTAKENLY SENT THE INTERNAL BILLING TO A COMPANY AND HER REGULAR BILLING AND NOTICED THAT THERE WAS A DISCREPANCY BETWEEN THE TWO.

AGAIN, THE AMOUNTS THAT CONSUMERS LIKE HER HAVE LOST IS RELATIVELY SMALL. SOMETIMES, IN THE HUNDREDS OF DOLLARS, SOMETIMES LESS. BUT, NEVERTHELESS, THOSE AMOUNTS AGGREGATE TEN MILLION IN ONE CITY ALONE.

HONORABLE JOHN L. CARROLL: WHAT DO YOU SEE IS THE SOCIETAL EFFECT OF THOSE SORTS OF CASES IF THE INJURY TO THE CONSUMER IS NIL?

MR. PLATT: WELL, THE FIRST BENEFIT I SEE IS YOU STOP THE PRACTICE FROM OCCURRING.

HONORABLE JOHN L. CARROLL: AND YOU CAN DO THAT BY INJUNCTION.

MR. PLATT: AND YOU DO THAT BY INJUNCTION.

AS A MATTER OF FACT, IN THE MAJORITY OF CASES -- AND

BY THE WAY, THESE CASES HAVE PROCEEDED IN THE FEDERAL COURTS BEGINNING IN WASHINGTON STATE AND GOING TO OTHER FEDERAL COURTS IN OTHER STATES WHERE THE PRACTICE HAS OCCURRED. IN VIRTUALLY EVERY ONE OF THOSE STATES, SUMMARY JUDGMENT HAS BEEN GRANTED ON LIABILITY ISSUES, LEAVING THE NEGOTIATIONS OVER THE DAMAGES, WHICH IS STILL ONGOING IN SOME OF THE CASES.

IN THE AGGREGATE, ALMOST A HUNDRED MILLION, IN FACT, HAS BEEN RECOVERED AS A RESULT OF --

HONORABLE JOHN L. CARROLL: WHAT WE HEAR THE DEFENSE SIDE SAYING, ESSENTIALLY, IS THAT THE CONSUMER PLAINTIFF REALLY DOESN'T CARE, BECAUSE HE OR SHE IS NOT LOSING ANY MONEY; THAT THEY'RE COUGHING UP HUGE AMOUNTS OF MONEY SIMPLY TO PAY THE PLAINTIFFS' ATTORNEYS.

MR. PLATT: I'VE LISTENED TODAY TO A LOT OF DISCUSSION OF HOW LUDICROUS IT IS THAT THE PLAINTIFFS' ATTORNEYS ARE RECEIVING THE FEES THAT THEY DO IN THESE CASES, AND I'D SUGGEST THE OBVIOUS. IF IT'S APPROPRIATE TO CUT THE FEES TO THE ATTORNEYS SUCH THAT THE REACTION IS NOT AS SEVERE, THEN THAT'S WHAT SHOULD BE DONE. CASES SHOULDN'T BE THROWN OUT.

THERE SEEMS TO BE SOME PRESUMPTION THAT IF YOU CUT DOWN ON THE FEES -- WELL, FIRST OF ALL, THERE SEEMS TO BE THE PRESUMPTION THAT EVERY CLASS ACTION ATTORNEY IS A MULTIMILLIONAIRE, WHICH IS, OBVIOUSLY, NOT THE CASE.

HONORABLE C. ROGER VINSON: WHY CAN'T YOU USE (B)(2) INSTEAD OF (B)(3)? WHY DO YOU NEED (B)(3) TO GET INJUNCTIVE

RELIEF?

MR. PLATT: IN THAT PARTICULAR CASE?

HONORABLE C. ROGER VINSON: IN ANY CASE.

MR. PLATT: WELL, AS I UNDERSTAND IT, (B)(2) HAS LIMITED APPLICATION. AS A MATTER OF FACT, IT REQUIRES THAT ALL OF THE MEMBERS OF THE CLASS BE JOINED TO THE ACTION, AND IT HAS BEEN INTERPRETED TO NOT COVER ACTIONS FOR MONETARY RELIEF IN A VARIETY OF SITUATIONS.

I KNOW THAT WE HAVE SOUGHT (B)(2) CERTIFICATION IN SOME CASES AND HAD IT DENIED, WHERE THE JUDGE SAYS NO, THIS IS REALLY A (B)(3) CLASS, BECAUSE WHAT YOU'RE REALLY ABOUT HERE ARE DAMAGES.

HONORABLE JOHN L. CARROLL: BUT YOU WOULDN'T BRING IT AS A (B)(2) CLASS BECAUSE YOU WOULDN'T GET AS MUCH MONEY AS YOU WOULD IF IT WAS (B)(3).

MR. PLATT: TO BE QUITE HONEST, I'VE NEVER FOCUSED ON THAT AS A MOTIVATION IN BRINGING A CASE AS A (B)(3) CLASS. YOU MIGHT BE RIGHT.

HONORABLE JOHN L. CARROLL: IF YOUR DESIRE IS TO STOP THE PRACTICE, YOU CAN DO IT BY (B)(2) INJUNCTION.

MR. PLATT: IF THAT'S THE ONLY THING YOU'RE AFTER. BUT OBVIOUSLY, FOR INSTANCE --

HONORABLE JOHN L. CARROLL: WHAT'S THE ONLY THING THAT YOU'RE AFTER?

HONORABLE CHRISTINE DURHAM: WELL, WOULD YOUR

PLAINTIFF THAT YOU DESCRIBED HAVE BEEN WILLING TO FINANCE THE LITIGATION FOR AN INJUNCTION? CLEARLY NOT, I ASSUME, FOR THE ONE LITTLE OLD LADY YOU DESCRIBED.

MR. PLATT: YES. I MEAN, THE AVERAGE RECOVERY IN THE CASE WAS 250 TO $500, AS I UNDERSTAND IT. NOW, I HAVE GREAT DOUBT ABOUT WHETHER, UNDER THE PROVISIONS THAT HAVE BEEN PROPOSED, THAT CASE WOULD BE CERTIFIED TODAY.

HONORABLE PAUL NIEMEYER: WELL, LET ME ASK YOU THIS. WHAT IF WE WERE TO LINK -- THIS HAS BEEN SUGGESTED BY SOMEONE -- IF WE WERE TO LINK THE (F) FACTOR TO AN OPT-IN, SO THAT YOU WOULD SAY TO OTHER PEOPLE IN YOUR LADY'S SITUATION: "YOU HAVE BEEN CHEATED, AND WE HAVE A LAWSUIT. WE'RE GOING TO RECOVER, WE ESTIMATE, SOMEWHERE BETWEEN $5 AND $500, DEPENDING ON THE AMOUNT YOU HAVE BEEN OVERCHARGED. IF YOU WOULD LIKE TO BE A PART OF THIS LITIGATION, CHECK THE BOX AND DROP THE PREPAID POSTCARD IN THE MAILBOX."

WOULD YOU OPPOSE THAT?

MR. PLATT: YES. ONE, BECAUSE I DON'T THINK THAT IT REALLY IS GOING TO DETER THE ACTIVITY, IN SOME CASES. I MEAN, IF --

HONORABLE PAUL NIEMEYER: DOESN'T THAT MAKE THE CLASS ACTION SUBSTANTIVE, THEN? IT WAS NEVER INTENDED TO BE THE ENFORCEMENT MECHANISM. IT WAS INTENDED TO BE A PROCEDURAL MECHANISM FOR ENFORCEMENT OF A LOT OF CLAIMS WHERE THE LITIGANT COULDN'T OTHERWISE BRING IT ALONE.

BUT IF, OUT OF A THOUSAND CLAIMS, YOU HAVE 500 ONLY WHO WANT TO LITIGATE, WHAT WOULD BE THE PROBLEM OF PROCEEDING WITH THE 500?

MR. PLATT: WELL, WHAT IS THE MOTIVE OF THE ATTORNEYS INVOLVED IF THE ISSUE'S GOING TO BE WHETHER THEY'RE GOING TO END UP WITH 500,000 OR 500 PEOPLE, IN RISKING THEMSELVES IN THE LITIGATION, RISKING THEIR RESOURCES?

HONORABLE PAUL NIEMEYER: THEN YOU'RE SORT OF CONCEDING THAT THE ACTION TURNS ON WHETHER THE LAWYER IS WILLING TO DO IT AS OPPOSED TO WHETHER THE LITIGANTS ARE INTERESTED IN LITIGATING AND RESOLVING THE DISPUTE.

MR. PLATT: WELL, I'D SUBMIT THAT THE REALITY IS THAT IT'S A COMBINATION OF THE TWO, AND TO TRY AND PRETEND THAT, YOU KNOW -- IF YOU'RE ASKING: IS EVERY MEMBER OF THE CLASS IN AN ABSTRACT MANNER GOING TO SUPPORT THE LITIGATION UP FRONT, I DON'T KNOW WHAT THE ANSWER IS. I MEAN, BUT THE ANSWER IS THAT WHEN YOU ASK THEM WHETHER THEY WANT TO OPT OUT --

HONORABLE PAUL NIEMEYER: BUT NOT EVERY MEMBER OF THE CLASS WILL OPT IN. BUT IT SEEMS TO ME -- AND I HAD THE SAME DISCUSSION WITH PROFESSOR MILLER THIS MORNING -- THE QUESTION IS: DO YOU PRESUME EVERYBODY IN A CERTAIN CIRCUMSTANCE IS A LITIGANT, OR DO YOU PRESUME THEY'RE NOT A LITIGANT UNTIL THEY SAY THEY ARE?

AND THERE IS A DEEP SOCIAL QUESTION THERE. IF WE PRESUME EVERYBODY'S A LITIGANT THAT'S BEEN WRONGED, THEN WE HAVE

EVERYTHING THAT'S DISCOVERED IN SOCIETY ENDS UP BEING LITIGATED. AND THE QUESTION IS WHETHER OUR WHOLE SOCIETY IS PERFECT ENOUGH TO CARRY THAT KIND OF A BURDEN.

IF WE SAY WE'RE ONLY GOING TO LITIGATE FOR THOSE WHO WANT TO LITIGATE, IT'S A DIFFERENT MATTER. AND THE QUESTION IS, I'M ASKING: WHAT'S WRONG WITH THAT? NOW, THE DIFFICULTY BY MY ASKING YOU THAT QUESTION IS I'M ASKING YOU: DO YOU WANT TO CONTINUE YOUR LIVELIHOOD? AND SO IT'S NOT FAIR FOR YOU TO ANSWER THAT QUESTION.

MR. PLATT: WELL, IT'S FAIR FOR ME TO ANSWER THAT QUESTION TO THE EXTENT THAT I CAN ASSURE YOU THAT THE ASSUMPTION THAT'S MOTIVATING SOME OF THESE PROPOSALS IS THAT LAWYERS LIKE ME ARE GOING TO GET IN ANOTHER LINE OF BUSINESS AND NOT HELP THE LITTLE OLD LADY IN SEATTLE WHO COMES IN --

HONORABLE PAUL NIEMEYER: I ASSUME YOU WILL CONTINUE. I'M BEING A LITTLE FACETIOUS.

BUT THE QUESTION IS: HOW DO WE GET THE LITIGANTS TO BE THE DRIVING FORCE OF THE LITIGATION AS OPPOSED TO A PERCEPTION IN SOME OF THESE CASES THAT THE ATTORNEY IS? AND THAT'S ONE OF THE DIFFICULTIES THAT HAS BEEN PRESENTED TO US AGAIN AND AGAIN.

SOME CASES SEEM TO FALL IN THAT CATEGORY, NOT ALL OF THEM. AND THE DIFFICULTY IS WHEN YOU HAVE SOMEONE WHO IS BEING CHEATED AND A LOT OF OTHERS IN THAT SAME SITUATION AND THEY WANT TO SUE, THE CLASS ACTION MECHANISM PROVIDES AN AGGREGATION AND

ABILITY TO CARRY THAT OUT. BUT I THINK IT'S LEGITIMATE TO ASK THE QUESTION: DO THE LITIGANTS WANT TO LITIGATE IT?

MR. PLATT: WHAT IF HALF OF THE LITIGANTS WANT TO LITIGATE AND HALF OF THEM DON'T; WHAT IS THE RESULT?

HONORABLE PAUL NIEMEYER: THEN YOU PROCEED WITH ONES THAT WANT TO LITIGATE.

MR. PLATT: CAN'T THEY JUST AS EASILY OPT OUT AS OPT IN?

HONORABLE PAUL NIEMEYER: AS A PRACTICAL MATTER, YOU PRESUME THEY'RE LITIGANTS THEN, AND WE'VE ALL TALKED ABOUT THE NOTICE PROBLEM AND THE QUESTION OF WHETHER THE PEOPLE EVEN KNOW THEY'RE PARTIES.

WE HAD ONE GENTLEMAN HERE TALKING ABOUT PEOPLE WHO HAVE BEEN VERY SERIOUSLY INJURED, WITH CANCER AND SO FORTH, WHO DIDN'T EVEN KNOW THEY WERE PARTIES TO CASES. AND IF THEY WANT TO LITIGATE AND THEY'RE TOLD THEY'VE GOT A CLAIM, THAT'S PART OF THE BASIC AMERICAN FREEDOMS OF MAKING THESE CHOICES; ISN'T IT?

MR. PLATT: ISN'T IT FUNDAMENTALLY CONTRARY TO THE NOTION OF AGGREGATION TO PRESUME THAT MEMBERS OF A CLASS WHO HAVE BEEN AFFECTED BY THE SAME COURSE OF CONDUCT ARE NOT PLAINTIFFS?

HONORABLE PAUL NIEMEYER: NO. THE QUESTION IS: DO THEY WANT TO BE PLAINTIFFS? LITIGATION IS NOT A LEGISLATIVE FUNCTION; IT'S AN ADJUDICATED FUNCTION BETWEEN PEOPLE WHO HAVE DISPUTES. AND IF THE PLAINTIFF SAYS, "I DON'T HAVE A DISPUTE,"

AND THE ATTORNEY SAYS, "OH, BUT YOU DO, BUT YOU DIDN'T MAIL YOUR CARD IN," THAT'S A PHILOSOPHICAL QUESTION. THAT'S BEEN THE ASSUMPTION OF THE RULE, AND I'M NOT SURE WE CAN CHANGE IT.

BUT IT IS A DIFFICULTY. IT'S A DIFFICULTY THAT A LOT OF PEOPLE WHO HAVE BEEN TESTIFYING HAVE BEEN TALKING ABOUT WITHOUT LAYING THEIR FINGER ON THAT PORTION OF THE RULE. THAT'S WHAT THEY'RE REALLY COMPLAINING ABOUT.

MR. PLATT: SO --

HONORABLE PAUL NIEMEYER: BUT THAT'S REALLY WHAT (F) SEEMS TO BE AIMED AT, AND THE QUESTION IS: HOW DO YOU DESIGN (F) TO PROTECT THE CASE LIKE YOURS BUT TO DISCARD THE CASE THAT'S DRIVEN JUST BY THE ATTORNEY WHERE THE LITIGANTS REALLY DON'T CARE AT ALL?

AND WE HAVE HAD SOME OF THOSE CASES HERE. APPARENTLY, WE'VE HAD CASES WHERE PEOPLE HAVE GONE AROUND AND SOLICITED. WE HAVE THE EXAMPLE FROM FORD, AND WE HAVE THE CHRYSLER GENERAL COUNSEL TALKING ABOUT HE'S PARTICIPATED IN SOME OF THAT, REGRETTABLY, AND WE HAVE THE MORTGAGE BANKERS WHO TALK ABOUT THE FACT THAT PEOPLE HAVE GONE AROUND AND SOLICITED "YOU'VE GOT A PROBLEM," AND THEY WRITE THE LETTERS BACK SAYING, "WE DON'T HAVE A PROBLEM."

THERE ARE THE GOOD CLASS ACTIONS, AND WE HAVE THE PARADIGM THAT BOTH SIDES DEBATE, AND THAT'S THE TEXAS OVERCHARGE CASE. HOW SHOULD THAT BE HANDLED AT $5.50 APIECE? AND THERE WAS CLEARLY A WRONG THERE. THE DEFENDANTS SAY THE WRONG WAS

CANCELLED, AND YOU HAD AN AGGREGATE AMOUNT OF 70 MILLION OR WHATEVER THE NUMBER IS, BUT INDIVIDUAL CLAIMS OF $5.50.

NOW, THAT'S REALLY SORT OF A PARADIGM OF THE ISSUE PRESENTED AND HOW THAT SHOULD BE HANDLED IN THE JUDICIAL SYSTEM. AND I WAS JUST ASKING YOU THE QUESTION: WHAT WOULD BE WRONG WITH GIVING EVERY ONE OF THOSE PERSONS A LITTLE POSTCARD THEY DROP IN THE MAIL AND HAVE THEM CHECK A BOX "YES" OR "NO," PREPAID?

MR. PLATT: AND THE ATTORNEYS' FEES WOULD THEN BE BASED UPON THE NUMBER OF PEOPLE WHO DROP IT IN?

HONORABLE PAUL NIEMEYER: WHY WORRY ABOUT THE ATTORNEYS' FEES? THERE IS GOING TO BE SOME OF THOSE PEOPLE THAT WANT TO LITIGATE. AND IF NOBODY WANTS TO LITIGATE, IT SAYS SOMETHING.

MR. PLATT: AND YOU WOULD DO THIS AT WHAT JUNCTURE IN THE LITIGATION? AS I UNDERSTAND THE PROPOSALS, IT'S GOING TO DELAY CERTIFICATION; IT IS INTENDED TO DELAY CERTIFICATION UNTIL THERE IS A DETERMINATION OF THE PROBABLE RELIEF.

HONORABLE PAUL NIEMEYER: COULD THE COURT SAY THAT WE WILL CERTIFY THIS CLASS PROVIDED THERE ARE ENOUGH INTERESTED?

MR. PLATT: AND WHAT WOULD "ENOUGH" BE?

HONORABLE PAUL NIEMEYER: WAIT TO SEE THE RESPONSE. YOU'D HAVE AN ARGUMENT OVER IT. IF YOU GOT BACK 10,000, YOU'D PROBABLY ARGUE THAT'S PLENTY. 10,000 IS A LOT OF PEOPLE WHO WANT TO LITIGATE. THEY HAVE THEIR RIGHTS. AGGREGATION IS A

PROPER METHOD; LET'S DO IT.

MR. PLATT: BUT I'M MISSING SOMETHING IN THE PROPOSALS. WHERE IS THAT --

HONORABLE PAUL NIEMEYER: I RAISED THIS QUESTION, AND MAYBE IT'S UNFAIR TO YOU BECAUSE YOU HAVEN'T HAD A CHANCE TO THINK ABOUT IT.

BUT (F) HAS BEEN THE FOCAL POINT OF A LOT OF TESTIMONY, FACTOR (F). AND FACTOR (F) AIMS AT THE "IT AIN'T WORTH IT." AND THE QUESTION IS: WELL, MAYBE IT IS WORTH IT, NUMBER ONE, SOME PLAINTIFFS CARE; TWO, THE DEFENDANTS ARE GETTING AWAY WITH CHEATING A LOT OF PEOPLE.

SO THE QUESTION IS: A SUGGESTION HAS BEEN MADE, "WELL, LET'S LINK (F), SO THAT IT DOESN'T DESTROY THE WHOLE CLASS. LET'S LINK IT CONDITIONALLY THAT YOU CAN ONLY USE THAT FACTOR, PROVIDED YOU PROVIDE AN OPT-IN." AND I'M ASKING WHAT YOUR REACTION TO THAT WOULD BE.

MR. PLATT: MY REACTION IS --

HONORABLE PAUL NIEMEYER: YOU DON'T LIKE IT?

MR. PLATT: I DON'T LIKE IT.

HONORABLE PAUL NIEMEYER: OKAY.

MR. PLATT: WHETHER I CAN THINK OF A REASON THAT WILL SATISFY YOU AT THIS JUNCTURE OR NOT --

HONORABLE PAUL NIEMEYER: I UNDERSTAND. I THINK THE REASONS ON ALL SIDES ARE SOMEWHAT OBVIOUS, BEFORE THE DEBATE.

BUT I THINK IT DOES HEIGHTEN SOME OF THE ISSUES THAT

WERE PRESENTED HERE, AND IT GOES A LITTLE BIT TO THE PHILOSOPHICAL QUESTION OF: WHAT IS THE CLASS ACTION RULE ABOUT? WHAT ARE THE COURTS ABOUT? AND WHAT IS THE ROLE OF THE PLAINTIFF LITIGANT, THE ATTORNEYS, AND THE DEFENDANTS?

AND WE'VE BEEN HEARING FROM ALL OF THEM, AND I MUST SAY THE MORE I HEAR, THE MORE I FIND THE PROBLEM ENORMOUSLY COMPLEX AND GOES REALLY TO THE HEART OF OUR WHOLE QUESTION AS TO WHAT WE'RE ABOUT, AND WHEN PROFESSOR MILLER SUGGESTS MAYBE WE'RE IN A NEW AGE, THAT WE DO NEED TO START LOOKING AT NEW METHODS OF ADJUDICATION THAT WERE NOT TRADITIONALLY AROUND.

MR. PLATT: I SHARE YOUR INTEREST IN THE REACTION TO THE TEXAS EXAMPLE THAT WAS DISCUSSED BY A VARIETY OF PEOPLE EARLIER TODAY. AND I WAS PARTICULARLY INTERESTED TO SEE THAT WHEN DIFFERENT SPEAKERS ON THE DEFENSE SIDE OF THE V WERE ASKED THE POINT IN QUESTION, WOULD YOU SUPPORT THIS LITIGATION, DIFFERENT ANSWERS CAME BACK.

I THINK THAT THAT IS A FAIRLY GOOD PREVIEW OF THE SORT OF PERCEPTION THAT THE STANDARD, AS NOW DRAFTED, IS GOING TO RECEIVE IN THE COURTS.

IF I COULD LAPSE INTO AN ANECDOTE, TWO EVENINGS AGO, WHEN I FOUND OUT I WAS GOING TO BE COMING DOWN, I WENT HOME, AND LIKE MANY OTHER PEOPLE HAVE SAID, EXPERIENCED GETTING A NOTICE IN THE MAIL, BUT THIS ONE WAS ACCOMPANIED BY A CHECK. AND IT WAS A RECOVERY IN A CLASS LITIGATION, THE FIRST ONE I'VE EVER HAD. IT WAS FOR $58.13. I HAD JUST READ THE PROPOSED RULES,

AND I WAS WONDERING TO MYSELF WHAT THE LIKELY STANDARD WAS GOING TO BE.

THE WORD "TRIVIAL" DIDN'T IMMEDIATELY COME TO MY MIND AS I WAS LOOKING AT THIS CHECK FOR $58.13. NOW, MAYBE THAT IS A PERSONAL REACTION THAT IS SUBJECTIVE ON MY PART. IT WOULDN'T BE SHARED BY SOME OF THE OTHER PEOPLE IN THIS ROOM, I AM SURE. BUT THE ONE THOUGHT THAT IMMEDIATELY DID COME TO MIND WAS: YOU KNOW, I PROBABLY WOULDN'T BE HOLDING THIS CHECK TODAY IF THIS PROVISION PASSES.

AND I WOULD URGE THE PANEL TO RECONSIDER THE PROVISION AS IT'S NOW DRAFTED, BECAUSE IT IS VERY AMBIGUOUS, AND I CAN'T TELL FROM READING THE COMMENT WHICH DIRECTION THE PANEL IS GOING. BECAUSE, ALTHOUGH I UNDERSTAND THE NOTE ISN'T MEANT TO BE ADDRESSED IN ABSOLUTE TERMS, AND THERE IS NO BRIGHT-LINE RULE, IT IS SO UNCERTAIN TO ME THAT I AM, AS I'VE SAID BEFORE, FEARFUL THAT CASES THAT MY FIRM HAS BROUGHT BEFORE WOULD HAVE NEVER BEEN CERTIFIED.

AND I REALLY DON'T HAVE ANYTHING ELSE TO ADD. THANK YOU.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH. I APPRECIATE IT.

MR. SOL SCHREIBER: MR. CHAIRMAN, DURING MY DISCUSSION WITH GENERAL COUNSEL OF BANK OF AMERICA, I ERRONEOUSLY SAID THE JUDICIAL CENTER SHOWING PLAINTIFFS' CLASS RECOVERY FOR COUNSEL WAS 18 TO 20 PERCENT. I'M ADVISED THAT THE FIGURE IS 27 TO 30

PERCENT, AND I'D LIKE THE RECORD TO SHOW THAT.

HONORABLE PAUL NIEMEYER: IT SHOWS IT. THANK YOU FOR THE CORRECTION.

ALL RIGHT. MR. TABACCO, ARE YOU HERE?

TESTIMONY OF JOSEPH TABACCO

MR. TABACCO: GOOD AFTERNOON. WELCOME TO SAN FRANCISCO. IF I TALK QUICKLY, YOU CAN GET OUT AND HELP OUR LOCAL ECONOMY, SO I'M GOING TO TRY TO DO THAT.

AFTER I SPENT SIX YEARS IN THE ANTITRUST DIVISION OF THE JUSTICE DEPARTMENT, I WENT TO WORK AS AN ASSOCIATE WITH THE FIRM POMERANCE & LEVY (PHONETIC) IN NEW YORK, WHICH WAS, AT THE TIME, A FAIRLY WELL KNOWN SECURITIES CLASS ACTION FIRM. I HAVE PRACTICED IN THE AREA OF SECURITIES ANTITRUST AND CONSUMER CLASS ACTIONS, REPRESENTING, 95 PERCENT OF THE TIME, PLAINTIFFS. SO IT SHOULD BE CLEAR WHERE MY POINT OF VIEW IS.

AND I RECALL GOING TO WORK AT THE POMERANCE FIRM IN THE EARLY '80S AND HEARING THE NOW LATE A. POMERANCE TALK ABOUT HIS TESTIMONY BACK IN 1965 AND 1966 BEFORE THE COMMITTEE THEN CONCERNED ABOUT MODIFICATIONS AND MODERNIZATION OF THE CLASS ACTION RULE. AND, IN THOSE LATE-NIGHT SESSIONS, I RECALL HIM VERY CLEARLY ARTICULATING THE SKY IS FALLING IN ARGUMENTS THAT CORPORATE AMERICA RAISED AT THAT TIME ABOUT THE DANGERS IF WE EVER PERMITTED AN OPT-OUT CLASS ACTION SITUATION, TO PROVIDE A REMEDY FOR ALL THOSE HUNDREDS OF THOUSANDS OF POTENTIAL VICTIMS OUT THERE THAT IT WOULD BE THE RUINATION OF THE U.S. ECONOMY.

WELL, AT THAT TIME, AND I LOOKED IT UP THIS MORNING, THE DOW JONES INDUSTRIAL AVERAGE WAS HOVERING SOMEWHERE AROUND 200, 200 POINTS. IT'S NOW BROKEN THROUGH 6,700 POINTS. THE GNP HAS INCREASED 15-FOLD, PICK A NUMBER.

HONORABLE PAUL NIEMEYER: A LOT OF IT MIGHT BE ATTRIBUTABLE TO THE CLASS ACTION RULES.

(LAUGHTER.)

MR. TABACCO: WELL, THAT MAY BE A POINT, YOUR HONOR.

BUT THE POINT IS, OBVIOUSLY, THE U.S. ECONOMY ENJOYS -- AND I THINK YOU HAVE TO LOOK AT WHAT YOU'RE ATTEMPTING TO DO AND THE DIFFICULT TASK THAT YOU'RE ATTEMPTING TO ACCOMPLISH IN THE CONTEXT OF THE ECONOMY THAT WE ARE INVOLVED IN, BECAUSE WHEN YOU REALLY STEP BACK AND JUST SAY: ARE WE BETTER OFF OR ARE WE WORSE OFF THAN WE WERE 30 YEARS AGO, BEFORE RULE 23 WAS MODERNIZED, CERTAINLY YOU CAN'T MEASURE IT BY LOOKING AT THE STATE OF BUSINESS AND THE STATE OF THE ECONOMY OR THE STANDARDS OF LIVING THAT PEOPLE IN THIS COUNTRY ENJOY.

AND I THINK THAT THE MESSAGE THAT I WANT TO BRING IS: IF IT'S REALLY NOT BROKEN DOWN, DON'T FIX IT. THAT'S NOT TO SAY THAT THERE AREN'T GOING TO BE ABUSES; IT'S NOT TO BE SAID THAT THERE AREN'T GOING TO BE SITUATIONS WHERE PEOPLE WILL SAY, "OH, THE LAWYERS GOT ALL THE MONEY IN THAT CASE AND THE CONSUMERS GOT NOTHING IN THAT CASE."

BUT WHEN YOU LOOK OVERALL AT THE HISTORY OF THIS RULE FOR 30 YEARS, I THINK THAT THEIR RESPONSE HAS TO BE THAT IT

BASICALLY WORKS, AND THAT IF YOU LOOK AT THE COMMON LAW, THE FEDERAL COMMON LAW THAT'S DEVELOPED UNDER RULE 23, WE NOW KNOW, AS LITIGATORS, WHAT THE BOUNDARIES ARE. AND THE COURTS ARE VERY, VERY WELL VERSED AT WRESTLING WITH THE VERY DIFFICULT QUESTIONS THAT THEY'RE OFTEN CONFRONTED WITH UNDER RULE 23.

NOW, I WAS STRUCK, REALLY, BY THE IRONY OF LISTENING TO THE VERY DISTINGUISHED PRESENTATIONS BY COUNSEL FOR WELLS FARGO AND BANK OF AMERICA, TWO BANKS RIGHT HERE IN MY TOWN, ABOUT THE FACT THAT ALL THE MONEY WENT TO LAWYERS.

WELL, I DIDN'T KNOW IF THAT WAS THE DEFENSE BAR OR THE PLAINTIFFS' BAR. I STILL DRIVE A VOLVO, TO RESPOND TO THE QUESTION, "IS EVERY CLASS ACTION PLAINTIFFS' LAWYER A MILLIONAIRE." I THINK THE ANSWER IS NO.

AND THE REASON FOR THAT IS BECAUSE THESE CASES BEAR ENORMOUS RISK. AND IT'S A RISK/REWARD RATIO. AND THE RISK/REWARD RATIO WOULD BE TOTALLY TAKEN OUT OF PROPORTION IF YOU COULD NOT PROVIDE THE MECHANISM IN ONE ACTION TO AGGREGATE CLAIMS.

AND THAT REALLY GETS BACK TO THE POINT THAT YOUR HONOR RAISED A FEW MOMENTS AGO, ABOUT: WHAT DO YOU DO WITH THESE SMALLER DAMAGE CASES? HOW DO YOU IDENTIFY THE LITIGANTS?

WELL, I SUBMIT THAT THE ANSWER IS NOT TO SAY, "LET'S GO BACK AND HAVE, EFFECTIVELY, AN OPT-IN PROVISION. BECAUSE IF YOU LOOK AT THE COMPLEXITY, FOR THE SAME REASON THAT EVERY TIME I OPEN UP MY MAILBOX AND I SEE THAT I'VE WON $10 MILLION IN THE

READERS DIGEST SWEEPSTAKES AND I'M STILL WAITING FOR THE CHECK THAT I CAN ACTUALLY CASH, IT'S THE SAME RESPONSE THAT MOST PEOPLE HAVE TODAY WHEN THEY GET THAT POSTCARD IN THE MAIL AND IT SAYS, "YOU MAY WIN FIVE OR $500. CHECK THIS BOX AND MAIL IT IN."

BECAUSE MOST PEOPLE, UNTIL YOU ACTUALLY MAIL THEM THE CHECK THAT THEY CAN CASH IN THE BANK, DON'T DO ANYTHING. IT DOESN'T MEAN THAT THEY'RE NOT LITIGANTS; IT DOESN'T MEAN THAT THEY WON'T BE MAD ABOUT BEING RIPPED OFF; IT DOESN'T ASK --

HONORABLE PAUL NIEMEYER: HOW WOULD YOU MAKE THEM A LITIGANT IF THEY NEVER LIFT A FINGER TO SAY THEY WILL BE A LITIGANT WITHOUT PRESUMING EVERYBODY IS A LITIGANT IN EVERY CLASS ACTION FILED TODAY? IN OTHER WORDS, THERE IS A CERTAIN ISSUE AS TO WHETHER WE START WITH THE NOTION THAT EVERYBODY'S A LITIGANT AUTOMATICALLY, OR WE MAKE THEM LIFT AT LEAST THEIR BABY FINGER.

MR. TABACCO: WELL, I THINK THAT THE QUESTION SHOULD BE -- IS -- NOT IS EVERYBODY A LITIGANT. THE QUESTION OUGHT TO BE: IS THERE REALLY A CONTROVERSY? HAS THERE REALLY BEEN AN INJURY?

BECAUSE WHEN I DEFINE A CLASS AND I SEND OUT NOTICE, I SAY: "ALL PERSONS WHO PURCHASED X, Y AND Z DURING THIS PERIOD AND WERE INJURED." BECAUSE IF YOU DON'T HAVE REAL INJURY, BY WHATEVER THAT MEASURE IS, THEN YOU DON'T HAVE A BASIS FOR AN ACTION AT ALL. AND ONCE YOU IDENTIFY THAT PEOPLE HAVE BEEN

INJURED, THEN YOU CAN GO ABOUT THE TASK OF SAYING, "WHAT'S THE REMEDY FOR THE INJURY." BECAUSE IN MY --

HONORABLE JOHN L. CARROLL: BUT SHOULDN'T IT BE PEOPLE WHO HAVE BEEN INJURED AND WHO CARE ABOUT HAVING BEEN INJURED?

MR. TABACCO: WELL, HOW DO YOU DETERMINE THAT WITHOUT DESTROYING THE CLASS ACTION DEVICE?

HONORABLE C. ROGER VINSON: WHY DON'T YOU JUST REQUIRE ACTUAL NOTICE.

MR. TABACCO: WELL, WE HAVE ACTUAL NOTICE IN (B)(3) CASES. AND REALLY, THE QUESTION IS: WHAT ABOUT THAT NOTICE? IS IT OPT IN, WHICH IS, YOU KNOW, WHAT YOU WRESTLE WITH, OR IS IT OPT OUT?

HONORABLE C. ROGER VINSON: MOST OF THE TIME WE DO NOT HAVE ACTUAL NOTICE.

MR. TABACCO: WELL, IT DEPENDS, AGAIN, ON THE CIRCUMSTANCES. FOR EXAMPLE, IN THE CREDIT CARD CASES, PRESUMABLY THERE IS A RECORD OF EVERY SINGLE PERSON THAT WAS OVERCHARGED ON THEIR CREDIT CARDS, AND YOU COULD HAVE NOTICE IN THOSE TYPES OF SITUATIONS. BUT LET'S NOT LOSE SIGHT OF WHAT THE OTHER SIDE OF THE COIN IS AND WHAT THE POTENTIAL PROBLEM IS OF THAT (F) SUBPART.

YOU KNOW, I HEARD THE SUB VOCE "GOTCHA" EARLIER TODAY IN ONE OF THE PRESENTATIONS BY ONE OF THE FOLKS WHO REPRESENTS DEFENDANTS QUITE OFTEN MENTIONED. WELL, THE VOICE THAT WE SAY WHEN WE LOOK AT THESE SITUATIONS, AS LAWYERS WHO ARE EXPERIENCED

IN THIS FIELD, IS: CAN WE GET THEM? WE WANT TO GET THEM. WE WANT TO SAY, "YOU'RE NOT GOING TO RIP OFF PEOPLE WHO ARE INNOCENT VICTIMS."

THERE IS AN INCENTIVE THAT WE HAVE THAT COMES FROM THE GUT WHEN WE SEE SITUATIONS WHERE PEOPLE ARE WRONGED. AND IF WE CAN GET A RECOVERY FOR THOSE PEOPLE, THEN WE DESERVE TO GET PAID FOR OUR EFFORTS. BUT IT'S NOT THE QUESTION OF WHETHER THE ATTORNEYS ARE GETTING TOO MUCH OR TOO LITTLE. THE FUNDAMENTAL QUESTION, I THINK, THAT GETS TO THE CONUNDRUM THAT YOU FACE IS IDENTIFYING REAL CASES.

BUT TO SAY THAT --

HONORABLE PAUL NIEMEYER: HOW DO WE DO THAT?

MR. TABACCO: WELL, I THINK THAT YOU HAVE TO TRUST THE JUDICIARY MORE THAN IT IS TO WRITE A RULE. BECAUSE AS I UNDERSTAND THE ORIGINAL THRUST OF THE COMMITTEE'S ANALYSIS, IT REALLY DEALT, IN LARGE PART, ATTEMPTING TO WRESTLE WITH THE MASS TORT PROBLEMS, NOT THAT THAT WASN'T IT EXCLUSIVELY, BUT I APPRECIATE THAT THAT'S CERTAINLY ONE OF THE FOCUSES.

BUT THE UNINTENDED CONSEQUENCES OF RULE 23(F), (B)(F), IF I COULD ILLUSTRATE THE SUBPART, IS IN THE SECURITIES FIELD. WELL, HOW DO WE DETERMINE WHAT THE EDGES OF THE CLASS ACTION SHOULD BE IN TERMS OF DEFINITION?

LET ME JUST GIVE YOU AN ILLUSTRATION. A TYPICAL SECURITIES CLASS ACTION TALKS ABOUT DAMAGES WHERE THE PRICE OF THE STOCK IS INFLATED DURING THE CLASS PERIOD. ALL OF YOU HAVE

SEEN THOSE PETITIONS, HEARD THAT LANGUAGE MANY TIMES.

BUT THE QUESTION IS: WHAT IS THE INFLATION? THE CLASS PERIOD BEGINS ON A DAY THAT THE PLAINTIFFS' LAWYERS WILL ARGUE IS THE DAY THE FRAUD BEGAN, AND IT ENDS THE DAY THE TRUTH WAS REVEALED. BUT SOMEWHERE IN THAT MAGICAL WINDOW IS A MEASURE OF DAMAGES.

BUT WHAT THE SUBPART (F) IS GOING TO CAUSE AN EXAMINATION OF IS: WHAT ABOUT THE PEOPLE ON THE EDGE OF THOSE WINDOWS? ARE THEY IN THE CLASS OR ARE THEY OUT OF THE CLASS? IT GOES TO MORE THAN WHETHER OR NOT A CLASS ACTION CAN BE MAINTAINED, BUT IT'S GOING TO START TO AFFECT THE ANALYSIS OF THE BOUNDARIES OF THE CLASS.

TO GIVE YOU AN EXAMPLE FROM A LITIGATOR IN THE FIELD: I WAS INVOLVED IN TRYING THE DATAPOINT LITIGATION. IT WAS A TEN-WEEK TRIAL DOWN IN SAN ANTONIO, TEXAS. IT WAS A SECURITIES CLASS ACTION, AND IT WAS A BIFURCATED TRIAL. THE JURY CAME BACK AND SAID THERE IS LIABILITY. NOW WE GET TO THE QUESTION OF DAMAGES.

WELL, I PUT MY DAMAGE EXPERT ON, AND HE SAID THE DAMAGES ARE $140 MILLION. THE DEFENDANTS PUT ON TWO VERY DISTINGUISHED PROFESSORS, AND THEY SAID THERE IS NO DAMAGES, AND THAT WAS AFTER A TEN-WEEK TRIAL.

SO ARE WE GOING TO GET INTO THAT TYPE OF PRESENTATION IN THE FIRST SIX WEEKS OR FIRST THREE MONTHS OF A SECURITIES CLASS ACTION, BECAUSE SUDDENLY THERE IS THIS NEW SUBPART IN THE

RULES? YOU MAY HAVE CREATED, BY THIS ANALYSIS, THE UNINTENDED CONSEQUENCES OF, IN EFFECT, MINI TRIALS AS TO WHETHER OR NOT, IN THE SECURITIES CONTEXT, AND I CAN EVEN SAY IN THE ANTITRUST CONTEXT, YOU CAN OVERCOME SOME OF THESE THRESHOLD ISSUES.

I HEARD MR. GOLDBERG --

MR. SOL SCHREIBER: MR. TOBACCO, IT WAS MY IMPRESSION -- MAYBE I'M WRONG, AND MAYBE THE COMMITTEE MEMBERS CAN SUPPORT OR NOT SUPPORT -- BUT IT WAS MY IMPRESSION THAT 23(B)(3)(F) WAS NOT INTENDED FOR SECURITIES CASES; IT WAS INTENDED FOR THE CONSUMER CASES.

NOW, IF THAT IS SO, DOES THAT CHANGE YOUR POSITION?

MR. TABACCO: WELL, RULE 23 IS A RULE OF ONE OF THE FEDERAL RULES THAT APPLY TO FEDERAL LITIGATIONS. ARE WE GOING TO NOW SAY, FOR THE FIRST TIME, WE HAVE ADMIRALTY RULES, I WILL CONCEDE RULE 72 TO 75? I'VE NEVER USED THOSE RULES. THEY ARE VERY NICE, BUT I'VE NEVER USED THEM. BUT ARE WE GOING TO SAY NOW THAT A CERTAIN SUBSECTION OF A CERTAIN PART OF RULE 23 ONLY APPLIES TO CERTAIN SUBSTANTIVE TYPES OF CASES?

AND THEN YOU START TO GET INTO ISSUES OF: WHAT IS A CONSUMER CLASS ACTION, VERSUS A 10(B) SECURITIES FRAUD ACTION? MAYBE THERE IS A COMMON LAW FRAUD CLAIM THAT SOMEHOW SPILLS OVER.

AND I THINK, AGAIN, THE POTENTIAL FOR SATELLITE LITIGATION IS MUCH, MUCH GREATER. AND I APPRECIATE WHAT YOU'RE TRYING TO WRESTLE WITH. BUT I THINK THE ANSWER IS THAT YOU

LEAVE IT TO THE JUDICIARY TO PROTECT THE VICTIMS AND TO PROTECT THE DEFENDANTS BY THE INHERENT POWERS THE COURTS HAVE.

AND AGAIN, IT'S NOT TO SAY THAT THERE AREN'T GOING TO BE CASES THAT DON'T NEATLY FIT WITHIN THE CURRENT RULE 23. BUT IF YOU LOOK AT THE WHOLE SPECTRUM OF THE CASES, AND THE SYSTEM FOR THE LAST 30 YEARS, PARTICULARLY IN THE CONTEXT OF THE U.S. ECONOMY, YOU CAN'T SAY IT'S BROKEN. IT MAY NEED SOME TINKERING, BUT YOU CAN'T SAY IT'S BROKEN.

THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU VERY MUCH, MR. TABACCO.

MR. AUDET, IS HE HERE?

TESTIMONY OF WILLIAM M. AUDET

MR. AUDET: THANK YOU. I WILL TRY TO BE BRIEF. I'LL EVEN TRY TO BE LESS THAN FIVE MINUTES. I KNOW IT'S GETTING LATE IN THE DAY.

I DID HAVE A STATEMENT. I JUST TURNED IT IN EARLIER THIS AFTERNOON. SO I WON'T EVEN GO OVER THAT.

I WORK IN A SMALL FIRM DOWN IN SAN JOSE. I USED TO BE A PARTNER AT LIEFF, CABRASER, HEIMANN & BERNSTEIN. I FEEL RIGHT NOW, AFTER WHAT I'VE HEARD TODAY, LIKE I'M IN A HOLY WAR HERE.

I THINK WHAT'S FORGOTTEN HERE IS: WHAT ARE WE GOING TO DO WITH ALL THESE PEOPLE WHO HAVE NO PLACE TO GO? THE CASES WHICH WE'RE TALKING ABOUT WHERE PEOPLE GET $50, TO US, MAYBE IT DOESN'T MEAN A LOT. BUT I GET A LOT OF THANK YOU NOTES FOR THE

$50 CASES. AND I THINK NOT TO LOOK AT THOSE CASES IN THE AGGREGATE RATHER THAN, "HEY, SOMEBODY GOT $50," IS A MISTAKE.

HONORABLE JOHN L. CARROLL: IT'S NOT THE $50 CASE THAT CONCERNS ME; IT'S THE $5 CASE.

MR. AUDET: I'LL TAKE A $5 CASE IF I THINK THAT THERE IS ENOUGH DAMAGES IN THE AGGREGATE THAT I CAN DO IT ECONOMICALLY AND I CAN TAKE ON A LARGE CORPORATION. I WILL DO IT IF THAT MEANS $5.

THERE ARE DIFFICULT CASES TO DO. I DON'T CARE IF SOMEONE GETS A CHECK FOR $5. THAT MEANS SOMETHING TO SOMEBODY. I GET THANK-YOUS FOR $5 CHECKS. WHAT I SEE THE PROBLEM IS -- I'LL TELL YOU WHAT WILL HAPPEN. LET'S SAY SOME OF THIS LEGISLATION IS PASSED. I'M OPPOSED TO ALL OF IT EXCEPT FOR THE SETTLEMENT CLASS PROVISION. I'M OPPOSED TO ALL OF THESE.

I DON'T THINK THAT SECTION 1292 DOES NOT ADEQUATELY DEAL WITH THE PROBLEMS, IF THERE IS A BAD CERTIFICATION ORDER. I HAVE BEEN INVOLVED IN CASES IN WHICH, AS I POINTED OUT IN MY STATEMENT, IN WHICH COURTS HAVE SAID, "HEY, THIS IS A QUESTIONABLE."

LET ME GO UP ON APPEAL. I'LL GIVE AN EXAMPLE, THE FALBATOL (PHONETIC) CASE. IT WAS JUDGE LEGGE. IT WAS BROUGHT BY LIEFF, CABRASER, HEIMANN & BERNSTEIN. I BELIEVE IT WAS JUDGE LEGGE. HE SAID, "I THINK THIS IS CERTIFIABLE, BUT LET'S HAVE THE NINTH CIRCUIT LOOK AT IT." THE NINTH CIRCUIT LOOKED AT IT A COUPLE MONTHS LATER, SAID, "YOU'VE GOT TO GO BACK AND GIVE ME

SOME MORE FACTS ON THAT." THAT'S THE WAY WE NEED TO DO IT.

I DO THINK A SETTLEMENT CLASS IS APPROPRIATE, AND I THINK THE CHANGE SUGGESTED THERE IS A GOOD IDEA, TO BE CONSISTENT WITH WHAT THE COURTS HAVE BEEN DOING OVER THE LAST TEN YEARS. ALL OF THE OTHER PROVISIONS, I'M VERY, VERY CONCERNED ABOUT, THAT THERE ARE PORTIONS OF THAT THAT WILL STOP PEOPLE FROM HAVING ACCESS TO THE COURTHOUSE, TO HAVING ACCESS TO FEDERAL COURTS.

LET ME DEAL WITH THE $5 CLAIM. HERE'S WHAT I FIND. EVERY TIME I FILE A STATE CLAIM, I WANT IT IN STATE COURT. I WANT IT LITIGATED IN STATE COURT. I WANT TO LITIGATE IT IN MY BACKYARD. EVERY TIME I FILE THAT, THE $5 CLAIM, THE $10 CLAIM, I FIGHT. I WANT IT IN MY BACKYARD. I WANT IT RIGHT HERE. I KNOW THE FEDERAL COURTS ARE INUNDATED WITH THE CRIMINAL CASES THAT ARE GOING ON. I CLERKED HERE, RIGHT IN THIS COURTHOUSE, FOR JUDGE ZIRPOLI AND JUDGE SMITH. I KNOW HOW BUSY JUDGES ARE IN FEDERAL COURT. I RARELY BRING CONSUMER CASES IN FEDERAL COURT. I KNOW THEY'RE THERE.

WHAT HAPPENS IS THE DEFENDANTS REMOVE THEM. AND THEN THEY START ARGUING, "OH, IT'S ONLY A $5 CASE. WHAT ARE YOU DOING CERTIFYING THIS, YOUR HONOR?"

AND I SAY, "WELL, LEAVE ME IN STATE COURT. LET THAT STATE COURT JUDGE DECIDE."

WHAT I'M AFRAID IS GOING TO HAPPEN: THE DEFENSE ARE GOING TO REMOVE IT AND SAY, HEY, THIS DOESN'T MEET THE STATUTE,

THE THRESHOLD HUNDRED-DOLLAR CASE, THE THRESHOLD $200 CASE. I'LL BRING THOSE ANY DAY OF THE WEEK IF I THINK THE CONDUCT'S BAD ENOUGH AND THAT THE AGGREGATE DAMAGES ALLOW ME TO DO IT, THE TEN MILLION, $15 MILLION CASE. IF IT'S LESS THAN THAT, I CAN'T DO IT. I JUST CAN'T DO IT.

HONORABLE DAVID F. LEVI: WHAT'S WRONG WITH THE OPT-IN IDEA IN THOSE CASES? SUPPOSE THE JUDGE SAYS THAT, "LOOK, I'M HAVING TROUBLE TELLING WHETHER THIS IS ATTORNEY-DRIVEN OR CLIENT-DRIVEN. I HEAR YOU TALKING LIKE AN ATTORNEY GENERAL. IF YOU THINK THE CONDUCT IS BAD ENOUGH, THEN YOU'LL GO FORWARD.

WE HAVE ALL SORTS OF ENFORCEMENT AGENCIES THAT MAKE A JUDGMENT, AND THIS IS A SOCIAL JUDGMENT ABOUT HOW MUCH ENFORCEMENT DO WE WANT. SO I'M NOT THAT IMPRESSED BY WHETHER YOU THINK THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA LOOKED AT THIS CASE AND MADE THE WRONG JUDGMENT. THAT DOESN'T IMPRESS ME. BUT YOU DO IMPRESS ME WHEN YOU SAY, "YOU KNOW, FOR A LOT OF MY CLIENTS, $50 IS VERY MEANINGFUL; IN FACT, $5 IS VERY MEANINGFUL."

SO I SAY: WELL, LET'S HAVE THEM --

MR. AUDET: DECIDE?

HONORABLE DAVID F. LEVI: WELL, IF YOU'RE RIGHT, THEY'RE GOING TO OPT IN.

MR. AUDET: IT'S HARD FOR ME TO ARGUE WITH YOUR POINT. HEARING TODAY WHAT YOU HEARD FROM THE DEFENSE COUNSEL, IT'S VERY HARD FOR ME TO ARGUE.

BUT I WILL POINT OUT SOME THINGS. WHEN I TALK TO PEOPLE -- LET ME GIVE YOU SOME EXAMPLES. I WAS INVOLVED IN THE PRUDENTIAL-BACHE OIL AND GAS LIMITED PARTNERSHIP CASE, GOT $120 MILLION. WE GOT $120 MILLION. I WISH WE GOT THE BILLION-DOLLAR DAMAGES THAT WE SOUGHT. IT WAS SO HARD FOR ME TO CONVINCE PEOPLE TO MAKE CLAIMS.

"I DON'T WANT TO BOTHER THE JUDGE."

"MA'AM, YOU'RE JUST FILLING OUT A CLAIM FORM. YOU'RE GOING TO GET SOME MONEY."

THE PROBLEM I HAVE IS JUST LIKE COMPANIES THAT TREAT PEOPLE LIKE PRODUCTS, LIKE INVENTORY, WHICH, IT'S THE WAY OF THE '90S, I'M GOING TO HAVE A HARD TIME CONVINCING PEOPLE TO STEP FORWARD TO EVEN MAKE CLAIMS, LET ALONE TO STEP FORWARD TO BE A, QUOTE, "PARTICIPANT" IN THE LITIGATION.

HONORABLE PAUL NIEMEYER: THAT'S VERY TELLING AND IT'S VERY IMPORTANT TESTIMONY, BECAUSE WHAT YOU'RE SAYING IS THAT A PERSON WHO IS INJURED AND IS TOLD, "ALL YOU NEED TO DO IS TO SAY 'YES,'" WON'T DO IT.

MR. AUDET: THOSE PEOPLE -- BUT IT'S NOT --

HONORABLE PAUL NIEMEYER: IS SOCIETY TO TAKE EVERY PERSON WHO HAS A CLAIM AND SAY "YOU GOT TO BE A LITIGANT"?

MR. AUDET: I UNDERSTAND YOUR POINT. I'LL TELL YOU, FROM THE TRENCHES, WITH ALL DUE RESPECT TO THE FEDERAL AGENCIES AND THE STATE AGENCIES, THEY ARE NOT THERE FOR US. THEY'RE JUST NOT. I WISH THEY WERE. I WOULD LET MY TAXES, MY PROPERTY,

WHATEVER TAXES, INCREASE. THEY DON'T HAVE THE RESOURCES. SO I DON'T THINK --

HONORABLE DAVID F. LEVI: THEY DON'T AGREE WITH THAT. I HAVE SPOKEN TO A DEPUTY ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AND RELAYED SOME OF THIS TESTIMONY THAT WE'VE HEARD. AND THEY SEE IT AS DECISION MAKING, THAT THEY MAKE A DECISION THAT THESE ARE NOT CASES THAT THEY CHOOSE TO ENTER, IT'S NOT A GOOD USE OF SOCIAL RESOURCES AND ENFORCEMENT RESOURCES.

BUT I DON'T AGREE. BUT THEY ARE THE ELECTED OFFICIALS.

MR. AUDET: THAT'S RIGHT. THAT IS CORRECT. THEY ARE THE ELECTED OFFICIALS. THAT'S WHY WE NEED AND THAT'S WHY I THINK IT'S IMPORTANT THAT WE CONTINUE TO HAVE PRIVATE ENFORCEMENT OF CONSUMER -- OF MASS TORT, EVEN.

YOU KNOW, I HEARD THIS TODAY, AND I WAS SHAKING MY HEAD; I REALLY AM. I AM SO CONCERNED. AND IT'S NOT ABOUT MY LIVELIHOOD. I WILL TELL EVERYBODY HERE I CAN MAKE MONEY --

HONORABLE PAUL NIEMEYER: I CAN ACCEPT THAT. YOU'RE OBVIOUSLY A VERY DEDICATED LAWYER. AND I GUESS MY QUESTION FOCUSES ON: LET'S ACCEPT EVERYTHING YOU'RE SAYING, THAT THESE PEOPLE ARE WILLING TO WRITE YOU A LETTER AND TO THANK YOU. I THINK THAT'S VERY GOOD WORK. THE QUESTION IS --

MR. AUDET: HOW DO WE MAKE SURE THAT THOSE PEOPLE REALLY WANT TO BE THERE?

HONORABLE PAUL NIEMEYER: IF YOU HAVE A PERSON THAT

SAYS, "I DON'T WANT TO," AND YET, YOU SAY, "BUT YOU'VE GOT TO. YOU HAVE BEEN HURT, AND YOU'RE GOING TO BE A LITIGANT"?

MR. AUDET: I DO THINK -- AND I WILL AGREE WITH ONE THING THAT WAS SAID HERE TODAY -- WELL, I AGREE WITH A LOT OF THINGS THAT WERE SAID. BUT I WILL AGREE TO ONE IMPORTANT POINT WAS THAT THE NOTICE, I THINK WE CAN IMPROVE ON. WE COULD ALL IMPROVE ON THE NOTICE, LIKE THE SEC IS GOING TOWARDS A SIMPLIFIED PROSPECTUS. I THINK WE SHOULD GO TOWARDS A SIMPLIFIED NOTICE PROGRAM.

HALF THE BATTLE I HAVE WITH THE NOTICE IS WITH THE DEFENDANTS. THEY DON'T WANT TO TELL ANYBODY WHAT'S GOING ON. I SPEND MONTHS DEALING WITH JUST A SIMPLE MERIT NOTICE. I'LL SPEND TWO MONTHS, SPENDING GOD KNOWS HOW MANY HOURS.

HONORABLE PAUL NIEMEYER: MAYBE WE NEED NOTICE FORMS.

MR. AUDET: I'LL GO WITH THAT, LIKE THEY DO IN STATE COURT. YOU FILL OUT THE INTERROGATORIES AND LET THEM GO.

BUT I AM JUST CONCERNED THAT -- AND I LISTED A BUNCH OF CASES THAT I PARTICIPATED IN THAT I THINK WE DID GOOD, AND THAT I THINK WE GOT A GOOD RECOVERY. I WOULD HAVE LIKED TO HAVE SEEN MORE. I THINK WE GOT SOME PEOPLE SOME MONEY BACK. THEY GOT 10, 20, 30 PERCENT ON THE DOLLAR. I WOULD HAVE LIKED TO SEE THEM SAVE 50 PERCENT. MAYBE I COULD HAVE GOT A HUNDRED PERCENT IF I WENT TO TRIAL, AND I'D BE UP ON APPEAL THREE YEARS, FOUR YEARS, BECAUSE IT'S A TRIAL, AND THERE IS SO MANY ISSUES TO BE LOOKED AT. AND THAT WEIGHS IN FAVOR OF THE DEFENDANTS.

MY VIEW IS: LET'S MAKE THE LAWS TOUGHER. LET'S MAKE CONSUMER LAWS TOUGHER. LET'S MAKE NOTICE GO OUT EARLIER, BECAUSE I THINK YOU'LL SEE THOSE $5 CHECKS TURN INTO $10 CHECKS.

HONORABLE PAUL NIEMEYER: SHOULDN'T THAT BE DIRECTED TO THE PEOPLE WHO MAKE THE LAWS?

MR. AUDET: THAT IS CORRECT.

BUT MY POINT IS WHAT WE'RE LOOKING AT HERE AT IS MAKING RULE 23 A TOUGHER VEHICLE FOR ENFORCEMENT, WHICH IS WHAT IT IS. I UNDERSTOOD YOUR POINTS. IT'S JUST A PROCEDURAL MECHANISM. BUT IT'S A PROCEDURAL MECHANISM THAT ALLOWS US TO ENFORCE AND TO TREAT PEOPLE SIMILARLY.

IF I MAY, YOUR HONOR, LET ME JUST RUN DOWN A COUPLE OF CASES I THOUGHT, UNDER A REASONABLE INTERPRETATION OF THE PROPOSALS, WOULD NOT BE CERTIFIED. AND IF I'M NOT GOING TO GET THEM CERTIFIED, THERE IS NO LIKELIHOOD I'M GOING TO GET A PENNY BACK.

I HAVE AN INSURANCE CASE NOW PRESENTLY PENDING IN ALABAMA, IN WHICH THERE WAS AN ATTEMPT, RIGHT TOP-DOWN ATTEMPT BY THE COMPANY TO CONVINCE POLICY HOLDERS, LIFE INSURANCE POLICY HOLDERS, TO EXCHANGE THEIR POLICIES FOR LESSER VALUE POLICIES.

HONORABLE PAUL NIEMEYER: THAT'S THE VERY PUBLIC CASE --

MR. AUDET: NO. THERE IS SOME SETTLEMENTS. WHILE THEY SETTLED THEM, I WASN'T PART OF THEIR CASES. I GOT MY OWN CASE. I'LL TELL YOU, UNDER THE PROVISIONS NOW, I DON'T THINK

THERE IS AN ARGUMENT THAT THESE THINGS SHOULDN'T BE CERTIFIED.

I HAD A CASE THAT I HAD WORKED ON FOR TWO YEARS WHEN I WAS AT LIEFF, CABRASER. IT HAD TO DO WITH CREMATIONS, AND WHAT THEY WERE DOING WAS COMMINGLING CREMATIONS. I GOT PEOPLE 300 TO $600. I WOULD HAVE LOVED TO GET THE PEOPLE 10,000, WHATEVER THEY DESERVED. IT WAS THE BEST I COULD DO. IT TOOK ME TWO YEARS TO GET -- BECAUSE IT WAS ALREADY GOING ON FOR TWO YEARS, SO A TOTAL OF FOUR YEARS JUST TO GET THE CLASS CERTIFIED. UNDER THE CURRENT RULES, I DON'T KNOW IF THAT CASE WOULD BE ABLE TO GO --

MR. SOL SCHREIBER: YOU MEAN THE CURRENT PROPOSAL.

MR. AUDET: EXCUSE ME -- AFTER CONVINCING THE STATE COURT JUDGE TO FOLLOW THE FEDERAL RULES. AND THIS IS IN CALIFORNIA, AND IT WAS JUDGE COOPERMAN.

I LOOK AT THESE CASES AND SAY, "I WOULDN'T HAVE GOTTEN $120 MILLION IN THE PRUDENTIAL-BACHE CASE UNLESS THE RULES ARE REASONABLY INTERPRETED, AS THEY ARE NOW, TO ALLOW ME TO GET CERTIFIED.

HONORABLE JOHN L. CARROLL: DID YOU GET THE $120 MILLION FOR THE PEOPLE THAT WANT THE $120 MILLION? WHY CAN'T YOU START THE LITIGATION FOR PEOPLE WHO WANT TO BE IN THE LITIGATION?

MR. AUDET: I DON'T THINK THE ANSWER IS MAKE AN OPT-IN CLASS. BUT I DO THINK THERE MAY BE WAYS IN WHICH -- HAVE PEOPLE REGISTER. I DON'T KNOW. I DON'T HAVE A PROBLEM WITH THAT.

I'LL GIVE YOU AN EXAMPLE. I HAVE A CASE THAT HAS TO DO WITH STUCCO. IT'S AN M.D.L. CASE. WE'VE MET WITH THE INSURANCE COMPANIES. WE MET RECENTLY WITH SOME OF THE DEFENDANTS. AND I SAID, "WE DON'T THINK IT'S A PROBLEM." I SAID, "LET'S SEND OUT THE NOTICE AND HAVE A REGISTRATION PROCESS. I'LL SHOW YOU HOW MANY PEOPLE HAVE PROBLEMS WITH THEIR HOMES." I'M ALL FOR THAT IF WE'RE GOING TO USE THAT PROPERLY.

THE PROBLEM I HAVE: IF WE HAVE AN OPT-IN CLASS, WHAT DO WE DO? LET'S SAY 50 PERCENT OF THE PEOPLE OPT IN. DOES THAT MEAN THAT THE COMPANY GETS TO KEEP THE OTHER 50 PERCENT? I DON'T KNOW. THAT'S WHAT MAKES ME NERVOUS. AND DO I HAVE TO CONVINCE THOSE PEOPLE, "PLEASE, OPT IN. YOU WON'T HAVE TO LITIGATE IT. YOU WON'T HAVE TO APPEAR BEFORE THE JUDGE. YOU WON'T HAVE TO TAKE DEPOSITIONS."

HONORABLE DAVID F. LEVI: THE TWO GENERAL COUNSEL INDICATED PEOPLE DON'T MAKE CLAIMS, AND SO ULTIMATELY, IT'S KIND OF A SHAM THAT'S GOING ON.

MR. AUDET: I RESPECTFULLY DISAGREE WITH, I THINK, THEIR VIEW OF IT. MOST PEOPLE WILL MAKE CLAIMS DEPENDING ON THE VALUE OF THE CLAIM.

THE $5 CLAIM, IT'S LESS LIKELY THAT A HIGHER PERCENTAGE -- IT'S SORT OF LIKE A SLIDING SCALE. THAT'S BEEN MY EXPERIENCE. THAT'S WHY LIKE, FOR EXAMPLE, THE $5 CLAIM, I LIKE TO DO IT. THE PEOPLE DON'T HAVE TO FILL OUT CLAIMS FORMS. GIVE ME THE LIST OF PEOPLE YOU HAVE; I'LL SEND THEM THE CHECK. THEY

DON'T HAVE TO EVEN FILL OUT A CLAIM FORM.

HONORABLE PAUL NIEMEYER: YOU'VE GIVEN US THESE GOOD EXAMPLES. WE APPRECIATE YOUR GIVING US THAT TESTIMONY.

MR. AUDET: THANK YOU.

HONORABLE PAUL NIEMEYER: MR. CADDELL? MR. MICHAEL CADDELL?

UNIDENTIFIED SPEAKER: HE'S NOT HERE.

HONORABLE PAUL NIEMEYER: THAT MAKES IT EASIER. NOT THAT I WOULDN'T APPRECIATE HEARING FROM HIM. WE'VE RECEIVED SOMETHING.

MR. JOHN COOPER?

TESTIMONY OF JOHN L. COOPER

MR. COOPER: GOOD AFTERNOON, AND THANK YOU FOR THE OPPORTUNITY TO ADDRESS YOU. I'M APPEARING HERE ON BEHALF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS' COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE.

THE AMERICAN COLLEGE OF TRIAL LAWYERS IS AN ORGANIZATION OF LAWYERS WHO TRY CASES IN THE UNITED STATES. YOU CANNOT JOIN THE ORGANIZATION. YOU HAVE TO BE INVITED TO JOIN IT. AND IT CONSISTS OF LAWYERS WHO REPRESENT BOTH PLAINTIFFS AND DEFENDANTS. AND SO I HAVE A RATHER LIMITED SCOPE OF THE IDEAS THAT I CAN PRESENT.

AND I WILL TELL YOU WHAT OUR COMMITTEE HAS ADDRESSED, AND SINCE I HAVE TRIED SEVERAL CLASS ACTIONS AND HAVE SOME EXPERIENCE, I MAY STEP ASIDE FROM WHAT OUR COMMITTEE HAS

PROPOSED AND MAKE SOME PERSONAL COMMENTS. BUT OUR COMMITTEE CONSISTS OF 29 TRIAL LAWYERS IN THE AMERICAN COLLEGE OF TRIAL LAWYERS WHO HAVE TRIED A LOT OF CASES, AND SEVERAL OF WHOM HAVE TRIED A LOT OF CLASS ACTIONS.

WE SUPPORT ALL OF YOUR AMENDMENTS EXCEPT FOR TWO. WE DO NOT SUPPORT THE 23(B)(3)(F) PROPOSAL, NOR DO WE SUPPORT THE SETTLEMENT CLASS IN 23(B)(4). WE SUBMITTED A LETTER THAT CAME FROM THE CHAIRMAN OF OUR COMMITTEE, MR. ROBERT CAMPBELL OF SALT LAKE CITY. IT'S DATED JANUARY 4TH, 1997. I WON'T REPEAT WHAT'S CONTAINED IN THERE.

BUT I WOULD LIKE TO ADDRESS MYSELF TO THE TWO PROPOSALS THAT WE OPPOSE. I THINK THAT THE SUPPORT FOR THE OTHERS IS ADEQUATELY COVERED IN OUR PAPERS, AS WELL AS IN THE OTHER COMMENTS THAT HAVE BEEN MADE.

23(B)(3)(F), AS I SEE IT, PROPOSES TO ADDRESS THE ABUSE OF THE SMALL CLASS ACTION, WHERE A FEW DOLLARS ARE WRONGFULLY TAKEN, ARGUABLY, FROM A LOT OF CLASS MEMBERS, OR SOME CLASS MEMBERS. AND THE LITIGATION PROCEEDS, AS I HEARD MR. ROETHE, FROM THE BANK OF AMERICA, AND MR. BAIRD, FROM WELLS FARGO, TESTIFY THAT IT PROCEEDS AND IT GETS UP TO THE POINT OF SETTLEMENT. THE BANK, THE DEFENDANT, AGREES TO THE SETTLEMENT FOR A CERTAIN AMOUNT OF MONEY, AND IT'S PAID OVER TO THE DEFENDANTS, SUBJECT TO APPROVAL OF THE COURT. THE PLAINTIFFS' ATTORNEYS PETITION FOR FEES. THEY ARE AWARDED SOME FEES. THE REMAINDER IS PAID OUT TO THE CLASS.

THE QUESTION IS ABUSE. IF THERE IS AN ABUSE, IF THERE IS AN ABUSE EARLY ON, THE COURT CAN ADDRESS IT, FIRST OF ALL, UNDER SUPERIORITY; SECONDLY, UNDER MANAGEABILITY; THIRD, UNDER FRIVOLOUS LITIGATION; AND FOURTH, ON THE AWARD OF ATTORNEYS' FEES.

IN ONE OF OUR COMMITTEE SESSIONS, A LAWYER FROM VERMONT SAID, "WE DON'T HAVE ABUSES OF CLASS ACTIONS UP IN VERMONT."

SOMEBODY SAID, "WHY?"

HE SAID, "WELL, WE DON'T HAVE THAT MANY FEDERAL JUDGES, AND THE ONES WE HAVE DON'T AWARD ATTORNEYS' FEES UNLESS THEY THINK THERE IS A SIGNIFICANT SOCIAL BENEFIT. WE DON'T HAVE A PROBLEM."

I SUGGEST THAT IN LITIGATION, AS IN EVERYTHING ELSE, THERE ARE VERY SUBSTANTIAL ECONOMIC FORCES HERE. AND IF YOU PAY LAWYERS MILLIONS AND MILLIONS OF DOLLARS TO ENGAGE IN ABUSES, THEY WILL ENGAGE IN ABUSES. AND IF YOU DON'T PAY THEM TO ENGAGE IN ABUSES, THEY WILL NOT ENGAGE IN ABUSES.

AND WE HAVE JUDGE WALKER HERE IN THE NORTHERN DISTRICT. HE GOT IN THE NEWSPAPER SEVERAL TIMES BECAUSE CLASS ACTIONS WERE FILED, SECURITIES CLASS ACTIONS, POINTED MOSTLY AT THE SILICON VALLEY, NEW COMPANIES, TECHNOLOGY, AND HE INVITED THE PLAINTIFFS' BAR TO COME IN AND BID ON THOSE CASES, MAKE A BID, COME IN AND REPRESENT THIS CLASS, AND THEY'LL ACCEPT THE LOWEST BID, A VERY INTERESTING EXCHANGE THAT TOOK PLACE. AND HE

TOOK THOSE BIDS AND ULTIMATELY AWARDED LEAD COUNSEL TO THE LAW FIRM THAT SUBMITTED THE LOWEST BID. THAT'S A VERY INTERESTING APPROACH, BUT I THINK THAT IT UNDERSCORES THE POINT THAT ECONOMICS WORK HERE.

BUT THE OTHER SIDE OF THE COIN THAT WE ADDRESSED IN OUR COMMITTEE IS THAT ECONOMICS ALSO WORK ON THE OTHER SIDE. IF YOU SAY, IF YOU SAY TO COMPANIES -- LET'S TAKE WIDGET, SO I DON'T SMEAR ANYBODY. IF YOU GET A $2 WIDGET THAT'S A CONSUMER ITEM, AND EITHER THROUGH SOME SORT OF CONSUMER FRAUD OR THROUGH PRICE FIXING OR OTHER ACTIONABLE CONDUCT, YOU ADD THREE OR FOUR OR FIVE CENTS TO THAT WIDGET, ACROSS THE BOARD, PRICE FIXING, A CLASSIC EXAMPLE, AND YOU SELL HUNDREDS OF MILLIONS OF THEM, YOU GOT AN ENORMOUS ECONOMIC INCENTIVE, ENORMOUS ECONOMIC INCENTIVE TO DO THAT.

AND YOU SAY, WELL, DO THESE PEOPLE WANT TO BE PLAINTIFFS? DOES ANYBODY IN THIS ROOM WANT TO BE A PLAINTIFF OVER THREE OR FOUR CENTS OF PRICE FIXING ON OUR CONSUMER PRODUCTS, ON OUR MILK, ON OUR GASOLINE, ON OUR SOAP, ANYTHING?

ABSOLUTELY NOT. YOU ASK ME THE QUESTION: DO I WANT TO BE THE LITIGANT FOR THAT? NO, ABSOLUTELY NOT. BUT THEN YOU ASK THE OTHER QUESTION: DO YOU WANT TO BUY PRODUCTS THAT HAVE BEEN THE SUBJECT OF PRICE FIXING? THE ANSWER IS NO.

SO WE SAY: WELL, LET'S JUST TAKE A (B)(2) CLASS ACTION AND ENJOIN THESE PEOPLE, ASK THEM NOT TO DO IT ANYMORE. SAY, OKAY, WELL THEN YOU GOT AN ENORMOUS ECONOMIC INCENTIVE TO

DO IT AS LONG AS YOU CAN UNTIL YOU GET CAUGHT. YOU'RE NOT GOING TO GET A VERDICT WITH THESE THINGS. YOU'RE GOING TO GO TO SETTLEMENT, AND YOU'RE GOING TO SETTLE THE INJUNCTION AND SAY, YES, WE WON'T DO IT ANYMORE.

HONORABLE PAUL NIEMEYER: THEN GO TO JAIL, TOO.

MR. COOPER: NOW THAT'S A DIFFERENT QUESTION. IF YOU CAN GET THE PUBLIC AGENCY INVOLVED AND THE ATTORNEY GENERAL INVOLVED AND SAY, YES, IF WE CAN GET THEM INVOLVED AND THEN MOVE IT ALONG, YES, THEY MIGHT DO THAT.

EXCEPT IT'S BEEN MY EXPERIENCE THAT THAT REALLY DOESN'T HAPPEN. AND IF THE DEFENDANTS ON THE OTHER SIDE ARE SMART, THEY'RE GOING TO SETTLE THIS CASE LONG BEFORE IT HAS THE ATTENTION OF THE ATTORNEY GENERAL, LONG BEFORE THOSE DOCUMENTS COME OUT.

AND THE PRACTICAL END RESULT, FROM THE CORPORATE POINT OF VIEW, IS THAT WHEN THE HEAT GETS UP THERE, THEY'LL STIPULATE TO THE INJUNCTION. "SURE, WE PROMISE WE WON'T DO IT." LIKE THE SEC INJUNCTION, "YOU ARE ORDERED TODAY TO OBEY THE LAW IN THE FUTURE." I'M NOT SURE THAT HAS A LOT MORE IMPACT THAN WHEN THE LAW IS PASSED AND YOU'RE ORDERED TO OBEY IT.

I'VE DONE BOTH PLAINTIFFS' CLASS ACTION WORK AND DEFENSE CLASS ACTION WORK. AND IN A (B)(2) CLASS ACTION FOR ANTITRUST CONDUCT, I HAD A (B)(2) CLASS ACTION THAT ADDRESSED A MEDICAL FACILITY THAT REPRESENTED ALL THE DENTISTS IN THE STATE OF CALIFORNIA, AND WE SUED TO CHANGE A PRICING PRACTICE IN A

PREPAID HEALTH CARE PROGRAM. AND, INCIDENTALLY, WE SUED FOR DOLLARS.

BUT WHAT THESE DENTISTS WANTED WAS THEY WANTED TO CHANGE THE CONDUCT BY WHICH THEIR FEES WERE REVIEWED ON THE ALLEGATION IT VIOLATED THE ANTITRUST LAWS, AND WE SUED TO DO THAT, AND WE SOUGHT FOR ATTORNEY'S FEES UNDER THE CLAYTON ACT. THAT WAS EFFECTIVE.

AND OUR LEGISLATION MORE AND MORE RECOGNIZES THAT THE PUBLIC ENTITIES ARE NOT AS EFFECTIVE IN ENFORCING AS WELL AS THE FREE MARKET IS. THEY FREQUENTLY INSERT ATTORNEYS' FEE CLAUSES IN THESE STATUTES THAT THEY WANT TO SEE ENFORCED. AND I WOULD SUBMIT TO YOU THAT THAT IS A RECOGNITION THAT THE PUBLIC ENTITIES ARE NOT ADEQUATE ENFORCEMENT.

SO I SUGGEST THAT THE SYSTEM WORKS FINE THE WAY IT IS, WELL, WITH A RECOGNITION OF THE FACT THAT CLASS ACTIONS REALLY DO ADDRESS TINY, TINY WRONGS THAT AGGREGATE INTO ENORMOUS AMOUNTS OF MONEY THAT PROVIDES AN INCENTIVE TO THE DEFENDANT TO ENGAGE IN THAT CONDUCT, AND THAT THE CORRECTIONS FOR ABUSE, OR THE EFFORTS TO STOP ABUSE THROUGH THE FOUR ITEMS THAT I LISTED, ARE ADEQUATE.

THE OTHER THING I'D LIKE TO ADDRESS IS THE SETTLEMENT CLASS. I THINK THAT ECONOMICS ARE AT WORK HERE AS WELL. WE ARE CONCERNED ABOUT IT. OUR COMMITTEE IS CONCERNED ABOUT IT BECAUSE WE THINK THERE ARE OPPORTUNITIES THERE FOR COLLUSION. IF YOU HAVE A PROBLEM, IF YOU HAVE A DEFENDANT THAT RECOGNIZES THEY'VE

GOT A PROBLEM, WHAT THEY WOULD LIKE TO DO IS BUY A CHEAP RETROACTIVE INSURANCE POLICY, A CLASS ACTION SETTLEMENT. IF YOU HAVE AN OPT-OUT KIND OF CLASS, YOU'VE GOT AN OPPORTUNITY FOR COLLUSIVE ABUSE AND A CHEAP RETROACTIVE POLICY.

NOW, YOUR HONOR ASKED THE QUESTION: SHOULD WE HAVE AN OPT IN FOR THE SMALL PLAINTIFFS, ADDRESSING THE ISSUE OF THE (F) ISSUE. I'VE ALREADY ADDRESSED THAT.

BUT WE MIGHT WANT TO LOOK AT THE SAME THING WITH REGARD TO SETTLEMENT CLASSES. AND MAYBE WE MAKE THAT AN OPT-IN CLASS. BECAUSE THAT ADDRESSES AND FOCUSES ON THE ECONOMICS OF THE ISSUE OF A COLLUSIVE RETROSPECTIVE INSURANCE POLICY.

MR. SOL SCHREIBER: MR. COOPER, WHY CAN'T THE JUDGE EXAMINE THE CASE AND INDEPENDENTLY DETERMINE IF THERE IS COLLUSIVENESS? ARE YOU SUGGESTING THAT JUDGES AREN'T EXPERIENCED?

I MEAN, WE HAVE THE PRECEDENT OF THE GM CASES AND GEORGINE, WHERE JUDGES HAVE EXAMINED AND HAVE COME UP AND SAID THERE IS -- THERE IS JUDGE SEARS, IN NEW ORLEANS, ON THE JAM CASE WHERE HE SAYS: THIS IS NOT A LEGITIMATE SETTLEMENT; I WON'T APPROVE IT.

MR. COOPER: WELL, I HAVE A TREMENDOUS RESPECT FOR OUR FEDERAL JUDGES, AND I THINK THAT THAT IS CERTAINLY POSSIBLE IF THE AMOUNT OF TIME AND ENERGY THAT THE PARTIES BEFORE THE COURT EXPEND TO ALLOW THOSE ISSUES TO BE ADDRESSED. HOWEVER, THERE IS A VERY SERIOUS RISK THAT THIS CAN ALL HAPPEN FAIRLY QUICKLY.

AND IF IT HAPPENS FAIRLY QUICKLY BEFORE IT HAS BEEN SUBJECTED TO THE TEST OF ADVOCACY, IT IS MORE DIFFICULT FOR THE COURT TO DETERMINE WHETHER OR NOT IT'S COLLUSIVE.

AND THE REAL PROTECTION, I BELIEVE, FOR DUE PROCESS AND WHY WE DON'T VIOLATE THE ENABLING ACT BY OUR RULE 23 AS IT PRESENTLY EXISTS IS BECAUSE WE HAVE ADVOCACY, AND WE HAVE THE TEST OF THE PARTIES ON BOTH SIDES SORTING IT OUT UNTIL THEY REACH A SETTLEMENT.

OF COURSE, IN CLASS ACTIONS THE WAY THEY EXIST, THERE IS A RISK THAT YOU LITIGATE AND LITIGATE AND LITIGATE UP TO THE BRINK OF TRIAL, AND THEN THERE MAY BE SOME ARGUMENT THAT THERE IS COLLUSION.

BUT IF YOU HAVE BEEN LITIGANTS LONG ENOUGH TO TEST IT THROUGH ADVOCACY, THERE IS A VERY GOOD OPPORTUNITY FOR THE COURT TO DETERMINE WHETHER OR NOT THERE IS COLLUSION THERE.

HONORABLE PAUL NIEMEYER: ALL RIGHT.

MR. SOL SCHREIBER: DOESN'T THE FACT THAT WE HAVE INTERVENORS PROVIDE THE OPPORTUNITY FOR TESTING?

MR. COOPER: I'M SORRY. I DIDN'T HEAR YOU.

MR. SOL SCHREIBER: I SAID: DOESN'T THE FACT THAT INTERVENORS COME IN GIVE THE COURT SOME INDICATION AS TO WHETHER THIS IS A SWEETHEART DEAL OR WHETHER IT'S SOMETHING THAT CAN GO FORWARD?

MR. COOPER: IT COULD, IF THERE IS ENOUGH INTEREST TO BRING THE INTERVENOR IN. BUT OUR COMMITTEE BELIEVES, AND I

BELIEVE, THAT THE OPPORTUNITY FOR ABUSE IN THE (B)(4) AMENDMENT, THE WAY IT IS PROPOSED, IS TOO GREAT.

THANK YOU VERY MUCH.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. COOPER. I APPRECIATE IT.

PROFESSOR SOLUM, IS HE HERE?

MR. SOLUM: THANK YOU VERY MUCH.

TESTIMONY OF LAWRENCE B. SOLUM

MR. SOLUM: JUST ONE WORD ON THE OPT-IN/OPT-OUT ISSUE. IT SEEMS TO ME THAT IT'S VERY IMPORTANT TO UNDERSTAND HERE THAT NEITHER OPT-OUT NOR OPT-INS REPRESENTS SORT OF THE FULLY INFORMED CONSENT OF THE PARTIES. WE KNOW THAT'S TRUE BECAUSE WE KNOW THAT THERE IS SUCH A BIG DIFFERENCE, DEPENDING ON WHICH WAY YOU CAST THE DEFAULT RULE.

AND ANOTHER WAY OF SEEING THAT POINT, I THINK, IS TO IMAGINE SORT OF THE PRE-1966 KIND OF OPT-OUT, THAT IS, OPT OUT AFTER YOU HAVE AN AWARD. THAT'S ANOTHER POSSIBILITY, TOO, AND THAT WILL CHANGE THE OPT-OUT RATES AND ALSO THE NUMBER OF PEOPLE WHO TAKE A SETTLEMENT BASED ON THE AMOUNT.

WHAT I'D LIKE TO PRIMARILY ADDRESS IS A VERY PARTICULAR QUESTION, WHICH WE MIGHT PHRASE THIS WAY: WOULD UNIQUE FAIRNESS PROBLEMS BE CREATED BY THE ADDITION OF THE PROPOSED (B)(4) SETTLEMENT CLASSES? OR IF WE THINK WE HAVE THEM ALREADY, THEN THE OTHER WAY OF PUTTING THE QUESTION IS: WOULD WE MAKE THE SYSTEM FAIRER IF WE ELIMINATED SETTLEMENT CLASSES?

AND THEN THE SECOND QUESTION IS: CAN SUCH PROBLEMS, IF THEY DO EXIST, BE HANDLED BY THE 23(E) HEARING AND APPROVAL PROCESS?

AND IN THIS CONNECTION, I'D LIKE TO ADDRESS A QUESTION RAISED BY PROFESSOR ROWE EARLIER. I WANT TO START OUT WITH THE IDEA THAT WE HAVE THREE NOTIONS OF WHAT MAKES A SETTLEMENT FAIR. ONE NOTION IS THAT A SETTLEMENT IS FAIR BECAUSE IT GIVES THE PARTIES THAT TO WHICH THEY ARE ENTITLED. SETTLEMENT CAN BE FAIR IN THE SENSE THAT IT GIVES THEM THEIR ENTITLEMENTS.

A SECOND IDEA IS FAIR VALUE, THAT YOU ACCEPT LESS THAN YOU'RE ENTITLED IF A PLAINTIFF, LESS OF A DAMAGE AWARD, IF YOU'RE A DEFENDANT; YOU PAY MORE IN EXCHANGE FOR SOMETHING, IN EXCHANGE FOR LESS INCONVENIENCE, LOWER LITIGATION COSTS, OR GREATER CERTAINTY. AND THEN THE FINAL IDEA OF A FAIR SETTLEMENT IS A PURE PROCESS IDEA, THE IDEA THAT THERE IS SIMPLY CONSENT.

WITH RESPECT TO THOSE IDEAS OF FAIRNESS, IS THERE ANY DIFFERENCE BETWEEN (B)(4) AND (B)(3) SETTLEMENTS? WELL, YOU HAVE TO LOOK AT WHAT THE DIFFERENCE IN THESE TWO KINDS OF CASES IS GOING TO BE. AND IT SEEMS TO ME THAT THERE ARE TWO IMPORTANT DIFFERENCES. ONE DIFFERENCE HAS TO DO WITH INCENTIVES; THAT IS, DEFENDANTS ARE IN A VERY DIFFERENT POSITION IN (B)(4) THAN IN (B)(3).

IN (B)(3), THE DEFAULT OPTION, THE THING THAT HAPPENS IF YOU DON'T SETTLE, IS THAT THE CLASS PROCESS GOES FORWARD THROUGH TRIAL. IN (B)(4), WHAT HAPPENS IS THAT WE GO BACK TO

SOME FORM OF DISAGGREGATED PROCEEDINGS. OF COURSE, IT MAY NOT BE INDIVIDUAL TRIALS, BECAUSE THERE ARE FORMS OF AGGREGATION THAT FALL SHORT OF THE CLASS ACTION. THAT'S GOING TO CHANGE WHAT DEFENDANTS ARE WILLING TO PAY.

THERE IS A SECOND DIFFERENCE, AND IT HAS TO DO WITH THE CRITERIA FOR (B)(4) AS OPPOSED TO (B)(3), THE CHARACTERISTICS OF THE CLASS ITSELF AND OF THEIR ACTION. AND HERE, I JUST, AS A SIDE NOTE, WOULD SAY: I'VE HEARD SEVERAL DIFFERENT EXPLANATIONS AS TO EXACTLY WHAT (B)(4) REQUIRES. I'VE HEARD THE EXPLANATION THAT SAYS THAT YOU MEET (A) AND THEN YOU DON'T HAVE TO MEET THE THREE FACTORS. AND I'VE HEARD OTHER PEOPLE SAY, "OH, NO, IT'S DEFINITELY YOU MUST MEET THE THREE FACTORS."

AND IT SEEMS LIKE THE NOTES OUGHT TO MAKE THAT CLEAR, OR PERHAPS THE WORDING OUGHT TO MAKE IT CLEAR. IT SEEMS TO ME THAT IF WE LOOK AT THE EXISTING DRAFT OF THE ADVISORY NOTE, THAT THE DIFFERENCE THAT'S IDENTIFIED HERE HAS TO DO WITH FACTORS THAT ARE DISCUSSED IN TERMS OF PREDOMINANCE, FOR EXAMPLE, IN GEORGINE. THAT IS, THAT WE CAN IMAGINE THAT THERE WOULD BE (B)(4) SETTLEMENTS IN SITUATIONS WHERE THERE WASN'T ENOUGH COMMONALITY TO TRY TOGETHER. AND SO THE EXAMPLE USED IN THE NOTE IS CHOICE OF LAW, THAT WE'D HAVE MANY DIFFERENT LAWS APPLYING; AND THEREFORE, IT WOULD BE IMPRACTICAL TO TRY.

SO, NOW WE HAVE A JUDGE WHO IS DECIDING WHETHER OR NOT TO APPROVE A SETTLEMENT FOR A (B)(4) CLASS. AND THE QUESTION IS

GOING TO BE: IS THAT SETTLEMENT FAIR? CAN THAT DECISION BE MADE SENSIBLY?

AND I THINK THAT THIS IS A CRITICALLY IMPORTANT QUESTION. THE STANDARD, OF COURSE WE HAVE IN THE LAW, FAIR, ADEQUATE AND REASONABLE, HARDLY PROVIDES GUIDANCE. AND EVEN THE PARKER V. ANDERSON FACTORS ADVANCED BY THE FIFTH CIRCUIT LOOK INTO THINGS LIKE FRAUD OR COLLUSION, COMPLEXITY, EXPENSE, STAGE OF THE PROCEEDINGS, BUT DON'T PROVIDE ANY REAL CRITERIA FOR WHAT IT IS WE'RE LOOKING FOR IN A SETTLEMENT.

IT SEEMS TO ME, THOUGH, THAT IF WE GO BACK TO THESE THREE IDEAS, THAT WE DO HAVE SOME GUIDANCE. WE MIGHT IMAGINE THE FOLLOWING SORTS OF SCENARIOS: ONE POSSIBILITY IS THAT THE (B)(4) SETTLEMENT, AS COMPARED TO THE ALTERNATIVE, WHERE THE ALTERNATIVE IS THAT WE DISAGGREGATE, THAT THE (B)(4) SETTLEMENT MOVES US CLOSER TO THE RESULT REQUIRED BY THE ENTITLEMENT. THAT'S OBVIOUSLY A FAIR SETTLEMENT, AND THERE COULD BE CASES WHERE THAT HAPPENS, WHERE DOES AGGREGATION IS GOING TO RESULT IN ALL KINDS OF PROBLEMS, EITHER FOR DEFENDANTS, THOUGH SORT OF THE BLACKMAIL SCENARIO, OR FOR PLAINTIFFS, IT'S NOT PRACTICAL TO TRY THE CLAIMS TOGETHER.

AND LIKEWISE, (B)(4), AS COMPARED TO DISAGGREGATION, COULD RESULT IN FAIR VALUE TO THE PLAINTIFFS, OR TO THE DEFENDANTS. WE CAN IMAGINE THOSE CASES. AND WE CAN IMAGINE CASES IN WHICH A (B)(4) SETTLEMENT WOULD DO NEITHER OF THOSE THINGS, WHERE A (B)(4) SETTLEMENT WOULD MOVE YOU AWAY FROM THE

ENTITLEMENT, AND IT WOULD MOVE YOU AWAY FROM FAIR VALUE; AND IF A JUDGE HAD THE INFORMATION -- WE'VE GOT PROCEDURAL QUESTIONS ABOUT WHETHER THE INFORMATION WOULD GET TO THE JUDGE -- IF THE JUDGE HAD THE INFORMATION, WE CAN IMAGINE THAT THOSE SETTLEMENTS WOULD RELATIVELY NON-PROBLEMATICALLY BE DISAPPROVED.

BUT BECAUSE (B)(4), SORT OF, BY ITS VERY NATURE, IS ADDING CASES IN WHICH THERE ARE DIFFERENCES AMONG CLASS MEMBERS, THERE IS A FINAL SCENARIO. AND I THINK IT'S VERY IMPORTANT TO AT LEAST THINK THIS THROUGH IN CONNECTION WITH THE DECISION WHETHER OR NOT TO ADD (B)(4).

AND THAT IS, THE QUESTION WHETHER OR NOT YOU'RE GOING TO HAVE A SETTLEMENT THAT SYSTEMATICALLY PROVIDES MORE FAIRNESS TO SOME SUBMEMBERS, TO SOME SUBGROUPS, SOME SUBCLASSES, BUT LESS FAIRNESS TO OTHERS. BECAUSE YOU CAN CERTAINLY IMAGINE THAT THAT WOULD HAPPEN, THAT YOU WOULD CERTIFY A (B)(4) CLASS AND THEN YOU WOULD GET A SETTLEMENT, AND IN THE SETTLEMENT, IT WOULD TURN OUT THAT SOME MEMBERS OF THE CLASS ARE MOVING AWAY FROM THEIR ENTITLEMENT, AS OPPOSED TO WHAT WOULD HAPPEN IF WE HAD DISAGGREGATED PROCEEDINGS, AND OTHER CLASS MEMBERS ARE MOVING TOWARDS THE ENTITLEMENT, A CONFLICT OF INTEREST WITHIN THE CLASS.

WHAT IS A TRIAL JUDGE TO DO IN THOSE CIRCUMSTANCES? I DON'T THINK THE EXISTING CASE LAW PROVIDES ANY CLEAR GUIDANCE IN THAT SITUATION. BUT IT'S OBVIOUSLY CRUCIALLY IMPORTANT TO THE QUESTION WHETHER OR NOT THE SETTLEMENT SHOULD BE APPROVED. AND

SO, IT SEEMS TO ME THAT THERE ARE SOME FACTORS THAT COULD BE CONSIDERED. WE COULD ASK QUESTIONS LIKE: DO THE NET BENEFITS TO THE CLASS, AS A WHOLE, SORT OF DWARF OR SUBSTANTIALLY OUTWEIGH THE HARM TO SOME SUBGROUP IN THE CLASS? WE COULD DECIDE NOT TO PERMIT SUCH SETTLEMENTS AT ALL. WE COULD HAVE A RULE THAT SAYS IF YOU HAVE THESE KINDS OF CONFLICTS, WE WOULD JUST DISAPPROVE THE SETTLEMENT. WE COULD TAKE A LOOK AT THE DISTRIBUTION OF COSTS AND BENEFITS AMONG CLASS MEMBERS AND ASK IF THAT DISTRIBUTION WAS FAIR.

BUT IT SEEMS TO ME THAT THIS ISSUE NEEDS TO BE THOUGHT THROUGH, AND THAT SOME OF THE OBJECTION, SOME OF THE VERY HEATED OBJECTIONS TO (B)(4), IS SORT OF IF YOU LOOK AT THEM CLOSELY, THEY ARE, IN PART, REFLECTING THIS PROBLEM, THAT WE DON'T HAVE A CLEAR UNDERSTANDING OF WHAT CONSTITUTES A FAIR SETTLEMENT.

HONORABLE PAUL NIEMEYER: ALL RIGHT.

MR. SOLUM: THANK YOU.

HONORABLE PAUL NIEMEYER: THANK YOU.

MR. CORTESE, YOU GOT ONE OF OUR FRIENDLY LETTERS; DIDN'T YOU?

MR. CORTESE: YES. I SEE, YOUR HONOR, I HAVE 20 MINUTES TO MAKE MY REMARKS. IS THAT CORRECT? IT'S NOT CORRECT. I'LL USE MY FIVE MINUTES TO PERHAPS TRY --

HONORABLE PAUL NIEMEYER: IT WOULD TAKE A TOTAL VOTE OF THE COMMITTEE TO OVERRULE MY FIVE MINUTES, UNANIMOUS.

HONORABLE JOHN L. CARROLL: DON'T WORRY.

TESTIMONY OF ALFRED W. CORTESE, JR.

MR. CORTESE: THANK YOU, JUDGE NIEMEYER.

I'D LIKE TO USE MY FIVE MINUTES TO PERHAPS BE PHILOSOPHICAL, PROMPTED IN LARGE MEASURE BY SOME OF THE REMARKS THAT MY DEAR FRIEND, ARTHUR MILLER, MADE THIS MORNING.

AS A SMALL VOICE FROM THE OTHER END OF THE SPECTRUM, THE IDEOLOGICAL SPECTRUM, BECAUSE ARTHUR IS MY MENTOR IN MANY THINGS THAT HAVE NOTHING TO DO WITH WHAT WE'RE TALKING ABOUT TODAY, BUT I DO THINK THAT IT IS IMPORTANT TO RECOGNIZE THAT NO MATTER WHERE YOU ARE ON THE IDEOLOGICAL SPECTRUM, IF YOU COME TO THIS AS A PRODUCT OF PRISON CASES, OR AS A PRODUCT OF TITLE VII CASES, THE ESSENTIAL ELEMENT THAT WE'RE SEEKING SOME GUIDANCE ON IS: WHAT IS THE NATURE OF THE CASE, AND HOW DO YOU IDENTIFY A CASE THAT CAN BE LITIGATED? THAT IS THE KEY INQUIRY, I THINK.

AND I THINK THAT WHAT HAPPENS -- AND, OF COURSE, IN PRISON CASES, AND IN TITLE VII CASES, OR WHEREVER YOU MAY BE IN TERMS OF ENFORCING SOCIAL POLICIES, YOU HAVE A DATA FILE OF LITIGANTS. I GUESS THE PRISONS KNOW HOW MANY PRISONERS THEY HAVE, AND COMPANIES KNOW HOW MANY EMPLOYEES THEY HAVE.

AND EVEN IN HOTEL FIRES, ALTHOUGH THERE IS THAT WONDERFUL EXAMPLE WHERE THE CLAIMANTS ADDED UP -- WERE IN EXCESS OF THE TOTAL NUMBER OF HOTEL ROOMS IN THE ENTIRE CITY, THERE ARE PROBLEMS WITH IDENTIFYING THE CLAIMANTS. AND WHEN YOU START AT THE END OF THE SPECTRUM WHERE YOU COMMAND THAT EVERY CLAIMANT WHO COULD POSSIBLY HAVE A CLAIM IS A LITIGANT, YOU ARE

ENORMOUSLY MAGNIFYING THE PROCEDURAL PROBLEMS OF AGGREGATION THAT YOU'RE TRYING TO SOLVE THROUGH RULE 23.

NOW, I DON'T BELIEVE THAT FACTOR (F), FOR EXAMPLE, ATTEMPTS TO TRIVIALIZE CLAIMS. I THINK THAT WHAT IT ATTEMPTS TO DO, AND, IN FACT, I THINK THAT IT IS A MISTAKE TO TRY TO CHARACTERIZE IT AS ELIMINATING TRIVIAL CLAIMS. I THINK WHAT IT ATTEMPTS TO DO IS TO PERMIT THE TRIAL JUDGE TO EXERCISE HIS DISCRETION IN ORDER TO DETERMINE WHETHER THE CASE IS APPROPRIATE FOR TRIAL, AS A CLASS.

AND PART OF THAT EQUATION, I BELIEVE, NEEDS TO BE HOW DIFFICULT OR IMPOSSIBLE WILL IT BE TO IDENTIFY THE CLAIMANT AND WHAT WOULD BE THE COST OF BURDEN OR BURDEN OPPOSED TO THE POTENTIAL RECOVERY. THAT IS ONE OF THE FACTORS THAT WOULD ENABLE THAT DETERMINATION.

IT IS PARTICULARLY IMPORTANT IN THE CONSUMER FRAUD AND PERHAPS THE PRODUCT LIABILITY CASES, ALTHOUGH THEY'RE AT THE OTHER END OF THE DOLLAR SPECTRUM.

HONORABLE ANTHONY SCIRICA: COULD THAT CONCEPT BE SUBSUMED WITHIN THE SUPERIORITY OF THE EXISTING SUPERIOR COURT?

MR. CORTESE: YES, IT COULD BE. AND I THINK THE ATTEMPT WAS, TO EXPRESS THE OTHER END OF THE SPECTRUM FROM WILLINGNESS AND DESIRE AND ABILITY TO MAINTAIN CLAIMS, BECAUSE AT THAT END OF THE SPECTRUM, WHERE THE DAMAGES ARE LARGE, THAT'S A REASON WHY YOU DON'T NEED A CLASS.

AT THE OTHER END OF THE SPECTRUM, WE KNOW THAT THE

REASON FOR THE CLASS IS TO TRY TO GATHER UP CLAIMS THAT MIGHT NOT BE APPROPRIATE AS INDIVIDUAL CASES. BUT THEN WE HAVE TO DETERMINE WHAT IS THE VALUE. AND IT'S NOT A MATTER OF IMPLICATING OR EFFECTUATING SOCIAL VALUES, BUT IT'S DRIVEN BY THE PROCEDURE. SO WE HAVE TO DECIDE: . CAN IT BE TRIED? THAT'S WHERE I COME OUT ON IT, BECAUSE NO MATTER WHAT YOUR VIEW OF THIS IS AS A MATTER OF ENFORCING SOCIAL POLICY, THE OBJECTIVE HAS TO BE TO TRY TO FIND THE CASES THAT ARE APPROPRIATE CLASS ACTIONS.

IN ALL OF THESE ARGUMENTS, THE PRIVATE ATTORNEY GENERAL ARGUMENTS AND THE DETERRENT IMPACT OF CLASS ACTIONS, ALL OF THESE ARGUMENTS FALL WHEN YOU FAIL TO ANSWER JUDGE NIEMEYER'S AND JUDGE LEVI'S AND OTHERS' VERY GOOD QUESTIONS ABOUT WHY SHOULD IT BE THE BURDEN OF RULE 23 TO ENSURE THAT EVERYBODY'S A LITIGANT; AND THEREFORE, ENSURE THAT THESE CLAIMS ARE ENFORCED.

BECAUSE THE PURPOSE OF RULE 23 IS NOT TO ENFORCE SOCIAL POLICIES. THE PURPOSE IS OF RULE 23 --

MR. SOL SCHREIBER: ISN'T IT CORRECT THAT WE'VE HAD OPT-OUTS FOR 30 YEARS NOW, AND NO ONE, EXCEPT IN THE LAST FEW MONTHS, HAS RAISED THE QUESTION OF CHANGING IT TO OPT-IN?

MR. CORTESE: WELL, NO, THAT'S NOT TRUE.

MR. SOL SCHREIBER: YOU HAVE BEEN SAYING THAT ALL THE TIME.

MR. CORTESE: PARDON? VERY SERIOUSLY, SOL -- EXCUSE ME, YOUR HONOR -- VERY SERIOUSLY, THIS HAS BEEN A QUESTION THAT'S BEEN RAISED A NUMBER OF TIMES THROUGH HISTORY. AND I

THINK THAT -- AND I CITED THAT AT THE LAST HEARING THAT I TESTIFIED AT -- I THINK IT REALLY COMES DOWN TO A QUESTION OF STRUGGLING WITH THIS FUNDAMENTAL ISSUE OF HOW DO YOU IDENTIFY APPROPRIATE CASES FOR TRIAL.

AND WHAT HAS HAPPENED OVER THE LAST 30 YEARS, THAT PERHAPS IT WAS A GOOD IDEA THEN, AND AS ARTHUR SAID, MAYBE THEY DIDN'T HAVE ANYTHING IN THEIR MINDS AS TO WHERE THEY WOULD END UP WITH THIS. BUT THEY CERTAINLY HAD IN THEIR MINDS, AND CERTAINLY JUDGE CLARK AND CHARLIE MOORE HAD PRIOR TO THAT IN THEIR MINDS, THAT THE PURPOSE OF CLASS ACTIONS, OR OTHER FORMS OF AGGREGATIONS, WERE TO PERMIT CASES TO BE TRIED THAT WOULDN'T HAVE BEEN TRIED IN OTHER WAYS.

AND THAT DOESN'T MEAN THAT THAT IS A PRIVATE ATTORNEY GENERAL FUNCTION. I THINK WHAT THAT MEANS IS THERE IS A PARTICULAR FUNCTION OF COURTS, JURISDICTIONALLY AND FOR REASONS OF JUSTICIABILITY, PARTICULARLY THE FEDERAL COURTS ARE NOT APPROPRIATE VEHICLES FOR THE ENFORCEMENT OF THESE SOCIAL POLICIES, UNLESS THEY ARE SIGNIFICANT.

NOW, WHEN YOU'RE TALKING ABOUT ENFORCING THE SOCIAL POLICY, THEN, OF COURSE, YOU'VE GOT (B)(1) AND (B)(2), WHICH, BY THE WAY, ARE MANDATORY CLASS ACTIONS, NO OPT-OUT CLASS ACTIONS, FOR THE MOST PART.

AND THE RELIEF IS NOT PRIMARILY DAMAGE RELIEF. AND IT'S ONLY WHEN YOU GET TO THE QUESTION OF DAMAGES THAT YOU GET INTO REAL PROBLEMS. AND THAT'S WHAT HAS HAPPENED. BECAUSE IN

THE LAST SEVERAL YEARS, YOU HAD A LOT OF CONCERN IN THE '70S ABOUT THE OPT-OUT MECHANISM. YOU HAD CONCERN ABOUT IT ORIGINALLY. AND AS FAR AS PROFESSOR KAPLAN WAS CONCERNED, IT WAS AN EXPERIMENT. LET'S SEE HOW IT WORKS.

WELL, WE HAVE SEEN OVER THE LAST 30 YEARS HOW IT HAS WORKED. IT IS THREATENING BASICALLY NOT TO DESTROY COMPANIES. THAT'S NOT WHAT THEY'RE COMPLAINING ABOUT. WHAT IT IS THREATENING IS THAT IT MAKES IT IMPOSSIBLE TO FAIRLY LITIGATE CLAIMS. THAT IS, I THINK, THE KEY, BECAUSE OF THE PRACTICAL EFFECT THAT WAS RECOGNIZED AND EXPLICATED HERE SO EFFECTIVELY BY A NUMBER OF THE PREVIOUS --

MR. THOMAS D. ROWE, JR.: IS YOUR EMPHASIS ON FIGURING OUT WHETHER CASES ARE APPROPRIATE FOR FILING BEFORE?

MR. CORTESE: NO, IT DOESN'T, BECAUSE THAT IS, AS A PRACTICAL MATTER, SOMETHING THAT PERHAPS MAY NEED TO BE DEALT WITH.

MY PERSONAL POSITION IS THAT I THINK WHAT YOU SHOULD DO IS AWAIT THE SUPREME COURT DECISION IN GEORGINE. THAT SHOULD GIVE SOME TEACHING ON THAT ISSUE. AND WHAT THE COMMITTEE SHOULD DO IS CONCENTRATE ON THE DIFFICULT TASK OF MAKING SURE THAT COURTS ADHERE TO THE GUIDELINES, THAT IS, THE CERTIFICATION STANDARDS IN 23(B), BY CREATING THE GUIDELINES THAT YOU HAVE DONE IN FACTORS (A), (B), (C) AND (F). AND TAKEN TOGETHER WITH THE APPEALS RULE, OR PROPOSAL, I THINK THAT PACKAGE OF AMENDMENTS AT LEAST HELPS TO FOCUS THE INQUIRY ON WHAT CASES ARE

APPROPRIATE FOR TRIAL.

NOW, WITH REGARD TO THE SETTLEMENT QUESTION, I THINK THAT'S GOING TO HAVE TO BE DEALT WITH, BUT IT PROBABLY WOULD BE BETTER DEALT WITH AFTER THE SUPREME COURT DECIDES GEORGINE. AND THEN WE'LL SEE WHERE WE COME OUT ON THAT.

NOW, I ALSO PERSONALLY BELIEVE THAT WE'VE GOT A CERTAIN AMOUNT OF FEEDING THE MONSTER GOING ON HERE. AND I THINK MR. GOLDFARB, OF CHRYSLER, BEST EXEMPLIFIED THAT BECAUSE THERE ARE LOTS OF COMPANIES THAT KNOW THEY'RE BUYING RES JUDICATA; THEY KNOW THEY'RE BUYING THE MONSTER, BUT THEY'VE GOT TO DO THAT BECAUSE THEY CAN'T TRY THESE CASES. AND THAT'S WHAT PUTS THE WHOLE SYSTEM IN THE CONDITION IT IS.

NOW, MY ORIGINAL SUGGESTION WAS NOT THAT IT BE LIMITED TO FACTOR (F)-TYPE CASES. AND I HAVEN'T REALLY THOUGHT THAT THROUGH, BECAUSE I THINK A LOT OF THAT DEPENDS ON OBVIOUSLY, THERE HAVE BEEN A LOT OF CASES. I STARTED LITIGATING -- AND I USE "LITIGATING" ADVISEDLY -- ANTITRUST CASES RATHER THAN TRYING ANTITRUST CASES BECAUSE NOT MANY OF THOSE WERE TRIED. AND THOSE WERE OPT-OUT CLASSES, ULTIMATELY. BUT THERE WAS GOVERNMENT ACTION, TO START WITH, THAT WAS ENFORCING THE SOCIAL GOALS.

AND THEN THE WHOLE QUESTION OF WHAT WAS THE RELIEF IN TERMS OF DAMAGES CAME AFTERWARDS. AND THEY MIGHT HAVE BEEN APPROPRIATE. BUT YOU HAD IDENTIFIABLE CLASSES, BECAUSE THEY WERE ECONOMIC CASES.

BUT IN A LOT OF THE CASES THAT ARE COVERED BY CLASS

ACTIONS NOW -- AND THIS HAS HAPPENED JUST RECENTLY WITH THIS EXPLOSION IN THE DISPERSED TORTS AREA, THE CONSUMER FRAUD AREAS AND ALL THAT WITH THE SMALL CLAIMS, IN MANY CASES, BEING AGGREGATED -- THAT YOU REALLY NEED TO THINK ABOUT THE IMPLICATIONS OF OPT-IN VERSUS OPT-OUT, AND WHETHER OR NOT THAT SHOULD BE ACROSS THE BOARD.

WHAT CONCERNS ME ABOUT NOT MAKING IT ACROSS THE BOARD IS THAT THE TEMPTATION MIGHT BE TOO GREAT THAT IF THERE IS A CLOSE QUESTION ON CERTIFICATION, A JUDGE WILL SAY, "WELL, WE'LL MAKE THIS AN OPT-IN CERTIFICATION" WHEN THE CASE SHOULDN'T HAVE BEEN CERTIFIED AT ALL BECAUSE IT COULDN'T BE TRIED AS A CLASS.

HONORABLE PAUL NIEMEYER: THAT WOULD BE APPROVED OR NOT BY WHETHER THE LITIGANTS HAVE ANY INTEREST.

MR. CORTESE: IT MAY BE. IT MAY VERY WELL BE, JUDGE NIEMEYER. BUT MY CONCERN IS THAT THAT MIGHT LEAD TO THE WORST OF BOTH WORLDS. BUT I NEED TO THINK THAT THROUGH A LITTLE BIT MORE, AND I WOULD URGE THE COMMITTEE TO AT LEAST LOOK AT THAT CONCEPT.

I THINK RIGHT NOW, WE'RE AT THE POINT WHERE THE BALANCE OF THE TESTIMONY -- AND I'VE BEEN THROUGH ALL THESE THREE HEARINGS, AND I'VE READ MOST OF THE STATEMENTS AND MOST OF THE TESTIMONY, SO I'VE SUFFERED AS MUCH AS YOU ALL HAVE. BUT I DO BELIEVE, AND I WOULD URGE THAT THE COMMITTEE OUGHT TO, AS EXPEDITIOUSLY AS POSSIBLE, ADOPT AND FORWARD TO THE STANDING COMMITTEE AT LEAST THE FACTORS (A), (B), (C) AND (F), AND THE

APPEALS PROVISION, AS EARLY AS PRACTICABLE.

HONORABLE PAUL NIEMEYER: ALL RIGHT. THANK YOU.

MR. CORTESE: AND I WOULD SUBMIT THAT. AND I THANK YOU VERY MUCH FOR HEARING ME AGAIN.

HONORABLE PAUL NIEMEYER: THANK YOU, MR. CORTESE.

IT'S BEEN A LONG DAY. IT'S TAKEN A LOT OF CONCENTRATION. BUT I THINK IT'S BEEN WELL WORTH IT. WE'VE RECEIVED VALUABLE TESTIMONY. SOME OF YOU HAVE BEEN HERE MOST OF THE DAY. WE APPRECIATE IT. IT'S ALL OVER THE PARK. AND I THINK THE POINTS ARE TELLING BOTH WAYS.

WE'RE GOING TO TRY TO DIGEST THIS, AND THE COMMENTS. WE STILL HAVE SOME OPEN PERIOD FOR COMMENTS. AND WE'RE GOING TO REFLECT ON IT IN OUR MEETING IN MAY. AND WE'LL, OF COURSE, ANXIOUSLY LOOK FORWARD TO WHAT THE SUPREME COURT SAYS, AT LEAST AS IT IMPLICATES 23(B)(4).

THIS HEARING IS CONCLUDED. THANK YOU. GOOD NIGHT.

(WHEREUPON, PROCEEDINGS ADJOURNED AT 5:21 P.M.)

CERTIFICATE OF REPORTER

I, SARA L. LERSCHEN, CERTIFIED SHORTHAND REPORTER NO. 6213 FOR THE STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 287, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH CERTIFIED SHORTHAND REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

Sara Lerschen

SARA LERSCHEN, CSR, RPR, CM, CRR

*U.S. GOVERNMENT PRINTING OFFICE: 1997-517-948/83634