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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

ADVISORY COMMITTEE ON CIVIL RULES

CIVIL RULES PUBLIC HEARING

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P R O C E E D I N G S

CALL TO ORDER

JUDGE LEVI: Good morning, all. This is the second of the hearings that the committee is having on the proposed amendments to the Civil Rules Rules 23, 51, and 53. Everybody is here for 23, but any members of the committee can ask any person testifying about the special master or jury instruction rule if they choose to.

We're on a tight schedule. We have many people here to testify and we're very appreciative of that and we want to hear you and have an opportunity to ask you questions, but there are so many people testifying today that I'm going to limit everybody to a ten-minute statement with the idea that there would be five minutes of follow-up questioning. It may be that some members of the committee will have more questions for some witnesses than for others and I don't propose to cut anybody off, but let us keep that in mind as our standard. That way, we will finish today and those of the witnesses who are listed at the bottom

of the list won't have made a trip for naught.

I should tell everyone--the members of the committee know this, but those of you testifying, that your statements are read. They're not only read but our Peerless reporter redacts them, he collates them, he takes comments that you make, and he puts them with other comments of a similar sort so that we not only read what you have said but then we get it in another format, as well, so that it correlates to the particular rule. So we truly do read what you have said, and if that's some comfort to you as you speak, then that may release you to be even briefer than ten minutes.

We do have a new committee member, Judge Kelly. Welcome aboard. You're making the traditional payment, I see.

[Laughter.]

JUDGE LEVI: Judge Kelly is on the Tenth Circuit. He's from New Mexico, a wonderful place. And Judge Fitzwater from Dallas is the new--he's not really new to this process. He's a member of the standing committee and he is our new liaison

from the standing committee. Welcome.

Mr. Beisner, are you here and are you ready?

PUBLIC WITNESSES

MR. BEISNER: Good morning. Thank you for the opportunity to appear before the Advisory Committee. Judge Levy, confirming your opening observation, when I arrived this morning, Professor Cooper advised me that in reviewing my testimony, he had located two typos in it, which I think confirms your observation that our testimony does get read. He also commented on its length. That confirms your observation that this should be kept brief, so I will confine my observations to three matters.

First, I wanted to address a subject which I know the committee has spent considerable time considering so far and that is the subject of overlapping or competing class actions. The committee has already amassed a considerable amount of evidence of the frequency and effects of this phenomenon, which I think poses a serious challenge

to the legitimacy of the class action device.

I wanted to note, however, one, what I believe is an important new data point which I understand is being provided to the committee today. The latest issue of the publication Class Action Watch reports some new research which has been done by a group of attorneys who have been examining this issue and those attorneys have looked at groups of class actions that have become significant enough to draw the attention of the Judicial Panel on Multi-District Litigation. In short, those researchers took a look at controversies that have spawned a sufficient number of Federal Court class actions to become involved in the MDL process.

As I understand it, those researchers took the last 50 multi-district litigation proceedings that involved class actions, and using a number of research tools, undertook to ascertain the extent to which there were competing State Court class actions on the same subject out there in the State Court system, that is, class actions that asserted

the same sorts of claims, alleging the same sorts of injuries basically on behalf of the same classes. And I think what they found is fairly dramatic confirmation of a lot of the impressions that the committee has developed already.

In the 35 MDL proceedings as to which this research has been completed, competing State Court class actions were found with respect to over half of those MDL proceedings. Now, standing alone, I think that number is quite amazing. It indicates that, more often than not, when a Federal District Court judge is asked to undertake an MDL proceeding and face the burden of coordinating class actions in the State Court system, or in the Federal Court system, that coordination is challenged at the outset by competing class actions in the State Court system.

Thus, at the same time the Federal Court is doing its job, one or more other State Courts are doing exactly the same thing. They're litigating the same claims, the same law, and on behalf of basically the same individuals, that is,

the purported class members.

I think these data, though, are even more surprising when you look at the minority of instances in which you don't find competing class actions, that is, where you have an MDL proceeding out there and you can't find parallel State Court class actions. If you look carefully at where that occurs, it's normally in instances where you can't have a State Court class action, such as in the securities arena, where recent changes in Federal law, in essence, preclude the filing of those competing actions in State Court.

Adding to the intrigue, I think, is another fact. The research tends to indicate that as the MDL proceedings mature involving these class actions, that is, as you get into those proceedings for a year or more, you tend to spawn more competing class actions in State Court, so as the Federal judge gets further into the proceeding, they're facing more competition from the State Courts.

In any event, I just wanted to bring that

research to the committee's attention, and I believe it is being provided to the committee today.

My second point concerns a related subject and that is how the committee should address the problem of competing State Court class actions. As I indicated in my prepared statement, I think that Professor Cooper did a masterful job of attempting to present the committee with options for rules-based solutions to this issue and I would urge the committee to consider carefully adopting some of those proposals that pertain exclusively to the Federal Court system, that is, those that don't raise the sorts of concerns about rules enabling act violations and so on that were raised at the conference at the University of Chicago Law School back in October.

In particular, I would urge the committee to consider adopting a rule that would bar efforts to ask Federal Courts to certify classes that have already been considered and rejected by another Federal Court. I don't think there's a lot of

empirical evidence out there that this repeat request for certification are occurring as much within the Federal system as it is occurring in the Federal versus State Court situation, but I personally have run into situations where, after a Federal Court has dealt with class certification issues, the case is basically resolved, perhaps a year or so later, another Federal Court will be asked to undertake consideration of the same class again, and I think the rule should reflect, at minimum, a need for that second Federal Court to take account of what the prior Federal Court has done on that issue.

Further, I would urge the committee to express support for the currently pending legislation to expand Federal diversity jurisdiction over interstate class actions, that is, the jurisdictional provisions of H.R. 2341 and S. 1712. I would submit that allowing more interstate class actions into Federal Court is the most rational way to deal with the competing class action issue.

I know that in the past that this proposal has sparked some controversy, largely because of the perception that it might overburden the Federal Court system, but I respectfully submit that the current system, a system that requires multiple Federal and State Courts to be litigating the same issues, the same claims on behalf of the same people really defies any notion of efficiency. In most major controversies, some Federal judge is already spending a substantial amount of his or her time addressing the resulting litigation and it would seem to me to make substantial sense to have that judge deal with the totality of the controversy rather than having to spend a considerable amount of time trying to reconcile its efforts with whatever activity may be going on in the State Court system.

Besides dealing with the competing class action problem, I think that the pending class action jurisdiction legislation would bring some rationality to the parameters of diversity jurisdiction. I would note, for example, in the

last year for which published data are available, only about 2,400 new class actions were commenced in our Federal Court system and I suspect that many of them were there in the Federal Court system only long enough for a determination to be made that Federal jurisdiction didn't exist over the class action. And over the same period, our Federal Courts saw the commencement of over 33,000 individual personal injury cases.

In short, it's easier to get a slip-and-fall case into Federal Court than it is to present a multi-billion-dollar, multi-million-class member interstate class action. The interstate class actions involve more people, more dollars, and more interstate commerce issues than any other sort of lawsuit that's out there, yet, by and large, they're being excluded from our Federal Court system.

My third and final point is that the substantial energy that this committee has put into over the past several years addressing procedural reforms in the class action arena, I think have

really begun to bear fruit. Even though it's been in effect for only several years, the creation of Rule 23(f), I think has had a truly profound effect on how class actions are being litigated in our Federal Courts.

The appeals that have been heard under Rule 23(f) have substantially clarified the jurisprudence in this arena, making class litigation, I think, substantially more predictable, and I think the mere prospect of appellate review has caused the class certification decision in most cases to be an event that is treated much more purposefully than it has been in the past.

In that regard, I would urge the committee to look again at the proposed text for Rule 23(c)(1)(B). That's the proposed rule concerning the content of class certification orders. I think that it's an excellent idea for the rules to specify, to some extent, the content of class certification orders, but I have some concern that, as drafted, the specifications requested by that

rule are not clear.

My sense is that in reviewing grants of class certification, particularly those that present issues involving the predominance and manageability elements of those class certification grants, a major challenge facing appellate courts is figuring out what the District Court intended to treat on a class basis, in short, which elements of the claims presented was the trial court envisioning having tried on a class basis, and thus, I would urge that the proposed rule be clarified to specify that a District Court indicate which elements of the class claims and defenses thereto it intended to try on a class basis, thereby indicating by omission what elements of those claims would be left to be adjudicated on an individual basis.

Again, I appreciate the committee's time and would be happy to try to respond to any questions.

JUDGE LEVI: Do you see minimal diversity as addressing this problem of repetitive

certification litigation?

MR. BEISNER: I think it would address that problem. Again, I think that it would be advisable for the Federal rules to in some way deal with the potential for repetitive requests for certification in the Federal system. I think most courts presently take account of that, but I think that it would be advisable to look at some of the proposals that Professor Cooper has advanced to make clear in the rules that there should be consideration given to prior instances when a Federal Court has addressed the certification issue in a particular matter.

JUDGE LEVI: I think what we heard at Chicago, though, is that after a Federal Court ruling on a certification decision, then the case would migrate into State Courts.

MR. BEISNER: And I guess my thought on that, though, is if you had the minimal diversity legislation in place, those cases that would migrate to State Court presumably would be removed to the Federal Court system so that the Federal

rules, if it had a provision such as Professor Cooper has proposed for the Federal Courts, would deal with the fact that you have a repetitive request for class certification and it probably should be dealt with as a repeat request that needn't be given a lot of further consideration unless the facts presented are substantially different than they were in the initial instance.

MR. MARCUS: Mr. Beisner, towards the back of your statement, you address the counsel appointment rule and suggest that something more should be done or said about when that should occur. I wonder if you could tell us, in your experience in Federal Court, when that sort of appointment normally occurs and what title it usually involves.

MR. BEISNER: I think my view of that rule is that the counsel appointment process ought to be limited to circumstances where the Federal Court is facing a conflict about who should take the leadership role in the case. You will find in many Federal MDL proceedings that when you transfer in

20 or 30 class actions, you have a significant number of counsel, all of whom claim to be lead counsel in the action. Clearly in that circumstance, the Federal Court is going to need to work with the plaintiffs' counsel to make some determination as to who should have that leadership role or it will be a management nightmare.

That's the circumstance in which I think that rule should be adopted and I think that that determination needs, by definition in a proceeding like that, to be made at the outset of the case. Otherwise, you have mass confusion going forward. Who's the defendant supposed to call to deal with discovery issues or any other issue in the case? That determination needs to be made then.

I am not in favor of a circumstance where you don't have that sort of conflict, where a court basically has one class action before it with the one counsel or group of counsel who brought the action and I do not favor in that circumstance the court undertaking efforts to go out and find other counsel to handle the litigation where there is no

real conflict about who should have that leadership role.

JUDGE ROSENTHAL: Would your concern be met if the rules were clarified to distinguish between the court selecting counsel, which should only occur when there are competing candidates, on the one hand, and the court appointing counsel, as in recognizing as the attorney for the class the attorney who has filed the case and represents the main parties?

MR. BEISNER: Yes. That's--you've stated much more clearly the distinction I was trying to make. I think where that conflict exists, the court obviously needs to resolve it and would certainly favor a rule that would clarify that. I think most courts view themselves as inherently having that power now, but I think clarifying that need in the rule would be advisable.

JUDGE LEVI: Mr. Beisner, thank you very much.

MR. BEISNER: Thank you.

JUDGE LEVI: Mr. Lee? Welcome.

MR. LEE: Good morning.

JUDGE LEVI: Good morning.

MR. LEE: I'd first like to apologize for submitting a small-type version of my statement. I myself yesterday bumped it up to 18 points.

[Laughter.]

MR. LEE: Thank you for this opportunity to testify. My name is Bill Lann Lee. I'm a partner in the law firm of Lieff, Cabraser, Heimann and Bernstein, where I prosecute employment discrimination, civil rights cases, on behalf of plaintiffs. I was Assistant Attorney General for Civil Rights in the last administration and I worked for many years for the NAACP Legal Defense and Education Fund.

I also spent two years as co-chair of the Class Action Derivative Suits Committee at the ABA Litigation Section, where I pestered Professor Cooper to find out what the committee was up to with the idea that we could galvanize lawyers to be interested in the process. I look around me and I don't see that that was a particularly necessary

thing to do.

I would like to focus my testimony on the proposal to require mandatory notice for cases certified under Rule 23(b)(1) or (b)(2) by new Rule 23(c)(2)(A)(i) and (ii) in the context of civil rights class actions, and my recommendation is that the Advisory Committee delete the proposal.

I believe that the proposal had many good intentions behind it but that it has unintended detrimental consequences for civil rights enforcement. Civil rights class actions, in my opinion, are vital to the overall national civil rights enforcement effort. The new provision, however, will seriously hamper the prosection of civil rights class actions.

Foregoing the proposal does not mean that the Advisory Committee necessarily forgoes advancing the underlying purpose of the proposal, which, as I understand it, is to promote communications with the class so that class members may better monitor the proceedings and decide whether to participate. That purpose can be

advanced under the preexisting Rule 23(d)(2) or other proposals that the Advisory Committee has made without going forward with the proposal that I'm speaking about.

With respect to background, as Assistant Attorney General for Civil Rights, I headed a division of some 300 lawyers and my experience after some three years was that the role of the Federal Government in enforcing the nation's civil rights laws is very important. The cases in the Civil Rights Division tend to be pattern and practice cases, but in area after area that are covered by the nation's civil rights laws, the principal burden for enforcement is actually carried by the private attorneys who bring class actions.

If you look at the history of civil rights enforcement, you notice that Rule 23(b)(2) class actions have played a pivotal role, actually, a vital role in making sure that the civil rights protections in our nation's laws are actually translated into practical reality. I've spent some

time in my background statement talking about the structure of our nation's civil rights laws. I just would skip over that except to say that what's remarkable about modern civil rights laws is that the principal enforcement device is private lawsuits. That's true in every major civil rights statute. If you look at in the aggregate now, one indication of how important Congress saw private enforcement was the existence of the attorneys' fees provisions, which are consistently provided for.

One of the things I've noticed in the time I've left the Department is that in studying what other nations have been doing to enforce the civil rights laws or human rights laws, some of them are beginning to adopt the class action device. In particular, South Africa recently came up with a post-apartheid constitution and one of the remarkable things is there is actually a provision safeguarding the availability of class actions in the South African constitution.

I believe that the need for strong civil

rights enforcement continues, that there are many issues that remain. Overt discrimination, of course, in many places is no longer an issue, but there's systemic issues. There are pattern and practice situations that still need to be addressed. Unhappily, the number of private enforcement actions has dropped since the 1970s.

The proposal to require mandatory notice, in my opinion, is unnecessary because here we're not talking about an issue of adding an additional power to the arsenal of the Federal District Court judge. The original Rule 23(d)(2), added with the original Rule 23 rule, gives the courts that power on a discretionary basis to give notice in any class action, quote, "for the fair conduct of the case at any step in the action." That broad preexisting authority would be unimpaired whether the proposed mandatory notice amendment is adopted or not.

The Supreme Court, as well as the Advisory Committee, in 1966 recognized that the pragmatic (b)(2) class action was perhaps a civil rights case

and that continues in practice. Civil rights cases tend to be brought under (b)(1) and (b)(2). In (b)(1) and (b)(2) cases where courts have utilized their discretionary authority to order notice of certification to the class, courts have uniformly imposed the burden of the cost of that notice on the plaintiffs.

I believe that the likely impact of the proposal would be to deter important civil rights litigation. I think it's foreseeable and I think it has a very practical impact.

In my statement, I gave an example. The last major civil rights class action I was involved with in Los Angeles before I left to join the Department of Justice was a case called Labor Community Strategy Center v. Los Angeles County Metropolitan Transportation Committee. In a nutshell, that case involved a lawsuit against Los Angeles transportation officials for favoring bus transportation and rail transportation serving predominately white communities in the suburbs and underfunding inner-city bus transportation. The

result was overcrowding, an inadequate number of buses, higher fares, and low quality of services and it affected approximately 400,000 daily bus riders.

We filed a complaint in 1994. The case was certified as a (b)(2) class action. There was a blur of activity in 1996 on the eve of trial. The parties submitted the consent decree that basically resolved all the allegations in the complaint. But I'd like to focus your attention on what the cost of this litigation was.

The benefit has been estimated something like $600 million to over $1 billion in terms of increased spending on inner-city bus transportation in Los Angeles County. I'd like to say that if you're not from Los Angeles, have never been there, only poor people ride public transportation in Los Angeles, the car capital of the nation.

Bottom line, this case pumped quite a lot of money into a system that really needed it. The case, however, was prosecuted by an office that had five lawyers and had a few cooperating lawyers.

Plaintiffs came to the NAACP Legal Defense Fund after unsuccessfully trying to get lawyers to represent them. The case was too risky, too big, too complex. In fact, this case required discovery on an expedited basis of hundreds of boxes of complex documents, a lot of technical depositions of experts, and preparation for an expedited trial.

The out-of-pocket costs and expenses over a year-and-a-half, two-year period was $150,000. The plaintiffs paid not one cent of that. They couldn't afford to. The Legal Defense Fund advanced all of it and in doing so stretched the budget of that office, which I headed.

Had the proposed mandatory notice provision been in effect, I can say without hesitation that plaintiffs' counsel would not have brought that case. I can say that because I know how much the MTA spent giving notice of the settlement to the class. That was the posting of a short notice in public places, like bus stops, and its publication in four Los Angeles newspapers for three days, but no individual notice to the class.

That publication notice cost $140,000.

JUDGE LEVI: Is that your primary concern, is the cost?

MR. LEE: I think that--

JUDGE LEVI: If it didn't cost anything, would you say, yes, this should be done, because I think the committee views this also as a civil right. That is, if someone is litigating on your behalf, you ought to know this.

MR. LEE: I believe if it cost nothing, then we would be talking about something different. But in the real world, it poses extreme costs and I think my example is not necessarily an extreme one because basically the costs of giving the notice, if you thought about it, would preclude basically the costs of preparation of the case for trial and its eventual settlement.

We're not talking about power here because (d)(2) already gives the power to the courts to give that notice where, in a particular case, notice of certification seems to be appropriate or required in the judgment of the Federal District

Court judge. That judgment can be made on a case-by-case basis today without any rules change.

Do we need the symbolism of imposing mandatory notice? I don't believe we do in the (b)(1), (b)(2) area.

JUDGE LEVI: Judge Rosenthal?

JUDGE ROSENTHAL: In your example, if the argument had been made that there was no way--that this was additional notice that we required and that there was no way the cost could have been afforded, do you know how much it would have cost to forego newspaper publication notice and instead to simply post announcements of the filing of the suit or the certification effort in the bus stops?\

MR. LEE: It would cost far less. But I will tell you a secret, which is in a certification notice, it's actually very difficult to get the cooperation of the defendants, who sometimes are the key to saving money.

Let's say an employment discrimination case. The surest notice would be to put a notice in a paycheck. I don't know of any defense counsel

who has ever voluntarily offered to do that. Posting a notice at a bus stop would make a lot of sense. Do I think MTA would necessarily have agreed to it? I could almost say that they would not have, although that would have made a lot of sense.

So, yes, the court can compel it, but at such an early stage in a proceeding, I can well imagine many courts not shifting the cost of the notice to defendants but following the traditional rule of imposing that cost on the plaintiffs, although in theory I think you have a good point.

JUDGE ROSENTHAL: I think my point is that if your argument is that the rule is unclear, that the judge should, indeed must, in determining the extent of notice that would be required, consider the cost and whether the cost would be inimical to the existence of the suit itself, then that's one point. That's a point that says the drafting needs to be much clearer and the emphasis made--

MR. LEE: Right.

JUDGE ROSENTHAL: If your point is the

entire notion is misconceived, then that's a different anethesis.

MR. LEE: I think the first is a reasonable argument. I think my position is actually the second one, the more extreme one, because I don't see the need for it at this point. Maybe if there were a developed record of heavy abuse in these kinds of cases of the kind that people were talking about earlier with the competitive filings in State and Federal Court, but there's no record of anything like that.

But clarifying and adding additional language beyond the reasonable costs provision of the proposal, yes, that would help. Do I think it would be adequate? No, I don't think it would be adequate because I think that the danger of the mandatory notice is that it would deter people from bringing the case.

Sitting in my office in Los Angeles, I would have had to calculate whether the more expensive notice would have been required and I would have had to tell the client that and I would

have had to talk to the people who would be concerned about budget and things like that. Now, it would make litigation an enormously expensive proposition in this area.

If you contrast what Brown v. Board of Education cost versus what this particular case cost, it's really rather extraordinary how much the cost of litigation has gone up with respect to civil rights class actions.

Mine is a very practical concern. In the real world, these cases are very expensive to litigate. It's my belief that that is probably responsible for why there are far fewer than there once were, although they are needed. I believe that proposals that further drive up the cost of prosecuting civil rights cases are not necessarily a good idea at this point.

JUDGE LEVI: Yes, sir?

JUDGE HECHT: What is your sense of the extent and effectiveness of private enforcement in the civil rights area in non-class actions?

MR. LEE: I think in the early days when

the issue was a kind of apartheid system, declaratory relief in individual cases could play a very important role over and above individual matters. I believe that in particular cases, you can--a lot of benefit can be achieved for individuals.

In this day and age, I think there are few individual cases that seem to have a kind of feeder effect affecting other individuals or affecting deterrence or providing example that the rest of society could follow. We now live in a very, I guess we can call it a media-rich society in which it's hard for any particular event to be noticed. For good or for evil, I guess, class actions, because they involve large numbers of people, tend to be noticed in this society. They also can accomplish actual tangible results.

I think it's very important--

JUDGE HECHT: Is any of that different or more than group initiated?

MR. LEE: I think that you can't just have class action enforcement and not individual

enforcement. I think they play a complementary role in some respects. It's my belief that it's often a good thing in some ultimate sense for some people to, let's say, opt out of a class action and pursue their own claims, because in some cases, individuals feel that some--and have good reason to feel that they can and want to pursue these remedies on their own. But that doesn't mean that a larger remedy that affects a larger group of people isn't a good thing, either.

I think that individual enforcement, both of the individual kind and class kind, will continue to be a mainstay of enforcement of these statutes. I think the government also has an important role to play, but I think it's definitely a supplemental role.

JUDGE LEVI: The witness who is going to follow you, Professor Fiss, I don't know if you've had an opportunity to look at his statement or not, but the two of you, and it's just happenstance, serendipity, that the two of you are put back to back here, but he makes the argument that we should

do away with the (b)(1), (b)(2), (b)(3) distinction because in many of the--in some of the cases, at any rate, of the civil rights cases, there is some sort of monetary relief that ultimately will be sought. It might not be called damages, it might be called back pay. But the interests are pretty much the same as one would have in a (b)(3) class and, therefore, the notice provision should apply rigorously.

He also made the argument, which I think Justice Hecht was picking up on, was that it was hard to imagine why one would need collective litigation in the civil rights area. I didn't want you to be surprised by the witness who followed you.

MR. LEE: Well, I have to confess, I haven't read Professor Fiss's statement--

JUDGE LEVI: Well, you couldn't have.

MR. LEE: I'm unable to give rebuttal before he testifies.

[Laughter.]

JUDGE LEVI: Well, you will have that

opportunity, at any rate.

MR. LEE: But if you wish, I'd be happy to comment on his testimony, if I can, in writing.

JUDGE LEVI: That would be fine.

JUDGE ROSENTHAL: May I ask one more question?

JUDGE LEVI: Of course.

JUDGE ROSENTHAL: You argued that one of the reasons counseling against adoption of the proposed amendment is that the power is already there and, therefore, there's no need for the additional language. Do judges assume that they lack the power? That is, is it your experience in the civil rights cases that you've been involved in or are aware of that notice is not issued in (b)(1) and (b)(2) cases?

MR. LEE: I've never had the experience where a Federal District Court judge felt he didn't have the power to do this.

[Laughter.]

MR. LEE: These people are not shy. I don't know if you know that.

[Laughter.]

MR. LEE: But, no, seriously, I think that the (d)(2) authority is right there. It's quite broad. It's unlimited. I think, in my experience in prosecuting class actions, courts generally take their managerial responsibility pretty seriously, and more so in recent decades than when I first started out.

So I don't think the courts lack awareness of the fact that they have this authority. That's why I said earlier I wondered if this was more of a symbolic gesture than one conferring additional authority.

I also in my statement pointed out that if the committee did want to make some kind of statement, you could make some kind of statement with respect to, I think it's (g)(2), in terms of appointment of counsel. Actually, that might be more effective, to put potential class action counsel on notice that courts and this committee think communications with the class is a very important aspect of their representation.

JUDGE LEVI: Yes, sir?

MR. SCHERFFIUS: Can you make a proposal for the specific language modification you would request under (1)?

MR. LEE: I said delete. Oh, I'm sorry.

MR. SCHERFFIUS: At the end of your statement, you suggest that there is a--

MR. LEE: Right.

MR. SCHERFFIUS: It says, delete proposed (2) and adjust the language of (1).

MR. LEE: Yes. The language of (1) says that notice in all class actions. I think I would revert back to the original, which was (b)(3) only.

MR. SCHERFFIUS: So what is your specific proposal? Do you propose language?

MR. LEE: I would--my argument is to go back to the original language that notice is mandatory only in the (b)(3) class actions. So I would change (a)(1) to conform to that and I would delete (a)(2), which requires the mandatory notice in the (b)(1) and (b)(2).

JUDGE LEVI: Thank you very much.

MR. LEE: Thank you.

JUDGE LEVI: Thank you for coming here today.

Professor Fiss?

MR. FISS: I appreciate and applaud the many proposals that the Advisory Committee has made for revising Rule 23. I think most of them will improve the administration of justice.

Mr. Bronstein and I offer what might be understood to be supplements. But once you view them as supplements, I fear the temptation will be great to leave the revisions offered for another day and perhaps for another committee. I would like to suggest that the proposals that we offer should be viewed as integral to the proposals that you, in fact, have on the table. Indeed, I see many of the ideas that we have to offer as really just extending and completing the reform process that you have set in motion.

To begin with the proposal singled out by Mr. Lee, when you propose to amend the rules to require mandatory notice in (b)(1) and (b)(2)

actions, I believe you have begun to erode the significance of the typology set forth in Section (b). As it's presently conceived, (b)(1) and (b)(2) classifications become critical because they shift you out of the mandatory notice provisions in (c)(2) and leave you to the discretionary provisions of (d).

I believe that it would be important and right for this committee to establish not just mandatory notice for all class actions, but I believe that the principle governing notice at the certification stage to test for the adequacy of representation should be governed by a single principle, the principle articulated in Mullane, the best notice practicable under the circumstances. This, I admit, would require a modification of (c)(2) which not only has the Mullane formula built into it, but also in addition requires individual notice for those members of the class that could be located reasonably.

I believe this addendum in (c)(2) is mistaken. I believe that it unduly constrains the

power of judges and creates unnecessary barriers to the maintenance of class actions. I believe that the requirement of individual notice in (c)(2) is, in part, a mistake of codification of the Advisory Committee of 1966, which not only tried to codify the Mullane principle, the best notice practicable under the circumstances, but erroneously also codified the application of that principle to the particular proceeding to settle accounts for a common trust.

But there's more, I think, that sustains (c)(2) these days than simply this attempt to codify Mullane. I think (c)(2) also is sustained by the connection between the right to opt out and (b)(3) class actions. I think that this linkage of (b)(3) to individual notice rests on a confusion between the notice that is necessary to test for the adequacy of representation and the notice that's necessary to actualize the right to opt out.

I would urge the committee as part of its endeavor to straighten out the notice provisions of Rule 23 to make a distinction between two functions

of notice, notice prior to certification to test for the adequacy of representation, and that should be governed by the general formula of Mullane, the best notice practicable under the circumstances, and the notice which would go out after certification but sometime before trial that would seek to operationalize the right to opt out. The right to opt out is an individual right and the notice for that must be individualized.

Now, as the rule is presently structured, which also explains the anomaly of (c)(2), the right to opt out is linked only to (b)(3) class actions. I think there's history to explain that choice. The 1966 revisions were a moment in which (b)(3) class actions were being empowered. But for reasons I stated in the written statement that I submitted to you, I do not believe that the right to opt out should be confined to (b)(3) class actions.

The right to opt out represents the very elemental proposition that any individual should be able to disavow the representation that's being

offered on his or her behalf by a self-appointed representative. I think at the core of the class action is this concept of interest representation and I think any individual should have the right to disavow that representation. It does not turn on whether it's a (b)(1) or (b)(2) or (b)(3).

Now, although I believe that the right to opt out should be available in all the three categories of class action provided in Section (b), I think we have to be more careful in ascertaining which cases the right should arise, not because it deviates from this elemental principle that I articulated, but rather because if you're going to have an opt out, because of the individual nature of that right, it's going to require individual notice. And if you are too careless in your insistence upon individual notice, I think you will create artificial barriers to class actions.

So what we propose is that we not link opt out to the categories set forth in (b)(3), but rather have a more functional perspective on opt out and make it available in any class action where

the interest of the individual members of the class is of a sufficient magnitude and particularity to make opting out just and appropriate.

Now, if you make these changes in the scheme of notice and in the scheme of opting out, I think Section (b) of Rule 23 has exhausted its usefulness. As it's presently structured, and as you know, in order to have a class action, you have to not only satisfy the prerequisites of Section (a) but also fit into one of the categories of (b).

We would propose a unitary standard that would be applicable to all class actions. The game of fitting a class action into the pigeonholes of (b) would end. We would also urge, however, that the two requirements for (b)(3) actions, namely the predominance requirement and the superiority requirement, be made applicable to all class actions, and we urge this out of a simple recognition of the anomalous form of representation that's provided in the class action, that the representative is not--is appointing himself or herself to represent the class and there is no

consensual tie between the members of the class and the named plaintiff.

It seems that if you grasp the anomalous form of representation provided by class action, it's only fair and just that we should only permit class actions when the common issues of law and fact predominate. If we grasp the anomalous form of representation provided by a class action, it seems only fair and just that the class action be allowed to proceed once it's found that the class action is a superior mechanism for a fair and efficient adjudication of the controversy in contrast with the other available means.

Now, this appreciation of the anomalous form of representation that's entailed in a class action also leads to perhaps the even more far-reaching proposal that I'd like to put on the table, and that is a shift at the settlement stage from opting out to opting in. Now, any settlement provides benefits that we all know and dangers that we all know, as well. A settlement in the ordinary two-party damages action presents benefits and

dangers that I think all of us are very much aware of.

There is a problem with settlement in the class action context that is distinct and, for me, deeply troubling, namely, because the representational relationship is not founded on consent but is founded on the identity of interests, the plaintiff lacks the power, in my view, to enter a settlement for the members of the class because a settlement is nothing more than a contract between the parties and there is no way that an individual can be bound by the action of someone who appointed himself as a representative of the class.

Now, I think here, too, there is recognition by the committee of the special problems posed by settlement in the class action context. I'm specifically referring to the second opt out that you propose for settlements. I would choose the mandatory alternative. I would also make the second opt out available to all class actions, once again reinforcing the notion of a

uniform conception of class actions and eliminating Section (b).

Even though I sincerely believe that the second opt out is an improvement in the administration of justice, I still think that it does not solve the basic problem, namely, the absence of consent between the named plaintiff and the members of the class. People do not enter contracts by simply not responding to a notice. People are not bound by contracts simply because a number of people, even same members of the class, have entered a contract. I think you could only enter a contract by signing on the dotted line and I think the same rule must be adhered to in the settlement of class actions context, as well.

I'm well aware of the practical consequences of opting in. I do not put this proposal before you because of those practical consequences. I put it before you in spite of those practical consequences. I put it before you to preserve the integrity of the judicial power when it is used to settle a class action.

Like Mr. Lee, Mr. Bronstein and I regard ourselves as friends of the class action. I believe the class action has great and salutary purposes to serve in our society. I do believe, however, that we must recognize, and I think we've been struggling with this for the last 35 years, we must recognize that the class action presents a very distinctive, anomalous form of representation and we have to craft the technical rules that account for that difference.

JUDGE LEVI: Thank you, Professor Fiss. Very interesting. Yes?

JUDGE SCHEINDLIN: Professor, the order of testimony was interesting. You do have a chance to respond to Mr. Lee. Isn't there a concern with your proposal that the costs of not one notice but two notices would so deter the kind of litigation that Mr. Lee described occurring in Los Angeles that that tremendous benefit--what was it, $600 million for L.A. transportation--would have been lost, at least via litigation, and does that concern you?

MR. FISS: I am concerned about civil rights cases. I would say that procedure is a sort of second calling for me. I spent almost my entire life in civil rights cases, practicing in Mr. Lee's division before he was Assistant Attorney General and then spending most of my academic career writing about them. So I start with the same concerns that Mr. Lee has, but I would differentiate myself from him in three respects.

First of all, no matter how worthy the goal of civil rights litigation is, I believe that we're also deeply committed to procedural justice, as well. And even in a civil rights case of the type that Mr. Lee articulated, I don't want just civil rights, I also want procedural justice, and I find it very difficult to understand how someone could appoint themself as a representative of a class without giving notice to the members of that class informing them of this representation and giving them an opportunity to complain. I think that's a basic statement that Judge Levi made in interacting with Mr. Lee.

Secondly, and this is suggested by Judge Rosenthal's intervention, the standard for mandatory notice is the best notice practicable under the circumstances, and as Judge Rosenthal suggested very diplomatically, but suggested the cost and the crippling impact that that cost might have on the lawsuit is something that any fair-minded judge would take into account. I mean, there is no--I don't believe in this individual notice for any of these class actions when it comes to testing the adequacy of representation, and I believe the Mullane formula is generous enough to permit that kind of accounting.

And my third point is also anticipated by the interventions to Mr. Lee. I feel that there is more of a role for individual actions in the civil rights domain than I think Mr. Lee does. I could see advantages to class action. I'm not at all interested in this media impact advantage, but there are enforcement advantages. Sometimes there's advantages about mootness. But I think also that a great deal of progress in the civil

rights domain could be made by individual actions.

I would even say that's true in the school desegregation category. I am an individual black student in a school district that's organized on a Jim Crow basis. I'm entitled to bring suit and seek structural relief because I'm entitled to be educated in a school system that's not organized on a dual basis. And indeed, this was recognized very early by the Fifth Circuit in the case called Potts v. Flack, which said it's not of any great significance whether it's an individual case or a class action. So I think I would create a larger domain for individual action to further civil rights than Mr. Lee.

JUDGE SCHEINDLIN: Only one follow-up question.

MR. FISS: Sure.

JUDGE SCHEINDLIN: Even if you had the Mullane formulation for the first notice, which would get you past some of the cost issues, would you also still want your opting requirement to go to the hundreds of thousands of poor people who

ride the buses so they would opt into the relief in that kind of action Mr. Lee described? Would you need the individual mailing there?

MR. FISS: In the case of settlement, I believe that you have to have individual notice. If you make the ascertainment that the interest of these people in the class is sufficiently large and sufficiently particularized. I don't know enough about his case to really speak to it.

I could imagine, for example, in the ordinary mass tort case, we would all absolutely say that there has to be opt in. Who would ever think in a mass tort case that you could bind by settlement by a chance to opt out. And I would think we'd say in the context of an Eisen, you would say--

JUDGE SCHEINDLIN: I am talking about the classic (b)(1), (b)(2). I want to stay there for a moment. In the (b)(1), (b)(2), you suggest there should be the same procedures, so they'd have a first mailing, then a second mailing, then an opt in, and all the costs associated with it. I'm only

asking in what we used to think of as a (b)(1), (b)(2) being more in the civil rights area, is that practical? It was the practical question that I was asking.

MR. FISS: What I was saying--what I was about to say was we can imagine cases like Eisen, just for a second, where you wouldn't have--there wouldn't be--I'm sorry. Let's go back to settlement. But, you know, where the interests are so identical and small, perhaps, that you wouldn't have individual notice in the first, but I think you need it in the settlement context.

I would say I don't know enough about Mr. Lee's case, but let us imagine--what did you say, 600,000 people, poor people?

JUDGE SCHEINDLIN: Is Mr. Lee still here? I don't remember.

MR. LEE: Four hundred.

JUDGE SCHEINDLIN: There you go.

MR. LEE: Four-hundred-thousand.

MR. FISS: Four-hundred-thousand people, poor people. I think you would have, in order to

bind these people, you would have to have notice to them--wait, just let me finish this thought. Of course, I don't understand how we can bind these 400,000 people by a contract in which they never participated. I mean, the case could go to trial. The case could go to trial and then we'd have judgment, which is the underlying premise of class action, but I don't see how a settlement could bind these people, because a settlement is just a contract and they have no role in it at all.

When I alluded very gently to the practical consequences of this proposal, I think it will put a lot of settlements off the board. I absolutely agree, absolutely agree. But once again, I feel the same way I feel about mandatory notice in (b)(2) actions. I feel the requirements for procedural justice gives us no alternative.

JUDGE ROSENTHAL: I have a quick follow-up question.

MR. FISS: Yes, Judge.

JUDGE ROSENTHAL: Why isn't a logical mid-point between Judge Scheindlin's proposed questions

and your response to say that if you make the determination that the stakes of the individual absent class member are not of such a magnitude as to require opt out opportunities, that in that kind of a case, you could give a settlement binding effect without requiring its limitation to an opt in circumstance and without individual notice, because if you don't--if you recognize that the nature of the case is not like a mass tort which would give the individual a sufficient, I can't remember your formulation, but would give that person a right that needs protection by way of opt out, then couldn't you from there reason your way to saying you don't need individual notice and you don't need opt in to make the settlement effective?

MR. FISS: I think that's engaging. I would like to think about it more. I think you're onto something, because I think that was--your question sort of reflects the confusion of my answer, where I began to answer in terms of mirroring the opt out in the context of certification rather than sticking with settlement.

It may be that there are a category of cases where the interest of the class members is so identical and so de minimis--maybe that's an Eisen type of case--

JUDGE ROSENTHAL: Well, not sufficient to support alternative means of pursuit.

MR. FISS: Right, right, that you might conceive of it. I'm still kind of--I think that's quite engaging, Judge, and I would like to consider it, but I also find myself sort of stuck on a basic principle of--I'm just offended by people making contracts for other people in which they did not deputize that person to act on their behalf. But I need to think about it more.

JUDGE ROSENTHAL: To be continued, probably not here.

JUDGE LEVI: I think we'll have to move on to Professor Resnik. Thank you very much, Professor Fiss.

MR. FISS: Thank you.

JUDGE LEVI: The Yale Law School seems to be uncommonly well represented here today. I don't

know whether that's the interest or representation, but in any event, welcome.

MS. RESNIK: Maybe we'll have overlapping class actions here.

JUDGE LEVI: It's very possible there'll be some, at least competition, if not duplication. Thank you.

MS. RESNIK: Good morning and thank you. I want to--I've submitted by e-mail, at least initially, long comments, and I want to in this brief time highlight a couple directions I'm going to cut, I think, this in a little different fashion.

I spent a lot of time reading the archives of your predecessors in the early 1960s and they were plainly writing with real cases in mind and with enforcing civil rights cases for (b)(2) clearly in their notes. The thing that they wrote, the class action rule, has, along with a lot of other social transformations, changed the reality that they were describing, and so I think that it is true that the clarity or coherence of what we

call (b)(1), (b)(2), and (b)(3) has eroded in the same way the true hybrid in Esperius might once have meant something powerful, but it's hard for us to get our heads around it now.

What I would suggest decoupling or divorcing is the question of what the remedy's going to be from whether to certify. Right now, the way the rule is written, there's this idea that at the time of certification, you know people get an injunction or they get damages. Since the rule was written, civil rights damages got invented. There weren't damage actions for civil rights before then, as well as mass torts, as well as some forms of injunctions in mass torts that go do research and use the--so that the blurring of the remedial schemes of what we call (b)(1) and (b)(2) is quite profound.

My suggestion is that the question of whether people have to joint venture, and I believe that the courts do have the authority and should properly, upon occasion, tell people to joint venture--a mandatory class action, I think, can

exist and it may exist for injunctive purposes and it may exist for monetary damage purposes because of the need to split a finite pie--but that that's a question that ought to be made at the end, not at the beginning.

So that the problem right now is that certification, which then drives the notice scheme, is key to the notion that we're going to either lock you in or let you out and then your wisdom is, I think, appropriate, let's ask you again at the time whether you want to get out or not. I think you just should drop the question of whether people are--of how and when they can exit from the entry point, and therefore, that the rule could say we'll certify you because a class is suitable and appropriate and we'll figure out when there is actually a remedy on the table whether you all have to take this and it's a joint mandated venture or whether you can go your separate ways and opt out.

So point one is to decouple, divorce the notion of what form of remedy at the time of entry.

Point two takes you back to the question

of the representative structure and who is going to be the class attorney, and I think it's very important and useful that your rule acknowledges up front that this is tremendously important, but I disagree with the notion that it is the individual judge who should do the selection/appointment for these purposes.

And when I go to think about this, I think about the judge at the get-go of the case, as the case is in formation, being asked to, what I've sort of said colloquially, shop for lawyers, employ lawyers, think through how to find lawyers for these purposes. And when I think about the role of court as employer, I'd like to bring two kinds of precedents to the table.

One is, when else do Federal judges employ people? One answer is, in our current world, magistrate judges, and in the District Courts, through merit selection panels is the process. So the judges neither do the initial searching nor do they do the initial vetting of the proper pool of candidates.

The second example, Criminal Justice Act. Poor defendants walk on the stage and judges don't say, "Okay, who can I find to represent?" There's a panel that has vetted a group of lawyers.

And the third example is actually the bankruptcy, which is both the role of who's going to be on the committees and then who are going to be the lawyers for the committees in bankruptcy, and once again, it is not the judge who does the initial surveying of the landscape. And, indeed, it was once the judge who did that and that brought us to the 1978 bankruptcy reforms, because the concerns are two-fold.

One is just the time and energy that it would take for judges to wisely and carefully vet all these people, but the other is the risk to the judge of patronage is tremendously powerful and the bankruptcy example is the vivid one, and the concern is that we're going to watch a judge be the appointer of the person that they then preside over on behalf of the--the plaintiff class then proceeds with this person.

Now, so one set of precedents is when do courts employ people? They don't do direct employment themselves, and it's a good idea. And the second is, what are the other sort of body of examples for the judge as selector of the class counsel? Well, there's a light motif of cases that talk about the judge as a fiduciary to the class, and the first iterations I could find were really in the common benefit payout moment. The case is really over. There's a pot of money in court. The defendants have left, and the question is how much money is the plaintiff's lawyer going to get, and there is a kind of clean example of the court standing there as the guardian of the money. The case is done.

You then see in a second sort of spate of cases the court describes itself as a fiduciary at the time of settlement of the class. There, I think the language is a little loose and you might not really want to use the word "fiduciary." You're trying to figure out, is it a just, reasonable, and adequate settlement and you're

looking at all of the interests before you, including absentees, but including present people.

Now move back yet to the earlier time and the judge is now appointing the lawyers, and there is language in the auction cases in which the judges say, we are acting as fiduciaries for the plaintiff class, and at that moment in time, how is the judge going to oversee the wisdom of how to staff, bring, equip, assess, require people to put in funds for the bringing of the class action over which the judge is then going to preside, possibly pursuant to your notes be involved in the negotiation of the settlement, then rule on the adequacy of the settlement, and then pay the lawyers again? The notes go on to notice the problems of managing the class as it's pending and of thinking about the adequacies of staffing and of assessing the lawyers' performance.

I agree completely that these are important issues for the management of a class action, but I worry greatly that if you ask the judge who is presiding over the case to do this,

you're really disabling the structure of the judge as adjudicator, as the judge is also the manager for the plaintiff on this side, and I do have some suggestions.

First of all, the way the rule is currently drafted, it totally ignores that there may be--Mr. Lee may already have been employed by a named, identifiable plaintiff who has walked into your court, and moreover, no other lawyer is getting near that case. There isn't a competition for those cases. The problem is staffing them.

So step one is, there ought to be a presumption in favor of an attorney-client relationship where--and then if one wants to vet the question of the quality of the representation for the group as an aggregate, one can sample within the class. The model could be a creditor's committee. You could develop a panel if you need to develop institutional structures, as well, but you should not have it located at the individual judge level for these purposes.

If, coming back to Judge Rosenthal's

point, you want to put on the record a kind of moment of recognition of the transformation from being an individual lawyer for an individual plaintiff to being a group lawyer, then I think you should christen people as common benefit lawyers, recognizing the real problematic cases, which are not the civil rights cases but some of the mass tort and consumer cases, that you actually need to christen a group of people and call them common benefit lawyers, that they do act on behalf of everyone. Whether they're taking discovery or they're doing whatever they're doing, they're--actually, their lawyering is functioning to affect everyone.

You can look also, I think--I think your rule very appropriately recognizes that at that point, the real question is do individuals have adequate representation for their individual and maybe different concerns, and that is appropriately under the judge's aegis, but again, not that the judge him or herself is the person who is figuring out how to staff and monitor.

Moreover, in the large cases where you have lots of lawyers present at the periphery, you should be using those lawyers, commanding their time and energy to function as monitors for you because they are well situated to do so. And you can in advance create structures that make it much easier. Databasing hours, time, economic disbursements--there's no reason why once the case exists at your creation you can't create common bases by which people who are on the inside on the same side of the case can know a great deal more about what is being done on their behalf and for their name, and you can regularly, through schedules and fees, using institutional entities like the AO, the FJC, the Bankruptcy Trustee Office, varieties of others, to create presumptions in terms of dealing with some of the expenses.

So I think the rule is a major step forward in acknowledging the problems within class actions in terms of fees, costs, attorneys' representation, but that its solution is to give a broad and unstructured--under-structured mandate to

judges, and that to the extent you're doing helpful mandates, they're almost all in your notes rather than in the text of the rule. So the rule recognizes the regulatory problems but doesn't actually, I think, give judges the comfort and buffer of sufficient regulation in terms of the "musts" of must hold hearings and must make findings and the like that could be in the text of the rule rather than the notes. The effort, therefore, to grab at the lawyer through the individual judge, I think, puts the judge in too vulnerable a position.

JUDGE LEVI: Thank you. On your first point about the blurring of the remedial scheme, you've probably addressed this in your written submission, but it's not just the looking at the end of the case, it's also the middle of the case, too, and the one-way intervention problem. Once you're in the class, you're going to be bound by legal decisions that are made on summary judgment and other sorts of things that occur as the case unfolds well before the end.

MS. RESNIK: My suggestion is sampling notice, that what you're looking to do is you are agreeing that there's an aggregate problem for which a group-based process is needed, and I think the perspective here is both the individuals who are members of the class, the court, which is concerned about repetitive litigation. We all know defendants in some instances are interested in group-based processing and we also understand that there may be finite resources or standards of conduct that cannot be ordered to be different, depending on different plaintiffs.

So what you're doing is making an initial assessment that there is sufficient commonality and legal questions that bear on a group such that you need to proceed at the get-go as a group. You then want to let--I think you worry about monitoring. I think the other actual change from the 1960s is there was an assumption in civil rights cases that there was a singular and obvious remedy--desegregate and you're fine, for example--without any of the complexity that within a civil rights

class might be people who have different views over what remedies ought to flow. So you're very interested in monitoring and information from class members, but you don't need to do it at the price of closing the door to the courthouse through this individual notice.

So through the conduct of the litigation, you can invite in information from plaintiffs through a sampling technique that provides notice without the costs of the individual notice, and then if and when you come to your remedy stage and you say both, I need either an injunction or the pie is so limited that we have to divide it and lock everyone into it, that's at the point when I think you should be able to mandate this joint venture and at that point you need better notice.

But, of course, in the practical world at that point, who is paying is now part of the negotiation, so that you can moderate the cost problem at the end in a way that you really can't fairly, or easily, under current case law at the beginning.

I actually did think, as I was listening, in terms of these costs that to the extent we understand that the class creature is partially at the interest of the court, and here the MDL is the analogy, it's not obvious to me that we couldn't tax the court with some of the costs of the notice or certainly mandate that the notice be provided by the litigants in as cheap a fashion as possible and that the rule--and that, again, rather than the vagaries of an individual judge who says, "Can I go and venture off in this unchartered water," the rule could say, not only take on the costs, but here are ways in which we can figure out, using court-based data accessing capacities and e-mail and the like, we can help lower the costs. I understand not everybody is on computers for these purposes, but we can figure out ways to use the--the reason for group litigation in circa 2000 is a lot our own resources as a polity and not just the plaintiffs and defendants.

The mandatory consolidations and the mandating of joint venturing isn't just because

some plaintiff or some defendant wants this. We want fewer of these cases and we need to resolve them en masse, and so we should be able to do some of the front end and absorb some of the costs so that we can respond to the barrier problems in this fashion.

JUDGE SCHEINDLIN: Just one question--

MS. RESNIK: Sure.

JUDGE SCHEINDLIN: --about the opt out, opt in of the previous speaker who proposed that it must be an opt in always and shouldn't be an opt out, where would you fall on that with the old (b)(1), (b)(2) distinction over (b)(3)? I know that they should be compressed to you--

MS. RESNIK: Right.

JUDGE SCHEINDLIN: --but if you were going to address opt in, would it apply to all kinds of actions?

MS. RESNIK: No, I disagree, and I believe that--I mean, bankruptcy is the example. I mean, the real hard problem is whether--as I understand it, in the 1960s, bankruptcy was a stigma. Now I

understand that your stock goes up when you file for bankruptcy.

[Laughter.]

MS. RESNIK: The real question is, should there be a mechanism for a kind of limited bankruptcy in the class action rule, and from my point of view, what might we learn from the ways the bankruptcies are currently struggling with questions of representation that might help us, inform us as we figure out if there is going to be a limited bankruptcy in the class action rule, how to carry it off and take into account the varying interests.

So, I mean, the reason, to use the example of the U.S. Trustee's Office, for example, is the Bankruptcy Court figures we've got a lot of people out there that may have different interests, but the judge can't personally sit there and figure out how to orchestrate all these people and how to get the representative structure right, so that spun off in that fashion.

Well, a limited fund class action is a, I

don't know, mini-bankruptcy, a quasi-bankruptcy, a walled-off bankruptcy for a certain part, and I believe that, just as in bankruptcy, if there is a finite pool or if there's a form of injunctive relief that is required, that you're going to have a community-based requirement that has to inure to everyone's benefit and/or detriment, as the case may be.

So I'm prepared to lock some people in, but I think that the question occurs--

JUDGE SCHEINDLIN: At the back end.

MS. RESNIK: --at the back end. And obviously, if somebody comes in with a certify to settle, you've got to ask these questions all at once, as you well understand, and there's also the notion that the line between adjudication and settlement for me in these massive organized classes is not so bright, either, because sometimes you're having adjudications along the way and the settlement is being shaped there. At what point am I going to say you bounce into the opt in versus the opt out category?

So recognize it's not that I'm looking for mandating a lot of class actions, but I would recognize it as a possibility and have the onus on the court to develop it with a concern that you prefer not to, but when and if you have to, you would definitely face it. But you don't need to face it the day you say you can begin as a group process, or we really want you to be a group process, which I think is what we're also hearing.

It's coming from the court, as we know from people historically. It has always come from courts that at points in time the joint venture is a preference for the court facing the repetition as well as for the litigants, and that's where I think the court can actually play a creative role to deal with the access barrier notions by saying it's happening on our watch and we're--it's happening to facilitate our processes so that we can absorb some of the problems that could otherwise limit access.

JUDGE LEVI: Thank you, Professor Resnik.

Let's hear from Mr. Schwartz and then we'll take a brief, ten-minute break.

MR. SCHWARTZ: Good morning, Judge Levi, Professor Cooper.

JUDGE LEVI: Good morning.

MR. SCHWARTZ: Thank you for inviting me. I just want to briefly comment on something that's a side issue. I want to mention, Mr. Ishida, I've had many hearings I've been at over the years. I've never had one where I was as well informed and made to feel as comfortable and I thank you very, very much for your help in that regard.

I'm going to keep my remarks brief and I'm testifying today on behalf of the American Legislative Exchange Council, which has drafted model State class action rules, which I'll submit to the committee, I think there are some very good ideas contained in them, and also the American Tort Reform Association.

I think you've been true to your goals in these rules and I'm just going to mention three of them and what I think are certain unintended consequences that may flow from those three, which are all good.

The first is just a word change. To lawyers, it may mean something, but the practical impact of that word change is to say to judges to take a little bit more care before you make a certification decision, and I agree with that and I think that's good.

The second is probably more important to lay people than any other proposal you have here, and that's the plain English requirement. I was looking out the window in the back of the room and I saw some people walking down the street who looked puzzled and I think they were reading class action notifications.

[Laughter.]

MR. SCHWARTZ: The plain English alone is not going to get us there unless we focus on content, and I know that you have in your rules certain suggestions as to that content, but at least in my travels and talking to people about class actions, if you ask a bell person at a hotel or a manicurist or a dry cleaner, they've all received these things. They all know about them.

And they find them opaque, confusing, a mystery. And also, if they're able to decipher what's there, what's important to them is not there, and I really suggest you give serious consideration to putting in your requirements what people really want to know when they get one of these things.

There are three things they really want to know. First, they want to know if the class action is successful, what do they get? What will they get? I have language that's legal language that suggests how that's going to be done.

And the second thing might surprise you. They want to know what the lawyers are going to get and what their possibility is going to be if this is successful.

And finally, they want to know if there are going to be any burdens on them, any costs to them. I think of the Bank of Boston case, which is cited in my materials, where class action members ended up having to have a charge to their account for attorney's fees, and those three things are not really set forth in your rules.

The third rule change that I think is good is the proposal to see that there's more scrutiny of attorneys' fees. My testimony is replete with situations where, unfortunately, the class action members got very little and the attorneys got a great deal. In many of them, and I know it's been referred to, the class action members got a coupon to buy a product that they really hated in the first place and the attorneys got a lot of money. I think more scrutiny to that is good and makes for more respect to the judicial system.

All of these changes, and I'll get to the law of unintended consequences, I believe, and we'll see if it happens, will augment what is already a very, very bad trend. It's been documented by committees of both houses of Congress and in many studies that are before this committee and cited in my materials, and that is a tendency to game the system so that current jurisdiction of the Federal Court, proper jurisdictions of the court, is ousted by gaming the system.

Now, I concur with Mr. Beisner in what he

said this morning. I think we need a minimum diversity rule and I'm strongly for that. But until we get there, at least legitimate jurisdiction of these courts, the Federal Courts, should be preserved.

I believe that the rules themselves will foster attorneys to name defendants who are not real defendants because they may not want to meet the plain English requirements. They may not want to have their fees more scrutinized. They may not want to be in a situation where intense consideration is given to whether the class should be certified or not.

And I do believe, and I will submit language to you if you feel it would be helpful, that a greater job can be done by District judges, and I look back over 36 years, back to the time I worked for a Federal District judge for two years, that more can be done to scrutinize these removal petitions and see whether or not a particular defendant who is named is a true defendant.

In one of the cases cited in my testimony,

it involved the sale of 140,000 vehicles and they named a salesperson who had sold 14 cars. Now, common sense tells you that there was no intent to enforce a judgment against that individual. I believe on these petitions attorneys should certify that he or she intends truly to enforce a judgment against a particular defendant and that this defendant is named not for the purposes of ousting Federal Court jurisdiction, and I think a liaison could be made to the type of sanctions that are in Rule 11 to see that this is done, and I think it's within your power to do that and I will submit language, as I say, that will help you, perhaps, enforce what is already an inherent power of Federal judges.

The second point goes to fraudulent joinder. Now, there is a statute that says one has one year to remove a case to Federal Court, but it's very difficult within one year to determine who's real and who's surreal, who's the real defendant and who isn't. The fact is, I've been in situations, and probably all of you have seen them,

where after one year, parties are dropped who were never intended to be real defendants in the first place.

There are a number of cases, and I cite them in my testimony, where judges believe that there is a procedural mechanism under the current rule to allow a person, a lawyer, an extended period of time beyond that year if they can show to you that there has been fraud, and when that fraud is discovered, I submit that a proper procedure needs to take place to allow removal after a year.

Now, some believe that that has to be done by Congress. The cases that we put in our submission suggest that you have the power to do it. If you believe you have the power to do it, and we will submit a draft proposal, a rule needs to take place for an equitable extension of that period of time. And if you believe that you don't have the power to do it, I think that's something to suggest to the Congress of the United States.

In sum, these rules really help, but they are very likely to expedite what is already a trend

that does not lead to respect for the law, and that is gaming the system. I think things can be done about it without Congressional change, although if the system is to be and work as it's intended to be by our Founding Fathers, there needs to be a change in the jurisdiction of the Federal Courts in class actions.

Thank you, and I'll be happy to get your questions.

JUDGE LEVI: Thank you, Mr. Schwartz. Anyone?

[No response.]

JUDGE LEVI: Thank you. It looks like everybody would like a break.

MR. SCHWARTZ: Okay. Right before restroom time is a difficult slot. It's like after lunch. Thank you very much.

JUDGE LEVI: Thank you. Thank you very much.

We'll be in a brief recess here for ten minutes. It's just a little bit after 10:15. We'll take our break.

[Recess.]

JUDGE LEVI: Mr. Chachkin, good morning.

MR. CHACHKIN: Good morning, Your Honor. Thank you for the opportunity to appear before the Advisory Committee. I'm Norman Chachkin, the Director of Litigation for the NAACP Legal Defense and Educational Fund, a former colleague of Bill Lann Lee's. The Fund has extensive experience with class action litigation, particularly (b)(2) class actions, and that's the main focus of my remarks. I'm going to try not to repeat matters that are covered in our written testimony.

In summary, our judgment is that the Advisory Committee's recommendations with respect to Rule 23 are primarily responsive to problems that have developed in mass tort and consumer class actions, especially those brought pursuant to 23(d)(3), and they have been unnecessarily carried over to Rule 23(b)(1) and (b)(2) class actions, which have not been studied by the Rand Corporation, by the Federal Judicial Center, and I would suggest that the committee may not be as

intimately familiar with the conduct of (b)(2) class actions as it is with the problems that have been referred to here today.

Before I summarize our objections, I do want to assure the members of the committee that there's no lack of communication between non-party class members and class counsel in (b)(2) class actions. We all spend a considerable amount of time in discussions with class members. Often, we must explain to class members the difference between the class actions and the class claims raised in the litigation and various unrelated immediate individual problems they're having with defendants, particularly institutional defendants, that they wish class counsel would add to the lawsuit at any time, including the eve of settlement or adjudication.

There really is no lack of communication that I think needs to be addressed in the manner in which it would be addressed by these rule changes in (b)(2) class actions. No attorney who is serious about his or her representation in such a

matter can afford not to be in communication and accessible to unnamed class members, if only because many of these cases result in settlements which must be preceded by notice to the class, and a lack of communication with class members during the course of the litigation can only complicate the efforts to present the pros and cons of settlements to class members at the attempted conclusion of the case.

After listening to some of the discussion this morning and the comments and suggestions of members of the committee, I'd like to suggest that the entire subject of the application of these provisions to 23(b)(1) and (b)(2) class actions be recommitted.

For example, there was discussion this morning about alternative means of providing notice that wouldn't emphasize costs, and I recognize that in the notes, the committee has made an effort to capture that idea. The notes say that the courts should attempt to ensure that notice costs do not defeat a class action or the certification. The

burden imposed by notice costs may be particularly troublesome in actions that seek only declaratory or injunctive relief.

But to me, the difficulty is that the notes are merely advisory, while both they and the text of the proposed rules use terms that, at the least, don't have an established meaning in current law, and they will, thus, allow wide variation in a court's construction of them.

For example, the sentence or two that I just read suggests to me that judges will have to decide according to some standards that aren't established whether a proposed class action is, quote, "worthy of certification" before they determine what sort of notice is practical and should be given, and I suggest that that will allow a great deal of latitude for judges and could even permit personal or ideological opinions to affect procedural decisions. That's not something I think the Advisory Committee wants to see happen.

So at a minimum, I'd suggest that the application of these proposals to Rule 23(b)(1) and

(b)(2) class actions should be given much further study before they are submitted to the standing committee.

I listened to Professors Fiss and Resnik this morning. I have not read their full testimony. I understand Professor Resnik's suggestion to be that the categories (b)(1), (b)(2), and (b)(3) established in the 1966 amendments to Rule 23 should not have an iron-clad functional outcome that drives the litigation. That is, a class action that is certified in recognition that it fits the mold, the descriptive mold set out in the 1966 amendments for a (b)(2) class action should not lock the court into any particular form of proposed remedy.

I would suggest there is no reason, given that understanding, to collapse these categories or to change the meaning of the rule. I think the (b)(2) category was added in 1966 to emphasize the suitability of claims of civil rights violations and racial discrimination to treatment in the class action setting and that is still a valid,

necessary, and worthy purpose. The structure of the rule should be maintained for its value in guiding courts about the sorts of actions that should be considered class actions without being determinant of what happens.

I do have to disagree with Professor Fiss about many of his suggestions, particularly given the current structure of the proposals which, for example, don't do enough to emphasize the need for low-cost forms of notice. I have to point out that the committee notes suggest unnamed non-representative class members have an interest in the class definition and the prerequisites for class certification, but under the proposal as it's now written, they don't get notice until the District Court has decided to certify a class and has enunciated a class definition.

I'd suggest unless that's changed, District judges are going to have a lot more work ahead of them, since when they give notice after certification and tell people they have a right to appear without regard to the intervention

requirements of Rule 24, all of the class certification and definition issues are going to be revisited. So from a simple efficiency standpoint, I'd suggest that these proposals need to be rethought.

I disagree with Professor Fiss that in the real world, we can achieve as much reform and progress and enforcement of constitutional and statutory rights through individual actions as we can through class actions. Economically, it is simply not possible to provide representation to thousands of individuals on a case-by-case basis whose rights to equal treatment in the workplace or elsewhere have been denied.

Most law firms, especially small and medium-sized law firms, cannot afford to undertake those cases realistically, and so if we do all of the things that I heard Professor Fiss suggest this morning, and perhaps I'm misreading what's in the written testimony, I think we will kill off class actions and set civil rights and human rights progress in this country back in a very substantial

way.

I don't have the same concerns that Professor Fiss did about protection of the interests of absent class members. In our written testimony, we cited cases in which District Courts, under the rules as they now stand, have exercised their responsibilities to protect unnamed non-representative party class members by decertifying class actions prior to final judgment when they conclude that the litigation has not adequately protected the interests of missing class members. By giving notice at the time of proposed settlements, and most cases end in settlements, and carefully assessing whether the settlement is fair, reasonable, and adequate, the same standard that the committee proposes in its rule to make sure that absent class members' interests are protected, Rule 24 intervention in pending class actions establishes the right of non-representative party class members to come into the litigation at any time upon a showing that their interests are not being adequately represented.

I would suggest that is an absolute key to manageability. The suggestion in these proposals that once a class is certified, any individual class member can make an appearance through counsel without regard to the Rule 24 standards is going to complicate the life of every Federal District judge handling a class action in this country in ways that I think will be very, very regrettable.

And finally, we cited cases recognizing that class members who don't want to be bound by a judgment because they believe their interests were inadequately represented can bring a collateral action for that purpose. The key is to establish that class counsel didn't fairly and adequately protect their interests.

Class actions in civil rights cases were developed in 1966, I believe to provide a practical means for assuring justice for thousands of individuals to enforce intangible, largely intangible rights that could not be handled through individual litigation. I think the record suggests that they have worked extremely well and the

committee should be very, very wary of launching a new set of procedures and a new set of untested standards without a great deal more study and care.

In our written testimony, we have expressed reservations about the notice requirements, about the right of individual class members to appear without meeting the intervention standards, and about the provisions for appointment of counsel in (b)(1) and (b)(2) class actions, and I won't repeat those here, but these are very, very serious matters. I think they could do great harm if they were to be adopted without much further study and I hope the committee will think about them a lot more.

JUDGE LEVI: Thank you.

MR. MARCUS: Could I ask you about two different kinds of things. First, one of the things you just mentioned concerning the right to enter an appearance through counsel. That's already in Rule 23(c)(2)(C) in regard to Rule 23(b)(3) class actions. I thought it was a rather limited opportunity and not the same as

intervention. Do you know of examples of cases where that's been treated as the same as intervention?

MR. CHACHKIN: I'm not familiar with (b)(3) class actions because we don't bring (b)(3) class actions, so I could not tell you. There have been numerous--perhaps "numerous" is the wrong word. There are reported cases involving requests for intervention in class actions to test, as Professor Fiss suggested, the adequacy of representation, and I think a study of those cases will indicate that almost all of them involve disagreements with the litigation judgment of class counsel, and almost without exception, although there are some few exceptions, District Courts have determined that that disagreement doesn't affect the substantial substantive interests of absent class members and it doesn't justify complicating the litigation by allowing individuals to intervene.

MR. MARCUS: If it were clear that this expansion of the existing right to appear through

counsel is not the same as intervention, would your concerns diminish?

MR. CHACHKIN: I'm not sure they would, because I'm not understanding what is being proposed in the context of a (b)(2) class action. For example, Professor Fiss suggested, and I agree, that an individual student could bring an action to challenge the segregated operation of a school system without bringing it as a class action and would be entitled to structural relief. I don't understand that another member of a punitive class that we can imagine, if it were brought as a class action, would have a substantive right to opt out in the sense of saying, "I want to continue to go to school in the system that's operated in violation of the United States Constitution."

So the parallel between the monetary interests, usually monetary interests of class members in (b)(3) class actions and the situation in (b)(2) class actions is not entirely clear.

And let me say with respect to the provisions in the 1991 Civil Rights Act and the

developing case law suggesting the availability of damages for the equitable relief of back pay in (b)(2) class actions, there's a lot of development of the law going on in the courts right now, particularly in the Fifth and Eleventh Circuits in cases like Allison and Rutstein, and I'm not sure it's appropriate for the Advisory Committee in the guise of procedural reform to decide what the appropriate balance is and try to resolve those questions that courts are struggling with.

JUDGE LEVI: They're struggling with the rule.

JUDGE SCHEINDLIN: Two quick questions. Judge Levi had asked the first speaker, if cost were not the issue, would you have a problem with the mandatory notice? I have the same question for you.

And my second question, just so you get them both at once, is you said you didn't want to repeat your written proposal, and I agree with that, but could you just summarize briefly the appointment of counsel objection, just so we

understand it, quickly? So those are my two questions.

MR. CHACHKIN: If costs were substantially less, I think it would be a much smaller issue. Again, the interplay between the notes and the text of the rule right now doesn't give me a lot of reason to believe that judges will necessarily opt for the least-cost mechanism.

I'm not sure that I ultimately believe that it will be very helpful or meaningful in (b)(2) class actions to give widespread notice at the time certification is being considered or proposed. It seems to me the most important time to do that is at the time of a proposed settlement, and that is required under the rules now and it does go forward.

JUDGE SCHEINDLIN: So there's very little benefit to you even if there were no costs? The notice would have little, if any, benefit?

MR. CHACHKIN: I would have many fewer objections. The fact that I'm not perhaps fully appreciating the benefit is, I think, not

controlling.

JUDGE SCHEINDLIN: Okay.

MR. CHACHKIN: As far as appointment of counsel goes, it seems to me what concerns us most is the fact that, as has been averted to earlier today, the proposal doesn't give any weight or credit, as we read it, to the established relationship between counsel who file the suit as a class action and the representative plaintiffs. It suggests the District Courts may decide to appoint other counsel without regard to those relationships, without regard to work that punitive class counsel may have done. The notes even suggest that counsel who files a case as a punitive class action, if the rule were adopted, cannot act on behalf of the class until he or she is appointed as class counsel, and I think that will make for a great deal of difficulty in pursuing discovery to support class certification under existing law.

For example, in the employment discrimination context, if counsel who filed the case cannot act on behalf of the class, I would

expect a lot of defense counsel to suggest that discovery should be limited to the circumstances of the named representatives.

So with due respect to the truly Herculean efforts that the committee has made over the past five or six years to grapple with the problems created by mass torts and consumer class actions, I believe you need to give a lot more consideration to how these proposed procedures could work effectively in (b)(2) class actions.

And let me say, we mention in our written testimony the possibility that defense counsel might see an advantage to stimulating other counsel to come in and seek to represent the class. I don't mean to suggest that's something that most people would do, but I am constrained to observe that the procedure suggested in the proposal right now would permit that and nobody likes spoliation, but there are spoliation cases and they don't all involve only clients. So I would urge the committee to be very wary about putting new procedures like this into place that could be

misused without thinking them through.

MR. MARCUS: Just to follow up on what you just said, something I asked Mr. Beisner earlier, I'm interested in your reaction to, also. It seems to me the note says that counsel, until appointed, class counsel cannot undertake actions that are legally binding on the unnamed members of the class, which may not be exactly the thing you're concerned with.

I'm wondering, in your experience in the cases your office handles, is there some action by the court to designate the lawyer who filed the case as the class counsel before the time class certification is decided? If not, is there some other title that is used?

And in relation to that general question, you do recognize at one point that class counsel, after appointment, has responsibility to the members of the class as a whole and not mechanically dependent on the desires of the named plaintiff. But another point, you emphasized the need to recognize and restrain the court's

interference, as you put it, with that relationship between the named plaintiff and class counsel. So it strikes me there's a tension there that maybe you could address a little bit more fully.

MR. CHACHKIN: Well, let me start with the title. In my experience, judges refer to counsel who file putative class actions as counsel for the plaintiffs. The Supreme Court recognized in Parker v. Crown Cork and Seal, for example, that a putative class action, once filed, has consequences for the class and for defendants. Once a putative class action is filed, the statute of limitations is told until class certification is denied or there is some other form of adjudication that's negative for individual unnamed members of the class.

The responsibility for ensuring that counsel fairly represents the interests of class members, including both those who are representative parties and those who are unnamed members of the class, continues throughout the litigation. It is a part, it seems to me, of a

trial judge's managerial function, and among the cases that we cited in our testimony are cases in which judges at various stages of the proceedings have taken actions either to recognize that there needs to be counsel appointed specifically to represent the interests of unnamed class members, either because of something that filing counsel has done, or simply recognition that the task may be beyond the capacity of counsel who filed the case.

We cited a case called Collen v. New York Civil Service Commission, I think. I also remember that in the Milwaukee school desegregation case, Judge Reynolds appointed separate counsel to represent the interests of the certified class members while the original counsel who filed the case continued to represent the named parties.

So judges already have many tools at their disposal to deal with these issues. I think they should be encouraged. The Advisory Committee has always encouraged judges to manage litigation effectively and efficiently and these issues should get dealt with in that process.

JUDGE LEVI: I think maybe the question is how these issues surface if there's no notice, and if a member of the class has a lawyer, that lawyer can't appear to make known these variations within the class to the judge.

MR. CHACHKIN: Well, again, Your Honor, I would say in my experience, a class member who can get a lawyer will move to intervene and will seek to demonstrate, and I think this is the key to the situation, that his or her interests are not being adequately represented. A mere disagreement over whether you should file a summary judgment motion this week or take another deposition is not the sort of thing that meets the Rule 24 requirements, and I would suggest it's not the sort of thing that we should encourage people to seek to get into litigation for.

And finally, again, in my experience in (b)(2) class actions, courts hear from class members, unfortunately or fortunately, they get lots of letters that they usually put in the file and send to counsel for all parties to be dealt

with as counsel wish. There's not a lack of initiative being taken, in my experience, by unnamed class members who are dissatisfied with what's happened.

JUDGE LEVI: Very good. Thank you very much.

MR. CHACHKIN: Thank you.

JUDGE LEVI: Mr. Allman?

MR. ALLMAN: Good morning and thank you for the opportunity to address you. My name is Tom Allman. I'm the General Counsel of BASF Corporation, which is the U.S. member of the BASF Group. We're a very large chemical company. I've had the experience of having to manage decisions about class actions for the eight years that I've been a general counsel.

I'm appearing here in support of your amendments and to comment on some of the issues that were raised in the request for comments by Professor Cooper, and I thought I was going to confine myself to those topics until I heard Professor Fiss and I cannot resist the opportunity

to respond as a loyal Yale graduate to some of the comments he's made, but I'll save that for the end.

[Laughter.]

MR. ALLMAN: First, with respect to my first topic, which is certification of class actions, there is no question that from the perspective of a general counsel, the improvident certification of a class action is our greatest single concern. You cannot underestimate the overwhelming pressure that is placed upon you when you are dealing with a potential class involving millions of people.

Accordingly, I applaud and appreciate very much what I see as three improvements that you are putting into Rule 23(c). First, I really like the comment that the early review of a trial plan should be part of the manageability review of the trial court. My experience in both State and Federal Court has been that many courts prefer to delay the unpleasant thinking about the consequences of certification and simply focus on the contentious allegations of liability. So I

think you have to think through the whole process and I think that's a wise thing to put in the comments.

Secondly, I like the idea that, or I think it's a good idea that we should have a skeptical review when it comes to boilerplate allegations and I've suggested in my comments that cases that could be cited in the commentary along those lines.

And finally, I appreciate the reference to the conditional nature of certifications to clarify that, again, you should not avoid the consequences of dealing with certification by calling it conditional, but simply recognize that the reality is that all initial judgments are conditioned and can be changed as the case may go on.

The issue that you didn't deal with explicitly, however, is one that probably is equally important to the risk of improvident certification and that is the seemingly unending choices that in a (b)(3) case the plaintiffs have if they simultaneously sue you in, let's say, 15 to 20 State Courts and 15 to 20 Federal Courts. As we

all know, in the Federal system, there's an excellent, well managed, well functioning system, the MDL system, and it works very well.

It is simply--I'll never forget when I was first told that I could lose one, two--or I could win one, two, three, four, five certification battles in State Court and then lose one and that the earlier decisions would have no impact on it and it wouldn't matter if the Federal Court had also denied certification. As somebody said to you in San Francisco, how many times do I have to win before the class doesn't have to be certified?

So we come to the suggestions that Professor Cooper has collected for us. I think it makes sense and I would have been very happy to support the initial amendment that you may direct that no other court can certify a substantially similar class. I think that makes a lot of sense.

I recognize the rule's enabling act issues and I certainly would support that clause that Professor Cooper has suggested, to the effect adding the phrase, "innate of its ability to

proceed effectively," to the rule's enabling act. I think that would probably cure the problem if it could be done.

There's another approach, and that would be to convince the States to enact similar or parallel or reciprocal rules and legislation, and there has been some very serious thought given to that. I sit on a panel of the American Bar Association on class actions. We have a task force on class actions and that's one of the things we're talking about. However, I'm a little concerned that this is not something we'll ever be able to get a consensus on, or at least not in all the States that currently and maybe in the future will be tempted to permit--are more likely to permit improvident certification.

So I think you really should give serious consideration to perhaps encouraging the courts in the Federal system to make the maximum use of the existing power that they do have under the anti-injunction act. There are many points along the way of a class action where you have the power to

protect your jurisdiction.

The current knee and hip litigation that I alluded to in the Sixth Circuit is a very extraordinary example right now of where a State and a Federal Court are in collision and yet things are being worked out, but I don't think it would have happened if the District judge had not had the courage to issue an injunction against State Court actions. This is in a settlement context, which I'm going to comment on next.

So I would urge you to use the creative powers that are available to you under the anti-injunction law and perhaps spell it out in your comments, and I would think this would be especially true in the case of a national class action, and I'd like to comment on what is a national class action because I haven't heard that talked about here today very much.

The current Senate and House bills for minimal diversity define national class actions in terms that deal with both the citizenship, the amount in controversy, and the nature of the

controversy, and I would think those would be the three touchstones that you might want to consider as what makes something a national class.

The second topic I'd like to comment on would be the approval process. Again, I think that your new Rule 23(e) is an excellent rule and I really support it because I think that it's time to recognize explicitly the ability of a court to approve a settlement. I think that not all battles are worth fighting through to the end. There's a real value to finality on both the class side and the defendants' side.

This is one of the places where I would disagree with Professor Fiss. I do not believe that that is merely a contract when that result is reached. I believe that the involvement of the third party, the District Court, explicitly under your rules, makes that a judgment, just as much a judgment as a judgment entered after trial or a judgment entered after a summary judgment or any other kind of judgment, and, therefore, it's not merely a contractual issue.

And I don't believe that Amchem has impeded the ability of this process to work. It's not been my experience that it has. The manageability issues are properly confined to the certification process. Where you have a settlement, manageability drops out and the question is, is it fair and adequate under the terms that you've now put into your rule.

Again, however, the sequential issue arises. Is it inappropriate or improper for a court, once having carefully considered a settlement, to be trumped or second guessed by another court who looks at the same settlement and concludes that it is appropriate? There are courts that are willing to do this. I've had personal experience with this. It often arises because there's dueling groups on the plaintiffs' side who perhaps feel they can get a better deal by going to another court.

My personal view is that the defendants have a duty in such a case not to permit that to happen without the consent of the first court, and

that's the way I played the one I had. I made my conditional settlement conditioned on going back to the original District judge, informing her of what we were going to do, and then if she had no problem with them going to State Court, then that was permissible. As it turned out, she did have a problem with it. We stayed in the District Court.

There are two solutions that I can see here, as well. First, you could amend the rules. You could do as Professor Cooper suggests, or as John Beisner suggests. You could take the intermediate step of just doing it in the Federal system. You could have a rule in the Federal system that would say, in the case of certification, you can't have two certification bites of the apple, and presumably in all but an MDL case, you could have it for the Federal Court, as well.

But I think the best remedy for both these issues would be for you folks to join with the Judicial Conference in supporting minimal diversity for national class actions. If we were to amend

the statutes so that a threshold amount on the aggregate for a controversy plus some requirement that one class member and one defendant be from a different State, with carve-out exceptions--for example, in the current bill, if a substantial majority of the members of the class and the primary defendants are citizens of the same State where the action is brought and whose law governs, then that's not considered to be a national class, something like that.

If you folks could find yourselves willing to support that, I think that the kinds of processes that you've developed through the MDL approach would, frankly, make many of these problems that concern me go away in the long run and I would urge you to consider taking that posture.

The final comment I'd like to make deals with Professor Fiss's comments. He has suggested that we should have a regime of opt in settlement and he says he's aware of the consequences, and I've had a chance to glance at his excellent

statement, which I recommend to you, in which he says the emphasis should be shifted from opting out to opting in and he recognizes that this would basically do away with settlements of cases that had little merit and where defendants are intimidated into settlement.

I'm not sure that's true, but let's assume for the moment that it is true. That would be a good result and I could support that, but it's only half of a remedy. If he's going to suggest opt in for the settlement remedy, he should also suggest opt in for the trial remedy. So that if you're going to have a trial of a class action, you would have to affirmatively opt in to the trial result, as well.

But in any event, those are intriguing comments he's made and I want to study this proposal further and get back to you on it.

JUDGE LEVI: Thank you very much. Yes?

JUDGE SCHEINDLIN: Just one question. Very early in your remarks, you liked the part about the early review of the trial plan--

MR. ALLMAN: Yes.

JUDGE SCHEINDLIN: --part of the certification review. My only question to you there is the tension with the discovery process, because you want the discovery very narrowly limited to certification issues, but if you're talking about developing a trial plan, aren't the plaintiffs going to say that they need some merits discovery to be able to create such a trial plan? So is there not some tension there?

MR. ALLMAN: There is tension, and as has been suggested to you by many witnesses on the plaintiffs' side, the first thing that we on the defense side say is, well, that's merit discovery and you can't have it. But that's true of every class action certification motion I've ever been involved in and we've always been able to work out an accommodation, I think, and I think we could here, too.

JUDGE LEVI: Thank you, Mr. Allman.

MR. ALLMAN: Thank you.

JUDGE LEVI: Thank you very much.

Mr. Wolfman?

MR. WOLFMAN: Good morning. Thank you for inviting me to testify. I work at Public Citizen Litigation Group, which is a public interest law firm here in Washington and we file class actions on behalf of consumers against governmental and corporate actors, and in my prior life as a legal services lawyer, I brought (b)(2) type class actions against governmental and other actors.

And so we recognize the importance of a vibrant class action rule that doesn't impose unnecessary costs, but, however, in recent years, the bulk of our class action work has been on behalf of class action objectors, such as in the Amchem case, the General Motors truck litigation, the Boling heart valve case, and the Akermid [ph.] bone screw litigation, and in those cases, of course, our clients claim that the class represented--and in reality, that means the lawyers--have been inattentive to their needs and their interests.

But I think these two kinds of class

action practice are related and complementary. If the class actions are abused, as they can be unless they're carefully monitored by the courts and by the absentees, the class actions will suffer, and the reason is this. If class members are victimized and the defendants walk away from a serious problem without much payment and the lawyers walk away with all the goodies, the result is that the kind of reform will be the kind that we don't want, a watered down rule or Federal legislation that results in erosion of the class action's ability to redress mass harms when they arise.

So in my limited time today, I want to approach the issue of Rule 23 reform thematically, explaining what I see as the overall need for reform and how several of the key areas addressed in the Advisory Committee's proposal mesh with our overall concerns.

If I could summarize the concern, my concerns, in one thought, it would be this. The class action rule should better address the

fundamental differences between ordinary bipolar or traditional litigation and large-scale vicarious representation in which the vast majority of the clients can't be expected on their own to monitor the work of their lawyers, and perhaps even more important, where the lawyers' interests are not naturally aligned with their clients' interests.

That being the case, and I believe it is, any Rule 23 reform must be based, I think, on the following interrelated principles: Increased monitoring by the courts, such as in the current proposal that the court make detailed fairness and attorney fee findings; increased openness, such as the proposal concerning the filing of side deals and disclosure and approval of objector settlements; and finally, facilitating the adversary presentation of settlements, for instance, through the current proposal to provide more meaningful notice and opt out rights to absent class members.

In some significant ways, the current proposal meets all these objectives. However, with

all respect, the proposal falls short in a number of important ways and I'd like to highlight a few of them in conjunction with, or in light of the basic principles that I've just outlined.

Let me turn first to notice and opt out rights. We support the proposals for expanded notice and opt out rights, particularly in the (b)(3) type cases, for two reasons. They enhance class members' ability to monitor their lawyers' work, and second, they make it more likely that the deal for the class, if there is to be a settlement, will be fair.

To be blunt about it, notification at the certification stage, which is the focus of the rule in its current form, is often not all that effective because not nearly enough information is available to make the notice and the opt out at that point useful. And that's, as I say, particularly true with respect to exercising opt out rights.

At the settlement stage, however, the lawyers' work can be evaluated and the class

members can vote with their feet, particularly in cases where large claims are involved and so that it makes sense for people to vote with their feet. Put it the other way around. If the opt out right is given at that time, at the settlement stage, the settling parties will have far greater incentive to make the deal for the class a fair one.

On the other hand, the proposal fails to enhance notice rights under Rule 23(e) in cases where the settlement establishes a claims procedure or some other process by which class members' property rights are extinguished. In that situation, the notice, whether it's a (b)(1), a (b)(2), or a (b)(3) case, must be the best practicable, which generally means individualized notice. Unless that failing is rectified, settling parties will continue to be free to provide publication notice at the settlement stage with an enormous adverse effect on class members, and in my testimony, I cite some examples of that occurring.

Let me turn now to the second theme, which is the one of openness. At several points, the

committee proposal seeks more openness but stops short, in my view, of achieving the goal. The court and class members need mandatory disclosure of all side deals. How much are the class representatives getting? How have the lawyers agreed to split up the fee? How much are the class representatives getting--excuse me. When I say how much, I made a mistake here. When I talk about the lawyers splitting up the fee, what I'm talking about is are these fee-splitting arrangements bloating the fee because they're just paying off people who might not otherwise have an interest in the case? And what additional deals does the defendant have with the lawyers or with class members inside or outside the class?

The only justification for secrecy of any kind is business as usual. There's no serious countervailing benefit to maximum openness. Moreover, and I deal with this at some length in my written testimony, the committee must close the serious loophole to the proposal in Rule 23(e) and require that objectors' deals be disclosed and

approved even when a settlement is pending on appeal.

Now, the final point is how can the rule go about enhancing adversariness by invigorating objectors? I agree with the statement in the committee note that objectors must be provided substantial procedural support. No question about it, they don't have enough of that now. But the problem with the proposed rule, and I say again, with all respect, is that, by and large, the rule does not provide any such procedural support. Here are a few examples.

The rule does not require that known objectors or even those who have entered an appearance be provided access to all settlement documents. That's a serious problem in objecting to class settlements under the current system.

The rule does not require that settling parties file and serve their full justification for the settlement prior to the objection debate, and that would avoid the shenanigans that go on now, where the settling parties hold back their

evidentiary support for the settlement until after the objecting date, and often until right before the fairness hearing.

The rule does not give objectors a stated ample time to file their objections. The rule does not give objectors a right to take discovery, even about the settlement terms themselves. I'm not speaking here of having discovery into the negotiation process, which I think would not be appropriate in most circumstances, but even as to the settlement terms themselves.

And the rule does not eliminate the objector intervention requirement, which creates a serious obstacle to appellate review of class action settlements. Now, as I say in my written testimony, since the publication of the proposed rule, the Supreme Court has taken up that question, but if the Supreme Court holds that objectors need be intervenors to obtain appellate review, I urge the committee to take up its prior draft proposal, which was then, I think, termed 23(g) at that time and publish that amendment, which would get rid of

the requirement to intervene.

The note does, as I say, speak of the importance of providing the means for absentees to challenge settlements. But, as I say, it doesn't carry through quite well enough.

Moreover, as I say at some length in my written testimony, the note potentially, and I think inadvertently, does damage when it singles out objectors for harsh characterization and threatens them and them alone with potential Rule 11 sanctions. If nothing else, we urge the committee to eliminate entirely the language concerning Rule 11 because I have no doubt--no doubt--that if it stays in the rule, it will chill participation by objectors.

Let me just reiterate in closing that heightened court vigilance, enhanced awareness, openness, and fairness for absentees and injecting adversariness into the settlement of class actions, those are the goals that should guide any amendment to Rule 23 and I believe those are the goals that animate, by and large, the proposal here. And I

ask the committee to consider each of our suggestions for improvements to the current proposals with those goals in mind.

Thanks once again for inviting me to appear and I'd be glad to answer any questions you might have.

JUDGE LEVI: Judge Scheindlin?

JUDGE SCHEINDLIN: At page four of your text, you comment on the notice to (b)(1) and (b)(2) class members and suggest that the language should be changed and that the notice should go to "a reasonable number of class members comprising a fair cross-section of the class." Relating to this morning's discussion, that would be a cost improvement. Is that the same as what Professor Resnik might have called sampling notice?

MR. WOLFMAN: I think that's right, and let me just say in response, exactly. Let me just say that although I said in the written testimony that certainly nothing like the comprehensive certification notice for (b)(3) cases should be required because of the cost issues, I had not

fully appreciated the cost concerns until I had read other people's testimony and heard what I heard today.

And so although I think there still should be notice for the reasons I say in the testimony, it is awfully important to take into account this cost issue, and perhaps one solution is to move some of the concerns about cost from the note into the text of the rule and be more definitive in the text of the rule about the type of sampling type or cross-section notice that would be required such that the costs could be minimized.

JUDGE ROSENTHAL: In your comments with respect to disclosure of side agreements, I have two questions for you. The first is to ask you to comment on a suggestion made in Mr. Beisner's written submission in which he suggests that the note should be clarified to capture--be directed to directly-related agreements so that it would not be so broad as to potentially apply to every agreement that is in some fashion perhaps incidental and insignificant related to the settlement. That's my

first point.

The second point is, with respect to your suggestion that the rule should be strengthened and the disclosures should be mandatory, would you accept or find your concern met by a rule that would perhaps require the disclosure of all directly-related undertakings but would leave it to the judge's discretion as to the extent and form of additional information required?

That is, the judge might accept a summary of some agreements or all agreements. The judge might decide that the entire agreement must be filed and made available to all parties or limited in terms of dissemination, but that the parties would be required to inform the court as to the existence and subject matter of directly-related undertakings with additional information to be tailored to the circumstances of each case in the judge's discretion.

MR. WOLFMAN: Okay, I'll take them up in the order you posed them. I'm not sure what Mr. Beisner is referring to when he means, referring to

agreements that are indirectly related to the class action. I guess my view would be that if it's related in any matter to the class action, it potentially impinges on the rights of the class members and it ought to be disclosed. So if what he's referring to is that there may be undertakings between the defendant and class members that truly have nothing to do with the rights asserted in the complaint or released in the settlement, then I suppose they wouldn't have to be disclosed. But other than that, again, I don't see the downside of disclosure.

As to your second question, I guess it would be better to have full disclosure and make it mandatory than to have even the disclosure itself to be non-mandatory. But the question arises, unless it's a question of confidentiality that would be otherwise confidential as in discovery or trade secret or whatever the reason might be, work product, I don't see the benefit in not making the material available.

And as to the question of summaries, I

wasn't sure from the note why the potential for summary as opposed to fully agreement were there. If the question is simply one of length and there's some notion that there would be agreements that would be just so burdensome to review, that's one thing. But that's not my experience. My experience in doing these cases is that there are agreements to pay certain members outside the class, to pay certain counsel to go away. I think the absentees have a right to determine for themselves whether those agreements are relevant.

JUDGE HECHT: As a practical matter, why should objectors not have to intervene to--

MR. WOLFMAN: Well, two reasons. One, I suppose, is a legal reason. The intervention rule is a rule that permits people to participate because their rights may be affected. But by definition, if they don't intervene, they're not bound by the result.

In a class action, by definition, the absentees are already parties in the sense that the res judicata effect of the judgment will have an

effect on them. To require them to intervene is really just a trap for the unwary. It's a paperwork requirement, because what they would be asserting at the settlement stage in their motion to intervene is not that they want to litigate the case but only that they want to be heard in opposition to the settlement.

The second point, which is related to the first, it is truly a trap for the unwary for pro se litigants. They would have no idea of the need to intervene or how to do it.

I should mention, as well, that if you're going to have an intervention requirement, which we're very much against, then someone's going to have to change the manual for complex litigation, which says nothing about the need to do so. You rarely, rarely, rarely see a settlement notice that says a word about doing so.

MR. SCHERFFIUS: On the (e)(4)(B) suggestions that you make on settlement on the appellate level, can that be effected in these rules or is that going to require a rule change in

the appellate procedure rules?

MR. WOLFMAN: I've thought about that and my answer is, I think not, but I'm not certain, and here's--

MR. SCHERFFIUS: You've thought about which way what?

MR. WOLFMAN: I think the appellate rules don't need to be changed, but I'm not certain, and here's why. I guess the concern would be that when a notice of appeal is filed, the jurisdiction of the Federal Courts--the District Court has lost its jurisdiction in some respects. But in complex litigation, it's often true that collateral matters go on in the District Court while a matter is up on appeal, particularly in the kinds of cases that we're talking about here.

I don't see why approval or disapproval of an objector settlement, which, after all, is collateral, it doesn't go to the merits of the settlement itself, couldn't be handled in the District Court while a matter was up on appeal, and I don't believe the District Court would lose

jurisdiction over that matter, but I leave that for people with more knowledge of appellate jurisdiction, I suppose.

JUDGE LEVI: We'll put our reporter on it. Thank you, Mr. Wolfman. Your written comments were very detailed and very helpful. Thank you very much.

MR. WOLFMAN: Thank you very much for inviting me.

JUDGE LEVI: Mr. Goldfarb?

MR. GOLDFARB: Good morning. My name is Lew Goldfarb. I'm a partner at Hogan and Hartson in New York, formerly Associate General Counsel of Chrysler, responsible for handling class actions over about 15, 16 years.

With the Chair's permission, I'd like to be able to incorporate into some of my brief remarks some thoughts that Linda Willett, who represents Bristol-Myers, would have presented today. She's unable to make it, and so I'd like to just make some reference to her comments.

I appreciate the opportunity to be here

this morning. I also really valued the other opportunity I had, which was to participate in the Chicago meeting. I was asked to speak on attorneys' fees and on the panel were two lawyers that I have to say I was shocked to appear almost in total agreement, Allan Morrison of Public Citizen and Mel Weiss.

[Laughter.]

MR. GOLDFARB: One of the lessons I took from that two-day meeting was that there really are two very discrete and distinct worlds of class actions and I would like to emphasize this point to this committee.

It appears to me that many of these reform proposals really go to the world described in the Third Circuit Task Force report, which really involves securities class actions, antitrust class actions, civil rights class actions, where there are real plaintiffs, there are real interested parties who do get involved in the litigation like Mr. Chachkin was describing--I think he's the only actual client who's testifying here this morning--

who care about the litigation, who direct the lawyers and play an active role.

There's also the other world, what I describe as the underbelly of the class action industry, which is very, very different and many of us defend cases in that area, and for those of us that do, by far, the most important proposal--it hasn't quite risen to the level of a proposed rule change--is the proposal dealing or the proposals dealing with what you call overlapping class actions.

And the second most important thing that the committee should consider, and I would strongly recommend that it does, is to look at opt in for these class actions because the abuses, some of which I'm going to describe a little in some brevity, because it is important to do so to make the point, is a serious problem for industry, the most serious, perhaps, and I think it should be given careful consideration.

Let me also say that I fully support and will not speak to the recommendations made by John

Beisner, Victor Schwartz, and Tom Allman, just to make my comments as brief as I can.

I would draw the committee's attention to the attachment to my testimony, which is an actual joint venture and fee agreement among plaintiffs' lawyers, which is very typical. It's been redacted, of course, but it's very typical of what one finds in these lawyer-generated class actions, and one of the interesting things about this agreement is you see no reference whatsoever to clients, to the interests of the class members. This whole project was known as "the project" and everything is directed to making "the project" succeed.

If you look at paragraph four, there's specific reference to the strategy of filing multiple State class actions as a strategy, and it's important to distinguish, in looking at this overlapping class action problem, from overlapping class actions that happen because competing lawyers happen to choose to file cases all over the country and those that are part of a very well-planned

strategy by a cadre of lawyers to file cases wherever they can in order to coerce settlement. That is the kind of situation that I'm used to dealing with and that many others are used to dealing with and I think it emphasizes the importance of dealing with this problem promptly and thoroughly.

I would say that while the committee's proposals are good ones, we all know there are some limitations on the committee's authority. I agree with John Beisner's suggestion that at least you go as far as directing Federal judges to take a look at other class certifications, but I would strongly urge the committee to get fully behind the proposed--the pending legislation on minimal diversity and that we all do everything we can to get that enacted as quickly as possible.

I'd like to, just for illustration purposes, refer to what Ms. Willett discussed at some length in her testimony because it really illustrates the problem with lawyer-generated class actions. In the instance that she describes, and I

think the pharmaceutical industry is one industry that is really bearing the brunt of just massive numbers of these no-client class actions, these no-injury class actions, Yale--once again, Yale is brought up for discussion here--did a study and it concluded that a particular ingredient in diet drugs could lead to a greater likelihood of strokes in certain patients.

What the plaintiffs' lawyers did was take that study and file a bevy of class actions in Federal and State Courts, not just with regard to alleged victims of diet drugs, but every conceivable pharmaceutical ingredient that has PPA in it, including over-the-counter cold medications, and sought to get these classes certified and sought to coerce a settlement from a whole array of pharmaceutical companies.

No one, no lawyer should be able to march into court on behalf of millions of clients and ask a judge down in Plaquemine in Louisiana to decide that some pharmaceutical ingredient is harmful. I mean, that's a job for the FDA. No one should be

able to march into a court in Madison County and ask a judge to find that some vehicle component is unsafe. That's a job for the Department of Transportation. But certainly, it should not take place before multiple State forums around the country.

I would like to speak to one very specific part of the committee's notes which does cause me concern. It's on page 54 of the booklet and it speaks to court approval of settlement agreements, or court approval, rather, of pre-certification dispositions of cases.

I'm very troubled by the language in here because it seems to imply that there is a class action before certification. No one's rights can really be adversely affected before certification and this language in this note suggests that there may be notice necessary for a voluntary dismissal, for some other resolution of the case pre-certification, and what it does is it will give impetus to those plaintiffs' lawyers that go into court and file a class action and think they're

actually already representing the class, which they're not.

We've had situations where--and so many of these cases piggyback on government investigations or actions already underway by companies--we've had situations where one client of mine had resolved an investigation with the Federal Government, had already begun giving redress to owners, and the plaintiffs' lawyers filed their class actions, actually went into court and filed the motion asking the court to take 25 percent out of the redress that was going to be given to class members and to put their names in the notices that the government had already approved be sent out in order to get a piece of the action. I mean, that is how brazen some of these plaintiffs' lawyers have gotten.

So I really think that it's important not to send a message to the Federal judiciary that a class is in existence and that plaintiffs' lawyers are representing the class before there's certification. This language implies that class

members' rights could be compromised before certification, and I don't think they can. I mean, unless the plaintiffs' lawyer has actually gone out and held a press conference and alerted the public that a class action is pending, which they shouldn't be doing under most judges' rulings, people do not know that a class action has been filed on their behalf until there's been certification and until there's been notice. So I would really urge that there be some changes to that language.

I'm going to stop there because I think my comments were a little repetitious of others.

Let me just also say that, on behalf of Linda Willett, that she also supports the promulgation and this committee's support of the pending legislation in the House and the Senate and also supports the committee taking a close look at opt in as a solution to some of these abuses. Thank you.

JUDGE LEVI: Anyone?

[No response.]

JUDGE LEVI: Mr. Goldfarb, thank you.

Professor Gallacher?

MR. GALLACHER: Good morning and thank you for allowing me to invite myself to your hearing. I'd also like to echo the comments of someone before who thanked your staff. They've been helpful, patient, and very calm in dealing with us and I appreciate that.

I recently made the leap in docketing and am still not quite comfortable with the professor title, but before that, I spent several years in the trenches of class action defense work and I would like to thank the committee for continuing to pay attention to the class action rule and continuing to seek to address the abuses that I think have been identified in previous hearings and today.

I'd like to support the proposed amendments and the current legislation pending in Congress and ask that the committee consider supporting that legislation, also, but I think that neither the amendments nor the proposed legislation

go far enough in addressing the problems of class actions.

Specifically, I think the damages class action--I want to speak only today on the damages class action, 23(b)(3)--should be returned to an opt in rather than an opt out default position. I think the committee was presented with a question by Judge Niemeyer in 1997 when he said in one of his memos that if the class action rule is a tool of social policy, then the pressure exerted on a defendant by the size of the class is enhanced by the opt out rule. But if the class is merely a joinder device to aid in claim aggregation, then the opt in is the more correct class action form.

I would submit to the committee that the rules should not be used as a weapon by one side against another but should rather be a neutral framework for the just, speedy, and inexpensive determination of any action and that when viewed in that light, the class rule should be viewed as merely a joinder device and that opt in is the appropriate default position.

My experience in class actions would indicate that, in fact, virtually all damages class actions become opt in class actions at some point. If the plaintiff prevails at trial, or more typically, if the class settles, class members are given the option to make an affirmative election to participate in the benefits obtained for them and that usually involves either mailing materials to the court indicating their membership in the class and seeking to obtain the benefit or using a coupon that's been mailed to them, and that is a de facto opt in position.

I think adoption of an opt in rule would restore balance, would make the joinder device useful again as a joinder device, and would facilitate the bringing together of those with similar claims who seek to assert them against a common defendant or defendants.

I know that two criticisms principally have been leveled against this proposal in the past, that it would make it more difficult for those with small claims to sue large defendants and

it would mean a return to one-way intervention. I'm not sure that either of those criticisms is valid.

Although the 1966 committee was concerned, and understandably so, with the ability of those with small claims to assert such claims, I'm not sure that there's any evidence to support the position that class actions help in that. Certainly, the situation is different now than it was in 1966. There are many more lawyers available. There are many more lawyers willing and ready and capable of bringing small claims in small claims courts.

More to the point, perhaps, I think it is dangerous to assume that just because someone doesn't assert a claim or assert to act to seek a remedy that that's evidence of an incapacity to act. If low numbers of participants in class action settlements teaches us anything, it's that people sometimes decline to act even when a benefit is readily available to them. The reasons for this may be complex, but I don't think we can assume

that they're incapable of making a decision to act on their own behalf.

I believe also the danger of one-way intervention is equally unpersuasive. It was an inappropriate practice and I am glad the committee acted to resolve it, but I think that retaining the timing requirement requiring class members to opt into a class by a certain date would effectively end that danger.

I recognize that some will argue that reversion to an opt in rule is beyond the committee's authority. I think the history of the rule belies that contention, but that if the committee agrees with that, I ask that you consider speaking to Congress and asking them to adopt opt in rules. Thank you.

MR. KASANIN: Did you submit anything in writing to us?

MR. GALLACHER: I did.

MR. KASANIN: You did? All right. Thank you.

JUDGE LEVI: We've talked about the opt

in. What would the practical consequences be, do you think, of an opt in rule?

MR. GALLACHER: I think the practical consequence is that the classes would be smaller and that fewer classes would be brought.

JUDGE LEVI: Sometimes, I mean, when you say that, the plaintiffs' lawyers, the plaintiffs' bar would be opposed to it, I suppose, and the defense part, depending on what phase of the proceeding you're talking about, would be opposed to it.

MR. GALLACHER: Yes, and I know we've heard today of people supporting opt in for settlement. I believe that the opt in rule should be the default position for all class action so that it would be the default for litigation as well as for settlement.

JUDGE LEVI: Thank you, sir.

MR. GALLACHER: Thank you.

JUDGE LEVI: Ms. Willett is not here. Ms. Brueckner? Good morning.

MS. BRUECKNER: Good morning. I'd like to

thank the committee for the opportunity to testify today. Like my former colleague, Brian Wolfman, I come to the committee wearing two hats. I'm a staff attorney with Trial Lawyers for Public Justice, which is a public interest law firm located in Washington, D.C., although we litigate cases across the country.

In my work there, we both bring class action lawsuits and we also fight abuse of the class action device. On the affirmative side, we have brought class actions in areas ranging from race discrimination to sex discrimination to environmental protection to consumer class actions for damages under Rule 23(b)(3), and not only do we litigate some class action cases in-house, but part of my job as a staff attorney is to develop cases and recruit lawyers from across the country from among our members to assist in litigating these cases. So in that capacity, I have a little bit of experience in knowing how class action practitioners approach the issue of cost when considering whether to take on a particular piece

of litigation.

In my capacity in fighting class action abuse, I and my organization have represented objectors and participated as amicus in opposing over 20 different class action settlements, including some of those mentioned by Mr. Wolfman. We particularly have fought to protect encroachments on the right to opt out, to protect the rights of future personal injury victims not to be included in class action settlements, and also the rights of class members generally to obtain full relief.

So, generally speaking, I think that the committee's proposal has a lot of very favorable provisions in terms of enhancing objector rights, encouraging openness, and that will advance and increase fairness in class action litigation, but there are some provisions that we oppose.

Let me take the points I had prepared out of order and cut right to the chase in terms of the notice provision in (b)(1) and (b)(2), which I stated in my testimony we oppose.

I mean, the fundamental point has been made repeatedly this morning, and I just want to emphasize it from my perspective, that this provision will impose substantial additional costs and will substantially chill particularly civil rights litigation. There's just no question about it. It will also have an effect, I believe, in the consumer rights area.

My organization has just won a trial of a case where we sought to defeat a mandatory arbitration clause that had been inserted in a consumer contract by AT&T of all of its long distance customers and that was a case within a (b)(2) case seeking purely injunctive relief. It's quite likely that if we had known at the outset that we could have been hit with the cost of providing notice to the class at the certification stage that the litigation would not have been brought.

I mean, this example and the example brought by Mr. Lee are merely Statewide cases. If you're talking about a nationwide class action, the

potential notice cost can number in the millions. In the Amchem case, which was ultimately thrown out by the Supreme Court, the settling parties, I believe, spent $8 to $12 million in notice costs across the country, and facing that kind of notice costs, I think would just simply prevent a lot of meaningful and important litigation going forward, especially in the civil rights area.

Judge Rosenthal's question, which was a good one, which is, well, what if the rule is clear that the judge must consider whether the costs of notice would be inimical to bringing the suit, and I think that that idea, with all due respect, is too little, too late. The practitioners have to consider what the costs are going to be at the time they decide whether to file the litigation.

If there's a chance that a judge could impose significant notice costs at the beginning, at the time of certification, if there's a chance that that will occur, that alone will be enough to kill the bringing of the litigation in the first place. So I don't think it's protection enough to

caution judges at the outset not to impose too large of a financial burden at the class certification stage.

JUDGE LEVI: Could I ask you about that--

MS. BRUECKNER: Yes, sure.

JUDGE LEVI: --because General Lee noted that the power is there already. So if the power is there already and if it's being used--I don't know that it's being used, but if courts are ordering notice where it's reasonable, then isn't that something you have to factor into your calculus already?

MS. BRUECKNER: I think that's right, but in my experience, it's been quite rare that the power is used. I mean, I could--I think the point is that the power exists in a special case, in an extraordinary case where a judge believes that notice is important for some particular reason. It could be imposed under Rule 23(d)(2), I believe. But in my experience, class action practitioners do not anticipate being required to fund the cost of notice at the outset of a (b)(1) or a (b)(2) case.

One additional point I'd like to make is that we're not just talking about one particular notice. The committee's proposed amendments also would require notice of the filing of a fee motion in all (b)(1), (b)(2), and (b)(3) cases. Now, this wouldn't particularly pose a problem in cases that are settled because the notice of the fee could be included in the 23(e) notice.

But in particularly civil rights cases that are litigated to judgment, that provision could require an additional round of notice at the fee stage, and in my written testimony, I've explained why we don't believe that this is at all warranted in the civil rights area, particularly in cases that are litigated to judgment. But what we're talking about is a potential double round of notice and I believe that this will simply--will substantially restrict private enforcement of the civil rights laws in this country.

JUDGE LEVI: What about sampling notice? We heard about that today, as well, and we've heard about that before. Wouldn't it be possible for you

to develop a notice plan that you felt would put you in touch with class members? I gather you want to communicate in any event, and that might give the court some confidence that this isn't really a (b)(3) class that's somehow being pushed into (b)(2), or at least there are parts of the class, perhaps, that have some financial interests at stake here or perhaps potential other litigation that might be precluded, that sort of thing.

MS. BRUECKNER: Sampling notice is certainly--to specify in the rule that sampling notice would be permissible would certainly be an improvement over the rule in its current form, which merely talks about reasonable notice and then in the note mentions Mullane, which could be read to impose a more onerous notice requirement.

But this is one of the few areas in which Brian and I disagree. I believe that even requiring sampling notice at this stage would exert a substantial chilling effect, because at the outset, it's very difficult to know what sampling notice would be ultimately approved by the court.

How many class members would have to be notified? What sample would suffice? In what form would the sampling notice have to go out? If you have a case where the defendant won't agree to place the notice in its regular mailings to the class or the court refuses to order that type of notice, what kinds of costs could be imposed at the outset?

I think the problem with the rule, even if it were amended to talk about sampling notice, is that it's simply too uncertain and will have a huge negative impact on civil rights cases and consumer rights cases, like our AT&T case.

I believe that reforms in this area may be warranted, but there needs to be more study. As was pointed out, Rand hasn't looked at this issue of notice in civil rights class actions. There's been no empirical data gathered to look at what are the costs of notice in these cases, what would the effect be on the civil rights bar if notice costs were imposed at that stage.

JUDGE LEVI: Is this something that you have studied, that TLPJ has studied?

MS. BRUECKNER: We have not studied except--I'm only speaking from my personal experience as a lawyer who tries to talk other lawyers into bringing civil rights cases and pay.

MR. MARCUS: Following up on your mention of concern about the Rule 23(g) notice to the class, which I take it is really focused on adjudicated cases, not settled cases, I wonder how deterrent it is for lawyers who might be contemplating those cases to know that at the end, if you win a judgment and you have to make a fee motion, you have to give notice, and also wonder whether you see any way that the cost of giving that notice might itself be recoverable as a cost by the lawyer who is directed to give notice.

It seems to me as a lawyer, I might well think, okay, that's another feature of getting paid, but that only happens when I know I'm going to get paid and I'm going to recover that, so maybe it wouldn't be a big deterrent. How do you feel about that?

MS. BRUECKNER: I feel very good about

that. I feel that if the rule were to specify--first of all, I do think that the requirement of fee notice in Rule 23(g) in its current form would exert a deterrent effect. Even though the notice wouldn't be incurred until the end of the case once the litigation is won, I still think that lawyers looking down the road have to chart out what they're going to have to spend at the certification stage if the case is settled and if the case is litigated to judgment and a fee is sought.

However, if the rule were to state that the costs of notice given to the class of the fee at the conclusion of the litigation would be taxable as costs and could be recovered by the plaintiffs' attorney as part of their fee application under a fee-shifting statute, then that would be a whole different ballgame.

If I may just turn very briefly to a few of the other provisions that we've highlighted in my written testimony, on the side deal disclosure provisions of Rule 23(e), I think this is an extremely important and laudable step forward, but

the rule in its current form lacks teeth. The rule is written in permissive language. It states that a court may direct disclosure of these agreements. And more importantly, it places no affirmative obligation on the settling parties to disclose the existence of related agreements to the court.

In my view, what this means is that those agreements most likely to influence the court's thinking regarding a proposed settlement are those least likely to be disclosed to the court. Therefore, we would urge the committee to rewrite the rule to require the mandatory disclosure of side deals.

On the class counsel provision of Rule 23(g)(2), we oppose the class counsel appointment process for many of the same reasons articulated by prior testifiers here today. As written, the rule does not require that counsel seeking appointment have any clients of their own. It does not provide for the class counsel who investigated and filed the original case to recover his or her fees and costs in the event the case is taken away. It

could create a tremendous drain on litigants and judicial resources by plummeting litigation at the class counsel appointment stage.

I think the rule simply is not--it's designed for multiple overlapping class action situations and has no place in the context of a single class action where existing class counsel may be perfectly adequate to represent the class. I think it opens up a can of worms, and as with the notice requirement of (b)(1) and (b)(2), would chill civil rights litigation, because if I'm a small class action practitioner and I think I could put this whole case together, investigate it, and file it, and then lawyers from across the country could come in and essentially bid for the role of class counsel, I'm not going to bother to touch that case. I'm going to walk away.

And I do believe that concludes my testimony.

JUDGE LEVI: Thank you.

MR. MARCUS: Could I just ask one follow-up question about that? It seems to me that

there's this little tension between the concern that it's hard to get lawyers to take these cases and the notion that they're just out there seeking to seize them and I wonder if you could comment on that, because I'm not sure why it's hard to get lawyers to take them if they're also vying for a chance to take them over.

MS. BRUECKNER: That's a very good point. I think that part of what my testimony reflects is that at Trial Lawyers for Public Justice, we tend to work with smaller law firms. Often, we work with smaller law firms with personal injury practices or consumer rights practices and we attempt to work with these lawyers in bringing innovative and cutting-edge litigation. So that's my constituency, and I believe that those are the types of practitioners that would be dissuaded from bringing these sorts of cases.

There is, however, a very sophisticated and well-heeled developed class action bar in this country, lawyers who essentially make their living doing nothing but class actions and they're often

excellent lawyers with enormous resources and experience. Our concern is that the class action appointment procedure could result in the increasing centralization of a class action practice among lawyers of that sort and ultimately would result in far fewer meritorious actions being brought.

If I may say one thing, I realize I completed my testimony a little bit too soon. I would also like to commend the committee and wholeheartedly endorse the second opt out provision of Rule 23, whatever the provision is of the rule. I think that that's a very important additional procedural protection for class members, and I think the argument that the rule will chill settlement is wrong for two reasons.

First, the costs of notice could go out in a Rule 23 notice so there wouldn't be any additional notice costs of giving class members notice of their right to opt out. And I also believe that the specter of additional opt outs won't chill settlement in any meaningful way in the

sense that these are classes, cases that have already been certified and the defendants routinely complain that certified classes, when they're facing a certified class action, there's a hydraulic pressure to settle.

That's the procedural posture that we're talking about here, requiring an additional opt out right at the settlement stage, and I believe that the incentives to settle at that stage are sufficiently great and the notice costs are sufficiently de minimis to warrant a second opt out at that stage.

JUDGE LEVI: Thank you. Thank you, Ms. Brueckner.

MS. BRUECKNER: Thank you.

JUDGE LEVI: Mr. Nelson?

MR. NELSON: Good morning, what remains of the morning. My name is Michael Nelson. I practice in Philadelphia and I toil in what Mr. Goldfarb has characterized as the underbelly in the class action world.

[Laughter.]

MR. NELSON: I represent largely insurance companies in consumer class action cases. It's unfortunate that I'll only be speaking for ten minutes because I usually hit my stride at about 15 or 20, so you'll just have to take my word for that.

[Laughter.]

MR. NELSON: I'm honored to have my comments considered by this committee and I want to refer the committee to my written comments for sake of brevity. I would like to focus on two main issues and one smaller point as I discuss the subject matter with you.

The first issue is overlapping class action cases. Right now, I'm defending a number of insurance companies on a number of issues that all relate to largely the same point and that concerns after-market parts, generic parts. It's been the subject of some notorious litigation in Illinois.

My principal client is defending five of these cases, all in State Court. All of these actions are circulated around the same subject,

which is heavily regulated by the insurance commissioners of the Eastern States. The courts in these State Courts are being asked to evaluate whether or not these insurance companies are complying with a regulatory scheme.

The pleadings in these cases say this, every one of these cases. Federal jurisdiction over this action does not exist. The amount in controversy as to the plaintiff does not exceed $75,000. Plaintiff specifically disclaims any amount of recovery greater than $75,000. The damages, attorneys' fees, and cost of individual class members may not be aggregated to meet the jurisdictional amount. Clearly, plaintiffs are trying to avoid the Federal Courts on these issues. Why?

At the same point, my primary client on these matters is involved in a Federal class action in Florida on the same issue. It is also joined by three other large insurers on, again, the same issue, and those insurers also have State pending class action matters.

The discovery in these cases is astronomical. One court, an elected judge has ordered, although the order has not seen the light of day because of some appellate issues, but the order has initially ordered the production of something like 80,000 e-mails from one corporate defendant because we get into merits discovery. The e-mail issue and the production of these documents ends up becoming terribly troublesome, vexsome, costly, and astronomical to maintain order.

These pleadings all plead different levels of class. One pleading in State Court in a rural county in Alabama with 40,000 residents asks for a 20-year class. This judge has no legal staff and has a part-time secretary.

I bring these points to your consideration because I'm asking this committee to strongly get behind the Federal initiatives, the Federal legislation to straighten out some of the class action issues. Minimal jurisdiction would go a long way towards solving many of these harms.

The preclusion rule, as proposed, would also help, and that's obviously open for comment at this point.

The second issue I'd like to talk about is court approval of voluntary dismissal of class action matters. My client is also faced with a different type of class action cases. It was started by a lawyer in Texas. Let me just make up her first name. Her name is Susan for the purpose of this example.

Susan left the law firm that she was employed at when she brought this class action. That firm is still maintaining that class action case right now. But to recapture the opportunity that that class action affords her, she started an identical class action at a new law firm. That class action--and these are all multi-State class action cases--that class action was voluntarily dismissed without any explanation at all after motions to dismiss were filed.

It was then refiled for the third time by this woman in the State of Delaware, again alleging

a national class action, 50-State class. After Delaware changed its law on the fundamental legal principle involved, that class action was dismissed voluntary without an explanation after two weeks and was refiled in the State of South Carolina, which arguably has better law on the books right now.

Voluntary dismissal of class actions has to be something that has to be taken notice of by this panel and by the legislature, and again, dealing with the federalism of the issue, because we're talking about multi-State national class action issues and the regulation of insurance companies. It's important for the Federal legislature to get behind paying attention to class action reform and controlling voluntary dismissal of class action cases.

The last issue I'd like to bring up is merit discovery versus class discovery. Many plaintiff attorneys right off the bat file discovery requests which get into both things, and again, from the standpoint of the expense to

corporate America, it's easy to ask for these things and much harder to deliver. There's been quite a bit of issue raised about how corporate America automatically suggests that merit discovery should not go forward and everything's merit discovery, but to the extent that there's been commentary on the appropriateness of merit discovery being closely watched, as mentioned in the proposed committee notes and some of the plaintiffs' bar suggested that that's not appropriate to have that in committee notes, I strongly disagree with that assertion.

Thank you very much.

JUDGE LEVI: Thank you, Mr. Nelson.

Mr. Stoller?

MR. STOLLER: Good morning, Your Honor and members of the committee. My name is David Snyder. With me is Ken Stoller. I'm an Assistant General Counsel with the American Insurance Association. We will make some very brief oral comments this morning and provide more detailed commentary by the February 15 deadline.

Let me say that I represent the American Insurance Association, which is a national trade association with approximately 410 property and casualty insurers that write about $90 billion annually in premium in the U.S. The points I want to make this morning are really three: First of all, the somewhat unique perspective of insurers with respect to the class action issues; secondly, the major reforms which we think will improve the system for everyone concerned; and third, very, very brief comments on some of the reforms which you have proposed so far.

First, our unique perspective. You probably most frequently deal with insurers as the financial managers of the civil justice system. We're the ones who, by and large, provide the defense and make the payments, and as such, we're a pass-through mechanism between plaintiffs and defendants, carrying out our obligation to defend vigorously but to pay injured victims when they deserve it.

Secondly, we're also increasingly

defendants in class actions. We estimate that there are more than 100 pending right now against AIA member companies.

And third, but as important as those other two perspectives, we frequently work with public interest groups to bring about safer workplaces, safer products, and cleaner air, so we understand the value of meritorious class action litigation in terms of making society safer and healthier and, consequently, more insurable and more insurable at a lower cost.

So that's, first of all, our perspective, really on all sides of these issues at one time or another.

Secondly, what do we think would be the most significant reforms that could be made to make the system work better for everyone? Increasingly, we find that State Courts through the class action mechanism are deciding issues of national significance, even though they're simply not equipped to do that. We would, therefore, urge that the Federal judicial system occupy its

appropriate and constitutional role in the class action situation.

Let me give you an example that best illustrates what's going on. It's a case out of Washington Stated where the Superior Court of Pierce County certified a class of 20,000 persons in 27 different States. The insurance company involved, of course, asked the Supreme Court to review that, and I'll indicate in a minute what the result of that request was.

Now, this class was certified even though the defendant is an out-of-State insurance company. most of the class members reside outside of Washington. Most of the subject automobile accidents occurred outside Washington. And most of the insurance claims were filed and processed outside of Washington in the States where the insureds were domiciled, where their automobiles were principally garaged, and/or where the subject losses occurred.

Interestingly enough, among the amici who were requesting the Washington Supreme Court to

review that class certification was the National Association of Insurance Commissioners, our regulators with whom, as you can imagine, we have a somewhat dynamic relationship. Those regulators stated, and I wanted to just give you just a little bit from the brief that they filed, the regulators said that by applying Washington law to purported-- these were diminished value claims in other States, the trial court appears to replace the policy judgments of other States with its own. This conflict will impair the ability of State regulators and legislators to protect their residents in this and other areas of insurance regulation.

The NAIC continued, in this case, a Washington trial court certified a 27-State plaintiff class which will have the effect of extra-territorially applying Washington law pertaining to the affected coverage. Instead of upholding this longstanding regulatory system, the State regulatory system, it appears that the trial court took for itself and from State regulators and

legislators the responsibility for making policy judgments about the contents of insurance policies. State insurance policy makers faced the previously inconceivable situation of having their judgments possibly overruled by one Washington trial court. This is inconsistent with our national system of insurance regulation.

One final excerpt from the insurance regulators' brief. The ability of States to make their own judgments concerning their own residents should be respected. The trial court's decision, however, threatens to defeat the right of States to make policy decisions concerning this coverage. Effectively, State legislators and insurance regulators in 26 other States are held hostage to one trial court in one State, uncertain of the effect of their judgments. That, from the brief of the insurance regulators.

The result was that the request to review the class certification was denied and it goes forward in a Washington court, and that's just an example of the many kinds of things, cases like

that, that are occurring with increasing frequency.

So we would urge focus on that particular issue, of restoring the Federal Courts to the key role that they need to play to resolve national issues, that they are best equipped to do that. You are best equipped to do that and we would urge that you reinstate your key role in that area.

Secondly, it's the experience of insurers that beyond that key issue, and we would hope that you support legislation and that you do whatever you can within your rulemaking authority to move in that direction, is the need for an absolute as of right appeal, immediate appeal on a class certification and a mandatory stay of proceedings pending the final resolution of that appeal, because we believe that these are key financial issues that will better enable the system to dispense justice and provide better benefits to injured victims and greater fairness to defendants.

So the first point was our perspective. The second point is, what are the three key reforms we think would have the maximum positive impact for

everyone concerned in the class action issue. And third, very brief comments on some of your specific proposals, and again, thank you so much for the time and effort that you've put into reviewing these issues.

With respect to the proposed rule amendments, we generally agree with the provisions relative to the appointment of class counsel, the handling of attorney fee awards, and the use of plain language in class action notifications.

Finally, as between the two alternatives with respect to settlement opt outs, we prefer the second alternative to the first alternative.

So let me conclude that considering the many roles that insurers play in this system, we are interested in injured victims being adequately compensated, quickly and efficiently compensated. We are interested in defendants, fundamental fairness for them in terms of national issues being resolved by those courts which are equipped to deal with those issues. The streamlining of the system so that every issue is decided once and decided

finally, if at all possible.

We commend you for the very, very hard work and the effort that's gone into reviewing these rules in light of the current status of class action litigation in this country. Thank you very much.

JUDGE LEVI: Thank you very much.

Mr. Scott?

MR. SCOTT: Good morning.

JUDGE LEVI: Good morning.

MR. SCOTT: I want to thank you for permitting me this opportunity to present this statement on the proposed amendments to Federal Rules of Civil Procedure 23. I am here today in my capacity as the President of Lawyers for Civil Justice, which is a national organization composed of leading corporate counsel as well as defense bar organizations.

My comments reflect my own experience as a partner in the Baltimore law firm of Semmes, Bowen and Semmes and more than 30 years of active practice in trying cases, as well as the input that

I have received from various members of LCJ. In offering these comments, I wish to acknowledge the input I have received from both corporate counsel as individual defense practitioners who view the problems associated with class actions as among the most serious facing our legal system.

At the outset, I want to recognize and commend the Advisory Committee on Civil Rules and the standing committee for the enormous amount of work that has already occurred in developing the pending proposed rule changes. We commend you for undertaking this examination of class action litigation and its impact that it has upon the legal system.

LCJ has a long history of responding to proposed revisions to the Federal Procedural Rules. We have watched closely this process as it pertains to the proposed changes to Rule 23 and have sought input from our members, specifically as they see these proposed changes affecting their practice or their business. In doing so, we have drawn upon the experience of our members, both corporate and

the individual defense practitioner, as well as others.

And while there is general consensus in favor of the proposed amendments, there are also some concerns. But the one area of unanimous agreement among the LCJ members is that the proposed rule changes do not go far enough. While the current proposals represent a first step, more needs to be done in order to address the abuses that have arisen in class action litigation.

Because of the various experiences of our members, I have encouraged them to present their individual views either in testimony before this committee or in written comments submitted for your review and consideration, expressing their support or concerns regarding these specific proposals, and some of these members have already appeared before you in San Francisco, while others have appeared earlier today or will be appearing later on this afternoon.

While the individual corporations or defense practitioners may not always agree on the

precise impact the pending proposals may have on class action litigation, we are all united and enormously gratified that the committee has seized this opportunity to address the problems that have affected the application of Rule 23 and we urge you to continue your work and to consider the beneficial impact which additional recommendations will have not only on the legal system, but on American society as a whole.

Modern class actions were meant to be a device to conveniently aggregate individual claims, but over the last few decades, they have been misused with increasing frequency to serve what many consider to be improper ends. It was out of this concern that the Civil Rules Committee began a study of class action litigation in 1991, culminating in the published amendments in 1996, as well as the recent proposed amendments that are the subject of this hearing.

Our legal system has been built on the principle that all parties should receive due process, but today, there is an increasing trend on

the part of the plaintiffs' bar to attempt to obtain class certification for almost any product liability tort claim, which has the effect of making the case a "bet the company" case, since if certified, the stakes literally can affect the survival of the defendant manufacturer.

The race for class certification in State and Federal Courts with the resulting overlapping class actions, which can result in inconsistent decisions, has the effect of trampling on the due process rights of the defendant.

One of the fundamental problems with class actions today is that they empower the class representative to claim to represent an unknown number of individuals, most of whose members do not even know their rights are allegedly being vindicated, probably would not seek vindication if they knew of them, and in many cases would object to being thrust into a court proceeding without their knowledge or consent.

Unfortunately, the major change that was introduced in the Federal class action rule in 1966

since has been followed by most State Courts, or most States that have enacted class actions, was the provision that any person who falls within the definition of the class is automatically included as a party to the action unless the party takes affirmative steps to opt out of the litigation. This change reversed the prior practice that only persons who had affirmatively decided to join the lawsuit would be affected by it.

In a nutshell, the spirit of class action jurisprudence has been distorted to capitalize on the extreme financial considerations that can be brought to bear when thousands or hundreds of thousands of claims are aggregated in one lawsuit. The mere fact of aggregation alone is enough to coerce settlements from one or more deep pocket defendants in cases of questionable merit.

The long-term implications of these multi-million-dollar transfers of money is significant for both the economy as well as for society. These dynamics warrant remedial measures and we urge this committee to continue to address some of the

fundamental problems associated with class action litigation.

The oversight of Federal Courts is increasingly important where overlapping and duplicative class action suits are filed, as referenced in the reporter's call for comment. It is not uncommon to observe overlapping putative class actions in Federal and State Courts by the same or different groups of plaintiffs' counsel.

It is for these and other reasons that we strongly suggest that the committee consider recommending comprehensive legislative and rulemaking proposals which would include the following changes that have been LCJ policy for several years. Many of these proposals have been dealt with in detail by others, both in San Francisco as well as in testimony today, and I will only briefly touch upon them here.

First, support passage of minimal Federal diversity removal legislation, together with other approaches that would streamline and improve coordination and cooperation among Federal and

State Courts to consolidate class actions for pretrial purposes but not for trial. We specifically urge this committee to recommend to the Judicial Conference to support the minimal diversity legislation that is presently pending before Congress. As Mr. Allman testified earlier, we believe that nationwide class actions should be handled in courts having nationwide jurisdiction, the Federal Courts.

We also support a preclusion rule, which would address the problem of multiple conflicting, overlapping, and competing class actions because of the increasing frequency of competing and overlapping parallel suits. I commend to you the comments that were made by Mr. Nelson earlier, as well as the written remarks that Ms. Willett on behalf of Bristol-Myers Squibb has already submitted to you.

While competing Federal class actions can be consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation, neither the MDL consolidation nor similar

interstate consolidation provisions can address the problem of competing class actions in different States, or in both Federal and State Courts. Such a system leads to waste and inefficiency and inconsistencies in court rulings on both substantive issues, as well as discovery rulings.

In San Francisco, there was testimony that this is already being done on an informal basis. However, this is not always the case and often where there has been coordination, it is only after the expenditure of great sums of money, time, and other resources in responding to multiple court proceedings and discovery requests. Preclusion rules in conjunction with minimal Federal diversity and removal legislation would create efficiencies and cost savings for both the litigants and the courts.

LCJ believes that the integration of these proposals would go far towards alleviating some of the most flawed aspects of our system of litigating class actions. I also believe that the Rules Committee's support of these components would help

to achieve fairness and restore faith and balance in the civil justice system.

Finally, I would like to again reiterate my appreciation on behalf of LCJ for the opportunity of appearing here today and presenting these comments. Thank you.

JUDGE LEVI: Thank you very much.

I think we can get one more witness in before we break for lunch. Ms. Middleton?

MS. MIDDLETON: I thank you for the opportunity to be here today and I will try to be brief because I know you want to break. I will incorporate by reference the comments of Mr. Scott, Mr. Goldfarb, Mr. Allman, Victor Schwartz, and John Beisner, the AIA, and so I'll cut out the parts of my written testimony that I would be repeating their remarks.

I am here primarily today to express my concern that your work is very good and the better the Federal Courts become, the more fair, the more cautious, the more scrutiny they give to class actions, the unintended and unfortunate result

we're beginning to see as defendants in class actions, and that is that we will be in Federal Court and we will not be in State Court--we will be in State Court and we will not be in Federal Court, and as Mr. Nelson explained, the plaintiffs' class action lawyers try very hard to keep themselves out of Federal Court, and so for that reason I'm here to ask you to support the minimal diversity legislation and to continue to work on the preclusion rules that are before you.

For as long as we have these overlapping, competing, copycat class action problems, defendants' companies will be required to really engage in coercive settlements. We just don't have any choice.

And I also want to state that, by far, the vast majority of State Courts are very good, but it only takes one or two State Courts to be open to abusive class actions to allow the abuses to continue. State Courts also don't have the MDL proceeding, the ability to consolidate and coordinate numerous cases that are copycats or

similar. They also often don't have the resources, the law clerks, that the Federal Courts have. So it's very important that these large national class actions be in Federal Court.

The insurance industry, I can speak to that and I can speak in particular about the managed care industry class action litigation that's going on. What we are seeing in the last couple years are these nationwide classes consisting of hundreds of thousands and even millions of individuals. We have State Courts who are willing to, in essence, set national policy on insurance matters that should be left to State insurance commissioners, State legislatures. That's where they've traditionally been.

And we are seeing a lot of cases in which the allegations, the issue relates to either diminished value or failure to disclose. We are particularly susceptible to these kinds of cases, and while Federal Courts may be carefully considering the issues, carefully considering the motions to dismiss--certainly that's the case in

the managed care class actions. The entire industry is down in an MDL proceeding. The motions to dismiss are being considered by the Federal Trial Court. Some issues are up with the 11th Circuit. Meanwhile, State Courts have certified classes and those cases are heavily into discovery. They're extremely expensive and disruptive and we're headed to trial.

So, again, the more careful the Federal Court is, the more care it gives to the motions to dismiss, our concern is that it sort of doesn't do us any good. We're headed to trial in State Court.

The other piece I'd like to mention about the managed care class actions is that the first notice that the industry got of these was not with the receipt of service of a complaint but rather reading about it in the Wall Street Journal. A very well known group of plaintiffs' class action lawyers went straight to the Wall Street Journal and announced that they would be going after the industry, and in that article and subsequent articles explained that by forcing our stock down,

our stock prices down--and indeed, that did happen and companies lose billions of dollars a day in market value by some of the things that these lawyers say to the press, they announced that they would force us to settle and they're quite unashamed about it and they, in fact, say it in the court down in the MDL proceeding, that they're making it clear that what they're looking for is a settlement.

So we have very sophisticated lawyers who have figured out how the system works, and again, I will agree with Mr. Nelson. We really are talking about two worlds here. I'm not addressing the civil rights class actions but rather the underbelly, or Lew Goldfarb, I guess, said there's this underbelly, and I really am focusing just on the abuses. They do exist and there are some very sophisticated, very well financed, very good attorneys who do know how to force settlements. They know that the stakes are so high for businesses that the only economically rational choice we have is to go to the settlement table.

Now, the problem many of the in-house lawyers dealing with this have is that it's our job to explain to our clients what it is they did wrong, what they can do to avoid these situations in the future, who is it who is suing us, and who do we talk to to resolve these cases, and how can we be sure that we're really buying peace, and it's becoming increasingly difficult for us to explain to our clients what the class action system is all about and how they can avoid these cases, how they can resolve them, how we can budget for them. Again, these are hugely expensive in terms of defense costs we pay. And how do we predict, which we have to do for our board or for the analysts or the public, what the ultimate relief might be when we have, truly in our cases, 14 million class members who are suing us.

So I do ask you to support the minimal diversity legislation and please, these improvements to Rule 23 that you're considering, I commend you and appreciate your hard work but we do ask that you go farther and really focus on the

abuses and what is happening out in the State Courts.

JUDGE SCHEINDLIN: Two quick questions, again, I think, related. One is do you find that the MDL process works, in other words, there aren't overlapping Federal class action suits that are troubling you within the industry? And secondly, are you finding within a State that there are multiple filings such that an MDL within a State at least would be helpful, if we can't get all the States to do MDL, at least within a State? So I have those two questions.

MS. MIDDLETON: In answer to your first question, we initially didn't want the MDL because we knew the entire industry would be down in one courtroom and it's rather inefficient to have to come to agreement with about 100 different lawyers, but it has worked. For the cases that we have been able to remove to Federal Court, they have been MDL-ed down to the one Federal Courtroom, and as I say, the Federal judge is considering every motion that's getting filed, the motions to dismiss, the

motions on discovery, whatever.

So, yes, the MDL proceeding is working. It's a bit unwieldy when you've got a huge--when you've got the entire industry in one place, but it's working. But there are many cases we removed and they got remanded, and so we are out in 20 or so different State Courts.

I don't have any experience with different cases brought within one State and whether they have sort of some kind of MDL mechanism. I presume that might be a good thing, but that's not the situation we have. We have a Federal proceeding. We have competing cases in Texas, Illinois, California, Louisiana, the usual cast of States.

JUDGE ROSENTHAL: I have one quick question. You mentioned that you support preclusion rules. Do you see a role for or a benefit or need for a Federal-only preclusion rule that would, for example, preclude a Federal Court from certifying a case that was not certified by a prior judge, that is a problem with successive Federal Court class actions in an attempt to

relitigate certification?

MS. MIDDLETON: It would certainly be better than none, but again, the concern I have is that--is with the State Courts. That's really where we're getting hurt.

JUDGE ROSENTHAL: Thank you.

MS. MIDDLETON: Thank you.

JUDGE LEVI: Anyone else?

[No response.]

JUDGE LEVI: Thank you. Thank you very much.

Notwithstanding all this talk about underbellies, our lunch isn't here yet apparently, so Mr. Ruane, if I'm saying your name right?

MR. BUCHANAN: Mr. Ruane will not be here. My name is Butler Buchanan and I was next after Mr. Ruane.

JUDGE LEVI: Very good. Mr. Buchanan?

MR. BUCHANAN: Thank you and good afternoon. I'm a partner with a law firm in Philadelphia called Marshall, Dennehey, Warner, Coleman, and Goggan, but I'm here today as a member

of the Board of Directors in the Defense Research Institute, which is comprised of approximately 20,000 litigators who, all or a substantial portion of their practice is defense civil litigation and I'm speaking on behalf of that organization today.

I want to, on behalf of that organization, to thank the members of this committee, and so many have, for the work and hours that have gone into this task. We all realize that the proposals thus far didn't just pull out of the air but only came after careful and considered reasoning by the committee and the content is reflective of that.

I also just wanted to make a comment, because I've heard so much from my brethren on the defense side and some from the plaintiffs' counsel, I guess, such animosity, and I just want to say to the committee on this issue, it is, but by and large, though, the Defense Research Institute and American Trial Lawyers Association has in the past and I'm sure it will again work together on many issues. Certainly, locally in Philadelphia, when rule changes come across the President Judge's

desk, it's not uncommon at all that defense counsel and plaintiffs' counsel agree and work together to get things changed.

So this is obviously a case where there are real differences, but I'd hate to have--I feel like we're bad little boys and girls here today in front of our parents and haven't been acting properly. Well, you know, it's not always this way, is what I just wanted to say to the committee, and actually, there is a lot of times when we do work real well together.

DRI believes that the proposed changes thus far from this committee are good and sound. I echo to some extent Mr. Scott's comments and Ms. Middleton's and Mr. Nelson's that we would ask you to consider going somewhat beyond the print proposals, and in particular the issue of overlapping class actions is one that was brought to my attention time and time again by my partners and also by people who practice in this area who are members of DRI.

Our experience in my firm and also with

many members of DRI has been that the overlapping class actions that, yes, in fact do exist and that it's not uncommon at all that the same attorney or same law firm will have a State Court action, maybe a second State Court action, and a Federal Court action in court all at the same time. This would have the potential effect of defeating the judicial economy, comity among the courts, and also could yield inconsistent results.

As was mentioned by Ms. Middleton, and we've seen it many times in representation of our clients, there are many times where the only thing to do is settle. Part of the practice that I'm involved in and my firm does is under the Federal Debt Collection Practices Act, and under that act, it's kind of a lockstep, rote way that a collection company must move forward in order to prevail when sued. Typically, these cases are really small numbers, case after case, but when it's a class put together, it can be a decent amount of money.

But so often, we find firms that specialize in this specific area. They'll bring

classes, but small classes, and when you're defending certification and other issues in three different courtrooms, all of a sudden someone in the accounting department is going to come and say, "Hey, you'd better consider settling these cases." It's not uncommon at all where they can shell a real solid defense. I'm sure that they comply with the statute, but for, quote, "business reasons," business reasons being there are overlapping class actions against them, settlements do at times fall out of the trees in these instances.

I guess I mentioned already inconsistent results, but you have situations where perhaps you're getting close to a certification decision in one court. It doesn't look so good. That case seems to go to the back burner and another is pursued, and eventually--of course, this doesn't always work, but sometimes it does in situations where different scenarios are presented to different judges, or really with the same factual scenario, the same case, really the same plaintiffs, just a different named plaintiff.

DRI supports whole changes in legislation that would enable defendants to remove national class actions to Federal Court as part of whatever comprehensive solution this committee and the legislature will come up with to address these issues.

I'm trying not to hit on the issues hit by Mr. Scott and the others just proceeding me, but one point I wanted to make on behalf of DRI is on the issue of timing and certification decision. Proposed Rule 23(c) would replace the current rule that a certification decision would be made as soon as practicable with a more flexible standard that the decision be made at an early practicable time. We would suggest that the court consider keeping that wording the same, as soon as practicable, and not give counsel handling these cases any inference that there should be any delay at all in making that decision, assuming, of course, the proper information is before the court to make that decision.

On the notice issue, we suggest that the

rules require that the certification ought to both define the class and describe the claims issues or defenses with respect to the class that is being certified. That certainly is similar to how it is now, but it gives the defense an opportunity to clearly assess what they're up against, and also from the standpoint of the participants in the class or potential participants, it gives them an opportunity to assess whether they would be part of that class, assess whether they would want to obtain counsel, whether they want to monitor the case or whatever.

Judicial oversight of dismissals, proposed Rule 23(a)(1)(A) confirms the requirement that a class representative does not have the right to dismiss prior to certification and we would strongly support that and ask that there be no alterations to that aspect of the proposals.

In conclusion, again, on behalf of my organization, I wanted to thank this committee for all the work that has gone into these proposals. It is certainly a welcome step forward and while

your work isn't done, we commend you on it thus far.

We do recommend, though, and suggest that the committee go further in the currently proposed amendments and take up the opportunity to amend the rules and create new rules that will remedy problems created by overlapping class actions. The minimized diversity legislation, of course, is one aspect of that.

And just in final closure, three of the noble aims of Rule 23 of class actions are to eliminate repetitive litigation, promote judicial efficiency, and, of course, achieve uniform results, and it's been our experience that, in many instances, that overlapping class actions defeat each of those goals. Thank you.

JUDGE LEVI: Thank you, Mr. Buchanan. Any questions? Judge Scheindlin?

JUDGE SCHEINDLIN: A couple.

JUDGE LEVI: Yes, Your Honor.

JUDGE SCHEINDLIN: Are you seeing a fair number of the voluntary withdrawals of class

actions that are filed with the goal maybe of either judge shopping or forum shopping? I mean, do you see them file and then withdraw, and file and then withdraw, and repetitively? That was one question.

The other one is you mentioned the court approval of the discontinuance, and you strongly support that, but is it also true as another speaker mentioned that you wouldn't support any notice of that because you wouldn't want to give any credence to the notion that it is a class before certification?

MR. BUCHANAN: On the second one, I'd say I wouldn't want to give credence to the notion that there was a class before certification.

JUDGE SCHEINDLIN: So you wouldn't want any notice of the settlement as a requirement?

MR. BUCHANAN: That's correct.

JUDGE SCHEINDLIN: You want court approval, but not a notice?

MR. BUCHANAN: Yes, Your Honor.

JUDGE SCHEINDLIN: Okay. And then the

first question?

MR. BUCHANAN: I'm sorry, the first one was again?

JUDGE SCHEINDLIN: Are you seeing repetitive filings and withdrawals?

MR. BUCHANAN: Yes. Not tons and tons of them, not a great number, but it's not particularly uncommon, either.

JUDGE SCHEINDLIN: Okay. Thank you. Would that be mostly in State Court, then, or are you seeing that federally, too?

MR. BUCHANAN: In State.

JUDGE SCHEINDLIN: State?

MR. BUCHANAN: Yes.

JUDGE LEVI: Thank you very much.

MR. BUCHANAN: Thank you.

JUDGE LEVI: Mr. Ausili? Lunch is here? Oh, I'm sorry.

[Laughter.]

JUDGE LEVI: If you don't mind, I think it might be in your interest.

[Laughter.]

JUDGE LEVI: By my watch, it's 20 to one. I don't know if anybody agrees with that or not, but close enough for committee work. We'll be in recess until ten after one and we will have lunch here. We have it brought in.

For those of you, there is a cafeteria on Level C in this building and then there are many other things that are available over at Union Station in the basement and also on the main floor.

We're coming back at 1:10.

[Whereupon the hearing was recessed, to reconvene at 1:10 p.m., this same day.]

A F T E R N O O N S E S S I O N

JUDGE LEVI: I think we were ready for Mr. Ausili.

MR. AUSILI: Good afternoon. I thank the Chair for allowing me to proceed after lunch. I've always found it to my advantage, particularly when dealing as a child with my parents, to approach them after dinner while they just ate and are close to falling asleep, whether you needed a favor or you had a problem.

[Laughter.]

MR. AUSILI: My name is Peter Ausili. I'm a member of the Eastern District of New York's Committee on Civil Litigation. I'm here to make a presentation on behalf of the committee, and as always, I'd like to commend the work of the Advisory Committee in all respects.

I'd like to touch on the amendments of Rule 23 and on Rule 53, and that will probably put the rest of the group here to sleep, but I will try to touch on Rule 53 today.

JUDGE LEVI: Very good.

[Laughter.]

MR. AUSILI: The Eastern District's Committee, the membership is over two dozen lawyers, practicing lawyers, law professors, and certain court employees, although the only acting court employee is myself, a law clerk to Judge Wexler, Senior District Judge. The other court employees are ex officio members of the committee.

I'd like to start with Rule 23. The committee largely felt that the changes, the proposed changes to Rule 23 were necessary or may have certain effects that go beyond what may have been intended. I'll start very briefly with--I'll try not to repeat too much of what has been said this morning. I know a lot of time and tarry was on Rule 23.

I do agree with--the committee did agree with the comments of Mr. Allman and Mr. Buchanan as to the language in 23(c)(1)(A) in changing the language to "an early practicable time" from "as soon as practicable," and the committee thought that although certification is key in a class

action, the majority felt that that proposed language might not have any significant practical effect and some members felt that it perhaps may encourage delay in the certification process.

Concerning 23(c)(1)(B), the notice requirements and the proposal to require the definition of class issues at the certification stage, the committee largely opposed that provision and thought it may be impractical at that time, early on in the action, to require the defining of those issues, although its definition as required should be in terms of the transaction or occurrence, transaction and occurrence, to appropriately bring in the effects of res judicata and claim preclusion.

The committee thought that perhaps that might prove counterproductive or frustrating to litigants at that early stage in litigation to define those issues. For instance, a defendant at the time of certification may favor issues to be narrowly defined, whereas at settlement time, the defendant may prefer the class issues to be more

broadly defined.

JUDGE LEVI: That's intended to help the appellate court.

MR. AUSILI: Yes, although--

JUDGE LEVI: I realize you're a committee of the District Court--

[Laughter.]

MR. AUSILI: Although we occasionally, working for a judge, do get the perspective when we sit by designation in the appellate courts.

As to the notice requirements, Rule 23(c)(2), the committee was of the view that mandatory notice should not be required for the (b)(2) class actions, believing that in that instance, as Mr. Lee had pointed out this morning, that where those cases typically involve declaratory injunctive relief, it may be unduly expensive and burdensome and may thwart meritorious (b)(2) class actions.

The committee had a concern over the rules requirement that it list various factors that need to be included in the notice. The only concern was

that there may be other factors that should be and may be relevant in an action and the committee was concerned that listing the several factors, it may be construed that that information would be sufficient when other information may be helpful or should be provided.

Certain other factors that perhaps should go into the notice, and the Manual on Complex Litigation lists additional factors, such as to indicate the relief that's sought, to identify the opposing parties, the class representatives and class counsel, provide the names and addresses of class counsel, and to describe succinctly and simply the substance of the action and the positions of the parties. Those may be important material to include in the notice, in addition to what is included in the proposal as bullet points.

For 23(e), the committee believed--the majority of the committee believed that the current provisions of Rule 23 were sufficient, requiring the court's approval of class action settlements and notice to class members regarding the terms of

the settlement.

The committee did have a concern that the notes, the Advisory Committee's notes, while they are always helpful and I hear from practitioners all the time, and I know when I practiced for several years that the committee's notes were always quite helpful and if you have a committee note that's on point, you certainly will bring it to the court's attention. The committee did believe, though, that the Advisory Committee notes in 23 were quite substantial and there are certain references in the Advisory Committee notes that the committee was concerned about that perhaps would be better reflected in text if it's going to be anywhere.

For instance, the reference to discovery for objectors in the committee's notes, it actually seems to lay out the standard that will be applied for an objector to obtain discovery concerning an objection. The notes indicate that if the objector shows reason to doubt the reasonableness of the proposed settlement. It also references a showing

of a strong preliminary showing of collusion and other improper balance. So the committee had certain concerns that the Advisory Committee notes went beyond what the text would seem to indicate.

The committee felt that--they were troubled some by the provision that would bar--excuse me, an objector would be barred from withdrawing an objection without court approval. The committee thought that raised a presumption that was uncalled for and that courts can appropriately deal with issues of withdrawals of objections, and if they think it's unseemly, investigate further the circumstances of the withdrawal.

As to the second opt out provision, the committee thought that that would offer little value, particularly if the claimant has a relatively small claim, there would not be the economic incentive, whether it's the first time around or the second time around, to opt out and, thus, those with large claims, the committee felt that they would normally have the incentive to

investigate and determine whether or not to opt out in the first instance.

One concern the committee had concerning the second opt out was that the rule does not describe what the preclusive effect would be after certification, rulings of the court that are made after the certification and then before the second opt out, where a second opt out is provided in the rule.

As far as 23(g), I would indicate that Professor Resnik, I think, very adequately stated grounds for concern about utilizing a bidding process and putting the judge in that particular role. The committee felt that was early and unwise at this time for the court to adopt essentially a competitive bidding procedure for selection of client's counsel.

JUDGE LEVI: You don't approve of that?

MR. AUSILI: Excuse me?

JUDGE LEVI: You don't approve of that?

MR. AUSILI: The committee?

JUDGE LEVI: Yes.

MR. AUSILI: The committee did not approve of the competitive bidding. I think that it may work in particular cases, and I think over time, when courts and this committee have a chance to better evaluate that process, then perhaps in the future it may be something that needs to be explored.

JUDGE LEVI: Are you about to move to 53?

MR. AUSILI: Yes, I would.

JUDGE LEVI: Why don't we see if there are any questions on 23. Anybody?

[No response.]

JUDGE LEVI: All right. Go ahead.

MR. AUSILI: Okay. I'll turn around again in a few minutes and see if they're awake.

[Laughter.]

MR. AUSILI: Concerning the provisions concerning special masters, the committee fully agrees that Rule 53 does need to be revamped to bring it in line with common practice, and that shouldn't come as a surprise to anyone.

As a threshold matter, certainly the

committee believes that the primary role for a master is to reduce the court's workload. Now, this I can only say in a representative capacity of a committee, is that they felt that once the parties consent to a special master, further judicial authorization is unnecessary. As a court employee, I might not agree with that, but from a committee perspective, they felt that once the parties do agree to a special master, you do not need further court authorization, which the rule does at least indicate needs--it needs court approval.

The drafters thought the rule may have been written a bit too narrowly. The exceptional conditions provision is carried over into the new rule. The committee believed that there perhaps could be certain examples of exceptional conditions and they provided in the written submission several different examples. One is where the matter is so overwhelming that it is unduly burdensome for the court to deal with the matter, particular matter, where the parties are so contentious that the court

is forced largely to ignore the rest of its docket in order to deal with the contentiousness, and where it simply does not make sense for the judge to deal with a particular matter. And actually, those are types of situations where we do see perhaps the need for a special master.

The rule, I will note--the Advisory Committee notes reference that 53(a)(1)(C) deals with pre-trial and post-trial matters. However, the rule itself does not explicitly state that, so the committee would suggest that 53(a)(1)(C) specifically refer to pre-trial matters, collateral matters arising during trial, and post-trial matters. It's only once you read the rule that you're clear that 53(a)(1)(C) then deals with everything else that's not dealt with by the consent of the parties and on jury trial.

As to the scope of review, the committee was fairly strong in their position that the rule be based on a clearly erroneous standard and that the court can adopt a de novo standard, if necessary, on a particular issue. I think that

would certainly depend on the particular matter that's put before the master.

I know in our practice with the judge, we have used special masters in a variety of different contexts, whether it's a special master presiding over discovery matters where there are voluminous documents and issues of privilege and work product, and we've also and are currently considering, with parties' consent, appointing a master in a very complex patent litigation where claim construction is an important aspect of the case, and we certainly see in that instance where review of the claim construction would be a de novo review.

The committee observed a couple of omissions from the proposal in Rule 53, and one in particular is the new rule does not refer to the circulation of a draft report, which is in the current rule and is not an untoward practice. The committee notes even reference the fact that circulation of a draft may be important. But it is left out of the rule. I think with it being in the Advisory Committee notes, it doesn't leave anyone

with the impression that it is improper to do so, but I don't think it hurts if it was in the text that was a proper and appropriate practice.

Now, the committee was concerned with a couple of the ethical issues that are raised in Rule 53, one dealing with the special master and whether the special master can appear before the appointing judge. Imagine our committee is composed of lawyers who are in large firms, medium-sized firms, small firms. Particularly out on Long Island where we sit, there is a large number of small and solo practitioners. And so there was some--the majority of the committee members felt that perhaps excluding a special master from serving before a judge, if that special master at that point in time has a pending case, may create an undue hardship to the solo and small practitioners.

The other issue of ethical concern was the ex parte communications and the committee felt that the rule did not have to require the judge to authorize up front what the content and what

circumstances ex parte communications could occur. But it certainly thinks it's good practice, though, if the court would put in its order, it may spell out when ex parte communications would be appropriate.

JUDGE LEVI: Thank you very much.

MR. AUSILI: Okay.

JUDGE LEVI: Oh, yes, sir?

JUDGE McKNIGHT: May I just ask a quick question?

JUDGE LEVI: Of course.

JUDGE McKNIGHT: On patent issues, I thought I heard you say you referred claim construction matters to a master.

MR. AUSILI: No, no, we haven't done it. We are at the present contemplating that--

JUDGE McKNIGHT: You are contemplating doing it.

MR. AUSILI: Yes.

JUDGE McKNIGHT: Are you contemplating letting a master conduct a Markman hearing?

MR. AUSILI: I think that's right, yes.

JUDGE McKNIGHT: How would that work? Would the master make findings of fact and conclusions of law in the claim construction?

MR. AUSILI: I suppose that would be within the realm of the construction, but then again, the scope of review would be dependent upon the nature of the issues that have to be determined. Certainly, some claim construction can be done on its face, and that's purely an issue, then, of law for the court. But to the extent that there are factual issues, they would have to be dealt with the master in the first instance and then the court would have to determine its scope of review from those determinations, whether they depend on credibility or not.

JUDGE McKNIGHT: Just one follow-up. The Markman is almost sometimes under electronics and subsequent cases a quasi-summary judgment.

MR. AUSILI: Sure.

JUDGE McKNIGHT: Does the committee feel that that would be within the scope of a master under the proposed rules?

MR. AUSILI: Sure, that that could be something that can be referred to a committee, yes.

JUDGE McKNIGHT: Okay. That's something we need to think about. Thank you.

JUDGE SCHEINDLIN: Just a point of information. Do we have your comments in writing?

MR. AUSILI: Yes, you do. I don't see them on the table here, but our committee did make these submissions.

JUDGE SCHEINDLIN: I think none of us got them and it would be helpful at least for me to have them in writing.

MR. McCABE: We're having several mail problems with anthrax, so--

JUDGE SCHEINDLIN: Really?

MR. McCABE: We are getting mail now from October.

MR. AUSILI: Then I can run before any of the tough questions.

[Laughter.]

JUDGE SCHEINDLIN: That's what I wanted to know. Thank you.

MR. AUSILI: I will make sure that they--

JUDGE LEVI: We'll make sure, as well.

MR. AUSILI: Okay. Thank you.

JUDGE LEVI: Thank you very much.

Mr. Hilsee?

MR. HILSEE: Good afternoon.

JUDGE LEVI: Good afternoon.

MR. HILSEE: Thank you for inviting me. As a non-lawyer practicing in this field, I'll give a little background on myself and the business. I'm going to try to offer a different perspective than you've probably heard this morning.

I'm the President of Hilsoft Notifications, a Philadelphia-area firm focusing on consumer class action notice planning, implementation, and expert analysis. I've handled about 100 cases, split evenly between defendants and plaintiffs, placing notices in 45 countries in 34 languages. With my background in the advertising industry, I've written and designed notices for the large cases involving Holocaust restitution, home siding, breast implants, tires,

tobacco, asbestos, insurance, pharmaceuticals, and others in State and Federal Courts. My testimony has been cited on the analysis of notice adequacy and my court-approved programs have withstood appellate challenges.

I've tried to improve notice effectiveness by reaching more class members, giving noticeable clear, simple messages. In addition to showing courts that we can scientifically study the reach of a notice dissemination plan, ensure that a lot of class members actually have a chance to see the notice, I've focused on the design and content of notice. I hope to provide the committee with a communications perspective that's driven by practical realities.

All of my comments address Rule 23(c)(2), particularly the notice issues, as amended, beginning on page 40 of the preliminary drafts of the proposed amendments.

First, I applaud the committee for its focus on the importance of communication with class members. The self-evident truth that plain

language is good cannot be questioned and I support it. However, the plain language notice amendment by itself will not help notices come to the attention of class members, which is really the major notice abuse today.

The main problem is that the plain language amendment addresses only one of the three key notice objectives, in my opinion. First, notice must get to the class. It has to effectively reach an appropriate percentage of people, net reach and frequency of exposure methodology. These are tools that have long been used by communications professionals to mathematically determine how many people are exposed to vehicles with communications messages in them has become well established in class action litigation since In re Domestic Air, 141 F.R.D. 534 in 1992, the Northern District of Georgia. This allows courts to study notice adequacy from a logical basis. How many class members will be notified and what percentage of the total class does that represent?

MR. MARCUS: Mr. Chairman, can I possibly interrupt just for the question there, not about content, because that's what you're talking about, but method?

JUDGE LEVI: Yes.

MR. MARCUS: Some of the earlier witnesses have expressed concern about the expense of giving notice in circumstances where it's not now required, particularly in cases of a sort where it's not now required. I wonder if you could educate us about what kinds of technological or other techniques there are that might provide some effective notice without generating huge costs, putting aside for a moment the question whether the content of the notice is ideal.

MR. HILSEE: Right. If you put aside content, which is the main thrust of what I'm talking about here, but if you talk about dissemination and cost, there's no question it can be costly to give national notice where you can document that you've reached a large percentage of the class.

My experience is, though, that best notice practicable is interpreted broadly because of the nature of the wording, best practicable, and various things that I've found, courts do enter into a decision on what's practicable and whether it's practicable to reach a certain percentage or not.

The Internet, the usage has broadened. Issuance of press releases can sometimes result in certainty of notice exposure, but other times, it doesn't.

So it's difficult for me to say how much is enough. That's not my decision, I don't believe, to say, but rather what's the best way to follow the rules as they are and follow the law as it's laid out.

MR. MARCUS: Well, just as a follow-up, I guess my concern was, without asking how much is enough or what the content should be, in a sense, my question is how little might be enough and how much savings might one accomplish in a way that would still be reassuring about giving some notice.

If you were presented with the task of giving notice of a class certification in an injunction class action--that's one of the things we're talking about--say the bus riders in a metropolitan area, do you think current technology would enable you to give some relatively broad dissemination at some moderate price, not hundreds of thousands of dollars?

MR. HILSEE: Well, it depends on the geographic scope. If it's limited to a certain city or region, I think you could probably definitely frame a reasonable notice program. If you're talking nationally, it's going to be more costly.

The problem that I face a lot of times is a perception of effective notice that's given by something that's national in scope, like the USA Today. We see that a lot. We see somebody place a notice in the USA Today thinking that they're providing some effective notice when simple math, looking at their own published circulation statements, shows that, at best, that that notice

will reach three percent of a given class of people affected by it. So it's difficult and cost does enter into it.

MR. MARCUS: Okay. Thank you.

MR. HILSEE: Yes. So despite our headway in the area of reach and methodology, showing how to effectively reach people, many notice programs do proceed, as I've just discussed, where simple calculations would reveal that a tiny fraction of the class had a chance to read anything, regardless of the content.

But secondly, the notice must be noticed, I believe. It must come to the attention of class members. I've actually heard parties unsuccessfully argue that a notice would be too noticeable. I think being noticed is the purpose of notice. The notice is delivered in an environment together with all the messages received by class members during his or her day. You can't pretend they get our notices in a clean room without distractions.

And then finally, the notice must be read

and understood. It must be simple, clear, and easy to act upon.

So the plain language amendment addresses only the third point: I don't think we can have plain language without at least calling for concise notices or without calling for notices that are designed to be noticed.

As shown by the sample model notices developed as a useful starting point by the Federal Judicial Center, which probably would mirror a reasonable person's interpretation of the plain language amendment if it were adopted without also adopting concise and designed to be noticed requirements, that could result in actually less effective reach of fewer class members, and I've separately suggested to the FJC that the sample model notices can be improved and I've offered to help.

I think the main message needs to be front and center so that readers notice them and know at a glance that it affects them and why it's important.

Second, a legal pleading style means that far fewer people would notice and read them than if they actually used prominent headlines or appropriate envelope call-outs and other inviting, well-known design features.

Third, they need to be shorter and less cumbersome. In mailings, lengthy explanations, even in plain English, result in notices that are not read. People are just not as interested in absorbing all the information that courts and lawyers deal with daily. In publications, in order to save money, smaller, less noticeable, less readable type would be used and fewer notices would be placed in fewer publications.

Finally, even the sample summary notice would neither be noticeable nor inviting as a publication notice, for sure. I fear that, in practice, the samples would probably be used for publication since they are model notices and are not indicated otherwise, and I suspect would be approved by courts. Parties struggling to include all of the information to conform to the models and

fit them in the publications at a reasonable cost will squeeze the text into a small size and run them in the back pages for less money. This could push us back to the small type, back page notices that the Supreme Court criticized long ago in Mullane.

Notices have only a fleeting chance of attracting attention and readership. The main message, who is affected, and why it is important to them must be the first item that draws their attention. The main message is not attention or the name of the court or the legal caption for the case or the title of a document, summary notice of class action. The court does provide substantial credibility and should be prominent in a notice, even at the top or on the outside of the envelope, but these are not part of the main message and will not by themselves ensure readership.

Uninviting visual clues feed perceptions that notices are lawyer-driven, disseminated simply for legal protection, boring, and not necessary to read.

Even all the notice concepts I've spoken of to this point would do nothing to tackle the primary concern of a notice program, and that is is the class being reached at all? And in my written comments, I suggested uncertainty between the concepts of reasonable number, best practicable, and reasonable manner in terms of how many class members should be reached by classes of different types, whether it be (b)(3), (b)(1), or (b)(2).

Admittedly, the design and content of notices are awful, of many of them. Lawyers draft them like legal pleadings as if the judge were the intended audience. Notice or the lack thereof can be used as a tool for minimizing negative publicity or as an elastic mechanism to reduce class participation and, therefore, costs in a claims-made settlement, or by plaintiffs to avoid a costly campaign or the potential for handling responses and opt outs.

Plain language is just one of the things that a bad notice program avoids. Often, bad notice programs start by putting consumer notice in

the legal section of a newspaper written for business executives, or mailed to an old list of class members without any knowledge of whether the list is accurate, or by window dressing techniques, like publication in the USA Today, providing appearance of notice but reaching a small fraction of the class. Then even if someone comes across the page it's on, the notice is passed by as a result of a design that is not attention getting.

The trend toward simple consumer notices has already been rising and courts have been approving them, and I'd be happy as a follow-up to submit some examples of notices that would demonstrate this that I've been fortunate to have approved by Federal Courts and State Courts. I believe as courts continue to be shown and expect what is practicable with modern notice techniques, that reasonable notice will become more consistent, serving everyone's goal of improving communication with large numbers of class members.

JUDGE SCHEINDLIN: David?

JUDGE LEVI: Sure.

JUDGE SCHEINDLIN: Two questions. We've heard today the phrase "sampling notice." As an expert in communications, can you tell me what you think of sampling notice? Is it effective? Will it really give you reason to believe that the class has been reached in a fair way?

My second question is, do you have a view as a communications expert between an opt in and an opt out program, so to speak? So those are the two thoughts.

MR. HILSEE: First, on the sampling, I've been perplexed by that to some extent. Certainly, it's only possible in cases where there is a known class, where there's names and addresses, which is as many times as not the case, could not be done when a class is not identifiable. I can't publish a notice in every other issue of a publication.

So I'm not certain what that would achieve. It may give you a sampling of--a fair sampling of those people who are interested in objecting, but I haven't studied that enough to be able to say whether that's going to be a useful

tool or not.

The second question was--

JUDGE SCHEINDLIN: Opt in, opt out.

MR. HILSEE: --opt in, opt out. Certainly, there's been criticism as to the participation rates, and not largely that's obviously driven by how much notice. The problem is that class members have a lot of information that they're presented with in a given day and the fact that a certain percentage do not respond is not indicative that they didn't read or understand the notice. It's whether they have other things to do and they have other things that they're interested in doing, or it may show that they're totally satisfied with it.

So the number of responses, I have found, is all over the lot, and I've had cases where there's been the same level of notice that have generated hundreds of thousands of phone calls and other situations where there isn't. If there's a litigation notice and no settlement, where there's no ability to file a claim and get money, you're

not going to get response.

So I'm not sure that opt in would be an effective way of proceeding because you wouldn't have any sense that someone who doesn't respond is not interested in participating.

JUDGE LEVI: Mark?

MR. KASANIN: Yes. Just as a matter of education, is there a trend now away from having lawyers writing notices and instead going to communicators, wordsmiths, people who have to write warnings for vehicles or whatever in place of the lawyers?

MR. HILSEE: I write all the notices in my cases. I speak for myself.

MR. KASANIN: What about generally?

MR. HILSEE: I think that other cases, lawyers are writing notices, and I think we see those in the newspapers and in the mail. I personally need to be able to look at them and be able to write them in clear, simple English.

MR. KASANIN: But do you think the judges are becoming more aware of the importance of

communicators--

MR. HILSEE: I think they are. I definitely think they are. I think that's on the rise and I think that's been a positive.

JUDGE ROSENTHAL: A couple questions. First, I want to tell you how much we collectively appreciate your working with the Federal Judicial Center to improve the quality of the model notices that they're developing. That's a tremendous contribution and we appreciate that very much.

You raised three points that are criteria for good noticing, and I was interested in your thoughts on how the rule itself that we've proposed could better support the creation of those or the insistence on those kinds of notices. The word "concise" was one you hit on and it's in the proposed rule language, that says that a notice must concisely and clearly describe in plain, clear, easily understood language. And the content in terms of plain and easily understood language is also part of the proposal.

What other words do you think would be

useful to have in either the rule or the note that would help judges look for the kinds of characteristics that they ought to be insisting on in approving particular notice?

MR. HILSEE: Well, I think designed to be noticed.

JUDGE ROSENTHAL: That's a nifty phrase, notice designed to be noticed. I'm not being facetious. It's just a nice turn of phrase.

MR. HILSEE: No, I think you're--I'm just going to give you an example. I'm not going to identify who this is, but this is a notice that appeared in the USA Today. I had to get a magnifying glass.

Compare that to the notice that I ran, and I'm not going to tout my own horn, but the notice that we ran in the Swiss banks case with a bold headline that says, addressing those who were persecuted by Nazi persecution. Just a few words, passing, reading through a newspaper, you have at least a chance of knowing if this affects you, to stop on it and read it, and I think it's not

something that adds to the cost. It doesn't make it more expensive.

It doesn't--because a notice has to be and must be vigorously neutral in the way it's written, it's not adverse to either party. Like I say, I've worked for plaintiffs and defendants and I think it's in everyone's interest, the class members' interest, that they have a chance to know that a notice affects them in a simple glance, and that's the big difference.

When you're writing plain language, if you try to take a legal concept and you write it in plain, simple English, that could expand greatly the words you need to use to express those concepts. So unless you're factoring in conciseness and designed to be noticed, you could end up with a lengthy document that if you do take the time to sit down and read for several hours would be useful, but I think without the design to be noticed feature that you might not see the benefit that you would hope to see from the plain English.

JUDGE KYLE: When you say designed to be noticed, you mean you want the recipient to see the notice and you want them to take the next step and actually read it?

MR. HILSEE: Yes, actually read it, yes. Even in direct mail, I mean, the perception of direct mail coming into the household as that's the best notice, well, I mean, I get, as we probably all do, I get things in the mail everyday, tons and tons of junk mail, and Postal Service statistics document that 87 percent of mail that's perceived to be advertising is not read.

I got something yesterday from the Administrative Offices of Records Division. To me, it's obviously junk mail because there are so many of these things that come. I think you have to take steps in mail and publication to ensure that they're read.

JUDGE LEVI: That was a paycheck from the AO.

[Laughter.]

MR. HILSEE: I think what it was was a

Ramada Plaza resorts.

[Laughter.]

MR. LYNK: So you opened it.

[Laughter.]

MR. HILSEE: I save them.

MR. SCHERFFIUS: Did you, on page eight, are you citing what you feel are inconsistent messages being sent through the various parts of Rule 23? I'm talking about in your written preparation you were talking about reasonable number of, best practicable, reasonable manner. I'm not sure I get your message there. Are you saying that--

MR. HILSEE: I'm saying it's not clear.

MR. SCHERFFIUS: --inconsistent messages--

MR. HILSEE: I think it's inconsistent. I think it just leaves uncertainty for the planner. I mean, I perceive that due to the inability of class members to request exclusion that notice to 23(b)(1) and 23(b)(2) classes are deemed adequate to a, quote, "reasonable number," but it need not conform to the higher best practicable standard

that 23(b)(3) classes have to adhere to, and the committee notes that Mullane explains reasonable as reasonably certain to reach most of those interested in objecting.

The Court of Appeals in the Third Circuit in a 2001 decision in Orthopedic Bone Screws says, however, that the Supreme Court in the Ortiz Fiberboard case implies that the level of notice for a (b)(1) action is the same as that required in a (b)(3), the best notice practicable.

And so for my purposes, it's vague. How many constitute a reasonable number? How many is most? Because it boils down to we can determine percentages, and courts routinely are looking at what percentage of the class is being reached by this notice program, and I started that back in 1982, and settlements now routinely, with courts looking at, you know, whether it's 70, 80, 90 percent, and we can mathematically get petty close to percentages that are covered.

But you see wide variations between notice programs that are deemed to be the best notice

practicable that reach a small percentage, if you run the math, and notice programs that are deemed practicable that reach 80, 90 percent, so--

MR. SCHERFFIUS: So what is the fix for the type of what you see as language inconsistencies? Is it to drop--

MR. HILSEE: I don't know--

MR. SCHERFFIUS: --that type of language or is it to be more specific or is it to go into the Advisory Committee note, make some recommendation? I'm not sure--

MR. HILSEE: Yes. I don't know that I can really hammer on a fix for that, because I think we have to be reliant on the court's discretion on what determines practicability for different cases based on jurisprudence that's out there, because it'd be hard for me to justify $3 million for a notice program for a settlement of $3 million. That would be silly.

So I don't know that there is a good fix for that, but I raised the point--I guess I raised the point in noting that you've deliberately

written language--for the new (b)(1), (b)(2) language, you've written language that says, calculated to reach a reasonable number of class members. It's just--it's not a useful phrase because what is that? Is that more or less than what we were supposed to be reaching in a (b)(3) class, which does not identify a certain number and just says, if you follow the note file, it goes to most. Does that mean 51 percent? I mean, these are some of the problems.

MR. SCHERFFIUS: Are you answering that it's best to leave that general, this type of language, I mean, because you're dealing with all types of cases.

MR. HILSEE: I think it is.

MR. SCHERFFIUS: We can't do very specific language.

MR. HILSEE: I think you're right.

MR. SCHERFFIUS: Okay.

JUDGE LEVI: Thank you very much.

JUDGE KELLY: Could I ask one?

JUDGE LEVI: Sure. Of course.

JUDGE KELLY: Do I understand your position to be, though, that even if you had a direct mailer to every member of the class, if it was put together the way that one you showed was put together, it would be your position that really did not constitute adequate notice?

MR. HILSEE: Yes.

JUDGE LEVI: Thank you very much.

MR. HILSEE: Thank you.

JUDGE LEVI: Mr. Romine? Good afternoon.

MR. ROMINE: Good afternoon. Thank you very much for hearing my testimony and receiving my written testimony. I understand that both my request and my written testimony were received late, so I am really grateful for the indulgence this afternoon.

I'm David Romine. I'm an associate at Fine, Kaplan and Black in Philadelphia. We're primarily a plaintiffs' class action firm and within that we're primarily a plaintiffs' antitrust class action firm. I'm also a co-chair of the ABA Subcommittee on Antitrust Law within the Class

Action and Derivative Suit Committee, but I don't speak for the ABA or the committee or even the firm. That's just by way of background. These are my own thoughts.

I'd like to commend the committee on its work. When looking at some of the materials, and some of the other witnesses have said that this work goes back to 1991, so obviously a lot of thought has gone into this and I commend the committee for that. I would also endorse the proposal to make sure that notices are written in plain language. That's the biggest genuine problem in class actions. I think that notices are often getting thrown away without being read, and that's a real problem.

The main focus of my testimony today, though, will be the Rand study and the FJC study, two empirical studies that took close looks at class actions. The reason why I want to focus on those is that I think if you take a close look at them, they really show that there are no systemic problems with Federal class actions.

The Rand study studied ten class actions, five in State Court, five in Federal Court. The Rand study--and I'm talking now about last year's class action dilemmas book--the Rand study had a lot of good information in it, but the two main points were that settlements were being approved without judicial scrutiny and fees were sometimes out of whack. Those were the two main points, at least that I got when reading it.

The authors of that study praised five courts, five judges out of the ten cases and said these five cases were cases where the judges took a good look at these settlements and they improved upon the settlements that the parties came up with, and that's what judges should be doing in class actions. Four of those cases were Federal cases. One was State Court.

The Rand study said there were three cases where the judges did not look at the settlements. They rubber-stamped the settlements. The class members, in their opinion, were hurt because the judges did not do a good job of looking at really

whether the settlements were in the best interests of the class. In those three cases, one was a Federal case, two were State Court cases. The other two cases did not get the sort of specific and detailed analysis.

So of the five Federal cases that were the subject of the Rand study, four of those cases, the Rand study said, the judges are doing a good job. The judges are looking at these settlements and they're improving the quality of settlements. In one case, the Rand study said this is a poor settlement because the judge did not pay attention.

Going to the fees, the Rand study looked at fees in a couple different ways. In the first initial way, the Rand study said, in most of these cases, the lawyers are getting 30 percent or less--in fact, I think in all of them--30 percent or less if you measure it one way. That is, what the lawyers get compared to the total possible gross payout, 30 percent or less, and in that way, it seems like the lawyers are getting what a typical contingency fee lawyer might get.

But if you measure it another way, there is a problem. If you measure what the lawyers get compared to not what the total gross payout might be, but what the total payout actually is, subtracting administrative costs and funds not claimed. So if you look at what the lawyers get and what the class members actually received, there were three cases that the Rand study singled out for criticism and said, in these three cases, the lawyers got more than the class members. Those three cases were State Court cases, not Federal cases.

And, in fact, you have to go down to number five before you get to a Federal case, meaning that the case where the lawyers received the most compared to the class members, got more than the class members, was a State Court case, and you have to go to one, two, three, four, five before you get to a Federal case, a case that was decided in Federal Court in which that was no longer a case where the lawyers got more. The lawyers got--it was close to 50 percent, but it was

under 50 percent, and then the rest of the Federal cases were below that, below even the 30 percent benchmark.

So if you're talking about the Rand study's problems, where they're saying these are problems that cry out for solution, those are problems in State Court, not in Federal Court. Again, the Federal Judicial Center study looked at these problems in a little bit different way, but I think the same conclusions can be drawn, and there are many, many statistics in here and they're sliced and diced in many different ways and it's very interesting, but I'd just like to bring out a few examples.

The settlement rates for class action and non-class action were approximately the same. The majority of class action settlements had decisions on the merits, either decision on motion to dismiss or summary judgment before the settlement. And the judges attached special importance to the benefits actually received by the class members when evaluating fees. In fact, the study mentions that,

based on the anecdotal evidence, which we've heard echoed here today, they expected that there would be some significant portion of cases where the judges did not look at the actual benefits when deciding fees. But at least according to this study, that didn't happen on any systemic basis.

And I think that that view is actually echoed in the notes of this committee back in March, which I think recognize that the problems were not the problem of the typical class action but that there were class actions out there, cases out there where there were significant problems, and I--because the references are not specific, I don't know if that sort of ties into what the Judicial Center study is--basically, that securities and civil rights cases are more routine, didn't result in more problems, but I expect that's so. I would just add to that, because they are almost always in Federal Court antitrust and some of the consumer statute class actions, which I believe result in more routine pre-hearings.

So I think that at least in the Federal

Court arena, the problem with class action is a problem of public relations. It's not a problem that needs to be addressed by the rule. And so it's a problem really of public relations and public education.

We've also heard a lot today about jurisdiction, but the jurisdictional issue, at least as I understand it, is not before this committee on these proposed rules. What's before this committee are the proposed changes that were published for comment, and in my view, the question should be, if we've got no systemic evidence of abuses, are the costs we're going to impose on the class members in every case worth the benefits we're going to get from the class actions that are the problems, the anomalies?

We've heard a lot, again, about the benefits of these proposed changes. I would suggest they're costs. These are costs in making judges spend more time on class actions. They already spend a lot of time on class actions, could be two or three compared to--one study all the way

up to 11--times the amount of time spent on a typical class action. That's basically--another word for it is regulation.

You're adding a lot more procedural steps to class actions from the get-go, all the way from the class appointment provisions, proposed Rule 23(g), to Rule 23(h), which requires findings of fact and conclusions of law on attorney fee provisions, and if I read the rule correctly, that Rule 23(h) would be the only time that a motion in Federal Court would require findings of fact and conclusions of law, something that Rule 50 explicitly says are not required on any motions, even motions to dismiss, a motion for summary judgment. The only motion that ever requires findings of fact and conclusions of law under the Federal Rules would be motions for attorneys' fees, something that's not even required for class certification.

So I think that the costs that you're going to be imposing on class members will be that decisions and settlements and resolutions will come

much later, because you're imposing these additional procedural requirements which are going to take time, and you're going to be imposing costs in terms of money, too, because plaintiffs' lawyers and defense lawyers are going to have to spend more time and money justifying the outcomes that happen.

They may be the same, they may be different. As I go back, there's no empirical evidence that they are going to be different on a systemic level. But even if they are the same, you're going to have to spend more lawyer time getting to the ultimate result, and that is a transaction cost which is going to marginally reduce, because of the regulatory burden, so to speak, it's going to reduce the ultimate benefits the class members get, both in terms of time and in terms of money.

I do have one--that's sort of a big picture. I do have one or two real specific proposals, and that is if you do go ahead with the class appointment provisions of Rule 23(g), I think that that really should be done much earlier than

class certification because you need class counsel to represent the class at the time they're getting the discovery to put together the class certification motion.

The other question doesn't really have a specific fix that I'm aware of right now, but in 23(e), the objector language is troubling to me because the committee notes suggest that objector discovery may be more available than I believe the current law to be, but yet the 23(e) rule itself does not address that. So I'm sure as to where the committee is going with whether the proposal is explicitly designed to change the law and widen objector discovery or not. If it is, I think that's unwise and another piece that would delay the litigation and also make it cost more.

JUDGE LEVI: Judge Scheindlin?

JUDGE SCHEINDLIN: You suggested that the class counsel be appointed before certification. Of course, there isn't a class before certification, so what would you be appointing? In other words, you couldn't call it the class

counsel. Would it be putative class counsel or what would your suggestion be?

MR. ROMINE: That would be one way to handle it. I mean, the way it's handled now seems to me to work pretty well. At least the cases that I work in, they're often antitrust MDL cases where the cases get MDL-ed and certified. The judge, and it's not a term of art, the judge could use lead counsel, class counsel, liaison counsel, and everybody knows what's going on and it seems to work pretty well. But that event is necessary because that person or firm then coordinates the discovery that's needed for class certification.

JUDGE SCHEINDLIN: And then would one revisit it again upon certification? In other words, if we took your suggestion, it was a two-step approach. So at first we would appoint, I don't know what, putative class counsel or lead counsel. Then you have a class. Would you open it up for maybe this competitive notion or for anybody who wanted to apply for the job?

MR. ROMINE: No. I think that whatever

process the committee ultimately determines is necessary should happen at the very outset of the case and that that be final for those purposes so that the class counsel is appointed or chosen or designated right away, and you don't have to call him class counsel, or her. You could call her lead counsel or putative class counsel. But whatever you call that person, that should be done right away and that should be final for class purposes from the outset.

JUDGE KELLY: As a plaintiffs' lawyer, do you see any problems with this competition to be lead counsel? In other words, if you had a good old plaintiffs' antitrust case and you'd set it all up and then I whipped in and I--

MR. ROMINE: I do see some problems with that--

JUDGE KELLY: Are they real problems or is it just--

MR. ROMINE: I think they're real problems and I've heard those problems expressed already today, but I'd just like to highlight two of them.

One is that you might--we typically have an attorney-client relation with the cases that we file, at least when we file a complaint, we have a relation with a client, and it's disturbing to me that some other law firm that does not have a relationship with this person or this business could come along and take that away. So there's an attorney-client relation there, and then there's also the, I guess you might call regulatory aspect to it, too, where lawyers are going to be discouraged from bringing cases if they think they're not going to be class counsel.

JUDGE KELLY: Let me follow up with one other question. Do you see any appearance of impropriety with the judge who's hearing the case picking somebody to be the lead counsel and then working with them as the case progresses?

MR. ROMINE: There is a problem with the appearance of impropriety and I thought that Professor Resnik's comments were very interesting and informative on that topic.

JUDGE HECHT: Given the lack of systemic

problems in Federal Courts handling these, do you think the minimal diversity legislation is a good idea and the other proposals to give preclusive effect to Federal Court decisions about denying certification and disapproving settlements?

MR. ROMINE: I hadn't really thought about the minimal diversity too much because it's not on the table here and I think that's going to be dealt with.

JUDGE HECHT: Several have talked about it.

JUDGE LEVI: It's a big table. It's on the table.

[Laughter.]

MR. ROMINE: It's an interesting concept. I haven't actually read any bills, so since I haven't really read about them, I don't want to talk about it. I'm sorry, I'm not as well versed in that proposal as I am with these particular provisions.

JUDGE HECHT: Among the proposals are those to give preclusive effect to Federal Court

decisions regarding denial of certification, and what's your view of those?

MR. ROMINE: I guess I'll give sort of two sides to that. I heard described earlier today a case where a Federal Court, I believe, enjoined a State Court from proceeding on a competing class action, and from the description of the case that I heard, it seemed like it was appropriate in those circumstances. Not having been involved or really knowing anything about that, I think in some cases, that may be appropriate and I think that we've heard that some judges already believe they have that power and are exercising it.

I do have another concern, though, in that we are in a Federal system and there are State laws and State procedural laws that States have and that they're entitled to have, and so that do we want Federal District Courts saying as a matter of Federal law, you can't certify a State class action? I'm not sure of the answer to that. I just raise it as an issue, again, not having studied it in any detail.

JUDGE LEVI: Mark?

MR. KASANIN: I don't have your written work, but as I followed the discussion about the Rand Corporation's report, I understand that in the Federal Courts, you don't see a problem for class actions apart maybe from public relations or image.

MR. ROMINE: Well, I guess my point was there are no systemic problems that were identified by the two studies that I talked about and I think that kind of generated at least some of the proposals here.

The Rand study, I think is fascinating. But when you read the recommendations, it doesn't always sharply distinguish between those cases that were filed in Federal Court and those that were filed in State Court because maybe that wasn't their mandate. Maybe that wasn't their commission.

When you go back and look at what cases generated the problems in those cases, and they talk about judges need to pay more attention to settlements because of these cases and they need to pay more attention to attorneys' fees because of

these cases, those are State Court cases not Federal cases, except for the one contact lens case in the Rand study.

MR. KASANIN: I was left with the impression you thought that there might be--if anything was wrong in the Federal system, it might be the image that the class action has, is that right?

MR. ROMINE: Well, yes.

MR. KASANIN: And is there some solution that you would propose to deal with it? I agree with you. I think there is an image problem.

MR. ROMINE: I think public relations on the part of the bench and the bar.

MR. KASANIN: I'm really directing my comments to consumer class actions.

MR. ROMINE: Consumer class action. Aside from just responding, I think, to op-ed pieces, as lawyers, we may read reports of cases that are written in such a way that they seem the class action results are unfair. Maybe they're unfair, maybe they're not unfair, and it's not a problem

just with class actions, it's with all aspects of cases. And when we see something that's reported incorrectly, we should call them on it and we should write an op-ed piece. We should ask to speak on the local television news and say, this is wrong. You reported this incorrectly.

MR. SCHERFFIUS: I didn't follow what you found troublesome about the 23(e) language on objectors.

MR. ROMINE: Okay. It's a problem with the draft note, because the draft note talks about objector discovery, but I believe the language, the black letter language of the rule, does not.

MR. SCHERFFIUS: So do you feel like it-- I'm not sure I see what you're saying.

MR. ROMINE: Right, but that may be because my own thoughts are somewhat confused, and my confusion results from the fact that I'm not sure if the rule changes are designed to bring about a change in the discovery that is allowed to objectors.

MR. SCHERFFIUS: Because the note itself

does not mention discovery?

MR. ROMINE: Well, because the rule itself, the rule doesn't mention it but the note does.

JUDGE LEVI: Have you had the experience where a defendant has tried to settle one of your cases in State Court?

MR. ROMINE: No, because I think since we deal primarily in the antitrust cases--

JUDGE LEVI: That's not a bar--

MR. ROMINE: Right--

JUDGE LEVI: --so why doesn't the forum shopping work both ways? I think maybe your partner indicated that it has, on occasion, Allan Black.

MR. ROMINE: Right. I know he submitted written testimony.

JUDGE LEVI: But there wouldn't be any reason why--a defendant could go into a State Court that didn't have jurisdiction over the Federal claim and settle the case on some State law, say antitrust claim, and bar you from proceeding.

MR. ROMINE: Yes, I guess that is possible. Yes, it's possible. I have not seen that, but it is possible, yes.

JUDGE LEVI: Anybody else?

[No response.]

JUDGE LEVI: Thank you, Mr. Romine, very much.

MR. ROMINE: Thank you very much.

JUDGE LEVI: Mr. Rheingold?

MR. RHEINGOLD: Good afternoon. It's kind of difficult to speak in the afternoon because most of the things that I was planning on saying have already been stated, so I'll try to be fairly quick and sort of talk about our organization and what our beliefs about class actions are and just hit on three quick points.

I'm Ira Rheingold. I'm the Executive Director of the National Association of Consumer Advocates. NACA is a nonprofit organization comprised of private, public sector, and legal services attorneys, as well as law professors and students, whose primary practice of work involves

the protection and representation of consumers. Our mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices.

From its inception, NACA has focused primarily on predatory and fraudulent business practices affecting consumers. One major area of our concern is class actions. In recent years, class actions and particularly class actions that are resolved by settlement have been subject to considerable public criticism. At times, this criticism has been warranted. However, much of the criticism has been generated by professional objectors and by defendant companies who are motivated by a desire to immunize themselves from liability for wrongs rather than by any concern for the public interest.

Certain types of businesses, such as financial institutions and insurers, commonly deal

with large numbers of consumers in similar ways. Often, such businesses are essentially immune from individual suits for damages since the amount at issue as to any particular consumer are small. These entities harbor an expectable dislike for the class action procedural device since it provides an effective tool for consumer redress in such situations.

While such entities are entitled to have their voices heard in any public debate, it appears that a concerted effort has been initiated in recent years to undermine the legitimate uses for class actions by overemphasizing the relatively infrequent occasions when abuses of the procedure occur. Even when class actions could be brought, it is only through class action status and class-wide discovery that the defendant's wrongful practice and its effect on large numbers of similarly situated consumers may be carefully and accurately determined. Class action discovery thus can improve the strength and size of the eventual recovery for affected consumers.

Let me just make one point. I haven't submitted a written statement at this point. I will be submitting that in the next couple of days. There is nothing in front of you that we have submitted at this point.

Class actions also can and have been abused. Therefore, a few years ago, NACA undertook to provide guidelines for honest and effective class action litigation in order to educate practitioners and courts on how to avoid conduct that is or may appear to be improper and on the most appropriate and effective way to fulfill the special obligations of class counsel to the class. The culmination of these efforts was published in the Federal Rules Decision and we think it's an important document and we offer it to our members because we think it's very important that class actions are used in seeking justice. We're very interested in the issues of justice and not in abuse and not of just collecting attorneys' fees and we stand for that proposition.

As to my comments about the rules, I

simply would like to endorse what my colleagues at Trial Lawyers for Public Justice and Public Citizen have stated for the most part. We agree on almost all the points they've raised and think that--and we simply endorse their testimony.

Our comments will be limited to three areas. First, simply the plain language. We think the plain language is extremely important, and while I was going to just say how we thought the proposal was right on, after hearing the commentary from the person who is an expert in communications, maybe it needs a little more work. Obviously, notice is extremely important and we want class action cases and all this litigation to be as open and as honest as possible and we want as much notice as possible so that consumers out there actually understand what's going on. I thought the suggestions you made were extremely interesting and very important for all of us to consider.

The area of--and we also commend much of the proposal. We like a lot of the proposals and I'm not going to get into the things that we

commend--

[Laughter.]

MR. RHEINGOLD: We want to be fast. But, obviously, a lot of hard work has come in here and we think that the proposal has much merit to it.

Two areas of concern that I will raise, however. One area is the 23(g) rule, and we have some real concern about how attorneys are chosen. NACA considers Rule 23(g) to be probably the most problematic of the proposed rule changes. As our guidelines on settlement should make clear, NACA is a group particularly concerned about ensuring that consumers are fairly and adequately represented. We welcome in theory anything that ensures that consumers obtain competent and able class counsel. We are concerned because the proposed rule changes appear unnecessary and we don't believe will lead to such a result, but rather will have impractical effect, possibly pernicious results.

As stated earlier by other people who were speaking, we think that the rules in effect, by moving toward the idea of auction or moving toward

the idea of having judges choose the attorney, will have a chilling effect on very good litigation and on the possibility of cases actually being brought.

NACA represents, as TLPJ does, a lot of small practitioners, and from those small practitioners and from a lot of the class action attorneys that we work with, a lot of innovative practices and cases are brought. We think that the rule, as it's presently written, along with the commentary made in paragraph two, particularly, is virtually an open invitation to law firms who have had nothing to do with the development of the case to step forward and claim to be more appropriate counsel by virtue of prior experience.

It can be safely predicted that some lawyers will view this provision as an open invitation to prowl the country's Federal Courts to make applications in class actions. Yet, the vitality of class actions and the protections they provide to plaintiffs, particularly consumer plaintiffs, arise in significant measure by virtue of attorneys who bring new theories and situations

to the fore. Most certainly, simply because a lawyer has yet to handle a class action does not mean the lawyer will not be adequate and able to do so.

Yet, a reading of the proposed rule and its commentary by such an individual is only likely to discourage them from being willing to take on the time and investment sometimes necessary to prepare to file a case. It is little solace to know that simply one of the factors, and the second factor, at that, to be considered will be the work the individual put into investigating the claim. So we think that's a bad idea that will have a chilling effect on people bringing those type of cases.

As you can see, I am skipping ahead fairly quickly.

The last point and comment is notice in non-damage claims, and again, we would join with other of our colleagues in opposing the notion of notice in those injunctive-type cases, and the reason again really comes down to cost. As in

civil rights cases, a lot of these cases are smaller cases. A lot of practical decision making is going on when those consumer cases are brought, when, in fact, if an injunctive case is being brought, and again, speaking from my own personal experience, I'm the Executive Director and General Counsel of NACA, but six months ago, I was a legal services attorney. So in that context, I have almost no experience recently with class action cases because we weren't permitted to do any class action cases. Nonetheless, a lot of our members are legal services attorneys who are interested in seeking justice and searching for injunctive relief and trying to achieve fairness to consumers.

If, in fact, that added cost of notice is part of the equation in analyzing whether a case is going to be brought, it will have a chilling effect because people are not making a lot of money. There are some cases where there are attorneys who are making an awful lot of money, but a lot of our members are simply doing what they think is right, trying to earn a living, but also attempting to

achieve justice, and if they're going to be charged--if they're going to be concerned about the cost of notice, it will make it that much more difficult.

I'll just finish up by saying if, in fact, in a (b)(2) notice case there needs to be notice, the courts have that ability to do so right now. To make it mandatory simply will have a negative effect on those type of cases being brought, and I think class actions are so very important in achieving justice for consumers because some of those cases are so small and the individual claims will be small enough that no individual case will be brought, that to chill that would have an extremely negative impact. Thank you.

JUDGE LEVI: Anybody?

MR. MARCUS: I'm a little bit interested or I'm anxious for you to say a little bit more about your problems with 23(g) just to explain. First, something that's been asked others. Is it your experience that the court does anything to designate the lawyer who brings a class action of

the sort your organization works on up until the time of class certification, to select that lawyer or recognize that lawyer as acting on behalf of the class?

And second, in terms of your uneasiness with the criteria for choosing a lawyer, it would seem to me that some consideration of those factors mentioned there would be relevant at that point and I wonder if the lawyers who handle the cases your organization is involved with advise the court of their experience and background as well as the work they've done on the case and the resources they would commit. Are you suggesting that the court ought not be aware of those things?

MR. RHEINGOLD: No. I think, clearly, it does, and I think, clearly, that happens right now. I don't think there's anything--I don't think there's a problem in choosing class counsel at this point. I think there's a danger that we move toward formalizing the way that's done at this point. I think, usually, the lead attorney is simply, again, called the putative class counsel or

the lead counsel and it's done and it moves forward.

I think the rules open up some problematic doors, and from our experience, and defense counsel will, I think, agree with this to some extent, I mean, in some ways, there can be a feeding frenzy going on amongst plaintiffs' counsel and there's some bad behavior that goes on there and we have a real concern that there will be sort of this cherry picking going on. In fact, people will be creating innovative theory and then losing those cases to people who are experienced, who bring case after case after case, and I think that's a real fear that we have.

JUDGE ROSENTHAL: If the, in order to understand what your precise problems are with the present formulation, would your concerns be addressed if the language of the rule and note were clarified to remove the impression that competition was being endorsed or welcomed where it would not otherwise occur?

MR. RHEINGOLD: I think that would get to

some of the concerns we have. I think sort of a general observation is I think sometimes in the notes, and I'm just sort of making a general comment, the notes sort of push you in a direction that I don't think the rule--I think they lead you to an interpretation that the rules may not lead and I think we need to be carefully generally in what the notes say, because they become almost a law itself because practitioners are going to look at that as to how a procedure is supposed to act. So I think there has to be something carefully done there.

I think the notes lead you to that conclusion, and maybe the rules don't, but I think that is a concern that we have, that there's a movement in that direction and we just don't see it as a problem right now.

JUDGE LEVI: You don't think consumers benefit from competition?

[Laughter.]

MR. RHEINGOLD: We think--

JUDGE LEVI: That's all right. It was

rhetorical. Judge Scheindlin?

JUDGE SCHEINDLIN: I was going to say something along the same lines, using the word "competition." If there are competing plaintiffs' counsel, then the 23(g) proposal that we have here may be acceptable to you--

MR. RHEINGOLD: Absolutely.

JUDGE SCHEINDLIN: --but if you just have a counsel and nobody has come forward on their own--

MR. RHEINGOLD: Right.

JUDGE SCHEINDLIN: --then you're saying that the court should just analyze their adequacy and leave it at that?

MR. RHEINGOLD: Right. Somebody made it--

JUDGE SCHEINDLIN: Is that right?

MR. RHEINGOLD: Exactly. Somebody made that point earlier, between appointment and selection. I think that's correct.

JUDGE SCHEINDLIN: I mean, if there's nobody else who wants the job coming forward, we should leave it alone and just look at adequacy.

MR. RHEINGOLD: Right. But if there are cases out there, then obviously, I mean, we have a system in place to try to choose or select the best lead plaintiff.

JUDGE LEVI: Thank you very much.

MR. RHEINGOLD: Thank you.

JUDGE LEVI: Mr. Andrews?

MR. ANDREWS: Thank you. Good afternoon. I will try not to repeat much of what's happened, but I don't think at this point it's avoidable. I'll skip over a few of the thoughts that I had in my written remarks.

My name is Walter Andrews and I am a partner in the Northern Virginia office of Shaw Pittman, LLP, where I'm head of the firm's insurance coverage practice. I have been representing insurers and their policy holders for over 20 years in both Federal and State Court litigation, many times involving class actions. I am co-chair of the ABA Insurance Coverage Litigation Committee, a member of DRI, and I have been asked to speak today by the Federation of

Defense and Corporate Counsel, though, of course, my comments are my own and not necessarily those of the federation, my firm, or the firm's clients.

As the committee knows well, the class action process tends to raise the costs of defending policy holders and, therefore, the cost of insurance as much as any other--in fact, more than any other litigation activity, and when insurance is available for a class action defendant, the abuses in class action litigation often magnify unnecessarily the overall cost to the insurer of providing defense to the policy holder. To the extent that the rules can reduce or eliminate these abuses, those in turn will reduce the defense costs and reduce the cost of spreading the insured risk which will benefit both the policy holders and all policy holders because of the lowering of the cost of insurance premium.

Now, let me speak to a few of the particular issues with respect to the proposed rules, or proposed amendments. First, as several speakers have already done so, I do want to speak

to the absence of a proposed amendment at this point that takes into consideration, in particular, the problem of competing or overlapping class actions brought in multiple jurisdictions by multiple counsel against the same defendants.

As everyone has noted, the practical difficulties in litigating multiple class actions with motions, practice discovery, certification, scheduling, and other aspects of pretrial procedure proceeding on multiple tracks simultaneously increase the likelihood of inconsistent decisions and impair the proper considerations of the claims and defenses of the case on its merits. As again has been pointed out, that practice sometimes involves outright forum shopping and it is that forum that is at a minimum a significant threat to judicial efficiency and unnecessarily inflates the costs of litigation.

Alternatively, where overlapping class actions are used for strategic purposes against a defendant or in pursuit of an overall control of multi-class actions, the practice does impair

traditional notions of judicial economy and comity, and generally not a motivation--is designed to ensure that a court will resolve class claims on their merits. I believe that reforming this practice is perhaps the most fundamental problem with the present class action practice and it should not be overlooked as Rule 23 is amended.

I think that whether through the opportunity to relitigate endlessly the certification issue or to impose unmanageable, overly expensive discovery demands, the present system affords named plaintiffs and class members a distinct unfair advantage and unlevel playing field and I think that the committee should consider appropriate rules that would even out the playing field and allow litigation to proceed more efficiently. Obviously, the committee--not the committee, but the rules have--the courts have dealt with this in other contexts in important situations, such as Y2K litigation and most recently, I think, the new court system in New York with respect to World Trade Center related claims

addressed some of these same issues.

With respect to the specific proposed amendments, I want to offer just a few comments as to certain of the proposals. First, with respect to the timing of certification under Rule 23(c)(1)(A), I believe that the proposed amendment requiring a District Court to decide the classification at an early practicable time rather than as soon as practicable, as in the current rule, is an appropriate change. I believe that all parties would benefit when the District Court makes a decision based on its efficient and complete record of issues, related certification, and reduce the risk of reversal and appeal.

That benefit exists more so, however, when the court strictly limits discovery to only those matters necessary to the development of the complete record on certification and when the court gives scheduling priority to certification issues. I believe the note to the rule change should emphasize that the District Court should be actively involved in limiting discovery to issues

relating to certification of the class and should take a gatekeeper approach to eliminating wasteful and costly discovery, direct it more towards the merits of the case, and instead focus on the certification issues, which would make the outcome more predictable for the parties and eliminate some of the costs that can result from the uncertainty of such litigation.

As to the conditional certification procedure under Rule 23(c)(1)(C), the proposed amendment to provide that class certification is conditional as opposed to may be conditional and may be altered before final judgment may be problematic. The proposed change in language could be construed to encourage courts to err on the side of granting class status, which should be discouraged. Instead, the parties and judicial economy would be better served by greater certainty in their certification decision.

Although the rule should permit the court to modify the class definition at the remedy stage, the note should express the conditional nature of

the class certification, which is premised on the plaintiffs' burden to establish ultimately that prerequisites for class certification are met. The note should stress the new language is not intended to loosen the rigor with which courts apply class certification requirements.

I want to note something that I think is particularly troublesome, potentially for insurers, that is the settlement agreement filing under Rule 23(e)(2) that would require that settlement agreements be filed with the court. The proposed amendment addresses an identified abuse where there are, quote, "seemingly separate agreements that may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for the others."

The court and the unnamed class members should indeed be aware of the terms related to settlement of class actions. However, the language requiring the inclusion of agreements in, quote, "related undertakings" poses a potential problem for insurers. Insurers are often involved in

addressing a controversy on several fronts, especially where it has multiple policy holders in a particular industry or field of commerce. The Amchem and Ortiz Fiberboard cases certainly illustrate the involvement of insurers in widespread class actions.

In addition to litigating or negotiating settlements in private class actions, insurers and their policy holders may be negotiating with Federal regulators and States' Attorney General at the same time, negotiations that may relate to and result in confidential insurance agreements between insurers and their policy holders. Requiring disclosure of such agreements or negotiations may detrimentally affect the ability of insurers to negotiate settlements.

Rule 23(e)(2) should exempt all underlying insurance agreements from inclusion in class action settlement documents filed with the court. Not to do so would permit an invasion into the confidential relationship between an insurance company and its policy holders and would have the

effect of potentially encouraging additional litigation against policy holders known to be covered by insurance.

I want to comment also on the second opt out opportunity of Rule 23(e)(3) that has been commented on by others. I think that it's--the possibility of opt outs has always negatively affected the prospects for settlement, in my experience, and granting an additional opportunity for class members to opt out will only exacerbate that effort.

Moreover, because the second opportunity will come after settlement, the potential for high rates of opt outs by unsatisfied class members is greater. This proposed change will make settlement of class actions more difficult, to say nothing of its disregard for the time-honored principle of taking only one bite at the apple. Plaintiffs should not have the opportunity to litigate a cause of action twice simply because their first opportunity came as a class member and the result was unsatisfying.

This, too, has a particularly adverse impact on insurers, whose business is based on assessing risks and paying damages. When a policy holder places an insurer on notice of a class action that may be covered by an insurance, the insurer must set aside a reserve fund for that claim. The amount of the fund is determined by assessing all the factors involved in the claim, including a likely settlement value.

If class members who have the opportunity to opt out of a settlement and pursue a cause of action individually against an insured, it would play havoc with the business of insurance. It would introduce an expensive level of volatility and unpredictability into the establishment of reserves, which will only increase costs to insurers and their policy holders.

Finally, with respect to Rule 23(g) and the class counsel appointment process, I just simply want to emphasize that the appointment process should be consistent with case management and efficiency in order to minimize the disruption

of inserting additional counsel of record into the pre-trial process. Class counsel should be appointed only at the time of certification. To appoint class counsel at the outset of litigation or during the limited certification discovery period would only not necessarily impose upon defendants the burden of dealing with and responding to shifting certification theories and discovery requests.

I will leave the rest of my remarks to the written materials which I submitted and respond to any questions.

MR. COOPER: Is it possible in the discrete and generic way to describe the sorts of agreements that insurers make with defendants, the insureds, that ought to be protected against disclosure?

MR. ANDREWS: Well, if you're asking the language that I would propose to put into a rule, I have not--

MR. COOPER: No. Rather, what are these agreements about?

MR. ANDREWS: They may relate to how to resolve various different disputes where there's a question as to the validity or viability of coverage. They may resolve whether or not a duty to defend is, in fact, going to be provided by the insurer, when, again, there are questions as to the amount of insurance, the applicability of insurance, when and how the insurance policy might kick in or apply based on the existence of deductibles or self-insured retentions, the right to control the defense, depending upon either language of the agreement or by negotiation between the insurer and its policy holders, the right to choose counsel, the right to direct counsel. All of those might become relevant and often have been manifested in agreements between insurers and their policy holders with respect to pending class actions that have been submitted as claims by the policy holders to the insurers.

MR. KYLE: Would filing those under seal for in camera inspection solve your problem or not?

MR. ANDREWS: Certainly, that would lead

to less abuse, yes. I'm not sure how often courts like to keep all those things under seal, but--

MR. KYLE: They don't, but it's better than nothing at all.

MR. ANDREWS: True.

JUDGE LEVI: What you just described are documents that exist independent of any settlement, I think. Are there insurance agreements that form part of the number of the settlement?

MR. ANDREWS: Sure, because in a particular given case you'll have a policy holder who will come to his insurer and say, hey, I can settle this case. The insurer says, well, now, wait a second. We've got a number of issues. It's not clear you have insurance for all the entities that are sued here because it relates to certain premises but not others. There may be an exclusion or endorsement that would restrict coverage. There are questions about the amount of deductibles that apply, number of occurrences.

With multiple class actions, many of the class actions involve disputes between insurers and

their policy holders over whether it's a single occurrence or a multiple number of occurrences. I'm sure you've all been reading about that in the Silverstein litigation of the World Trade Center as an example, although that's not a class action, but that does actually come up in much more mundane situations involving class actions.

And so at the time of settlement, the insurers and the policy holders often reach a side deal, separate settlement agreements that, okay, we're going to fund this amount, subject to reservation of rights, what have you, but no more than that, and you're going to compromise and not accept anything more. We're going to pay a portion of it or what have you, and those are negotiated when there's a dispute over the terms of the contract or the applicability of the contract to the particular claims at issue.

JUDGE ROSENTHAL: Wouldn't that be useful, if not critical, for the judge trying to determine whether the settlement is fair, reasonable, and adequate enough?

MR. ANDREWS: Well, I think it can be misused or abused in that context because it really is not a dispute over whether the merits of the settlement of the class claims are valid, but as to whether the dispute or potential dispute between the insurer and the policy holder is valid, and I would be concerned that that would lead to further abuse, because once that gets out, then the plaintiffs are going to believe that there's an even more an attractive target to go after because maybe there's additional insurance proceeds as well as whatever proceeds the individual defendant has.

So I think it can be misleading because it really doesn't go to the merits of the class action. It goes to the merits of the insurance contract and what coverages or is not provided for that contract. And if you start getting into agreements as to the number of occurrences, for instance, which is one of the central issues, I think that could really skew a class action approach by plaintiffs.

JUDGE ROSENTHAL: So that we come back to

the question that was raised. If there's some parts of that information that might be useful to the judge evaluating the settlement, because it would inform the judge as to the extent of the resources that are, on a practical level, available and how quickly they would become available, then perhaps that might argue in favor of a summary of some information that is broadly disseminated and more information that is provided on a more limited basis, perhaps under seal or in camera. Would--

MR. ANDREWS: That would certainly be a better benefit than no rule at all.

JUDGE ROSENTHAL: That's very helpful. Thank you.

JUDGE LEVI: John, did you have a question?

MR. MARCUS: Mr. Andrews, you seem to be on a different approach from a number about the timing of class counsel's designation. At least, some people had said that should be done soon, or as soon as possible, and you seem to say, not until class certification because otherwise some adverse

consequences would follow, and your written statement is that there would be a risk of unnecessarily imposing on defendants the burden of dealing with and responding to shifting certification theories and discovery requests.

One of the things some who favor early designation have said is, unless you do that, the defendant will say, oh, you can only have discovery about the individual claims of the named class representative. Could you explain what it is that concerns you--

MR. ANDREWS: Well, I think--

MR. MARCUS: --about designating earlier?

MR. ANDREWS: --if the premise that those who advocate what you're suggesting were true, and maybe they'd be right, that would become more efficient. But I don't think that that's really going to be true. I think you're going to end up, in reality, because until the certification actually happens, they're not going to be bound by the theory that they're bringing the case under, and so I think until then, to say that there's a

certain class counsel that speaks for everyone, I think is illusory.

MR. MARCUS: Well, in the cases in which you've worked, has the court done anything to recognize the lawyer who brought the case as representing the class up until the time of class certification?

MR. ANDREWS: I think it differs from case to case. I mean, certainly, certain cases where the court has said the first lawyer bringing it in, the named plaintiffs, will call the shots at the beginning. But I think most courts have been pretty open, and certainly most experiences I've had where the courts have been pretty open until certification as to how things are going to proceed and give all the parties a chance to take discovery on the issues they see fit, subject to court approval and briefing various issues by different counsel as to what should be certified or not.

JUDGE LEVI: Thank you, Mr. Andrews.

We'll take a stretch break until 3:10.

[Recess.]

JUDGE LEVI: Well, let's bring this ship into port. Ms. Mintel, welcome.

MS. MINTEL: Thank you. Professor Cooper, Judge Levi, members of the committee, thank you very much for the time that you're going to give me and my company. I hope it will be brief.

My name is Judy Mintel and I come from the hinterland in more senses than one. The specific one is that I came from Bloomington, Illinois, which is where State Farm Mutual Automobile Insurance Company is headquartered, and State Farm is my employer and my one and only client. I speak today on State Farm's behalf.

I submitted some written testimony and that testimony basically advocates that this Advisory Committee endorse the concepts in the legislation that is currently pending in Congress. The testimony doesn't really comment on the specific rule proposals that you have and I wanted to explain why we decided to do that.

First of all, State Farm is the defendant in a large number of class actions and more than 90

percent of them are currently pending in State Court. So in a lot of ways, we're not very expert on the Federal Rules of Civil Procedure and how they're operating. We're much more familiar with the State Courts.

Our particular view here is to let you know the important interstate commerce issues that are being decided or not decided in State Courts, but all of the action from our perspective is in the State Court arena. Your ship analogy, we feel like we're chugging through the water and we come upon an iceberg, but we just see the tip of it, which is the Federal Rules of Civil Procedure, several hundred yards away, but we're already--the hull of the ship is into the class action procedures in the bottom half of the iceberg under the water, which is the State Courts.

JUDGE LEVI: No icebergs in Lake Michigan.

[Laughter.]

MS. MINTEL: Our experience in the class action area in the Federal Courts has been relatively positive. I attached to my testimony a

decision by a District Court in Tennessee that dealt with the non-OEM parts case and you can see the way that judge treated the issues and dealt with the fairness of certifying the class or not.

In our State Court action in Williams County, Illinois, we had first what we call a drive-by certification, where we had a class certified before my company was served, a nationwide class certification, and then later on there were hearings and a recertification of a 48-State class.

I give some of the history of both the-- well, you can see on page four, I've summarized current class action litigation that the company has pending against it in the non-OEM parts case, in the diminished value cases, and then related to our dividends, and the written testimony, you can read.

There are two parts, really, that I didn't emphasize that I would like to emphasize today, and the first is in there, but maybe I didn't emphasize it enough, and that is that we, when we have a

major national practice, a claims settlement practice or an underwriting practice or a pricing practice that is controversial and a major public policy issue, with some people thinking it should be one way and some people thinking it's another, we cannot get resolution of that and I think the non-OEM parts case, the history that I've provided here demonstrates that.

We settled a case in Illinois. The court in Illinois said, yes, you can continue to use non-OEM parts in your estimates. We settled another case in California. We got much more future looking. I describe how the court there said, yes, you need to use non-OEM parts, it's a good thing, but you have to give greater notice, do this, do that, do that. Okay, we said. Okay.

Then we had the same plaintiffs litigate with us in Tennessee, where I've given you the decision, and in several other State Courts where they did not prevail. Either the class was not certified or the litigation was dismissed for one reason for another, but it doesn't matter how many

times you settle a case, how many times you win a case with the way the class action practice is proceeding. We had 19 cases, basically, where we either settled or won, and then we went to trial in Southern Illinois and came out with a jury verdict of $1.8 billion. That's with a "b".

So these are the kinds of cases where, in the non-OEM parts, we have issues of international trade, creation of a monopoly pricing opportunity in a major part of the U.S. economy, tens of millions of people involved, and billions of dollars, and we are in State Court under the current rules, which to me and to my clients doesn't make a lot of sense. I mean, I don't think the State Courts are all that bad, but once you have these serial litigations, where we had 19 cases, and it's not possible to resolve it.

Diminished value is another. We're starting on the dividend case.

So in terms of the economic impact, the rules that you're looking at, you know, it's hundreds of yards off in the distance to us, and we

encourage you. I've heard that some members of this Advisory Committee feel that expanding Federal jurisdiction is problematic for some reasons that I'm not sure that I know, maybe workload reasons and the like, but I can tell you, from my perspective, my partner, one of my colleagues down the hall who is in our claim litigation counsel section and represents policy holders in slip-and-fall cases, in automobile accident liability cases, they get into Federal Court all the time on $100,000 or $200,000 issues. My practice is in Hildago County, Texas, near Brownsville, it's in Alabama, it's in Southwest Central Los Angeles.

To me, the issues that are being litigated, I mean, in a lot of ways, my company says, yes, let's go for expanded diversity jurisdiction and so I recommend that to you on their behalf.

To me, what I'm seeing in these cases, these are Federal questions. I know that that's-- my more practical colleagues tell me, don't say that, but I just felt like I had to because I feel

it's true.

[Laughter.]

MS. MINTEL: So I'd be glad to take any questions.

JUDGE LEVI: Very interesting.

JUDGE ROSENTHAL: I do have one question. I know your Federal Court experience is less common now than your State Court experience, but in the cases in which you have been sued in Federal Courts, do you see a useful role for a Federal Court preclusion rule, that is, that would tell a Federal Court judge that if another Federal Court judge has previously declined to certify a class action, that repeated attempts to obtain a different result would not be permitted?

MS. MINTEL: Yes, of course. I also attached--you got a lot of paper, but I thought it was important. I attached Judge Gaitan's decision out of the Western District of Missouri, and in that particular case, the plaintiffs had a class action against the industry in Federal Court and Judge Gaitan declined to certify the class and then

dismissed it. This was actually a civil rights case under the Federal Fair Housing Act and the Civil Rights Act.

He dismissed that case, and then the plaintiffs immediately, with the same named plaintiffs, with the same factual complaint, turned around and sued us under the Missouri Equal Rights Act and the Insurance Code in State Court. Judge Gaitan issued an injunction against them to prevent them from doing that, which is currently on appeal in the Eighth Circuit, and they've been quiet for more than two years.

So a preclusion rule would be something that I think would be very valuable to indicate that you can't just sue again and again and again. There has to be some resolution.

JUDGE LEVI: Thank you very much.

MS. MINTEL: Thank you.

JUDGE LEVI: Ms. Carmody?

MS. CARMODY: Thank you very much. I did not submit anything in writing because until very recently, I had a conflict and was unable to

attend. But with your permission, I would like to submit a formal--

JUDGE LEVI: Oh, you don't even need our permission. You have until February 15 to do so.

MS. CARMODY: Thank you. With my background, I always ask permission anyway.

JUDGE LEVI: Permission granted.

[Laughter.]

MS. CARMODY: And now you can all guess what that is. My name is Sheila Carmody. I practice law in Phoenix, Arizona, with the law firm of Snell and Wilmer. I appreciate the opportunity to come here and speak with you today. I was intending to call myself a front-line practitioner, but now that Mike Nelson has decided we really practiced in the underbelly, I guess I'll have to go with that.

My practice takes me to places like Gainesville, Florida, Madison County, Illinois, and other places where clients I have are sued. Oftentimes--and I'd like to add, my prepared remarks were absolutely brilliant and were going to

flow, but since so many people have spoken before me, they will appear choppy because I do not intend to repeat what others have said.

People today have said to you they are friends of Rule 23. I think I am a friend of Rule 23, as well, and although I don a defense lawyer hat most of the time, it's a darn good rule and we need to keep it and support it.

The Reporter's Call asked, is there a problem in the current practice so severe and persisting as to warrant new rules? When I read that question, I answered, absolutely yes. I see it in my practice day in, week in, week out.

Another gentleman who appeared here today before you said he did not see any systemic problem. I had not thought of the word "systemic," but they're consistent, they're repetitive, they're there, we see them.

I applaud this committee for the very hard work that it has done and the tremendous patience you have had. I have stood on the sidelines as many people have spoken to me about class actions

and rules over the years and I thought to myself, they're terrific people to have the patience to keep working at this. And I applaud the work that you've come up with and the recorded notes, but I would respectfully suggest that your committee, the type of committee that people should listen to, should go further and ask for more relief.

I specifically ask that the committee support minimal diversity jurisdiction legislation and support appropriate preclusion rules for the reasons that others who have appeared before you today have noted, including Ms. Middleton and Mr. Stoller.

Overlapping class actions, I have cases, substantially similar cases in Arizona, Florida, Maryland, Washington, Illinois, Louisiana. One case that actually someone referred to earlier is the same type of case, but it has an antitrust gloss and it's pending in Gainesville, Florida. The size of that class--we haven't gotten to the specifics, but there are four major defendants--will be 80 million people. When people were

talking about notice costs earlier, that case came to mind.

What is causing it is inconsistent rulings in different jurisdictions. The enormous costs of defending these cases, when you send out the bills monthly, you don't feel good about it. The document searches, we're searching every corner of the companies' regions and smaller offices.

And something nobody else has mentioned, the document retention costs. My clients complain to me, because I've told them, don't destroy anything. Please don't destroy anything. We'll be accused of spoilation of evidence. And they have begun to start giving me statistics on how much it's costing them to retain all of these documents. And when they say to me, but we've won this. This case was not certified. We won it in Arizona and it wasn't certified in Maryland. And I remind them, yes, but we have other cases with the same issues now in Southern Illinois. Please--they've started to say that I should go back and tell their records people not to destroy things or retain them

for longer.

I wanted to share with you today, outside of what other people have done, a concrete example of some things we're seeing. This is a case that I have pending in Southern Illinois. I took the-- it's a class action filed by a prominent local plaintiffs' firm with national class plaintiffs involved, and I think there are perhaps seven plaintiffs' firms on the briefs and complaints. It could be six, but I think it's seven.

Typical, I'm taking the class representative's deposition. I'm asking what to me would be a throwaway question, "Have you ever been involved in other lawsuits?" You know, I'm barely taking notes. It's hardly an interesting question. And the gentleman says, "Yes." And I say, of what type? He said, "Well, I'm a class representative in another national class action." Those aren't his words, those are mine.

Let us call my class action where I'm deposing him Class Action A. The other one is Class Action B. He didn't seem to know that much

about it, so I pursued and we dug a little bit and we found out that he had given a deposition in Class Action B. We dug a little more and got the deposition. We read the deposition.

What we learned in Class Action B, which was fortuitous, one, that we asked the question, two, went digging, was that he answered questions about my class action in that other case and he explained, which he didn't volunteer in ours, that he had gotten calls from lawyers about being a class representative in Class Action A and the lawyers had his name, they had his policy, they had his car information, they even had the police report, and they encouraged them and said that they believed he had been wronged.

He said, "But I didn't call them back, but I got more calls, you know, a week or so later." He wasn't sure--he knows he didn't call them back, but his wife may have, but he's not sure. Then he went on to state in that deposition, "I didn't want to do it," it being sue my client in Class Action A, "in the first place, but it got so every night

or every day, somebody was calling, calling," and I found that very useful information.

He then--not only does he testify that he didn't want to bring that class action A in the first place, he also testified that he'd be interested in dismissing it. They asked him, "Did you know when Class Action A was started?" He said, "Oh, last year or so or the year before, I'm not sure, but I'm seriously thinking about dropping it." Seven pages later, he states, the name of the company, "That case, that's going to go away."

And 40 pages later, he said, "Oh, that case, that thing will be dropped."

Now, I did bring this to the plaintiffs' lawyers' attention when I learned of it, and I also brought to their attention something else that I think is tremendously important and demonstrative of the problems we're seeing in these kinds of cases. Who is running the show?

When the class representative was asked about that, they said, "Do you know where Class Action A is pending?" He said, and I quote, "I

haven't kept up with it, and I think my attorney here would tell you, they send me stuff, I pile it. I don't even open up the envelopes. I'm sorry to admit that, but I just--I'm at the point in my life where, you know, I just don't want to be bothered."

[Laughter.]

MS. CARMODY: And it continues, and I will not--and there are some other equally, I think, incredible pieces of testimony. I won't tell you what I did with this. I approached the other counsel, but let me just say this. The case continues. The case still has life.

I submit that that is demonstrative of some of the ills that we are seeing. Last night, as I was determine which concrete stories I'd tell, I have five others if time would permit that I'd be telling, but I realize time is of the essence.

I would support and really think it would help if we can move these cases to Federal Court. I tried to remove that case to Federal Court. Strike that. I did remove that case to Federal Court, but it was remanded and it is back in State

Court in Southern Illinois.

The last thing I would suggest to the court, and this is just a personal request, that it would be terrific if this committee would look at attorneys' fees because the fees in these cases really need to be tied to the actual benefit that class representatives get, either in settlements or after trials. It's a good rule. We want people to undertake and get benefit for people who have been wronged. But the attorneys' fees must be tied to something concrete.

Thank you for the time you've allowed for me to speak with you today and I really appreciate the opportunity.

JUDGE LEVI: Thank you. Do you have any questions?

[No response.]

JUDGE LEVI: Thank you very much.

MS. CARMODY: Thank you, Your Honor.

JUDGE LEVI: Mr. Alexander?

MR. ALEXANDER: Judge Levi, members of the committee, it's a real privilege to be here today

and I thank you very much for the opportunity to give you my personal observations on all the hard work you're doing and on the Reporter's Call and some other ideas that I would like to bring to your attention.

I have submitted a written set of comments. It came in late, but I saw it on the back table, so I hope you have that at your disposal. I am going to emphasize a couple of the things that I think are more important. I'm not going to go into the things that I think you're doing well. You're doing a lot of good things well, and the fact that I'm not--

JUDGE ROSENTHAL: You could take the time to do that.

[Laughter.]

MR. ALEXANDER: Well, only if you give me extra time.

[Laughter.]

MR. ALEXANDER: No, you are doing a lot of good things well, and the fact that you're keeping at this for such a long period of time is a real

tribute to your tenacity and, I think, to your view of the importance of this subject, because I can guarantee you that there is a lot of corporate America who view this subject as vitally important.

This phrase of "bet the company" is a real phrase in corporate America. It does mean something and the subject of class actions brings that home. At least the executives I talk to, they don't know much about the law, but when you mention class action, you get their attention.

I'd like to emphasize in my oral comments a couple of things that are in the proposed amendments. One is the notes to 23(c)(2)(A)(iii), which is concerning the use of defendants' regular mailings to its customers. I'd also like to address Rule 23(e)(3), alternative two, which is the second opt out provision. Very briefly, I'd like to give you some anecdotal experiences with the Reporter's Call about the successive litigation and non-certification issue, and then I have four other ideas that have been talked about to one degree and some new ones.

Certainly, the minimal diversity, the ability to remove is a subject that's very important to us in the financial services industry and through my observations. There's a separate but related problem coming up with multi-jurisdictional consumer class actions. Basically, I think there are a number of good reasons why consumer class actions should not be allowed on a multi-jurisdictional basis.

No one has mentioned today stays of discovery while their certification appeal is pending, and there are some sad examples right now of not allowing stays.

And finally, there's a sad practice of some sharp practices where if you have a small Federal claim that the defendant might otherwise be content to litigate as an individual claim in a State Court, getting hoisted by that decision when months later new sophisticated class actions appear in the case magically, amend the case to assert multi-district, interstate class actions, and your chances of removal are now gone because you didn't

remove the small individual case when you had the first opportunity. That, I think, needs to be corrected, because what you're going to end up with is actually more small cases in Federal Court because you're going to have to remove them to avoid getting this sharp practice played upon you.

With respect to the notes to the rule about using the defendants' regular communications with his clients--this is the notes to Rule 23(c)(2)(A)(iii), I really find the concept pernicious and troublesome. It's pernicious because it undermines the proposition that it's really the plaintiffs' obligation, the plaintiffs' counsel's obligation to be communicating with his clients. I say that recognizing that there are lots of reasons, particularly in the civil rights arena, where that may be impractical.

Listening today is an educational experience for me. I don't know how you're going to fashion a single rule to cover all the exigent circumstances that you need to face with this rule. So, I mean, that's just an off-the-cuff thing, but

I don't see how that's possible to do, because you really do have a division of types of cases out there and the rule may need to be amended to reflect that fact.

But it's troublesome, it's troublesome because it really demonstrates, I think, a lack of a practical understanding about how defendants may regularly communicate with their customers. If you have a regular communication with your customer, it's all preprogrammed. It's all done off the computer. It's all set and all ready to run.

And the moment you start messing with that, you are inviting disaster. You're going to get people's mailings in the wrong envelope. They're going to go to the wrong people. I have never seen a class composed of every single current customer, so you're going to get people noticed who are not supposed to be noticed. You're going to have confusion issues.

You're going to have people who are customers, because it's part of the regular mailing, believe that it's from the defendant no

matter what is on that stuffer that goes in that envelope. You can have all kinds of disclaimers, and I don't care what kind of experts you'll have here telling you that he can make it appear different and distinctive. They're going to believe it's from the defendant and guess who they're going to call first for an explanation, the customer service line. You're going to have to have separate routings for that, to have people educated, because the plaintiffs' attorneys, they don't want to have anything to do with communicating and explaining what's going on.

I have been involved in more than a dozen class action settlements and the last thing they want is to have their name and address and phone number on one of the communications so that the plaintiff, their client, can call them and get an explanation of what's going on. They don't want to have to man that process. They don't want to have to deal with that process. And because they're our customers, guess where they call? And, of course, you can't rely on someone who is a part-time

customer service representative to be able to explain what is going on in that lawsuit.

You have all kinds of issues of confusion. You have extra costs because those preprogrammed mailers are all set to go out on a bulk basis. The moment you start adding things to it, the moment you start adding additional costs. You don't have controls over who gets the mail, and I've had a sad experience of that, when you had a breakdown in making sure that addresses and names lined up properly.

So I caution you sincerely to think carefully about making even a suggestion that that's a reasonable option without some very serious caveats, because it is my experience that the unintended practical consequences will be severe in individual cases.

With respect to Rule 23(e)(3), alternative two of the second opt out provision, I think the unintended effect of this will be even less and less of a nexus or an interest by the litigants in the litigation. We've talked about that today.

This is a real problem with class actions, particularly in the consumer context. We have people, as Professor Fiss, I believe, mentioned today, who purport to represent them with no proxy, with no contract, and I get them in the mail, too, and I find it obnoxious that someone would go out and purport to be looking after my best interest in some "big brother" type of concept.

I'd like to take an opportunity, if I may be so bold. Judge Levi, you asked earlier, what would be the consequences of an opt in provision, because I think that's what really needs to be considered, not a second opt out but an opt in. And I think the practical consequences of an opt in procedure or requirement is that you know what is really at stake. You know who's interested. You know what the fight's about. You know how much money is involved. You're able to quantify the issues. As my friend in Texas says, you know which dogs are in the hunt.

You don't have that, other than by a very approximate proxy, under the present system of

proceeding along with a class counsel who purports to represent a number of people, and our experience is when you actually mail out a claim, we have customers writing back saying, "Don't ever include me on one of these things again. I find them obnoxious." And other people that we know got the mail, because it wasn't returned--we have controls on that--just not bothering to write back in.

And so this supposed benefit, it's my belief, sincerely, is that most people find these benefits either undesirable or they find the process obnoxious. There are certainly a number of people who do find it desirable and beneficial to them, but it is a small percentage of the population who is otherwise, quote-unquote, "untitled" to make this claim that this class action attorney who is supposedly bringing it on their behalf.

Moving on to the Reporter's Call, I have observed anecdotally, and I have just had it confirmed for me from Michael Agoglia at Morrison and Forrester, the yieldspread premium litigation

is something that's plaguing the financial services, the mortgage origination industry, quite severely. It is a "bet the business" type of problem, and the problem of successive litigation on the same subject is endemic to that.

He gave me two examples. One of his clients had eight successive litigations. Seven out of those eight were with the same firm. Six out of those seven were filed within three days of one another and in six different jurisdictions and they lost all of the certifications, but they had to litigate it over and over and over again. Another of his clients had to do it four times and for different jurisdictions. My client is now facing its fourth case.

We've had the question before about would there be a benefit to a rule from a Federal judge saying that this subject can't be certified, shouldn't be certified, and I wholeheartedly endorse that. I think that that would be a very beneficial rule. We need to be able to build up some sort of stare decisis on class certification

denials.

Four other topics. The multi-jurisdictional class actions, that the minimal diversity rule, I think that that would be very beneficial. These are very large issues involving federalism concepts. We think that the committee should take this as something that they can address, but if they can't, we would certainly hope that the committee would recommend this as an appropriate subject to Congress.

And now I'm going to move on to something that nobody has mentioned here yet before. These are the bankruptcy class actions. This is a new wave. I've been in contact with a number of other defendants. There's real questions in my mind as to whether the policy reasons underlying class actions have any basis here. By definition, everybody's been in bankruptcy. They've been before a judge. The vast majority already have an attorney. There's a trustee at least involved or theoretically involved, appointed to look after the estate, and the estate, the bankruptcy estate, is

already before the jurisdiction of a court.

Now you have someone coming into a different jurisdiction purporting to say, "I'm going to represent him on a separate issue," very often an issue that is telling the other bankruptcy judge how he ought to be conducting the procedure in that case. This, I predict, will create a number of problems in a very discrete industry. It's going to be the financial services industry. But this is really not what class actions are about.

These people are already represented. They're already before a court. Their claims are, by definition, very often very small. I don't see how class actions are furthered by allowing them on a multi-jurisdictional basis. I don't want to go so far as to say that there's no place for class actions in bankruptcy, but I think that it should be properly limited to the jurisdiction where they're filed, where the judges can coordinate their rules, their local practices, because a lot of these bankruptcy procedures are driven by local

custom and local rule.

Very briefly about stays during appeal, if appeal has been denied, I don't see there's any reason--I mean, if certification has been denied, I see no reason to allow the case to proceed, and if certification has been granted, I see every reason for the judge to be very cautious about letting the case to appeal--continue during appeal.

There's a couple of examples of this pending right now in the 11th Circuit. The cases have already gone to trial. They appealed the certification order of the judge and the judge just proceeded right to trial, and their ability to get that issue resolved in a practical sense was cut off at the knees. I think this is just bad judicial management and it's a bad image for the whole judicial system.

And the final thing is a sharp practice that I've observed, and it's a minor thing but I think it leads to major problems. If you have a Federal claim that's alleged on a small individual case in a State Court along with a number of State

Court claims, the defendant may be very well content to litigate that small individual claim in the local jurisdiction.

But if you allow sharp practices, such as the amendment of those claims, as is freely allowed in many State rules of procedure, to allege then class claims a year or more after the case is filed, and then you can't remove it because, well, the Federal claims were there all along. The only thing that's changed is there is now a class action and it's a class action that involves borrowers or customers in every State in the Union, then what you end up doing is having every small Federal claim removed to Federal Court to avoid just that kind of problem from happening.

I think that if you have an amendment to a State Court individual claim that supports any kind of removal basis, you ought to have another shot at removal if they amend the case to bring a class action.

And with that, my comments are concluded and I'll try to answer any questions.

JUDGE LEVI: Anybody? Thank you, sir. Oh, one question.

MR. COOPER: Could you describe a little bit more for me this bankruptcy overlap? I'm not quite clear who is in bankruptcy, what the claims that are being pursued on a class basis are, and how they relate to the bankruptcy proceeding.

MR. ALEXANDER: I'd be happy to. The people who are in bankruptcy are customers, okay, not the institutions but the individual customers. I'm familiar with at least two different circumstances. One, the sending of letters to customers while they're in bankruptcy was perceived as an obnoxious practice and a violation of the automatic stay.

Well, every one of those customers was in bankruptcy before a judge and had an attorney when they were supposedly receiving these obnoxious letters. But one plaintiffs' class action attorney now in one jurisdiction is bringing a class action on behalf of all customers who are in bankruptcy, saying that the sending of those letters is a

nationwide problem, even though every one of those people were in court with an attorney with an opportunity to object if they found that the practice was obnoxious.

Another type of claim is whether or not it's permissible to request an attorney fee for the preparation of a proof of claim in a Chapter 13. We have some rulings from some judges saying, well, the recovery of attorney's fees is a matter of contract and a State law and I'm not going to even address it, and we have other judges in bankruptcy court in Alabama, in particular, saying, "Yes, I think that's a nationwide due process problem and I'm going to deal with it nationwide," even though, again, every single one of the participants of this class is already before a judge with an attorney who could object if they thought that the practice was inappropriate, and they're well placed to do so.

JUDGE LEVI: Thank you, Mr. Alexander.

MR. ALEXANDER: Thank you.

JUDGE LEVI: Mr. Harrison?

MR. HARRISON: Thank you, Judge, members of the committee. I've been told these hearings are going to end at four o'clock. They will.

[Laughter.]

MR. HARRISON: My name is Bruce Harrison. I'm managing partner of the law firm of Shawe and Rosenthal in Baltimore, Maryland. I've been practicing employment law for over 35 years, originally with the Equal Employment Opportunity Commission in the 1970s and then since 1976 with the EEOC. I guess I'm the spy that came in from the cold.

In any event, I'm going to talk about employment discrimination class action litigation because I understand it hasn't been talked about much here and that's what I'm interested in, and that's where my practice lies and that's--my clients have asked me to come here today.

The 1970s and 1980s were the heydays of employment class action litigation in the Federal system. Virtually every other case, or almost every case that was filed was a blunderbuss across-

the-board class action lawsuit challenging the full panoply of employment practices from A to ZZ on behalf of applicants, employees, former employees, and what have you.

And the Federal Courts struggled with this phenomena because of the numbers of suits, the issues that were being raised, and the concerns about the rights of the putative class members which in numbers of instances were clearly being--were susceptible to the interest of plaintiffs' counsel, and it really took about 15 years of litigation before we had a set of coherent standards for review of employment class action litigation and what exactly a representative named plaintiff had to satisfy and how to apply the commonality to all the other standards applicable to Rule 23 class action lawsuits.

I have to say, some of the abuses that occurred were--I mean, they weren't exclusively on the plaintiffs' side by any stretch of the imagination. There were, I remember even when I was at the EEOC, settlements of class action

lawsuits. Actually, they were styled as pattern and practice cases because the EEOC did not have to satisfy Rule 23, where it was common knowledge that 90 percent of the monies that were being thrown about in terms of what the value of the settlement were were essentially funny monies, that is, monies that would have been devoted to training and other activities on the part of corporations and didn't bring anything new to the table on behalf of the affected class members.

I litigated a case with a major employer with the EEOC for 11 years in the administrative stage. This was not even--didn't get to the point of getting into court, where the case was so "bolloxed up" that at the end, we settled for $35,000 on behalf of 7,500 class members. Individuals were getting settlements that equaled little more than the cost of the stamps on the envelopes. It was, frankly, shameful, but those things did go on.

What we're experiencing today, and I guess I'm here because I began my career with all this

class action litigation. It looks like the last part of my career is going to be now focusing in again on it, but now in State Courts, because as a famous baseball personality once said, "it's deja vu all over again."

What is happening is, and I don't know if anybody else has spoken about this phenomena, but plaintiffs' counsel that are familiar with securities and consumer class action lawsuits, about which I know nothing except every once in a while I get an offer, I get told I can get $10 off on some $150 of software I do not want to purchase in settlement of some class claim that I never knew I was a part of. That's the sum and total of my knowledge of consumer class action litigation.

But these plaintiffs' attorneys are now turning their eyes, or sights, depending on your perspective, on the employment field, and as a consequence, in California alone, there are now 27 lawsuits challenging a specific insurance company practice of paying insurance adjustors as exempt employees, that is, not subject to the overtime

provisions of the State law, and we have a whole consortium of attorneys that meets by telephone twice a week trying to figure out how we're going to deal with these lawsuits and how we should be in Federal Court over them, but no, we're stuck now in State Court.

I represent a major insurance carrier that presently has pending before it a class action lawsuit before Judge Paul Friedman of the Federal District Court here in the District of Columbia, an opt in class action under the Fair Labor Standards Act. Two weeks after that, I have a class action filed in the State of Washington in State Court under the equivalent of Rule 23 alleging the same practices as being unlawful. Now it's a race to who gets decided first.

Some of the ironies, just, and I just want to rest upon the handout that I passed out during the break, of that particular case is that if it proceeds on a State Court basis--and it's a race to judgment. Whatever case gets decided, it's going to bind the plaintiffs as to the other case,

except--well, there are some special circumstances where that would not be the case.

But the irony is that one of the possibilities that the case, if the case is tried in Washington, there's a standard for liquidated damages which are available under the Federal statute, as well, the standard is much higher in Washington under the State law than it is under the Federal law and individuals may not get liquidated damages, which to my mind, you know--I would much rather be in Federal Court, honestly, with a Federal judge who understood these issues.

I've had some experience trying these cases, and most particularly, experience dealing with these complex class certification issues, most particularly with regards to employment cases. You know, I don't minimize the importance of consumer cases and bankruptcy cases and mass tort litigation, but I have in my own heart of hearts a special feeling about this area of the law.

I think that we have special obligations with regard to employment discrimination because it

goes to some of the most pressing issues that we face, social issues that we face, in this country. It would be a shame, it seems to me, that if the rights of both employers and employees were lost in the shuffle as a result of what I perceive to be a focus away from the Federal Courts, where these rights had been protected, where substantive and procedural law has evolved to protect them, and into State Courts where, frankly, you're going to be forum shopping and who knows what's going to happen.

That's my pitch. I thank you for listening to me. I said I would finish in five minutes, and I did.

JUDGE LEVI: Almost.

[Laughter.]

MR. HARRISON: You had to say that.

[Laughter.]

JUDGE LEVI: Thank you. Any questions? Just before you go, was the Washington State case, is that an opt in or an opt out?

MR. HARRISON: No, that's interesting.

The Washington State case will be an opt out case. It will be sort of like a Rule 23 case. Under the FLSA, it's opt in, so I don't know--

JUDGE LEVI: How will that work?

MR. HARRISON: One wonders. We don't know the answer right now. I mean, Judge Friedman just has issued class notice, and it's our position that we'll take the position in State Court that the State Court should not proceed in terms of class certification because everybody who would conceivably be covered by the State Court action would have the opportunity to opt in into the Federal Court action, but I don't know what the resolution of that is going to be.

Yes, ma'am?

JUDGE ROSENTHAL: Has anyone asked Judge Friedman to consider whether he has the authority to enjoin the Washington action, now that he has sent out class notice, to the--

MR. HARRISON: No, nobody has considered that until today when I was sitting here listening to--

[Laughter.]

MR. HARRISON: So there's some benefit that's occurred to me.

JUDGE LEVI: Can I ask you about notice in (b)(1) and (b)(2)? I don't know if you were here earlier this morning, but we had a number of witnesses at this hearing, and actually at San Francisco, as well, who represent plaintiffs in civil rights cases, some of which are employment cases.

MR. HARRISON: Sure.

JUDGE LEVI: They are concerned that the rule may impose undue costs of notice, not of settlement--I think they accept that because the defendant will pay--but of certification. My question is what your experience is with notice in those sorts of cases, (b)(1) and (b)(2), and whether there is a way to give notice that isn't so crippling that the case can't be brought.

MR. HARRISON: Quite frankly, it hasn't been an issue in the employment cases, and I've litigated over 50--when I say litigated, I've

handled over 50 class action lawsuits, and notice has never presented the type of issue that I understand it appears to present in other types of cases. It just hasn't been a great issue.

Typically, the largest class--I mean, the largest classes that I've dealt with have been 7,500 to 10,000 members, although I did have a famous fast food chain that employs one out of six people in this economy, or has employed it, and you can figure out who that is, that was sued on a class action basis in Tampa, employees, former employees, and applicants, and that would have been 600,000 individuals. I readily concede that that would be a burden to provide notice.

I would say in fairness, I'm not one side on this. In fairness to plaintiffs' counsel, consideration would have to be given as to how, if that class had gone forward, as to how notice should be provided. It wasn't a viable class action case and a magistrate judge that was assigned to it so ruled and so did the judge and the Circuit Court. But that was the only case I

know of where it would have been an issue.

JUDGE LEVI: And otherwise it was given? Notice was--

MR. HARRISON: Yes, notice was given and it didn't pose a problem and there wasn't objection on the part of plaintiffs' counsel to providing notice. Notice is being given in the class action lawsuit I mentioned before Judge Friedman and it doesn't pose an issue, hasn't posed an issue. Obviously, in different fields it may be a different problem. I'm just saying it's not been a problem in employment cases.

Yes, ma'am?

JUDGE ROSENTHAL: Are the cases you're talking about, if they are non-FLSA cases--

MR. HARRISON: Yes.

JUDGE ROSENTHAL: --if they are instead certified under 23, are they (b)(2) classes or are they (b)(3) classes or what?

MR. HARRISON: Well, that's interesting. In terms of--I do not know--in the first place, they would not--I mean, all these cases, the

Federal cases are money damage cases. In terms of the State law, nobody knows how this case will be certified.

I mean, this is one of the problems. I asked a local counsel who is quite familiar with all the judges in the area what this judge's approach is to class certification. He said, "Damned if I know because he hasn't certified any practices." What is the practice and procedure in Davis County? "Darned if I know. There haven't been any employment class action lawsuits."

So I wish you could tell me the answer to the question. I don't know right now. But I would assume, assuming that there's a parallel between the Federal and the State law, that they would treat it as if it was a Federal case where it's monetary damages and give the appropriate notice.

MS. BIRNBAUM: Are these State Court case national class actions or--

MR. HARRISON: Yes, and that's another problem. I mean, what law are you going to apply in Oregon--excuse me, in Washington? Are you going

to apply--and there's law that goes all over the place. Are you going to group the cases by various jurisdictions that have similar laws, because the Fair Labor Standards Act statutes of the States that do have them--about five of the States don't even have them that are covered by this class action, putative class action lawsuit--are varied. Or are you going to impose the law of the jurisdiction in which the case is brought?

There are a whole bunch of issues that are posed by this and reasons why, in all honesty, I think the State Court should show little interest in pursuing these particular matters, and why it's so important, in my view, that the requirements in terms of diversity be loosened so that these cases such as this can be held in what I consider to be the proper forum, which is a forum familiar with this type of litigation and where we can have the consistency of judgment both with respect to--at least with respect to procedural law. I realize the substantive measures may differ because States can have different statutes.

JUDGE LEVI: Anybody?

[No response.]

JUDGE LEVI: Thank you, Mr. Harrison.

MR. HARRISON: Thank you.

JUDGE LEVI: Thanks so much.

That concludes our hearing today. Thanks very much to all of you who came to testify. Any of you who did not testify but wish to submit comments, you have until February 15 to do so. We encourage you to do so. If anything that happened here today causes you to reflect further and you'd like to supplement what you've sent in previously, that is fine, as well. Thank you very much for being here today.

[Whereupon, at 4:10 p.m., the hearing was adjourned.]