BEFORE THE ADVISORY COMMITTEE ON THE

RULES OF CIVIL PROCEDURE

JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE HONORABLE JUDGE DAVID F. LEVI, CHAIRMAN

PHILLIP BURTON UNITED STATES COURTHOUSE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102
NOVEMBER 30, 2001
8:30 A.M. - 12:35 P.M.

COMMITTEE MEMBERS

JUDGE DAVID F. LEVI, CHAIRMAN
JUDGE LEE H. ROSENTHAL
JUDGE RICHARD H. KYLE
JUDGE SHIRA ANN SCHEINIDLIN
JUDGE H. BRENT MCKNIGHT
JUDGE PETER G. MCCABE
JUSTICE NATHAN L. HECHT
MARK O. KASANIN, ESQUIRE
SHEILA L. BIRNBAUM, ESQUIRE
PROFESSOR EDWARD H. COOPER
PROFESSOR RICHARD L. MARCUS

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CHAIRMAN LEVI: GOOD MORNING. MY NAME IS DAVID LEVI. THANK YOU VERY MUCH FOR BEING HERE THIS MORNING TO HELP THE CIVIL RULES ADVISORY COMMITTEE IN THIS PROJECT THAT WE HAVE BEEN UNDERTAKING FOR THE LAST TEN YEARS TO LOOK AT THE CLASS ACTION RULE.

WE HAVE BEEN LOOKING AT SOME DIFFERENT ASPECTS OF RULE 23, I THINK IT'S FAIR TO SAY, FOR THE BETTER PART OF TEN YEARS WITH SOME EBBING AND FLOWING.

WE HAVE OVER THE PAST 18 MONTHS OR SO, THE SUBCOMMITTEE THAT'S CHAIRED BY JUDGE ROSENTHAL, TO MY LEFT, HAS BEEN WORKING INTENSELY ON THE RULE AND, AS YOU KNOW, WE HAVE PROPOSED SOME RATHER MODEST, I THINK ON THE WHOLE, AMENDMENTS TO RULE 23 WHICH ARE OUT FOR PUBLICATION.

IN OCTOBER WE HAD A CONFERENCE AT THE UNIVERSITY OF CHICAGO LAW SCHOOL ON RULE 23 WHICH WAS EXTREMELY INFORMATIVE FOR ALL OF US AND WE ARE VERY GRATEFUL NOW TO HAVE THE PUBLIC HEARING PROCESS ON THE RULES THAT HAVE BEEN PROPOSED.

AS YOU KNOW, IN ADDITION TO THE RULES THAT HAVE BEEN PUBLISHED BY THE STANDING COMMITTEE, THERE IS ALSO A REPORTER'S CALL FOR COMMENT THAT PROFESSOR COOPER, TO MY RIGHT, HAS ISSUED IN WHICH THE QUESTION OF OVERLAPPING CLASSES, COMPETING CLASS ACTIONS, THE PROBLEM THAT WE HAVE

IN THE FEDERAL SYSTEM OF MULTIPLICITAS LITIGATION IN DIFFERENT FORMS IS DISCUSSED AND SEVERAL PROPOSALS ARE OUTLINED BY PROFESSOR COOPER AND HE HAS INVITED THE PUBLIC GENERALLY TO COMMENT ON THIS AREA OF CONCERN.

WE HAVEN'T PUBLISHED ANYTHING FORMALLY, BUT THIS IS THE BEGINNING OF A PROCESS IN WHICH IT MAY BE ULTIMATELY WE WILL PUBLISH SOMETHING DOWN THE ROAD.

WE WOULD BE HAPPY TO HEAR FROM PEOPLE TESTIFYING TODAY ON EITHER OF THESE AREAS; THAT IS, WHAT WILL BE PUBLISHED FORMALLY OR ON PROFESSOR COOPER'S INFORMAL CALL FOR COMMENT.

GENERALLY, IF YOU HAVE OTHER OBSERVATIONS ON RULE 23 THAT YOU THINK WOULD BE OF USE TO THE COMMITTEE, WE WOULD BE PLEASED TO HEAR FROM YOU AS TO ANY MATTER THAT YOU THINK WOULD BE RELEVANT TO OUR CONSIDERATION

THE PROCEDURE THAT WE ARE GOING TO FOLLOW IS THAT WE WILL ASK YOU TO CONFINE YOUR REMARKS TO TEN MINUTES. THEN WE WOULD LIKE TO BE ABLE TO ASK QUESTIONS FOR APPROXIMATELY FIVE MINUTES OR SO, SO THAT EACH WITNESS CAN TAKE ABOUT 15 MINUTES ON THE WHOLE. IF MEMBERS OF THE COMMITTEE HAVE MANY QUESTIONS FOR A PARTICULAR WITNESS, WE MAY GO A LITTLE BIT LONGER WITH THAT PERSON.

MR. STORTZ HERE?

MR. STORTZ: YES, YOUR HONOR.

CHAIRMAN LEVI: WE WOULD BE PLEASED TO HEAR FROM YOU, SIR.

MR. STORTZ: GOOD MORNING AND THANK YOU ALL FOR LISTENING TO OUR COMMENTS. MY NAME IS MICHAEL STORTZ. I AM A PARTNER IN THE SAN FRANCISCO FIRM OF PREUSS, SHANAGHER, ZVOLEFF & ZIMMER.

I AND MY FIRM HAVE HAD THE PRIVILEGE OF REPRESENTING SEVERAL MANUFACTURERS OF PHARMACEUTICALS AND MEDICAL DEVICES AS NATIONAL COORDINATING COUNSEL IN SOME OF THE MDL AND MASS TORT LITIGATION THAT I'M SURE EVERYONE IS FAMILIAR WITH.

I WELCOME THE OPPORTUNITY TO REVIEW THE AMENDMENTS TO THE FEDERAL RULES. I HAVE PROVIDED SOME COMMENTS IN ADVANCE IN TERMS OF SOME OF THE PARTICULARS, BUT THE MAIN FOCUS I WOULD LIKE TO ADDRESS THIS MORNING IS THE ISSUE OF OVERLAPPING FEDERAL AND STATE PUTATIVE CLASS ACTIONS.

BY WAY OF SOME ILLUSTRATIVE EXAMPLES, WE ARE NOW DEFENDING IN AN MDL LOCATED DOWN IN NEW ORLEANS AND SEVERAL STATE COURTS ACROSS THE COUNTRY PRODUCTS LIABILITY, PERSONAL INJURY, MEDICAL MONITORING AND CONSUMER REFUND CLASS ACTIONS INVOLVING THE SALE AND THE WITHDRAWAL OF A PRESCRIPTION MEDICATION FOR A MAJOR PHARMACEUTICAL COMPANY.

THE FEDERAL JUDGE, THE MDL JUDGE THIS WEEK IS ENTERTAINING MOTIONS TO ENJOIN PROCEEDINGS IN THE STATE COURTS INCLUDING, IN PARTICULAR, STATE COURTS THAT ARE VESTED OVERSEEING PUTATIVE CLASS ACTIONS.

UPON WITHDRAWAL OF THE MEDICATION FROM THE MARKET, THE COMPANY SAW THE FILING OF CLASS ACTIONS IN THE DOZENS ACROSS THE COUNTRY, LITERALLY WITHIN DAYS OF THE WITHDRAWAL OF THE MEDICATION. MANY OF THESE ARE PERSONAL INJURY CLASS ACTIONS, NOTWITHSTANDING THE PHARMACEUTICAL LAW IN THAT AREA OVER THE LAST SEVERAL YEARS.

MANY OF THE CLASS ACTIONS SEEK MEDICAL MONITORING AND ARE DEFINED AS ABOUT HALF OF STATEWIDE PUTATIVE CLASSES AND, ALSO, ON BEHALF OF NATIONAL CLASS ACTIONS.

CURRENTLY THE POSTURE ARE NATIONAL AND STATEWIDE CLASS ACTIONS PENDING IN ROUGHLY A HALF DOZEN STATE COURTS ACROSS THE COUNTRY AND JURISDICTIONS, SUCH AS WEST VIRGINIA, PENNSYLVANIA, NEW JERSEY, TEXAS AND TENNESSEE.

IN THE MEANTIME, THE FEDERAL MDL JUDGE HAS APPROXIMATELY 30 CLASS ACTIONS AS THE COMPANY IS LOCATED OUTSIDE OF MOST OF THESE JURISDICTIONS. IT'S A NEW JERSEY COMPANY. MOST OF THE CLASS ACTIONS ENDED UP IN FRONT OF THE FEDERAL MDL JUDGE.

NOTWITHSTANDING THAT, THE PLAINTIFF'S PUTATIVE

CLASS COUNSEL HAVE BEEN RACING TO SEE WHO CAN GO FIRST GETTING A FAVORABLE CLASS DECISION.

IN ONE INSTANCE THAT I ACTUALLY HAD THE PRIVILEGE OF WITNESSING, THE STATE COURT JUDGE CERTIFIED A CLASS ON FRIDAY OF ONE WEEK, WHERE TUESDAY OF THAT WEEK WE HAD BEEN ASSURED THAT NO CLASS DECISION WOULD BE MADE AT THAT TIME, AND THIS WAS ABOUT A MONTH AFTER THAT JUDGE FIRST BECAME ACQUAINTED WITH THE CASE.

WE ARE FORTUNATE TO BE ABLE TO -- AT LEAST IN MY VIEW, FORTUNATE TO BE ABLE TO REMOVE THAT CASE AND ULTIMATELY IT IS NOW IN FRONT OF THE FEDERAL MDL JUDGE.

PROFESSOR MARCUS: EXCUSE ME, COUNSEL. WAS THERE A REASON THAT THE OTHER FIVE OR SIX THAT ARE STILL IN STATE COURT WERE NOT REMOVED TO FEDERAL COURT?

MR. STORTZ: THERE ARE LAWS IN THE DIFFERENT CIRCUIT COURTS ABOUT THE FRAUDULENT JOINDER THEORY. IN OTHER WORDS, A PUTATIVE CLASS COUNSEL WILL JOIN A LOCAL PHARMACY.

IN MISSISSIPPI THERE IS A PHARMACY CALLED BANKSTON DRUGS THAT IS LOCATED IN FAME, MISSISSIPPI IN JEFFERSON COUNTY, AND IT HAS BEEN WRITTEN ABOUT IN THE NEW YORK TIMES, I BELIEVE. WE ARE WELL FAMILIAR WITH THE PROPRIETOR OF THAT FINE ESTABLISHMENT AND THEY HAVE SEEN MORE THAN THEIR SHARE OF CLASS ACTION LITIGATION. SO, AS

A RESULT, ARE ESSENTIALLY STUCK IN THE STATE COURT AND PUTATIVE NATIONAL CLASS ACTIONS OR EVEN STATEWIDE CLASS ACTIONS, BUT MISSISSIPPI RESIDENTS, AS AN EXAMPLE, VERSUS AN OUT-OF-STATE COURT DEFENDANT.

IT IS A VERY REAL PROBLEM. IT'S A VERY PRESSING PROBLEM. CLASS COUNSEL IS TRYING TO OBTAIN INJUNCTIVE RELIEF IN SOME FORM, SOME MEDICAL MONITORING OR OTHER INJUNCTIVE PROGRAM. THAT COMPANY IS FACED WITH A VERY REAL POSSIBILITY OF INCONSISTENT DECISIONS FROM ONE COURT AND ANOTHER COURT.

YOU CAN'T DO TWO MEDICAL MONITORING PROGRAMS. THEORETICALLY, YOU COULD, BUT REALISTICALLY, SCIENTIFICALLY AND LOGISTICALLY IT'S IMPOSSIBLE. THAT'S JUST ONE EXAMPLE OF THE RISKS FACING THE COMPANY.

THE MORE PRACTICAL LITIGATION RISKS, AS I OUTLINED, I THINK ARE REFLECTED IN THE REPORTER'S CALL IS THE STATE COURTS PROCEED ON THEIR OWN SCHEDULE WITHOUT REGARD TO ANYTHING THAT IS HAPPENING IN THE FEDERAL MDL, NOTWITHSTANDING THAT THE MDL MISSION IS TO COORDINATE THE LITIGATION, BE FRONT AND CENTER, AND RESOLVE IT MOST EFFICIENTLY AND COST EFFECTIVELY.

SO THE REPORTER'S CALL, IN MY VIEW, IS A WELCOME SIGN. I SHOULD SAY THAT IN THE LITIGATION I WAS DESCRIBING AT THE OUTSET, THE FEDERAL JUDGE, THE MDL

JUDGE, IN CONSIDERING THE INJUNCTION MOTION WE HAD BEEN ARGUING THAT -- AND I SPEAK JUST PERSONALLY AT THIS POINT, BUT WE WERE ARGUING THEN AND I WOULD SAY NOW I BELIEVE THAT THE FEDERAL COURTS CAN AND WILL DECIDE IN THE FACE OF WHAT I BELIEVE IS A MORASS AND A CRISIS AT TIMES TAKE ACTION.

IT MEANS THEY ARE FINALLY HAVING APPARENT POWER AND THE AUTHORITY TO CORRAL THIS MASS AS PART OF THEIR OBLIGATION, PARTICULARLY WHEN IT'S AN MDL PROCEEDING AND IF -- THE CHOICE, IT SEEMS TO ME, IS THAT THEY ARE PROVIDED WITH SOME GUIDANCE BY WAY OF RULES AND POLICY CONSIDERATIONS OR THEY GO BASED ON WHAT THEY SEE IN THE CASE LAW AND THEIR BEST JUDGMENT.

WE THINK THAT THE ACTION WILL BE TAKEN AND THE QUESTION IS WHETHER IT SHOULD BE DONE BY WAY OF GUIDANCE OR RULES OR OTHER ARTICULATED POLICIES OR IT SHOULD BE JUDGED BY THE LAW.

WE ENDORSE THE PROPOSAL FOR MINIMAL DIVERSITY JURISDICTION IN THE LAST ACTION CONTEXT. I THINK THAT WOULD GO A LONG WAY TO REMOVING SOME OF THE PROBLEMS HERE.

IF THE COMMITTEE FEELS THAT IT IS IN SOME WAY RESTRICTED FROM ENACTING SOME OF THE PROPOSALS OR IDEAS SET FORTH IN THE REPORTER'S CALL, THEN WE BELIEVE A LEGISLATIVE RECOMMENDATION WOULD BE APPROPRIATE.

BUT MY POINT THIS MORNING IS A VERY SIMPLE ONE. THERE IS A REAL PROBLEM OUT HERE. IT'S NOT SCATTERED. IT'S NOT RARE. IT'S VERY COMMON. IT'S BEEN, QUITE FRANKLY, THE BREAD AND BUTTER OF WHAT I HAVE BEEN DOING FOR THE LAST FIVE YEARS IN MY PRACTICE.

I WOULD BE HAPPY TO ENTERTAIN QUESTIONS.

CHAIRMAN LEVI: THIS IS DAVID LEVI. I'M INTERESTED IN YOUR REQUEST FOR AN INJUNCTION. MAYBE IF YOU TAKE IT OUT OF THE PARTICULAR CASE BECAUSE I DON'T WANT TO MAKE YOU ARGUE ABOUT WHAT'S GOING ON IN CURRENT LITIGATION, BUT JUST IN GENERAL, WHEN YOU SEE THIS PROBLEM, DO YOU SEEK AN INJUNCTION OF INDIVIDUAL LITIGATION AS WELL AS CLASS LITIGATION OR DO YOU SEEK TO SIMPLY ENJOIN AND TO BRING TO ONE COURT ALL OF THE PENDING CLASSES?

MR. STORTZ: THERE ARE TWO PRIMARY PROBLEMS. THERE IS A CLASS ACTION PROBLEM THAT I ADDRESSED TO THIS COMMITTEE BECAUSE OF THE SUBJECT OF THE AMENDMENTS, BUT THERE IS AN ADDITIONAL PROBLEM THAT IS ALSO THE SUBJECT OF INJUNCTIONAL RELIEF AND THAT IS DUPLICATIVE, OVERLAPPING DISCOVERY.

BY WAY OF ANOTHER EXAMPLE, ALSO FROM THE SAME LITIGATION, THE STATE COURT PLAINTIFFS' ATTORNEYS SOUGHT TO NOTICE A DEPOSITION OF SOME 38 COMPANY WITNESSES OVER

THE COURSE OF 45 BUSINESS DAYS AND AT THE SAME TIME THE SAME PEOPLE ARE BEING NOTICED TO APPEAR IN OTHER JURISDICTIONS ACROSS THE COUNTRY. THAT'S SIMPLY A MATTER OF LEVERAGING ACROSS THE DIFFERENT PLAINTIFFS' COUNSEL AND IF THEY ARE ABLE TO MUSTER THE ATTORNEYS TO TAKE THESE DEPOSITIONS, THE COMPANY IS FACED WITH HAVING TO SOMEHOW MAKE TWO -- ONE WITNESS AVAILABLE IN TWO OR MORE PLACES AT ONCE. THAT'S NOT AN EXAGGERATION. THAT IS QUITE SIMPLY WHAT THE FACTS ARE.

CHAIRMAN LEVI: DO YOU INVITE THE JUDGES TO COORDINATE THAT SORT OF --

MR. STORTZ: ABSOLUTELY.

CHAIRMAN LEVI: AND WHAT SUCCESS DO YOU HAVE?

MR. STORTZ: IT'S VERY MUCH A LIQUID PROMISE THAT, UNFORTUNATELY, DISSOLVED AS THE LITIGATION UNFOLDS.

THE PROBLEM IS THE -- AGAIN, IN OUR VIEW, AND I ADMIT THE BIAS OF THE DEFENSE PETITIONER, BUT THE PROBLEM IS THAT THE PLAINTIFF CLASS COUNSEL OR LEADER OF THE PLAINTIFFS' BAR WOULD TAKE WHAT THEY CAN GET OUT OF THE MDL PROCEEDING AND THEN GO BACK TO THEIR STATE COURT AND PROCEED FORWARD TRYING TO OBTAIN WHAT THEY WERE DENIED IN THE MDL COURT OR OTHER PRIOR PROCEEDING, AND THE DISCOVERY IS AN EXAMPLE.

THE MDL JUDGE IN EVERY PROCEEDING -- MOST

RECENTLY I WAS UP EARLIER THIS MONTH UP IN SEATTLE IN THE MOST RECENT MDL INVOLVING -- IN FRONT OF JUDGE ROTHSTEIN. THE FIRST WORDS OUT OF HER MOUTH WERE COORDINATION, COORDINATION, COORDINATION.

WE ARE VERY OPTIMISTIC THAT WE HAVE THE OPPORTUNITY TO REALLY EFFECTUATE THAT IN THIS LITIGATION. DEFENDANTS ARE ALL FOR IT. THERE IS -- WE HAVE NO INTEREST IN HAVING OUR PEOPLE CALLED TO A DEPOSITION IN MULTIPLE LOCATIONS.

THE PROBLEM IS, IS THAT WE HAVE COUNSEL WHO TAKE WHAT THEY CAN GET AND WE CALL THEM -- MAYBE IT'S NOT THE MOST FAVORABLE TERM -- DOUBLE DIPPERS. THEY TAKE WHAT THEY CAN GET IN ONE LOCATION. IN SOME INSTANCES THEY SIT ON THE STATE FEDERAL COORDINATION COMMITTEE IN THE MDL. THINGS DON'T GO THEIR WAY THERE, THEN THEY ARE STILL ON THE COMMITTEE, I GUESS, BUT THEY PROCEED FORWARD IN STATE COURT.

JUDGE KYLE: WHEN YOU ARE SEEKING AN INJUNCTION, WHO ARE YOU SEEKING TO ENJOIN; JUDGE, PARTIES, THE LAWYERS?

MR. STORTZ: WE ARE NOT SEEKING IN OUR LITIGATION TO ENJOIN INDIVIDUAL PLAINTIFFS PERSONALLY THROUGH CASES, OBTAINING TRIAL DATES AND MOVING FORWARD, OBTAINING JUDGMENTS IN THE PERSONAL INJURY CASES.

WE ARE, HOWEVER, SEEKING TO ENJOIN ATTORNEYS WHO HAVE APPEARED IN BOTH FORUMS AND WE BELIEVE QUITE FIRMLY THAT THE COURT HAS IN REM JURISDICTION SITTING AS AN MDL JUDGE TO PREVENT SOME OF THESE ABUSES AND, ACCORDINGLY, CAN ISSUE AN INJUNCTION TO PROTECT THAT.

MS. BIRNBAUM: SHEILA BIRNBAUM. HOW DO YOU GET AROUND THE ANTI-INJUNCTION PROVISIONS BECAUSE IF YOU ARE RIGHT THAT THERE IS INHERENT POWER, THEN THERE WOULDN'T BE A REALLY NEED FOR CHANGES AND I THINK PEOPLE ARE CONCERNED THAT THERE MAY NOT BE THAT INHERENT POWER.

MR. STORTZ: I WOULD LIKE TO REFLECT ON THAT BECAUSE IT'S TOO CLOSE TO THE BONE OF WHAT WE ARE ARGUING ABOUT.

BUT I WOULD SAY THAT THE DIFFICULTY IS, I THINK THE COURTS DO HAVE THE INHERENT POWER, BUT THE MORE DIFFICULT PROBLEM IS HOW THE COURT ACTS IF THEY AGREE WITH ME THAT THEY HAVE THAT POWER; HOW THEY ENFORCE THE INJUNCTION; HOW DOES THAT HAPPEN AS A PRACTICAL MATTER.

I THINK THAT'S AN AREA WHERE CERTAINLY THE JUDGES HAVE CREATED AND CRAFTED SOLUTIONS, GIVEN THE PRAGMATIC CRISIS THAT THEY FACE OF MOVING FORWARD CRAFTING SOLUTIONS. I THINK THE QUESTION IS WHETHER IT'S BETTER TO PROVIDE SOME GUIDANCE AND AUTHORITY FOR A COURT FACED WITH THAT SITUATION.

THANK YOU VERY MUCH.

JUDGE ROSENTHAL: I DO HAVE ONE OTHER QUESTION BEFORE YOU LEAVE. I'M SORRY. LEE ROSENTHAL.

IN SOME OF THE COMMENTS THAT WE RECEIVED IN WRITING THE CONCERN WAS RAISED BY PEOPLE WHO FACED THE KINDS OF DIFFICULTIES YOU HAVE DESCRIBED; THAT THE PROPOSED FOR PUBLICATION CHANGE WITH RESPECT TO THE TIMING OF CERTIFICATION MIGHT -- BECAUSE IT MIGHT BE READ AS PERMITTING A GREATER PERIOD OF TIME TO ELAPSE BEFORE CERTIFICATION DECISIONS ARE MADE IN FEDERAL COURTS, MIGHT LEAD TO A FURTHER COMPLICATION; THAT IS, FEDERAL COURTS WILL WAIT AND GIVE THE STATE COURT RACES AN EVEN GREATER OPPORTUNITY TO OCCUR. DO YOU SHARE THAT CONCERN?

MR. STORTZ: YES, I DO.

JUDGE ROSENTHAL: AND IF YOU DO, WHAT DO YOU THINK WE OUGHT TO DO WITH RESPECT TO THE PROPOSAL TO ADDRESS IT, IF ANYTHING?

MR. STORTZ: I THINK MY PROBLEM WAS NOT WITH THE PROPOSAL, THE LANGUAGE OF THE PROPOSED RULE AMENDMENT, BUT THE LANGUAGE OF THE DRAFT NOTE.

I THINK THAT RATHER THAN DECIDING PENDING STATE COURT LITIGATION AS GROUNDS FOR THE FEDERAL COURT DEFERRING, THE NOTE SHOULD HAVE BEEN MADE CLEAR THAT THAT'S SOMETHING THE FEDERAL COURT NEEDS TO BE COGNIZANT

OF AND RATHER THAN BEING GROUNDS FOR DEFERENCE MAY, IN FACT, BE GROUNDS FOR MOVING WITH GREATER DISPATCH TO RESOLVE THESE ISSUES.

I CERTAINLY THINK THE FEDERAL COURT NEEDS TO BE COGNIZANT OF WHAT IS GOING ON IN OVERLAPPING STATE COURT CLASS ACTION LITIGATION.

IN THE CASES THAT I HAVE BEEN INVOLVED WITH, MY VIEW IS THAT THAT IS USUALLY GROUNDS FOR THE FEDERAL COURT TO MOVE MORE QUICKLY RATHER THAN A DELAY.

CHAIRMAN LEVI: THANK YOU, MR. STOTZ.

MR. STORTZ: MY PLEASURE.

CHAIRMAN LEVI: IS MR. HIMMELSTEIN? MR. HIMMELSTEIN?

MR. HIMMELSTEIN: GOOD MORNING. I AM ESPECIALLY PLEASED TO BE TESTIFYING BEFORE THE COMMITTEE TODAY.

PROFESSOR MARCUS WAS MY FIRST YEAR CIVIL PROCEDURE PROFESSOR. AFTER A YEAR OF SUCH MUNDANE TOPICS AS CELOTEX SUMMARY JUDGMENT STANDARDS, NONE OF US IN HIS CLASS WILL EVER FORGET HIS FINAL EXAM, WHICH INVOLVED COMPETING FEDERAL AND STATE CLASS ACTIONS AND RES JUDICATA EFFECTING THE JUDGMENT ON SOME CLAIMS AND THE CLAIMS IN THE OTHER FORUM.

CHAIRMAN LEVI: WE HAVE SOME EXTRA CREDIT QUESTIONS FOR YOU.

(LAUGHTER.)

MR. HIMMELSTEIN: I'M NOT SURE IF HE WAS FISHING FOR MATERIAL OR WAS TESTING US.

THE SUBSTANCE OF MY COMMENTS ARE REALLY IN MY WRITTEN TESTIMONY. I WOULD BE PLEASED TO FIELD ANY QUESTIONS OR JUST START TALKING ABOUT WHAT I TALKED ABOUT IN WRITING.

AS TO THE TIMING OF CLASS CERTIFICATION, THE COMMITTEE NOTES SEEM TO SUGGEST TO JUDGES THAT THEY SHOULD ORDINARILY BIFURCATE DISCOVERY BETWEEN CLASS AND MERITS ISSUES; THAT THIS IS THE WAY TO GO.

IN MY EXPERIENCE THAT'S NEVER BEEN SOMETHING THAT'S JUST BEEN ASSUMED, EITHER BY THE PARTIES OR BY THE COURT, AS EVIDENCED BY THE FACT THAT THE DEFENDANTS WILL TYPICALLY BEFORE CASE MANAGEMENT CONFERENCE DISAGREE WITH THE PLAINTIFFS ABOUT THAT.

THERE WILL BE A STATEMENT FILED WHERE THERE IS A PLAINTIFF'S POSITION THAT DISCOVERY SHOULD NOT BE BIFURCATED, A DEFENSE POSITION THAT DISCOVERY SHOULD BE BIFURCATED AND WE HASH IT OUT BEFORE THE COURT.

THE LINE BETWEEN CLASS AND MERITS DISCOVERY IS GENERALLY VERY, VERY FUZZY AND WHERE DISCOVERY IS BIFURCATED, MORE OFTEN THAN NOT, YOU WILL HAVE MANY MORE DISCOVERY BATTLES THAN YOU WOULD IF WE WERE SIMPLY ALLOWED

TO SEEK RELEVANT EVIDENCE AND LEAVE IT TO OUR OWN, THE PLAINTIFFS' LAWYER'S JUDGMENT, AS TO WHAT WE REALLY NEED NOW TO MOVE THE CASE FORWARD.

IF A SUFFICIENTLY QUICK DEADLINE IS ESTABLISHED FOR FILING CLASS CERTIFICATION MOTION, WE WILL SELF REGULATE. I WILL NOT TAKE TEN DEPOSITIONS I DON'T NEED TO BRING THAT MOTION. I WILL GO AFTER THE STUFF I NEED TO BRING AND WIN THAT MOTION BECAUSE, AS WE ALL KNOW, THAT MOTION USUALLY DETERMINES WHETHER THE CASE GOES FORWARD OR NOT.

I WILL TYPICALLY EVEN BEFORE THE COURT HAS RESOLVED THE ISSUE OF WHETHER OR NOT THERE SHOULD BE BIFURCATION, IF I GET AN OPPORTUNITY TO SEND OUT DISCOVERY FIRST, I WILL GET BACK RESPONSES FROM DEFENDANTS WITH THE BOILERPLATE OBJECTIONS TO EVERYTHING INCLUDING IT'S IRRELEVANT BECAUSE NO CLASS HAS BEEN CERTIFIED YET AND WE ARE BASICALLY REFUSING TO PRODUCE A SINGLE DOCUMENT, AND THAT GIVES THE PLAINTIFFS' LAWYERS A SEVERE DISADVANTAGE.

THERE ARE MANY FACTUAL MATTERS DEFENSE LAWYERS WILL INTRODUCE IN OPPOSITION TO CLASS CERTIFICATION. AH-HAH, YOU DIDN'T KNOW ABOUT THIS. THIS IS WHY THE PRODUCTS ARE DIFFERENT OR THE CLASS MEMBERS ARE DIFFERENT AND CLASS SHOULDN'T BE CERTIFIED.

AND THEY HAVE ALL THAT INFORMATION. THEY CAN

SEARCH IT AND FIND ALL THE REASONS WHY CLASS SHOULD NOT BE CERTIFIED, BUT I NEED THE SAME LATITUDE TO SEARCH FOR THE REASONS WHY IT SHOULD BE CERTIFIED.

SO I WOULD SUGGEST, MY PREFERENCE WOULD BE TO FLIP THIS AND SAY THAT BIFURCATION GENERALLY IS INEFFICIENT, BUT I RECOGNIZE THAT MAY BE GOING TOO FAR AS FAR AS THE COMMITTEE IS CONCERNED AND WOULD RECOMMEND THAT THE BIAS IN FAVOR OF BIFURCATION SIMPLY BE WRITTEN OUT OF THE COMMITTEE NOTES AND IT BE LEFT AS IT IS NOW IN THE JUDGE'S SOUND DISCRETION TO MANAGE THE CASE.

ON MY SECOND POINT, THE ORDER CERTIFYING A CLASS, A CLASS NOTICE PROGRAM IS A LOT LIKE A SECURITIES OFFERING. A LOT OF THINGS HAVE TO BE IN PLACE THE MINUTE YOU GO EFFECTIVE. YOU HAVE GOT TO GET -- USUALLY NOWADAYS YOU HAVE SOME COMBINATION OF DIRECT MAIL AND PUBLICATION. YOU HAVE TO RESERVE PUBLICATION DATES. FOR EXAMPLE, WE FREQUENTLY USE THE A.A.R.P. PUBLICATION, MODERN MATURITY. YOU HAVE TO BOOK TWO MONTHS IN ADVANCE TO GET IN THERE.

THAT'S A VERY EFFECTIVE WAY OF REACHING A LOT OF PEOPLE. NEWSPAPER TIMELINES ARE SHORTER, BUT IT IS QUITE AN UNDERTAKING AND IT TAKES LOT OF ADVANCE PLANNING AND NO ONE KNOWS WHEN THE CLASS CERT ORDER GENERALLY IS COMING DOWN, AND THE JUDGE WHO ISSUES THE ORDER DOESN'T REALLY KNOW ALL OF THE STUFF THAT HAS TO GO INTO THE NOTICE PLAN.

SO YOU REALLY CAN'T PUT AN OPT-OUT DEADLINE OR EVEN AT THE BEGINNING DATE FOR OPT-OUTS IN THE CLASS CERT ORDER ITSELF. IT IS JUST NOT FEASIBLE.

WHEN YOU ARE DOING A SETTLEMENT, YOU CAN SOMETIMES DO THAT, JUST GENERALLY DO THAT IN CONJUNCTION WITH PRELIMINARY APPROVAL WITH CLASSES AS PROVISIONALLY CERTIFIED AND THE SECOND THE NOTICE PLAN IS APPROVED, AND THAT IS LIKE A SECURITIES OFFERING IN THAT YOU HAVE EXHIBITS A THROUGH DOUBLE Z IN THE MOTION WHERE YOU HAVE GOT ALL THE FORMS OF NOTICE AND THE PROJECTED REACH OF THE NOTICE AND EXPERT DECLARATIONS AND ALL THAT AND THAT'S A BIG UNDERTAKING.

WE CAN DO THAT, BUT WHEN WE ARE LITIGATING CLASS CERTIFICATION, THE DEFENDANTS AREN'T GOING TO SIT DOWN AND TRY AND HASH OUT ALL YOU THAT STUFF WITH YOU UNTIL THE CLASS IS CERTIFIED.

SO I WOULD RECOMMEND THAT THE ORDER BE -- EXCUSE ME, THE RULE AND COMMENTARY BE REVISED TO INDICATE THAT IT IS APPROPRIATE TO SET THAT DEADLINE LATER. IT MUST BE SET BY ORDER, THAT'S FINE, BUT THE ORDER SHOULDN'T HAVE TO ISSUE AT THE SAME TIME.

ON TO COURT APPROVAL WITHDRAWAL OF CLASS CLAIMS. I WOULD LIKE TO PRETEND THAT WE GET A COMPLAINT JUST RIGHT EVERY TIME, BUT THESE ARE VERY COMPLEX MATTERS WITH THE

INTERLOCKING STATE AND FEDERAL CASES, CHOICE OF LAW RULES MDL'S, FAST-DEVELOPING FACTUAL SITUATIONS AND WE CONTINUE LEGAL RESEARCH AFTER WE FILE THE COMPLAINT. WE MAY DECIDE CERTAIN CLAIMS.

I WILL GIVE YOU AN EXAMPLE. RICO, SOME JURISDICTIONS FOR MAIL FRAUD PREDICATE ACT REALLY REQUIRE PROOF OF RELIANCE. OTHERS INDIVIDUAL RELIANCE. OTHERS MAY BE MORE LAX. WE DON'T KNOW WHERE THE CASE IS GOING TO END UP AND, ACTUALLY, WE LITIGATE IT WHEN WE FILE.

WE MAY DECIDE WE WANT TO AMEND THAT CLAIM OUT BECAUSE AT THE CLASS CERTIFICATION HEARING THE DEFENDANTS WILL MAKE IT ALL ABOUT THE INDIVIDUAL RELIANCE ELEMENT THAT'S REQUIRED FOR RICO AND, THEREFORE, YOU SHOULDN'T CERTIFY THE CLASS AND THAT KIND OF CASTS A SHADOW OVER THE REST OF THE CLAIMS.

I THINK THAT THE RECENT COMMENTARY OF THE SEVENTH CIRCUIT IN THE MONEY TRANSFER LITIGATION REALLY HITS THE MARK WHERE THE OBJECTORS WERE COMPLAINING THAT THEY DIDN'T ASSERT EVERY POSSIBLE CLAIM. WHY THEY SHOULD HAVE AN OBLIGATION TO FIND SOME WAY TO DEFEAT CLASS TREATMENT IS A MYSTERY. IT IS BEST TO BYPASS MARGINAL THEORIES IF THEIR PRESENCE WOULD SPOIL THE USE OF AN AGGREGATION DEVICE THAT ON THE WHOLE IS FAVORABLE TO THE HOLDERS OF SMALL CLAIMS.

SO A CLASS ACTION COMPLAINT IS VERY MUCH A WORK IN PROGRESS. WHEN IT'S FILED, WE GENERALLY WILL USE THE OPPORTUNITY TO FILE ONE AMENDMENT AS A RIGHT BECAUSE, AS ANYONE IN THIS PRACTICE KNOWS, IT'S GOING TO BE MONTHS GENERALLY BEFORE YOU GET AN ANSWER OR A MOTION TO DISMISS. THERE WILL BE AN MDL PETITION. THE CASES WILL BE STAYED WHILE THAT GETS RESOLVED AND IT COULD BE SIX MONTHS OR A YEAR BEFORE YOU EVER GET AN ANSWER AND A LOT HAPPENS BEFORE THEN. AND PLAINTIFFS' LAWYERS OF VARIOUS JURISDICTIONS WHO HAVE BEEN PURSUING VARIOUS THEORIES COME TOGETHER AND, HOPEFULLY, TRY AND PUT TOGETHER THE BEST COMBINED WORK PRODUCT FOR THEIR CLIENTS.

WE WOULD LIKE THE OPPORTUNITY TO DO THAT WITHOUT HAVING TO PLACE OUR REASONS FOR MAKING CHANGES UNDER THE MICROSCOPE OF THE JUDGE AND HAVE TO EXPLAIN OUR STRATEGY AND LEGAL THEORIES TO THE DEFENDANTS.

SO I MERELY SUGGEST THAT THE RULING AND COMMENTARY BE CLARIFIED SUCH THAT IF A CLAIM IS DROPPED IN THE AMENDMENT, AS A RIGHT IT DOESN'T NECESSARILY REQUIRE COURT APPROVAL.

THERE IS ONE CIRCUMSTANCE WHERE, OF COURSE, YOU WOULD WANT COURT APPROVAL, WHICH IS IF YOU AMEND OUT CLASS ALLEGATIONS ENTIRELY. AS LONG AS IT REMAINS A CLASS ACTION COMPLAINT OF SOME KIND, IT'S NOT GOING TO BE

DISMISSED OR SETTLED WITHOUT JUDICIAL SCRUTINY AND IF THE PLAINTIFFS HAVE PULLED SOMETHING ALONG THE WAY, YOU KNOW, THE COURT CAN DEAL WITH IT AT THAT TIME.

BUT, OTHERWISE, WE WOULD LIKE, YOU KNOW, THE NORMAL LATITUDE THAT LITIGANTS HAVE TO APPROVE THEIR WORK PRODUCT AS THEY GO ALONG.

JUDGE ROSENTHAL: CAN I ASK A QUESTION ABOUT THAT? EXCUSE ME.

MR. HIMMELSTEIN: YES.

JUDGE ROSENTHAL: YOU WOULD CARVE OUT THIS EXCEPTION FOR AMENDMENTS THAT WOULD AMEND OUT CLASS ACTIONS ALLEGATIONS ENTIRELY?

MR. HIMMELSTEIN: YES.

JUDGE ROSENTHAL: I JUST WANT TO SEE HOW FAR THAT WOULD GO. WHAT IF YOU WERE AMENDING TO GREATLY NARROW THOSE WHO WOULD BE INCLUDED IN THE CLASS OR TO ELIMINATE A SUBCLASS ENTIRELY? DOES THAT MEAN THAT YOU WOULD WANT TO GET COURT APPROVAL BECAUSE YOU ELIMINATED CLASS ACTION STATUS FOR A NUMBER OF POTENTIAL PEOPLE WHO WOULD -- WHO WOULD UNDER THE PRIOR PLEADING HAVE BEEN COVERED BY IT?

JUST TO MAKE IT EASIER TO ANSWER, AS A FOOTNOTE TO THAT, WHAT IF YOU ELIMINATED THE DAMAGES CLAIMS AND ALL YOU WOULD SEE IS THE -- GO AHEAD.

MR. HIMMELSTEIN: I STRUGGLED WITH THAT AND TRIED

TO COME UP WITH BRIGHT LINES BECAUSE I RECOGNIZE WHEN YOU ARE SETTING A RULE THAT DETERMINES WHETHER OR NOT JUDICIAL APPROVAL IS REQUIRED FOR SOMETHING, YOU NEED A BRIGHT LINE, OTHERWISE THE PARTY WILL INTERPRET THE RULE IN THEIR OWN FAVOR AND NOT ASK FOR APPROVAL. I RECOGNIZE THAT.

AND THE CONCLUSION THAT I CAME TO AFTER TALKING WITH MY PARTNER, ELIZABETH CABRASER, IN TRYING TO WORK THIS OUT IS THAT THE CONCERN HERE THAT THE COURT SHOULD HAVE IS THAT THE CLASS, THE PUTATIVE CLASS REPRESENTATIVE IS SELLING OUT THE CLASS, GETTING SOMETHING ON THE SIDE AND NARROWING THE CLAIMS OR THE CLASS DEFINITION FOR THAT REASON.

AND IF THAT HAPPENS, THE DEFENDANT IS GOING TO -- UNLESS THERE IS JUST SOME INCREDIBLE ACT OF COLLUSION GOING ON, THE DEFENDANT IS GOING TO INSIST THAT THE COMPLAINT BE DISMISSED IN ITS ENTIRETY; THAT THEY HAVE SETTLED WITH THAT PERSON. BOOM. IT'S OVER. OR THAT AT LEAST THE CLASS ALLEGATIONS GO AWAY; OTHERWISE THE DEFENDANT, THE DEFENSE COUNSEL WILL KNOW THAT WHEN IT COMES TIME TO SETTLE WHATEVER IS LEFT OF THE CLASS, THE JUDGE WILL BE SCRUTINIZING IT. AND YOU HAVE OTHER RULES WHICH REQUIRE THE PARTIES TO GIVE THE JUDGE INFORMATION ON ANY PRIOR DEALS OR SIDE DEALS HAVING TO DO WITH THAT EVENTUAL SETTLEMENT.

SO I THINK THOSE OTHER RULES ENSURE AND PROVIDE THE DETERRENCE THAT YOU CAN'T JUST DO SOMETHING LIKE THAT AND NOT WORRY ABOUT IT. THE JUDGE WILL FIND OUT ABOUT IT SOONER OR LATER AND IF YOU TRY TO PULL SOMETHING, HOPEFULLY, YOU KNOW, YOU WILL BE HELD ACCOUNTABLE.

ON THE SECOND OPT-OUT OPPORTUNITY UNDER RULE 23(E), I REALLY HAVE NO STRONG PREFERENCE. I PREFER TO LEAVE THINGS TO JUDICIAL DISCRETION WHEN THERE IS A CHOICE. NO PROBLEM, REALLY, WITH EITHER VARIANT OF THE RULE.

CHAIRMAN LEVI: HAVE YOU BEEN SETTLING CASES WITH AN OPT-OUT AT THE SETTLEMENT PHASE?

MR. HIMMELSTEIN: YES. YES, BUT I CAN'T RECALL THE LAST TIME I PERSONALLY HAD, HAD THAT HAPPEN IN MY CASES.

THE ONES I HAVE BEEN INVOLVED WITH RECENTLY HAVE BEEN SIMULTANEOUS NOTICE OF BOTH CLASS CERT AND THE SETTLEMENT. THESE ARE MORE FREQUENT.

CHAIRMAN LEVI: YOU CAN OPT-OUT WITH THE CLASS KNOWING WHAT THE SETTLEMENT IS?

MR. HIMMELSTEIN: I HAVE NO PROBLEM WITH THAT CONCEPT. I THINK -- YES, YES, BUT I HAVE NO PROBLEM WITH THE SECOND OPT-OUT OPPORTUNITY. I THINK IT'S JUST FINE.

I LIKE TO GIVE PEOPLE THE OPTION TO STAY IN OR

GET OUT. I'M NOT TRYING TO HOLD THEM IN AGAINST THEIR WELL.

RELATIVELY FEW PEOPLE GENERALLY DO OPT-OUT UNLESS THEY HAVE SERIOUS PERSONAL INJURIES AND I HAVE QUESTIONS ABOUT WHETHER CLASS CERTIFICATION IS APPROPRIATE FOR THOSE KINDS OF CLAIMS ANYWAY. SO I THINK THAT'S FINE GIVING THEM THE SECOND OPT-OUT OPPORTUNITY.

CHAIRMAN LEVI: WOULD YOU SKIP FORWARD A BIT BECAUSE YOUR TIME IS SHORT HERE. COULD YOU COMMENT ON THE ATTORNEY PROVISIONS?

MR. HIMMELSTEIN: YES. ON THE PROCEDURE FOR EMPLOYING COUNSEL?

CHAIRMAN LEVI: YES, AND FIELDS.

MR. HIMMELSTEIN: OKAY. YES, THIS IS, OF COURSE, TWO TOPICS NEAR AND TO ALL OF THE HEARTS OF THE PLAINTIFFS' CLASS ACTIONS LAWYERS.

I DON'T LIKE TO FIND MYSELF ON THE SECOND TIER OF AN UNWIELDY CLASS COUNSEL STRUCTURE. I DON'T THINK IT'S TERRIBLY EFFICIENT. YOU CAN END UP ON, YOU KNOW, DOZENS OF CONFERENCE CALLS WITH 20 PEOPLE WHERE NOT TOO MUCH GETS DONE.

I THINK IT IS APPROPRIATE TO APPOINT A SINGLE LAW FIRM TO RUN A CASE OR IF YOU HAVE TWO OR THREE CONTENDERS WHO ALL SEEM TO BE PRETTY EQUALLY WELL

QUALIFIED AND WILLING AND HAPPY TO WORK TOGETHER, TO LET THEM DO THAT BECAUSE THESE ARE RESOURCE INTENSIVE CASES, AND IT'S -- YOU OFTEN GET A BETTER WORK PRODUCT PUTTING TWO OR THREE LAW FIRMS ON THE TOP.

AND I THINK AS FAR AS THE RESOURCES REQUIRED TO LITIGATE A CASE, I HAVE MET JAN SCHLICHTMAN. HE WAS ASSOCIATED WITH OUR FIRM FOR AWHILE, AND THE STORY OF THE CIVIL ACTION IS A TRUE STORY. A FIRM THAT DOESN'T REALLY HAVE THE RESOURCES TO BRING A CASE TO TRIAL IS GOING TO MORE LIKELY THAN NOT BE FORCED TO SETTLE THE CASE FOR LESS THAN ITS WORTH BECAUSE THAT FACT IS NOT LOST ON DEFENSE LAWYERS.

AND I HAVE EGALITARIAN SENTIMENT. EVERYONE SHOULD HAVE AN EQUAL SHOT. YOU SHOULDN'T JUST PICK THE BIG FIRMS BECAUSE THEY ARE BIG. AT SOME POINT THEY WERE SMALL UNTIL THEY GOT THEIR SHOT.

AND THE ANSWER TO THAT MAY BE TO ALLOW, YOU KNOW, ASSOCIATIONS OF COUNSEL, SMALL FIRM AND A BIG FIRM, WHATEVER, TO BE RUNNING THE CASE; BUT IT IS IMPORTANT, I THINK, THAT THE COURT SATISFY ITSELF THAT WHOEVER THEY APPOINT CAN BRING THIS CASE TO TRIAL AND STAY IN BUSINESS UNTIL THAT TIME, IF THAT'S WHAT THE CASE REQUIRES.

PROFESSOR MARCUS: MR. HIMMELSTEIN, I'M SORRY. DO YOU THINK THAT -- RICHARD MARCUS. DO YOU THINK THAT THE

CURRENT RULE PROPOSAL AND NOTE LANGUAGE ARE INSENSITIVE TO THESE CONCERNS AND SHOULD BE CHANGED?

MR. HIMMELSTEIN: NO. I DON'T -- I DON'T THINK THEY ARE INSENSITIVE TO THE CONCERNS. THEY DO ACKNOWLEDGE THAT RESOURCES ARE IMPORTANT. I GUESS I AM SUGGESTING, PERHAPS, AMPLIFICATION OF WHAT'S THERE, BUT I REALLY HAVE NO QUARREL WITH WHAT IS THERE.

ON THE ATTORNEY'S FEE AWARD PROVISION, I DO HAVE A QUARREL WITH THE COMMITTEE NOTE WHICH SEEMS TO SUGGEST THAT IF THE JUDGE IN HINDSIGHT WHEN THEY ARE AWARDING THINKS THAT, YOU KNOW, THIS WAS A PRETTY SOLID CASE, THEY DIDN'T REALLY HAVE MUCH RISK, I'M JUST GOING TO GIVE THEM THEIR LOADSTAR OR NOT REALLY A RISK MULTIPLIER OR A SERIOUS PERCENTAGE OF THE CASE, THAT THERE IS A PROBLEM WITH THAT.

THIS IS A VERY TOUGH BUSINESS AND WHEN JUDGES ARE HANDING OUT MULTI-MILLION FEE AWARDS, I THINK THEY OFTEN, YOU KNOW, FEEL KIND OF LIKE SANTA CLAUS, LIKE THEY ARE GIVING SOME HUGE WINDFALL.

AND I HAD PERMISSION FROM MY PARTNERS TO TELL YOU THIS. OUR LAW FIRM HAS GROWN OVER $33 MILLION A YEAR. IT TAKES AN AVERAGE OF SOMETHING OVER THREE YEARS TO BRING A CASE IN, TO BRING FEES IN ON A CASE. THAT MEANS I HAVE TO GENERATE OVER $100 MILLION IN REVENUE JUST TO BE IN

BUSINESS WHEN IT'S TIME TO GET PAID ON A CASE I FILE TOMORROW, AND DEFENSE LAWYERS DON'T HAVE THESE KINDS OF PROBLEMS.

IF THE PARTNERS IN MY FIRM AREN'T MAKING MORE THAN THE PARTNERS AT A BIG DEFENSE FIRM, SOMETHING IS WRONG BECAUSE THEY ARE NOT TAKING THESE CHANCES. THEY ARE GETTING CHECKS EVERY MONTH FROM FORTUNE 500 CORPORATIONS, WHETHER THEY WIN THE CASE OR NOT, AND THEY ARE GOING TO BE THERE AND EVERY TIME I FILE A CASE, I'M ROLLING THE DICE. AND IF I PLACE MY BETS WELL, IF I PICK GOOD CASES, IF I LITIGATE THEM WELL AND SETTLE THEM FAIRLY, WE SHOULD BE MAKING MORE FOR THOSE EFFORTS THAN SOMEONE WHO DOESN'T TAKE THOSE CHANCES.

JUDGE ROSENTHAL: YOU CRYPTICALLY REFERRED TO A SERIOUS PERCENTAGE. IS THERE A BENCHMARK, A MODEL THAT YOU ARE URGING THAT WE INCORPORATE INTO OUR RULE-MAKING THINKING; AND IF SO, CAN YOU DEFINE WHAT A SERIOUS PERCENTAGE MIGHT BE?

MR. HIMMELSTEIN: THE TERM OF ART I WOULD USE TO RESPOND TO YOUR QUESTION IS OY.

JUDGE ROSENTHAL: THOSE OF US IN THE RULE-MAKING ARE FAMILIAR WITH THE TERM.

MR. HIMMELSTEIN: I THINK THE 25 PERCENT BENCHMARK THAT IS KIND OF PERCOLATED AROUND THE CIRCUITS HAS WORKED

FAIRLY WELL. IT HASN'T PRODUCED FOR US TRUE WINDFALLS IN ANY CASES THAT I'M AWARE OF.

I THINK THE TREND TOWARDS TRYING TO AUCTION -- IT'S SORT OF A GOVERNMENTAL AUCTION APPROACH TO APPOINTED COUNSEL NOW TO THE LOWEST RELIABLE AND RESPONSIBLE BIDDER IS NOT THE WAY TO GO BECAUSE, YOU KNOW, YOU HIRE TWO DIFFERENT CONTRACTORS TO BUILD AN AIRPORT. YOU ARE GOING TO GET AN AIRPORT AND IT'S GOING TO CONFORM TO THE ARCHITECTURAL SPECS THAT IT WILL BE USED FOR.

IF YOU HIRE TWO DIFFERENT LAWYERS TO LITIGATE A CASE, YOU CAN END UP WITH WILDLY DIFFERENT RESULTS. YOU CAN END UP WITH $100 MILLION SETTLEMENT FROM ONE OF THEM AND A $25 MILLION SETTLEMENT FROM THE OTHER AND THE COURTS COULD EASILY END UP APPROVING BOTH AS WITHIN THE BOUNDS.

SO I THINK THAT THE QUALITATIVE ASPECT OF SELECTING CLASS COUNSEL IS REALLY MORE IMPORTANT THAN THE PERCENTAGE FEE THAT'S AWARDED.

I'M INTRIGUED AND, UNLIKE THE SEVENTH CIRCUIT'S NEW APPROACH THEY MADE IN THEIR SYNTHROID OPINION, IN WHICH I WAS DEEPLY INVOLVED, SOUND LIKE IT WAS THEIR OLD APPROACH, BUT IT LOOKED KIND OF NEW TO SOME OF US WHERE THEY SUGGEST THAT, YOU KNOW, SETTING FEES AFTER THE FACT -- AND THEY SEEM TO EVEN REJECT THE THIRD CIRCUIT APPROACH OF USING THE LOADSTAR MULTIPLIER CROSS CHECK ON A

PERCENTAGE FEE, THAT THIS ISN'T THE WAY THE MARKET WORKS.

YOU SHOULD SET A PERCENTAGE AT THE OUTSET OF THE CASE AND SIMPLY AWARD IT AT THE END AND IF THE PLAINTIFFS' LAWYERS DID A GREAT JOB AND MADE A LOT OF MONEY ON IT, FINE.

AND I KIND OF LIKE THAT APPROACH, BUT IT'S GOING TO BE UP TO THE JUDGE TO DECIDE WHAT THAT PERCENTAGE IS. I THINK THE 25 PERCENT BENCHMARK DOES MIMIC THE MARKET FOR PRIVATE LEGAL SERVICES, EVEN IN LARGE DEFENSE LAW FIRMS WHO I THINK IT'S -- IT'S FAIR FOR US TO COMPARE OURSELVES TO THEM.

IF A CLIENT WALKS IN WITH A CONTINGENT FEE CASE AND THAT -- TO A PARTNER AT A LARGE LAW FIRM, THEY HAVE TO GO TO THEIR FIRM MANAGEMENT COMMITTEE AND SELL IT. SAY, YOU KNOW, IT'S GOING TO COST US $3 MILLION IN LOAD STAR TO LITIGATE THIS THING, I THINK WE ARE LOOKING AT ABOUT THREE YEARS UNTIL IT COMES IN AND THEY WANT US TO ADVANCE THE COSTS. CAN YOU BELIEVE THAT? IT'S GOING TO COST US A HALF A MILLION DOLLARS, BUT THEY ONLY WANT TO GIVE US 15 PERCENT OF THE RECOVERY, BUT IT'S A GREAT CASE. HOW CAN THE MANAGEMENT COMMITTEE APPROVE THAT? I DON'T THINK YOU WILL FIND A SINGLE ONE.

CHAIRMAN LEVI: DO YOU HAVE ANY MORE QUESTIONS FOR MR. HIMMELSTEIN?

THANK YOU, SIR. THANK YOU VERY MUCH.

PROFESSOR GRUNDFEST?

PROFESSOR GRUNDFEST: GOOD MORNING. THANK YOU FOR THE INVITATION TO APPEAR. I RISE IN FAVOR OF THE APPOINTMENT COMPETITION WHICH TEND TO WORK VERY WELL AROUND OUR ECONOMY AND I BELIEVE THAT WE HAVE EVERY REASON TO BELIEVE THAT THEY COULD ALSO WORK VERY WELL IN THE INTERESTS OF ABSENT CLASS MEMBERS, AS DO COURTS, PLAINTIFF COUNSEL, HAVE FIDICUARY OBLIGATIONS.

VERY BRIEFLY, AS THIS COMMITTEE WELL KNOWS, RULE 23 IS CURRENTLY SILENT ON THE PROCEDURES RESPECTING CLASS COUNSEL. PROPOSED RULE 23(G) RECOGNIZES THAT COMPETITION FOR APPOINTMENT MAY BE USEFUL. THERE HAS BEEN A RECENT THIRD CIRCUIT REPORT THAT I WOULD INTERPRET AS CASTING SOME DOUBT ON THAT POINT OF VIEW.

WHAT I WOULD LIKE TO DO IS VERY BRIEFLY SUMMARIZE THE THIRD CIRCUIT REPORT AND EXPLAIN WHY IN MY VIEW THIS PROPOSAL, PROPOSED RULE THAT THIS COMMITTEE IS LOOKING AT, HAS THE FAR, FAR BETTER OF THE ARGUMENT AND, INDEED, I THINK IT ONLY TAKES A LIGHT READING OF THE TASK FORCE REPORT TO OBSERVE THAT IT'S SUBJECT TO A VARIETY OF VERY SIMPLE, BUT UNFORTUNATE AND PROFOUND GLOSS THAT DESERVE CAREFUL MENTION.

BRIEFLY PUT, WHERE WOULD I COME OUT IN TERMS OF

A PROPOSED CONCLUSION? A PROPOSED CONCLUSION I THINK IS SIMPLE. IF IN ANY CLASS ACTION THERE IS A RESPONSIBLE, KNOWLEDGEABLE, CAPABLE LEAD PLAINTIFF WHO PASSES TWO TYPES OF ADEQUACY TESTS, FIRST AN ADEQUATE UNDERSTANDING OF THE GRAVAMEN OF THE PROCEEDING, DOES THE PLAINTIFF KNOW WHAT THE COMPLAINT IS ABOUT? THIS IS THE ISSUE THAT THE FIFTH CIRCUIT LOOKED AT IN BERGER VERSUS COMPAQ. THAT'S ADEQUACY TEST A.

THEN THERE IS ADEQUACY TEST B. DOES THIS LEAD PLAINTIFF KNOW HOW TO BARGAIN AND NEGOTIATE WITH PLAINTIFFS' CLASS ACTION COUNSEL IN ORDER TO IDENTIFY THE APPROPRIATE COUNSEL AT THE APPROPRIATE PRICE?

NOW, THAT'S NOT AN EASY TEST. PLAINTIFFS' CLASS ACTION COUNSEL MAKE THEIR LIVING BY BEING GOOD NEGOTIATORS. WHEN YOU TALK ABOUT ARM'S LENGTH BARGAINING, PLAINTIFFS' CLASS ACTION COUNSEL HAVE VERY LONG AND VERY STRONG ARMS. THEY KNOW HOW TO BARGAIN. THAT'S ONE OF THE REASONS WHY THEY ARE VERY, VERY GOOD AT WHAT THEY DO.

IF A PROPOSED LEAD PLAINTIFF IN ANY CLASS ACTION LACK THE ABILITY EFFECTIVELY TO SHOP FOR THE APPROPRIATE LAWYER AT THE APPROPRIATE PRICE, THEN THERE MAY WELL BE A ROLE FOR THE COURT BOTH IN THE SELECTION OF THE LEAD COUNSEL AND IN THE NEGOTIATION AND IN THE DESIGNATION OF THE FEE ARRANGEMENT.

NOW, THERE ARE A VARIETY OF WAYS THAT A COURT CAN GET INVOLVED AT THAT STAGE, IF THE ABILITY OF THE LEAD PLAINTIFF IS IN QUESTION.

ONE APPROACH THAT'S DRAWN A GREAT DEAL OF ATTENTION IS THE USE OF AN AUCTION MECHANISM. THERE ARE A VARIETY OF DIFFERENT WAYS AN AUCTION MECHANISM CAN BE USED.

AN AUCTION MECHANISM, I THINK IS IMPORTANT TO RECOGNIZE, IS REALLY ONLY ONE FORM OF WHAT MANY PEOPLE CALL A MARKET CHECK. ANOTHER FORM OF MARKET CHECK WOULD BE TO HAVE A NEUTRAL THIRD-PARTY MAGISTRATE, A SPECIAL MASTER OR WHAT-HAVE-YOU, STAND IN THE ROLE OF THE LEAD PLAINTIFF WHO OTHERWISE LACKS THE ABILITY TO NEGOTIATE ON BEHALF OF THE ABSENT CLASS MEMBERS TO WHOM THE FIDICUARY OBLIGATION IS OWED.

UNDER THOSE CIRCUMSTANCES THE SPECIAL MASTER MIGHT SIT AND ACT JUST LIKE THE INSTITUTIONAL INVESTORS IN THE ASCENDING LITIGATION, MEET WITH A VARIETY OF WELL-QUALIFIED LAW FIRMS AND HAVE A SERIES OF NEGOTIATIONS.

LAW FIRM A MIGHT BE WILLING TO DO THE CASE FOR A TEN PERCENT FEE. LAW FIRM B MIGHT BE WILLING TO DO IT FOR AN EIGHT PERCENT FEE. LAW FIRM C MIGHT BE WILLING TO DO IT FOR A TWELVE PERCENT FEE. AND AFTER CONSIDERING ALL

QUALIFICATIONS OF EACH OF THESE FIRMS, A SPECIAL MASTER MIGHT DECIDE FOR LAW FIRM C THAT'S CHARGING A TWELVE PERCENT FEE.

THE RULE OF DECISION MUST IN ALL OF THESE CIRCUMSTANCES, I THINK, BE TO MAXIMIZE THE EXPECTED NET RECOVERY TO THE CLASS. THE CALCULATION OF THE NET RECOVERY IS REMARKABLY SIMPLE. WHAT IS THE FINAL RECOVERY AFTER YOU HAVE SUBTRACTED THE ATTORNEY'S FEES?

IF YOU HAVE TWO LAWYERS AND IF EX ANTE THERE IS NO REASON TO BELIEVE THAT LAWYER A WILL DO A BETTER OR WORSE JOB THAN LAWYER B, BUT LAWYER B IS WILLING TO REPRESENT THE CLASS FOR 10 PERCENT AND LAWYER A IS DEMANDING 30 PERCENT, TO SELECT LAWYER A AT 30 PERCENT IS TO TAKE 20 PERCENT OF THE CLASS RECOVERY OUT OF THE POCKETS OF THE ABSENT CLASS MEMBERS AND PUT THAT MONEY IN THE LAWYER'S POCKET. THERE IS NO REASON TO DO THAT.

NOW, ONE OF THE THINGS THAT'S VERY INTERESTING IF YOU PRACTICE IN THIS AREA FOR ANY PERIOD OF TIME, EVEN A VERY SHORT PERIOD OF TIME, YOU DISCOVER THAT THE FEES ARE TYPICALLY SET AT THE END OF THE PROCESS AND THEY RELY ON WHAT'S CALLED A BENCHMARK, AND THE BENCHMARK IS TYPICALLY SET IN THE RANGE OF 25 TO 33 PERCENT.

THE THIRD CIRCUIT REPORT SAYS A GREAT DEAL IN SUPPORT OF THE BENCHMARK, BUT MUCH OF THE SUPPORT,

UNFORTUNATELY, LACKS SUPPORT. THERE ARE FOOTNOTE REFERENCES TO THE OBSERVATION THAT MANY CASES HAVE ACTUALLY DEPARTED FROM THIS BENCHMARK AND THAT'S TRUE; BUT WHAT ABOUT THE HUGE NUMBER OF CASES, THE FAR, FAR, FAR LARGER NUMBER OF CASES THAT DON'T DEPART FROM THE BENCHMARK?

IF ONE LOOKS AT THE AREA OF SECURITIES CLASS ACTION FRAUD LITIGATION, THE DATA ARE OVERWHELMING. THE VAST MAJORITY OF THE COMPLAINTS, OF CASES ARE SETTLED AND THE ATTORNEY'S FEES IN THESE SETTLEMENTS ARE TYPICALLY IN THE RANGE OF 25 TO 33 PERCENT AND THE AVERAGE IS 30 PERCENT.

THE NUMBER OF THE CASES THAT DIVERGE FROM THE BENCHMARK ARE A VERY SMALL PERCENTAGE OF THE AGGREGATE VOLUME OF BUSINESS THAT'S DONE IN THE FEDERAL COURTS AND CLASS ACTION SECURITIES FRAUD LITIGATION.

WE THEN FACE THE QUESTION OF WHERE DOES THIS 25 PERCENT BENCHMARK COME FROM? RESEARCH THAT I HAVE BEEN DOING IN CONJUNCTION WITH MELANIE PEACH, WE ARE ABLE TO TRACE THE 25 PERCENT BENCHMARK BACK TO LAW REVIEW ARTICLES AND CASES ALL THE WAY TO THE 19TH CENTURY. THAT'S FASCINATING BECAUSE IN THE WORLD OF THE LAW, WHERE THE LAW RELIES ON PRECEDENT, THAT'S TYPICALLY A GOOD THING.

WE CAN FIND PRECEDENT ALL THE WAY BACK TO THE

19TH CENTURY; BUT IN THE WORLD OF MARKETS, WHERE I OFTEN LIVE, THAT'S A TERRIBLE THING. YOU ARE STILL PAYING A 19TH CENTURY PRICE GIVEN EVERYTHING ELSE THAT'S HAPPENED IN THE WORLD SINCE THEN FOR A PARTICULAR ITEM?

FURTHER, WHEN WE ACTUALLY STEP INTO THE MARKETPLACE AND WE OBSERVE NOT THE HYPOTHETICAL BICKERING THAT MIGHT GO ON AT SOME HYPOTHETICAL DEFENSE LAW FIRM WITH REGARD TO A HYPOTHETICAL FEE ARRANGEMENT OF A HYPOTHETICAL CASE, BUT WHEN WE GO OUT AND HAVE A LOOK AT WHAT HAPPENS WHEN LAW FIRMS COMPETE FOR THE RIGHT TO REPRESENT PLAINTIFFS IN A SPECIFIC ACTION, WHAT DO WE OBSERVE?

WE OBSERVE LAW FIRMS THAT ARE VERY HAPPY TO WORK FOR FEES FAR BELOW 25 TO 30 PERCENT AND GETTING RESULTS THAT PLAINTIFFS' LAWYERS WHO OFTEN DEMAND 25 TO 30 PERCENT AREN'T ABLE EFFECTIVELY TO SAY ARE TOTALLY INFERIOR. THERE IS NOTHING THE MATTER WITH THE RESULTS. WHAT'S THE MATTER WITH THE QUALITY OF THE PRODUCT?

WHO CAN SHOW ME A SITUATION WHERE IN ANY ONE OF THE AUCTION CASES IN ANY ONE OF THE NEGOTIATION CASES ONE CAN CREDIBLY CLAIM THAT A BAD JOB WAS DONE BECAUSE A LOW PRICE WAS PAID TO CLASS COUNSEL? THAT EVIDENCE IS NOT THERE.

I WOULD SUBMIT THAT ALL OF THE DATA AND ALL OF

THE EVIDENCE POINT IN PRECISELY THE OPPOSITE DIRECTION; THAT THERE IS A GRAVE AND MATERIAL RISK THAT THE AMOUNT OF MONEY THAT'S BEING PAID TO CLASS COUNSEL, PARTICULARLY IN THE AREA OF CLASS ACTION SECURITIES FRAUD LITIGATION, IS HIGHER THAN THE MARKET CLEAR END PRICE.

TO THE EXTENT THAT IT EXCEEDS THE MARKET CLEAR END PRICE, THAT AMOUNT CONSTITUTES AN UNAMBIGUOUS TRANSFER OF WEALTH IN VIOLATION OF A FIDICUARY OBLIGATION FROM THE ABSENT CLASS MEMBERS TO COUNSEL REPRESENTING THE CLASS.

THANK YOU VERY MUCH. I WOULD BE HAPPY TO ANSWER QUESTIONS.

JUDGE ROSENTHAL: CAN YOU COMMENT ON HOW SUCCESSFULLY OR NOT YOU THINK THE PROPOSED RULES THAT HAVE BEEN PUBLISHED FOR COMMENT ON THE SELECTION OF COUNSEL AND ATTORNEY FEE AWARDS EITHER REFLECT OR FACILITATE OR ARE CONSISTENT WITH WHAT YOU HAVE DESCRIBED?

PROFESSOR GRUNDFEST: IN ALL CANDOR, IF IT WERE UP TO ME TO WRITE THE RULES, I WOULD BE MORE AGGRESSIVE.

THE RULES, I THINK, PERMIT MANY OF THE PROCEDURES AND THE PROCESSES THAT I HAVE BEEN SPEAKING ABOUT. THEY DON'T GO AS FAR AS I MIGHT IN URGING COURTS TO LOOK CAREFULLY AT THESE CONSIDERATIONS AND IN EMPHASIZING THAT THE COURTS' OBLIGATION IS TO MAXIMIZE THE NET RECOVERY TO THE ABSENT CLASS MEMBERS.

VERY SIMPLY. IF YOU HAVE GOT TWO LAWYERS AT THE BEGINNING OF THE CASE AND THERE IS NO REASON TO BELIEVE EX ANTE THAT ONE WOULD DO A BETTER JOB THAN THE OTHER, GO FOR THE ONE THAT IS WILLING TO CHARGE THE ABSENT CLASS MEMBERS THE LOWER PRICE.

I WOULD, IN ALL CANDOR, PREFER TO SEE STRONGER LANGUAGE IN THE NOTES TO THE PROPOSED RULE URGING THE COURTS TO ADOPT MARKET CHECK MECHANISMS. IT DOESN'T HAVE TO BE AN AUCTION. THERE ARE MANY WAYS TO DO THAT.

MS. BIRNBAUM: UNDER YOUR MODEL, THEN, THE COURT WOULD SETS THE FEES BEFORE -- IN THE EARLY STAGES OF THE CASE WHEN CLASS COUNSEL ARE BEING SELECTED, NOT AT THE END OF THE CASE?

PROFESSOR GRUNDFEST: WELL, THE COURT WOULD RETAIN JURISDICTION TO REVIEW THE FEES AT THE END. I THINK THAT IT'S IMPORTANT TO OBSERVE IT'S NOT THE COURT THAT WOULD SET IT, THE MARKET PROCESS, THE MARKET CHECK.

IN RISKY CASES WHERE COSTS ARE HIGH, LAWYERS WILL BID HIGH FEES AND THAT'S THE RIGHT ANSWER IN CASES ABOUT YOU PRETTY MUCH KNOW HOW THE CASE IS GOING TO PLAY OUT. YOU KNOW WHAT THE RANGE OF RECOVERY IS LIKELY TO BE, LAWYERS WILL BID LOWER FEES. AND IF EVENTS OCCUR DURING THE LITIGATION THAT WOULD MAKE IT FUNDAMENTALLY UNFAIR TO FORCE A PLAINTIFFS' LAW FIRM TO STICK BY THE INITIAL

BARGAIN, THERE IS IN THE COMMERCIAL ROLE A PROCESS THAT'S KNOWN AS A CHANGE ORDER.

ALL RIGHT. WHEN YOU HAVE A LARGE COMMERCIAL PROJECT THAT YOU ARE BUILDING AND ALL OF A SUDDEN DISCOVER BEDROCK WHERE NOBODY EXPECTED THERE TO BE BEDROCK, YOU HAVE GOT TO BLAST OUT, YOU KNOW, PARTIES WILL ENTER A CHANGE ORDER.

OR, GEE, WE NEED TO REDESIGN A SHIP AND THE REDESIGN IS GOING TO BE MUCH MORE EXPENSIVE. GET THE CHANGE ORDER AND YOU CAN HAVE INCREASED COMPENSATION.

I BELIEVE THAT THE COURTS, ONCE THEY RELY ON THE MARKET PROCESS TO SET THE FEE UP FRONT, SHOULD HAVE A STRONG PRESUMPTION TO HONOR THAT FEE, BUT THE PRESUMPTION SHOULDN'T BE CAST IN CONCRETE.

MS. BIRNBAUM: YOU WOULD HAVE A BIDDING PROCESS FOR EVERY CLASS ACTION THAT GETS BROUGHT?

PROFESSOR GRUNDFEST: WELL, YOU KNOW, WHAT I WOULD DO, IN ALL CANDOR, IS I THINK IT'S VERY IMPORTANT TO BREAK THE BACK OF THE BENCHMARK.

WHAT WE ARE CURRENTLY RELYING ON IS A BENCHMARK THAT HAS ABSOLUTELY NO FOUNDATION IN MARKET EXPERIENCE AND TO THE EXTENT WE HAVE MARKET EXPERIENCE, ALL OF IT SIGNALS THAT THE BENCHMARK IS MATERIALLY ON THE HIGH SIDE.

ONCE WE HAVE ENOUGH EXPERIENCE IN TERMS OF

REASONABLE MARKET PRICES, WE THEN MIGHT BE ABLE TO HAVE A NEW BENCHMARK AT A LOWER PRICE THAT WOULD ALLOW PEOPLE TO SAY, WELL, ALL RIGHT. WE PRETTY MUCH KNOW HOW TO PRICE THIS COMMODITY.

ALL RIGHT. YOU DON'T HAVE TO NEGOTIATE WITH THE GROCER OVER EVERY GRAPEFRUIT THAT YOU BUY. WHY? BECAUSE THERE IS A MARKET PROCESS OUT THERE THAT ALLOWS YOU TO KNOW PRETTY MUCH, ALL RIGHT, THE SEASONALITY AND EVERYTHING ELSE, WHAT THE RIGHT PRICE OF THE GRAPEFRUIT IS; BUT IF YOU DON'T HAVE THAT LARGER MARKET PROCESS, ALL RIGHT, YOU CAN'T RELY ON A WELL-KNOWN AND FAIR PRICE.

PROFESSOR COOPER: THIS IS EDWARD COOPER. IN YOUR OPENING SENTENCE YOU SAID SOMETHING VERY BRIEFLY THAT APPEARED IN YOUR WRITTEN STATEMENT AND THAT IS TO REST PART OF THIS ON THE OBLIGATION OF THE COURT THAT YOU CHARACTERIZE AS A FIDICUARY OBLIGATION TO THE CLASS.

DO YOU VIEW THAT AS AN IMPORTANT FOUNDATION FOR YOUR APPROACH?

PROFESSOR GRUNDFEST: I VIEW THAT AS ONE OF SEVERAL IMPORTANT FOUNDATIONS, YES.

PROFESSOR COOPER: AND TO THE JUDGE WHO SAYS I MUST BE NEUTRAL AMONG THE PARTIES, I CANNOT BE AN FIDICUARY FOR ANY PARTY, WHAT DO YOU RESPOND?

PROFESSOR GRUNDFEST: THE RESPONSE IS THE JUDGE,

OF COURSE, HAS AN OBLIGATION TO BE NEUTRAL TO ALL OF THE PARTIES, BUT WITH REGARD TO ARRANGEMENTS THAT ARE ABSOLUTELY NECESSARY AS PART OF OUR JUDICIAL PROCESS IN ORDER TO PROTECT THE INTERESTS OF THE CLASS MEMBERS, THE SUPREME COURT AND COURT OF APPEALS HAVE BEEN CLEAR THAT THE COURT HAS A FIDICUARY OBLIGATION TO MAKE SURE THAT DEALINGS WITH RESPECT TO THEIR INTERESTS ARE FAIR AND THAT THE OBLIGATION IS FIDICUARY.

NOW, WE ALL KNOW THAT FIDICUARY IS A BIG WORD, ALL RIGHT. THERE ARE FIDICUARY OBLIGATIONS AND THEN THERE ARE FIDICUARY OBLIGATIONS. AND, PERHAPS, THE SELECTION OF THE WORD FIDICUARY IN THAT CONTEXT BY THE SUPREME COURT IS UNFORTUNATE, BUT I LACK JURISDICTION TO OVERRULE THE LANGUAGE THAT'S BEEN USED BY THE COURTS.

JUDGE KYLE: INSTEAD OF HITTING BEDROCK DURING THE PROCESS --

PROFESSOR GRUNDFEST: I'M NOT USED TO CALLING ON JUDGES. PLEASE, FORGIVE ME.

JUDGE KYLE: INSTEAD OF HITTING BEDROCK, THE PLAINTIFFS HIT A GOLDFIELD, WOULD YOU ALLOW THE COURT TO REDUCE THE FEE?

PROFESSOR GRUNDFEST: AGAIN, THE STRONG PRESUMPTION WOULD BE AGAINST THIS.

JUDGE KYLE: I AGREE.

PROFESSOR GRUNDFEST: AND IF THERE IS A SITUATION -- YOU KNOW, I THINK THE TEST FOR A CHANGE ORDER SHOULD BE AS RIGOROUS ON THE UPSIDE AS ON THE DOWNSIDE.

I THINK IF YOU HAVE A FAIR AND ADEQUATE MARKET CHECK PROCESS AT THE OUTSIDE, I HAVE NO PROBLEM WITH A LAWYER WHO DOES A REALLY GREAT JOB IN GETTING A REALLY GREAT RESULT HAVING A REALLY GREAT PAYDAY BECAUSE THERE ARE GOING TO BE DAYS IN WHICH HE GETS NOTHING.

AND IF WE LIMIT THE UPSIDE, THAT HAS AN ADVERSE EFFECT ON THE OPERATION OF THE MARKET.

CHAIRMAN LEVI: I KNOW YOU HAVE BEEN THINKING ABOUT THIS, PARTICULARLY IN TERMS OF SECURITIES LITIGATION, THE SECURITIES REFORM ACT.

IS THERE ANY AREA OF PRESENT CLASS ACTION PRACTICE THAT YOUR COMMENTS AND YOUR VIEWPOINT DON'T APPLY TERRIBLY WELL TO?

PROFESSOR GRUNDFEST: I HATE TO BE IMPERIALISTIC, BUT I THINK IT APPLIES ACROSS THE BOARD.

IT APPLIES, I THINK, WITH MOST VIGOR IN THE SECURITIES AREA, NO. 1, BECAUSE OF THE WORDING OF THE PSLRA; BUT, NO. 2, BECAUSE SECURITIES LITIGATION, LET'S FACE IT, IS ABOUT AS CLOSE TO A COMMODITY AS YOU GET IN THE CLASS ACTION AREA.

YOU KNOW, STANFORD WITH OUR WEBSITE, WE ARE

TRACKING MORE THAN 1,000 COMPANIES THAT HAVE BEEN SUED FOR CLASS ACTION SECURITIES FRAUD SINCE THE PASSAGE OF THE REFORM ACT IN 1995. MANY OF THESE CASES FOLLOW VERY STANDARD AND WELL-KNOWN AND RELATIVELY PREDICTABLE PATTERNS AND TO THE EXTENT THAT IT'S POSSIBLE TO SAY THAT YOU HAVE GOT A COMMODITIZED FORUM CLASS ACTION SECURITIES FRAUD LITIGATION, LADIES AND GENTLEMEN, THIS IS IT.

ALL RIGHT. BUT I DO THINK THAT THE LEARNING THAT WE HAVE ACQUIRED IN THAT AREA COULD WELL BE APPLIED IN MANY OTHER CONSUMER FRAUD ACTIONS, MASS TORT CASES AND THE LIKE. YOU HAVE ARMIES OF LAWYERS ALL CLAIMING THE RIGHT TO REPRESENT THE CLASS. WELL, LET'S SEE WHO IS REALLY WILLING TO DO THE BEST JOB AT THE BEST PRICE AND YOU WILL HAVE THESE LAW FIRMS ASSERTING THEIR ABILITIES AND, EX ANTE, YOU WILL HAVE NO REASON TO BELIEVE THAT LAW FIRM A WILL DO ANY BETTER OR WORSE JOB THAN LAW FIRM B.

JUDGE SCHEINDLIN: ONE OF OUR COMMENTATORS SAID THAT IN THE CIVIL RIGHTS AREA, MAYBE TOO FEW LAWYERS MAY NOT BE TOO MANY. THEN THERE IS NOT THE BENCHMARK THAT THEY ARE USED TO HELP THEM OUT. THERE IS NO COMPETITION AND YOU TRY TO TRACK LAWYERS.

WHERE DO YOU FALL BACK ON MARKET APPROACH? DO YOU FALL BACK ON THE 25 OR DO YOU NEED THE LAWYERS TO COME FORWARD IN THESE CASES? DO YOU TAKE THE NEWLY ESTABLISHED

COMMERCIAL BENCHMARK OF 10 TO 12 PERCENT, MAYBE, WHICH WORKS IN SECURITIES, BUT MAY NOT WORK AT ALL IN CIVIL RIGHTS.

PROFESSOR GRUNDFEST: WELL, I THINK THAT'S AN EXTRAORDINARILY GOOD OBSERVATION AND THE WAY I WOULD EXPECT THE MARKED TO EVOLVE IS THAT IF SOMEBODY SHOWS UP IN A MARKET CHECK PROCESS AND IT'S A CIVIL RIGHTS CASE AND THEY ARE THE ONLY LAWYER IN THE ROOM, THEY ARE NOT GOING TO BE BIDDING AGAINST THEMSELVES FOR FIVE PERCENT.

JUDGE SCHEINDLIN: I UNDERSTAND, BUT THE NEW BENCHMARK HAS NOW BECOME MUCH LOWER, ACCORDING TO YOUR THEORY, AND IT MAY NOT BE A FAIR BENCHMARK TO APPLY IN A NONCOMPETITIVE SITUATION, BUT IT'S NOW THE MARKET GOING RATE. I MIGHT BE TROUBLED BY THAT AND WONDER SHOULD IT NOT BE BACK TO THE 25 THAT'S BEEN AROUND SINCE THE 19TH CENTURY?

PROFESSOR GRUNDFEST: I THINK IN THAT SITUATION, IF THE COURT IS GOING TO RELY ON THE BENCHMARK, THEN I THINK YOU ARE ABSOLUTELY RIGHT AND YOUR OBSERVATION, YOUR HONOR, UNDERSCORES THE PROBLEM WITH THE BENCHMARK.

LET'S ASSUME THAT A 25 PERCENT BENCHMARK IS PERFECTLY REASONABLE, 30 PERCENT IN CIVIL RIGHTS CASES, AND WHERE THESE CASES HAVE MUCH GREATER HETEROGENEITY AND MUCH GREATER RISK THAN THE TYPICAL CLASS ACTION SECURITIES

FRAUD CASE. WHY SHOULD BOTH OF THEM BE PRICED THE SAME? IT'S AS THOUGH WE ARE SAYING, ALL AUTOMOBILES SHOULD COST THE SAME AMOUNT.

CHAIRMAN LEVI: THANK YOU VERY MUCH, PROFESSOR.

JUDGE ROSENTHAL: ACTUALLY, PROFESSOR, CAN I ASK YOU ONE QUESTION? ARE YOU GOING TO BE SUBMITTING A FORMAL RESPONSE OR COMMENT ON THE THIRD CIRCUIT CLASS POSITION?

PROFESSOR GRUNDFEST: YES. MY INTENTION IS -- I THINK TEMPLE LAW REVIEW HAS ANNOUNCED THERE WILL BE AN ARTICLE. I WILL BE REDUCING SOME OF THE OBSERVATIONS TO WRITING AND STAYING OUT OF THE THIRD CIRCUIT.

JUDGE ROSENTHAL: THANK YOU.

CHAIRMAN LEVI: IS MISS JAUREGUI HERE? AM I SAYING THAT RIGHT?

MS. JAUREGUI: GOOD MORNING. MY NAME IS JACQUELINE JAUREGUI. I'M A PARTNER WITH THE CALIFORNIA FIRM OF CROSBY, HEAFEY, ROCH & MAY. I AM VERY HONORED TO HAVE MY COMMENTS CONSIDERED BY THIS COMMITTEE.

BY WAY OF BACKGROUND, SINCE I DON'T KNOW ANY OF YOU, MY PERSONAL PRACTICE INVOLVES REPRESENTING INSURANCE AND FINANCIAL INSTITUTIONS, FINANCIAL SERVICES INSTITUTIONS, AND I DO A SUBSTANTIAL AMOUNT OF CLASS ACTION WORK IN THAT AREA AND WITH CLIENTLESS CLASS ACTIONS.

MY FIRM, HOWEVER, ALSO HAS A SUBSTANTIAL PRACTICE IN MEDICAL DEVICES, PHARMACEUTICAL PROCESS LITIGATION AND WITH WHAT THE COURT REFERS TO AS THE MASS TORT CASES AND I, THEREFORE, HAVE SOME COMMENTS IN THAT COURSE AS WELL. I SPEAK FROM THE PERSPECTIVE OF A CALIFORNIA PRACTITIONER WHO SPENDS TIME IN THE DEFENSE OF INSTITUTIONS, OF CLIENTS.

I HAVE NOTICED IN THE REPORTER'S CALL FOR COMMENTS AND IN THE FOOTNOTE IN THE COMMITTEE'S MAY REPORT AN INQUIRY AND A NEED FOR INFORMATION ABOUT DUPLICATIVE AND OVERLAPPING CLASS ACTIONS AND I WANTED TO ADD SOME FACTS TO THIS GROUP'S DATA BASE THAT MAY BE HELPFUL IN TERMS OF UNDERSTANDING THIS PROBLEM.

ONE SORT OF CASE STUDY I THINK MAY BE USEFUL TO YOU, OUR FIRM HAS SPENT SOME CONSIDERABLE TIME IN THE YEAR 2001 AS A NATIONAL COUNSEL FOR A COMPANY THAT'S BEEN INVOLVED IN MEDICAL DEVICE LITIGATION. IT'S A ONE PROBLEM PRODUCT THAT HAS BEEN -- INVOLVES THOUSANDS, IF NOT MILLIONS, OF PEOPLE WHO HAVE BEEN EXPOSED TO IT.

IN THE FIRST SIX MONTHS OF 2001 WHAT WE FOUND WAS THERE WERE FILED AND SERVED AGAINST THIS ONE CLIENT WITH THEIR ONE PROBLEM PRODUCT 53 CLASS ACTIONS INVOLVING THIS PARTICULAR DEVICE; 35 OF THESE ALLEGED NATIONWIDE PUTATIVE CLASSES, 18 ALLEGED EITHER A SINGLE STATE OR

CANADIAN PUTATIVE CLASSES.

OF THIS TOTAL, 36 WERE EITHER INITIALLY FILED AND/OR WERE REMOVED TO FEDERAL COURT AND THOSE ARE NOW THE SUBJECT OF MULTI DISTRICT LITIGATION.

THERE WERE 17 CASES WHICH WERE DEEMED TO BE UNREMOVABLE BECAUSE THERE WAS A LOCAL DEFENDANT WHICH HAD DEMANDED TO DEFEAT DIVERSITY AND IN SOME INSTANCES WHERE THERE WAS NO LOCAL DEFENDANT, THE CASE WAS REMOVED TO FEDERAL COURT. IT WAS THEN DISMISSED AND REFILED IN STATE COURT WITH THE LOCAL DEFENDANT SO THAT IT WOULD BE KEPT IN STATE COURT.

AND, AS I SAID, THE MEDICAL DEVICE ARENA IS NOT MY PERSONAL PRACTICE, BUT WHEN I SAT DOWN WITH THE OFFICE'S CHART OF ALL THESE CASES, I WAS STUNNED BY THE PRODIGIOUS WASTE OF JUDICIAL AND PUBLIC RESOURCES THAT THIS ONE EXAMPLE PRESENTED, AND IN ADDITION, WHICH I SUPPOSE IS OBVIOUS, THE PRODIGIOUS WASTE OF THE DEFENDANT'S RESOURCES AS WELL.

AND AS I THOUGHT TO MYSELF WHAT I MIGHT BE ABLE TO OFFER THIS COMMITTEE, THE THIRD THING THAT STRUCK ME WAS THE ABSENCE OF ANY APPARENT BENEFIT EITHER TO SOCIETY OR TO THE CIVIL JUSTICE SYSTEM BY THIS ANTHILL, IF YOU WILL, OF LITIGATION.

I WAS FASCINATED ACTUALLY LISTENING TO THE

PROFESSOR'S COMMENTS. I THOUGHT PERHAPS THERE WAS SOME SECRET BENEFIT HERE SOMEWHERE WHERE, PERHAPS, YOU WILL ULTIMATELY HAVE THIS COMPETITION WHICH WILL IGNORE THE BENEFIT OF THE CLASS.

AND I ALSO UNDERSTAND FROM TALKING TO A NUMBER OF PEOPLE THAT'S IN THE PRODUCT LIABILITY ARENA, THIS IS NOT AN UNCOMMON SERIES OF EVENTS. I THOUGHT PERHAPS THIS WAS AN ABERRANT TYPE OF SITUATION AND I'M TOLD THAT IT'S VERY COMMON.

ANOTHER THING THAT STRUCK ME AS I WAS PREPARING THIS, THERE WAS A LETTER OF COMMENT FROM MR. FRANK OF THE LEWIS AND ROCA FIRM WHICH CONTAINS THE STATISTIC FACTS THAT AT LEAST LAST YEAR THERE WERE APPROXIMATELY 2400 CLASS ACTIONS INITIATED IN FEDERAL COURT NATIONWIDE AND ALTHOUGH MATH IS NOT MY STRENGTH, I THINK THAT THE CASES IN THIS PROBLEM ALONE WHICH ENDED UP IN FEDERAL COURT WITH CLASS ACTIONS WOULD BE ONE AND A HALF PERCENT OF AN ANNUAL CASE LOAD.

SO I THINK IN TERMS OF WHAT THE JUDICIARY IS DEALING WITH, IF THERE ARE A HALF A DOZEN OF THESE EVERY YEAR, YOU ARE LOOKING AT CLOSE TO TEN PERCENT OF THE FEDERAL CLASS ACTION CASE LOAD IS THIS TYPE OF OVERLAPPING AND DUPLICATIVE CLASS ACTION MORASS.

SO IN TERMS OF SUPPORTING THE MDL PROCESS AND

SUPPORTING THE COORDINATION OF LITIGATION THAT THE MDL IS INTENDED TO ACCOMPLISH, I BELIEVE THE MINIMAL DIVERSITY LEGISLATION WOULD GO A VERY LONG WAY TOWARDS RESOLVING THIS PROBLEM.

I UNDERSTAND THAT THERE IS A CONSIDERABLE RELUCTANCE ON THE PART OF THE FEDERAL JUDICIARY TO DO ANYTHING WHICH IS GOING TO EXPAND DIVERSITY JURISDICTION, BUT I DO THINK THAT THIS IS A CASE WHERE THE ONLY TOOL THAT I CAN ENVISION THAT WOULD UNRAVEL THIS THORNY KNOT IS PRECISELY THAT, MINIMAL DIVERSITY LEGISLATION.

FROM MY PERSPECTIVE IN TERMS OF THE OVERLAPPING CASES, THE MASS TORT SITUATION SEEMS TO BE THE MOST DRAMATIC, BUT, AS I SAID, IT'S NOT MY PRACTICE.

I SPOKE TO A NUMBER OF MY CLIENTS IN THE INSURANCE AND FINANCIAL SERVICES INDUSTRY TO SAY, YOU KNOW, I HAVE BEEN ASKED TO SPEAK IN FRONT OF THIS COMMITTEE. WHAT'S YOUR PROBLEM AND YOUR ISSUE? WHAT ARE YOU SEEING BY WAY OF DUPLICATIVE CASES, OVERLAPPING CASES THAT IT WOULD BE USEFUL FOR ME TO SHARE WITH THESE JUDGES AND PROFESSORS AND PRACTITIONERS?

AND I HAVE ANOTHER STORY TO TELL YOU. I WAS TALKING TO A PRETTY EXPRESSIVE CLIENT OF MINE AND SHE SAID, WELL, I WILL TELL YOU WHAT MY BIG QUESTION IS. HOW MANY TIMES DO I HAVE TO BE CLASS CERTED IN THE SAME CASE?

THAT'S MY ISSUE. I SAID, OKAY. WELL, EXPLAIN TO ME WHAT YOU ARE TALKING ABOUT? HOW CAN I GIVE AN EXAMPLE THAT WOULD HELP THESE JUDGES AND PROFESSORS AND PRACTITIONERS UNDERSTAND WHAT IT IS YOU ARE DEALING WITH? SHE GAVE ME WHAT I THOUGHT WAS A VERY INTERESTING AND TELLING EXAMPLE.

CLASS ACTIONS FILED IN STATE COURT IN OKLAHOMA CHALLENGING A PARTICULAR CLAIMS ADJUSTMENT PRACTICE OF THIS CASE, PROPERTY AND CASUALTY INSURER, CLASS CERTIFICATION IS DENIED. IT'S APPEALED TO THE INTERMEDIATE APPELLATE COURT IN OKLAHOMA. DENIAL IS UPHELD. OKLAHOMA SUPREME COURT IS NOT INTERESTED IN ADDRESSING IT, SO THERE WE HAVE A NICE FINAL JUDGMENT RES JUDICATA, DENIAL OF CLASS CERT.

TWO WEEKS LATER, SAME PLAINTIFFS' FIRM, SAME CLAIMS PRACTICE, DIFFERENT PLAINTIFF, FEDERAL COURT. IDENTICAL LAWSUIT IS FILED AGAINST THE IDENTICAL DEFENDANT.

AND I THINK A DATA POINT WHICH IS USEFUL IN TERMS OF EXAMINING WHETHER THIS IS REALLY A PROBLEM IS THE TRANSACTION COSTS FOR THE DEFENDANT IN TERMS OF GETTING ONE OF THESE CASES UP TO CLASS CERTIFICATION AND THROUGH A CLASS CERTIFICATION HEARING.

SPEAKING WITH A WOMAN WHO MANAGES LITIGATION ON BEHALF OF A NATIONAL COMPANY WHICH INSURES MANAGED CARE

ORGANIZATIONS, SHE TOLD ME HER AVERAGE COST OF DEFENSE, AND THIS IS THE AVERAGE, FOR PRECERT DISCOVERY AND BRIEFING IN ADVANCE OF A CLASS CERTIFICATION HEARING RUN AN AVERAGE OF A MILLION DOLLARS.

I ASKED MY CLIENT WITH THE OKLAHOMA CASE, DOES THAT RESONATE WITH YOU? DOES THAT SOUND ABOUT RIGHT? SHE AT FIRST SAID NO. THEN THE MORE WE TALKED ABOUT IT, THE MORE SHE SAID, REALLY, A SERIOUS CASE WHERE SOMEONE IS MAKING A SERIOUS PUSH AT CLASS CERT, YES, $750,000 TO A MILLION DOLLARS.

AND SO, THEREFORE, I DO THINK IN ADDITION TO THE CONSUMPTION OF JUDICIAL RESOURCES, WHICH THIS TYPE OF OVERLAPPING LITIGATION DOES, INDEED, PRESENT, WE ARE ALSO LOOKING AT A SOCIAL COST OF SPENDING AN AWFUL LOT OF MONEY REINVENTING THE WHEEL ON THIS TYPE OF LITIGATION.

IN REVIEWING THE MATERIALS, I FOUND THE DRAFT RULE 23(C)1(D), WHICH I UNDERSTAND IS NOT AT THIS POINT OPEN FOR COMMENT, BUT I THOUGHT IT WAS A SUPERB TOOL TO DIMINISH THE WASTE OF BOTH PUBLIC AND PRIVATE RESOURCES ON THIS TYPE OF WASTEFUL LITIGATION.

WHAT I WOULD ALSO SUGGEST IS, I NOTICE THAT THERE WAS A SUGGESTION THAT ONE OF THE BASIS ON WHICH CLASS CERTIFICATION MIGHT BE GRANTED OR DENIED WOULD BE WHAT ANOTHER COURT HAS REVIEWED AND DENIED CLASS CERT ON, AND

MY THOUGHT WAS A MORE APPROPRIATE VEHICLE OR AN ADDITIONAL VEHICLE OUGHT TO BE THE ABILITY FOR THE DEFENSE TO GO IN AND SEEK A DISMISSAL OF CLASS ALLEGATIONS ON THE BASIS OF THIS HAS ALREADY BEEN LITIGATED AND NEED NOT BE RELITIGATED SUCH THAT YOU WOULDN'T NEED TO WAIT FOR THE EXPENSIVE CLASS CERTIFICATION PROCESS IN ORDER TO TRY TO GET RID OF LAWSUIT NO. 2.

SO THOSE ARE MY THOUGHTS AND I WOULD BE HAPPY TO ANSWER ANY QUESTIONS.

PROFESSOR MARCUS: RICHARD MARCUS. THIS ISN'T SOMETHING YOU TALKED ABOUT, BUT IN TERMS OF THE FINANCIAL SERVICES CLASS ACTION AS YOU ENCOUNTERED, ONE OF THE EARLIER SPEAKERS URGED THAT SOME SORT OF A COMPETITIVE PROCESS OF SELECTING PLAINTIFF CLASS COUNSEL MIGHT BE ATTRACTIVE.

DO YOU THINK THAT WOULD WORK IN THOSE KINDS OF CASES? HAVE YOU SEEN ANYTHING LIKE THAT?

MS. JAUREGUI: I HAVE NOT SEEN THAT DONE. THE VAST MAJORITY OF THE CASES THAT I WORK ON DO NOT INVOLVE A HORDE OF PLAINTIFF'S LAWYERS, EACH ONE OF WHOM WOULD LOVE TO --

PROFESSOR MARCUS: YOU HAVEN'T SEEN THAT CLAMOR OF THE BAR IN THOSE CASES?

MS. JAUREGUI: THE CLAMOR TENDS TO BE NATIONWIDE

CLASS IN STATE NO. 1; NATIONWIDE CLASS IN STATE NO. 2, NATIONWIDE CLASS IN STATE NO. 3.

THEY ARE NOT ALL IN THE SAME PHYSICAL LOCATION WHERE A JUDGE CAN SAY, ALL RIGHT, LAWYERS ONE THROUGH FOUR OR LAWYERS ONE THROUGH TEN, WHAT WILL EACH OF YOU DO FOR THIS NATIONWIDE CLASS SHOULD I SEEK TO CERTIFY? IT'S MORE DIFFUSE THAN THAT.

JUDGE ROSENTHAL: IN THE CASES WHERE YOU HAVE HAD THE COMPETITION AMONG THE VARIOUS COURTS, EACH OF WHOM HAS A PUTATIVE NATIONWIDE CLASS, HAVE YOUR CLIENTS OR YOU ENCOUNTERED SUCCESS IN THESE INFORMAL COORDINATION EFFORTS THAT WE HAVE HEARD PRAISED BY SOME PEOPLE?

MS. JAUREGUI: NO. TO THE EXTENT THE COORDINATION IS TAKING PLACE, IT'S GENERALLY BEEN WITH A DEFENSE LAWYER WHO HAS COME TO KNOW THE FUND OF THE COMPANY'S KNOWLEDGE AND THE FUND OF THE COMPANY'S DOCUMENTS AND WORKS IT OUT INFORMALLY RATHER THAN GOING THROUGH THE COURTS.

JUDGE MCKNIGHT: MAY I FOLLOW UP WITH THAT? THE JUDGES, THERE HAS BEEN NO INFORMAL COOPERATION AMONG THE JUDGES?

MS. JAUREGUI: THAT'S CORRECT.

JUDGE MCKNIGHT: WAS THERE ANY EFFORTS IN THAT REGARD; STATE, FEDERAL?

MS. JAUREGUI: IN TERMS OF THE FINANCIAL SERVICES

AND INSURANCE LITIGATION, NO.

JUDGE MCKNIGHT: DO YOU THINK THAT WOULD BE A GOOD THING? WHAT COULD BE DONE TO ENCOURAGE IT? WOULD IT WORK?

MS. JAUREGUI: I THINK IT PROBABLY ULTIMATELY WOULD PROVE BENEFICIAL WHERE PEOPLE ARE PURSUING NATIONWIDE CLASS, YES; BUT I DON'T KNOW WHETHER IN A STATE COURT SETTING JUDGES WOULD BE WILLING TO DO THAT.

I MEAN, THAT'S AN ISSUE OF SPECIFIC JUDICIAL PREFERENCE AND SOME STATES, THEY MIGHT NOT VERY WELL COTTON TO IT.

MS. BIRNBAUM: IF IN THESE CASES THEY ARE NOT BEING MDL'D, BUT THEY ARE BEING BROUGHT IN STATE-BY-STATE KIND OF BASIS, SO THERE ISN'T THE MDL JUDGE WHO CAN SORT OF ACT AS A CONDUIT FOR TRYING TO GET DISCOVERY IN SOME WAY?

MS. JAUREGUI: THAT'S CORRECT, MA'AM. TYPICALLY THEY ARE STATE COURT CASES WHICH ARE DESIGNED NOT NECESSARILY TO BE REMOVED ALONG A DIVERSITY BASIS, BUT THEY ARE NATIONWIDE CLASSES.

MR. KASANIN: ON YOUR MEDICAL DEVICE, IS THAT ENTIRELY STATE CLASS ACTIONS OR FEDERAL CLASS ACTIONS, ALSO?

MS. JAUREGUI: THE MEDICAL DEVICE ACTION I WAS

TALKING ABOUT, WE ENDED UP HAVING 53 CLASS ACTIONS. EITHER 36 OR 37 WE WERE ABLE TO REMOVE AND THE BALANCE REMAINED IN STATE COURT.

CHAIRMAN LEVI: THANK YOU VERY MUCH. IS MISS ALEXANDER HERE?

MS. ALEXANDER: GOOD MORNING. I'M MARY ALEXANDER. I PRACTICE LAW HERE IN SAN FRANCISCO. IT'S AN HONOR TO APPEAR BEFORE YOU.

I AM PRESIDENT-ELECT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA. AS YOU MAY KNOW, ATLA IS A PRIVATE BAR ASSOCIATION OF ABOUT 60,000 MEMBERS WHO PRIMARILY REPRESENT PLAINTIFFS IN PERSONAL INJURY CASES, BUT ALSO CIVIL RIGHTS EMPLOYMENT, ENVIRONMENTAL LITIGATION, CRIMINAL DEFENSE, AND BOTH SIDES OF COMMERCIAL LITIGATION. I'M HERE TODAY TO PRESENT ATLA'S POSITION ON THE PUBLISHED PROPOSAL TO AMEND RULE 23.

MY COLLEAGUE GERSON SMOGER IS HERE AND HE WILL ADDRESS THE DRAFT PROPOSALS ON THE SUBJECT OF REPORTER'S CALL FOR INFORMAL COMMENT, BUT I WOULD ASK YOU TO PLEASE CONSIDER OUR TESTIMONY JOINTLY HERE AND TAKEN AS A WHOLE AS ATLA'S POSITION ON THESE PROPOSALS.

LET ME BEGIN BY SAYING ATLA COMMENDS THE ADVISORY COMMITTEE AND ITS SUBCOMMITTEE ON CLASS ACTIONS FOR THE GREAT AMOUNT OF WORK THAT YOU HAVE DONE ON THE

SUBJECT AND FOR YOUR CONTINUING OPENNESS TO INPUT FROM ALL PARTIES, PUBLIC OR FROM THE BAR. I REALIZE THAT IT HAS BEEN THE SUBJECT OF STUDY FOR OVER TEN YEARS AND AS JUDGES LEVI AND ROSENTHAL HAVE PROVIDED GREAT LEADERSHIP IN THAT EFFORT AND WE APPRECIATE IT.

WE AGREE WITH JUDGE LEVI'S ASSESSMENT THAT NOTHING HAS BECOME SIMPLER OR LESS CONTROVERSIAL SINCE THE LAST PROPOSED AMENDMENTS IN 1996, BUT THE ADVISORY COMMITTEE HAS WORKED VERY HARD IN REVIEWING THESE AND WE THANK YOU FOR THAT.

IN MY WRITTEN COMMENTS WE HAVE ATTACHED ATLA'S POLICY ON CLASS ACTIONS WHICH DATES BACK TO 1996 WHEN WE ADOPTED A FORMAL POLICY ON CLASS ACTIONS.

AS YOU CAN SEE FROM LOOKING AT THAT POLICY, OUR BOARD RECOGNIZED AT THAT TIME, AND CONTINUES TO, THAT CLASS ACTIONS CAN BE IMPORTANT PROCEDURAL VEHICLES TO DETER WRONGFUL CONDUCT ON THE PART OF THE DEFENDANTS AND TO ENABLE CONSUMERS TO GET A REMEDY FOR SMALL SCALE DAMAGES CASES THAT ARE OF WIDESPREAD COMMONALITY AS WELL AS LARGE SCALE DAMAGES.

HOWEVER, ATLA'S POLICY ALSO RECOGNIZES THAT THERE IS ATTENTION BETWEEN THE USE OF CLASS ACTION MECHANISM AND A NUMBER OF OTHER IMPORTANT VALUES, SUCH AS THE RIGHT TO DEDICATED LEGAL COUNSEL AND THE RIGHT TO

TRIAL BY JURY AND IT EXPRESSES SUPPORT FOR MEANINGFUL OPT-OUT RIGHTS IN CLASS ACTIONS AND INJURED PLAINTIFFS', VICTIMS' RIGHTS TO CONTROL THEIR OWN LITIGATION.

IT ALSO EXPRESSES DEEP CONCERN ON SEVERAL OTHER ISSUES THAT WERE THE SUBJECTS OF RULEMAKING IN 1996; THE ADJUDICATION OF THE RIGHTS OF FUTURE CLAIMANTS THROUGH SETTLEMENT ONLY CLASSES AND THE INAPPROPRIATE USE OF LIMITED FUND CLASSES PERMITTING JUDGES TO SPECULATE ABOUT THE LIKELY SUCCESS OF THE MERITS OF A CLASS ACTION WHILE ENTERTAINING THE MOTIONS FOR CERTIFICATION AND SPECIAL APPEAL PROCEDURES FOR CLASS ACTIONS THAT HAVE SINCE BECOME LAW.

ALTHOUGH NOT EVERY CASE AND EVERY ONE OF THESE MENTIONED IN ATLA'S POLICY IS A SUBJECT OF THE 2001 PROPOSED AMENDMENTS, OUR OVERALL CONCERNS ARE STILL WELL FOUNDED. WE FEEL THAT WE HAVE TO BE VIGILANT, THAT WE HAVE TO KNOW THAT THE FEDERAL RULE MAKERS ARE ALSO VIGILANT -- WE KNOW THAT THEY ARE -- FOR THE EROSION OF AN INDIVIDUAL CLASS MEMBER'S RIGHTS AND THAT THEY MUST BE CONSIDERED.

CLASS ACTION SETTLEMENTS CONTINUE TO BIND ABSENT CLASS MEMBERS WHO DO NOT HAVE THE BENEFIT OF A REAL CHOICE IN THE MATTER BEING LITIGATED OR REAL REPRESENTATION OF COUNSEL OF THEIR CHOICE AND REAL OPPORTUNITIES TO OPT OUT

OF CLASS ACTION AND REAL CHOICE TO -- WHETHER TO ACCEPT A SETTLEMENT.

THESE RIGHTS ARE OF IMPORTANCE AND THE CENTER -- AND THE CENTER OF THE ADVISORY COMMITTEE PUBLISHED PROPOSALS AND WE APPLAUD YOUR ATTENTION TO THOSE.

LET ME MOVE TO THE SPECIFIC PROPOSALS. WITH REGARD TO 23(C)(1)(A), THE CERTIFICATION DECISION, WE ARE CONCERNED ABOUT THE PROPOSAL TO AMEND ON 23(C)(1) TO REQUIRE THE CERTIFICATION DETERMINATION TO BE MADE AT AN EARLY PRACTICAL TIME AS OPPOSED TO CURRENTLY, AS SOON AS PRACTICABLE.

WE SHARE THE CONCERN OF MANY PLAINTIFF LAWYERS THAT THIS CHANGE IN LANGUAGE WILL PROVIDE AN OPPORTUNITY FOR EXTENSIVE PRECERTIFICATION DISCOVERY AND LITIGATION THAT COULD BE USED TO DELAY CRUCIAL CERTIFICATION.

JUDGE ROSENTHAL: THE RESEARCH THAT WE HAD AVAILABLE WHEN WE PROPOSED THIS CHANGE SHOWS THAT THERE IS ALREADY MORE TIME THAN THE PRESENT RULE LANGUAGE SUGGESTS THAT PASSES BETWEEN THE FILING OF THE CASE AND DECISION ON CERTIFICATION MOTION.

DO YOU HAVE A -- GIVEN THE FACT THAT, APPARENTLY, THIS IS THE WAY THE PRACTICE IS CONDUCTED NOW, DO YOU THINK THAT THE MODEST CHANGE IN LANGUAGE AND THE NOTE CHANGE THAT ACCOMPANIES IT WOULD ADD TO THE TIME

SPENT BEFORE CERTIFICATION IS DECIDED?

MS. ALEXANDER: YES, WE DO FEEL THAT WAY. WE ARE VERY CONCERNED THAT IT'S GOING TO MAKE THAT SITUATION EVEN WORSE, EVEN GRAYER; THAT THE DEFENDANTS WILL USE THAT LANGUAGE TO CONVINCE THE COURTS TO DO FURTHER DISCOVERY AND TO DELAY THE PROCEEDINGS, MAKE PLAINTIFFS MORE DESPERATE TO SETTLE.

JUDGE ROSENTHAL: LET ME ASK A FOLLOW-UP QUESTION, IF I MAY.

WE HEARD A COMMENT EARLIER TODAY FROM SOMEONE WHO PRACTICES IN PLAINTIFF'S SIDE OF THE V AS WELL THAT ANY EFFORT TO CIRCUMSCRIBE DISCOVERY IN THE EARLY STAGES TO CERTIFICATION ONLY DISCOVERY IS PROBLEMATIC AND, IN FACT, WHAT HE WANTED WAS AN OPPORTUNITY TO USE SELF REGULATION TO MAKE THE DECISION AND TO GO AS FAR INTO THE MERITS OR INTO WHAT HE NEEDED TO GET, I THINK WAS THE TERM, AS MUCH AS POSSIBLE IN THE EARLY STAGES OF THE CASE.

IT SEEMS TO BE SOMETHING OF AN INCONSISTENCY WITH WHAT YOU ARE SAYING, THAT YOU WOULD PREFER AS LITTLE DISCOVERY AS POSSIBLE AND AS QUICK A DECISION AS POSSIBLE.

MS. ALEXANDER: WELL, I WAS SURPRISED AT THOSE COMMENTS. WE FEEL THAT THERE IS A -- WITH THIS LANGUAGE AND FURTHER DELAY AND DISCOVERY ON THAT ISSUE ONLY, THAT IT IS MUCH MORE OPEN FOR ABUSE ON THE PART OF LITIGANTS

AND SO WE WOULD URGE YOU TO KEEP THE LANGUAGE AS IT IS; THAT TO DO SO WOULD MAKE THAT EVEN A GREATER PROBLEM.

MS. BIRNBAUM: DO I UNDERSTAND THAT YOUR POSITION WOULD BE THAT THERE SHOULD BE LIMITED AMOUNTS OF DISCOVERY AND GET TO CLASS CERTIFICATION QUICKLY RATHER THAN ALLOW MORE DISCOVERY THROUGHOUT THE PROCESS OF CLASS CERTIFICATION?

MS. ALEXANDER: WHAT WE ARE CONCERNED ABOUT IS THIS EXTENSIVE PRECERTIFICATION DISCOVERY WOULD BE SO EXTENSIVE THAT YOU ARE REALLY LITIGATING THE CASE PRIOR TO CERTIFICATION AND USE OF THAT TO DELAY THE CASE BEFORE WE EVEN KNOW WHETHER THE CLASS IS GOING TO BE CERTIFIED. SO, YES, THAT'S OUR CONCERN.

MS. BIRNBAUM: WHAT'S YOUR POSITION ON MOTIONS TO DISMISS VARIOUS CAUSES OF ACTION OF THE COMPLAINT BEFORE CERTIFICATION? DO YOU HAVE A POSITION ON THAT?

MS. ALEXANDER: WE DON'T HAVE A POSITION ON THAT, NO.

PROFESSOR MARCUS: JUST ONE FOLLOW-UP TO JUDGE ROSENTHAL'S QUESTION ABOUT PRECERTIFICATION DISCOVERY.

IS IT ATLA'S EXPERIENCE THAT DEFENDANTS HAVE VIGOROUSLY RESISTED DISCOVERY BY PLAINTIFFS ON THE GROUND THAT IT WAS ONLY TO BE ABOUT CLASS CERTIFICATION AND NOT THE MERITS?

MS. ALEXANDER: YES. WE HAVE SEEN THAT IN MANY SITUATIONS THAT IT'S ONLY LIMITED AND SO IT'S BEING USED ON THAT GROUNDS TO -- AS WELL TO DELAY THINGS AND DELAY THE ACTION.

PROFESSOR MARCUS: THE REASON I ASK YOU, IT SEEMS THAT'S A SITUATION WHERE YOU WOULD BE SAYING WE WANT MORE DISCOVERY AND NOW YOU SEEM TO BE SAYING WE WANT LESS DISCOVERY.

MS. ALEXANDER: WELL, WHAT I THINK IS, OUR CONCERN IS THAT THIS LANGUAGE "TO REPLACE AS SOON AS PRACTICABLE" TO "THE EARLY PRACTICABLE TIME" MEANS THAT DEFENDANTS CAN USE THAT TO CONVINCE THE COURTS THAT THERE HAS TO BE THIS OTHER KIND OF DISCOVERY AND TO USE IT TO DELAY.

AND I THINK THAT THERE DOES NEED TO BE JUDICIAL OVERSIGHT OF THIS AND IT DOES HAVE TO BE TAKEN ON A CASE-BY-CASE BASIS. WE ARE NOT SAYING IT SHOULDN'T BE.

WE ARE TALKING ABOUT THE CHANGE IN THIS LANGUAGE AND HOW IT MIGHT BE USED AND OUR CONCERN FOR THAT, BUT I THINK THERE NEEDS TO BE CAREFUL JUDICIAL OVERSIGHT ON THESE ISSUES.

CHAIRMAN LEVI: I THINK IT'S INTERESTING. I THINK ONLY LAWYERS AND 14TH CENTURY SCHOLARS COULD ENJOY DEBATING THE DIFFERENCES BETWEEN "AT AN EARLY PRACTICAL TIME" AND "AS SOON AS PRACTICABLE."

MS. ALEXANDER: I WILL CONCEDE THAT.

CHAIRMAN LEVI: I THINK YOU HAVE TO. I HAVE HAD TO CONCEDE IT AS WELL IN OTHER CONTEXTS, BUT I THINK THE ISSUE IS THIS PERHAPS FROM THE POINT OF VIEW OF ATLA.

IF ONE OF THE ROLES FOR THE COURT IN THAT EARLY PERIOD IS TO MAKE SURE THAT THE CLASS ACTION ISN'T HOMOGENIZING INDIVIDUAL CLAIMS, WHICH OUGHT NOT TO BE HOMOGENIZED -- THAT IS, THEY ARE DISTINCTLY DIFFERENT OR THEY FALL INTO SUBSETS -- SO THAT A CLASS TREATMENT MAY BE UNFAIR AND I THINK FROM THE POINT OF VIEW OF ATLA YOU WOULD PARTICULARLY SHARE THAT CONCERN SINCE YOU ARE -- AS YOU SAID, YOU HAVE THIS CONCERN FOR THE SINGLE LITIGANT.

IT'S DURING THAT PERIOD THAT THE JUDGE CAN BECOME INFORMED AS TO, WELL, WHAT ARE THE ISSUES IN THIS CASE AND ARE THEY BEING INAPPROPRIATELY HOMOGENIZED AND THAT MAY TAKE A CERTAIN AMOUNT OF TIME. THE CONCEPT TO DELAY FOR THE SAKE OF DELAY IS NOT A GOOD THING, BUT I THINK THAT'S THE BALANCE THAT'S GOING ON.

MS. ALEXANDER: PRECISELY. THAT TO PROTECT THE INDIVIDUAL RIGHTS, DEFENDANT'S RIGHTS, BUT, ALSO, NOT TO UNDULY DELAY IT JUST FOR THE DISCOVERY ON THAT ONE ISSUE OF CERTIFICATION.

JUDGE SHEINDLIN: WOULD YOU AGREE TO A TRADE THAT YOU WOULD HAVE BIFURCATED DISCOVERY IN RETURN FOR EARLY

CERTIFICATION?

IN OTHER WORDS, ON THE PLAINTIFFS' SIDE WOULD YOU SAY I WOULD AGREE TO BIFURCATE ON DISCOVERY OF CLASS-ONLY ISSUES IF I HAD A GUARANTEE OF AN EARLY CERTIFICATION?

MS. ALEXANDER: WELL, I'M NOT HERE TO BARGAIN ON THE PART OF ATLA, BUT WE WOULD BE HAPPY TO LOOK INTO THAT ISSUE AND SUBMIT SOME FURTHER COMMENTS IF YOU WOULD LIKE THAT. IT'S AN INTERESTING POINT.

JUDGE ROSENTHAL: ONE FINAL, I THINK FINAL QUESTION ON THIS TOPIC.

THE NOTE LANGUAGE THAT ACCOMPANIES THE PROPOSED CHANGE ATTEMPTS TO STRIKE THE BALANCE THAT JUDGE LEVI DESCRIBED AND TO PROVIDE SOME GUIDANCE TO JUST THE KIND OF OVERSIGHT THAT YOU HAVE DESCRIBED AS NECESSARY.

DO YOU THINK THAT THERE SHOULD BE SPECIFIC CHANGES TO THE WORDING OF THE PROPOSED NOTE LANGUAGE TO MAKE THE BALANCE CLEARER OR THE RISKS THAT YOU HAVE VOICED CONCERN OVER MORE CLEARLY ILLUSTRATED?

MS. ALEXANDER: YOU KNOW, I HAVE TO LOOK AT THAT NOTE LANGUAGE AGAIN, BUT WHAT WE ARE CONCERNED ABOUT IS THAT THE LANGUAGE BE USED INAPPROPRIATELY OR USED TO CONVINCE THE COURT THAT THIS DISCOVERY HAS TO BE DONE, AND SO WE WOULD LIKE TO SEE THE LANGUAGE CURRENTLY AS IT IS

AND I THINK THAT WOULD INCLUDE WHAT YOU ARE TALKING ABOUT.

IT'S MOST IMPORTANT THAT THERE NOT BE A WAY IN WHICH THIS EARLY DISCOVERY, IF PRACTICABLE, IN LITIGATING THE CASE ON THAT ISSUE BEFORE THE CERTIFICATION. THAT'S WHAT OUR CONCERN IS, AS WELL AS THE INDIVIDUAL.

AS TO 23(C)(1)(B), WE SUPPORT REQUIRING CERTIFICATION ORDERS TO DEFINE THE CLASS AND IDENTIFY CLASS CLAIMS AND ISSUES AND DEFENSES.

WE TAKE NO POSITION ON 23(C)(1)(C), WHICH ALLOWS THE CERTIFICATION ORDER TO BE AMENDED AT ANY TIME.

NOTICE REQUIREMENTS, IF I CAN MOVE TO THAT, ARE OFTEN SACRIFICED FOR THE -- IN THE NAME OF EXPEDIENCY. NOTICE IS AN EXPENSIVE, TIME-CONSUMING PROCESS; BUT, AGAIN, THE RIGHTS OF INDIVIDUAL LITIGANTS HAVE TO TAKE PRIORITY.

SOME NOTICE PROCESSES ARE CONDUCTED IN SUCH A FASHION THAT PROSPECTIVE CLAIMANTS MAY NOT EVEN REALIZE THAT THEY HAVE RECEIVED NOTICE OF THE EXISTENCE OF CIVIL ACTION IN WHICH THEIR RIGHTS MAY BE TAKEN AWAY.

ATLA SUPPORTS THE PROPOSAL AMENDMENT 23(C)(2)(A)(I) TO REQUIRE CLASS NOTICES TO BE PLAIN, EASILY UNDERSTOOD LANGUAGE, AND WE APPLAUD THE EFFORTS IN THAT REGARD. WE THINK IT'S VERY IMPORTANT THAT PLAIN LANGUAGE PROVISIONS BE IN THERE.

WE TAKE NO POSITION ON 23(C)(2)(A)(II) OR (III).

WITH REGARD TO JUDICIAL OVERSIGHT OF SETTLEMENTS, WE GENERALLY SUPPORT THE CONCEPT OF 23(E)(1)(A) FOR JUDICIAL INVOLVEMENT AND SCRUTINY AND ULTIMATE APPROVAL OF THE CIVIL ACTION SETTLEMENTS THAT ARE FOUND TO BE FAIR REASONABLE AND ADEQUATE, AND THAT'S AS STATED IN 23(E)(1)(C).

ALTHOUGH WE THINK THAT THE PROBLEMS THAT EXIST IN THE CLASS ACTION FIELD HAVE BEEN GREATLY EXAGGERATED DURING DEBATES OF THE LAST DECADE, THERE ARE PROBLEMS AND THERE ARE ABUSES AND MANY OF THESE INVOLVE SETTLEMENTS AND THE SETTLEMENT PROCESS.

WE ARE LESS CONCERNED THAN SOME ARE ABOUT THE SO-CALLED SIDE AGREEMENTS CONNECTED TO SETTLEMENTS, WHICH ARE THE SUBJECT OF 23(E)(2). WE WOULD WONDER JUST HOW PRACTICAL OR APPROPRIATE IT IS FOR FEDERAL JUDGES TO TRY TO POLICE SUCH AGREEMENTS UNLESS THERE REALLY ARE SERIOUS ALLEGATIONS OF WRONGDOING AND MERITORIOUS DISSATISFACTION BY CLASS MEMBERS.

WE SUPPORT 23(E)(1)(B) FOR REQUIRING NOTICE OF SETTLEMENTS THAT WOULD BIND CLASS MEMBERS AND WE SUPPORT ALLOWING OPT-OUTS FROM SETTLEMENTS AS WOULD BE DONE UNDER ALTERNATIVE 2 TO RULE 23(E)(3).

WE RECOGNIZE ENSURING OPT-OUT RIGHTS FOR CLASS

MEMBERS CAN BE DIFFICULT FOR PRACTITIONERS ON BOTH SIDES. HOWEVER, WE THINK THAT, AGAIN, LITIGANTS' CHOICE IS MOST MORE TO ADMINISTRATIVE CONVENIENCE AND THE MANAGEMENT OF THE LITIGATION.

WE SUPPORT 23(E)(4), OBJECTIONS TO PROPOSED SETTLEMENTS, AND WE BELIEVE THAT 23(E)(4)(B)'S PROVISION FOR JUDICIAL SCRUTINY OF WITHDRAWN OBJECTIONS WOULD PROVIDE SOME PROTECTION AGAINST THE POSSIBILITY OF COLLUSION.

I WANT TO MOVE TO THE CLASS COUNSEL IN 23(G). ATLA'S CLASS ACTION POLICY SUPPORTS LITIGANTS' RIGHTS TO COUNSEL OF THEIR CHOICE, IS UNDIVIDED BY ANY CONFLICT OF INTEREST. THEREFORE, WE ARE WARY OF THE NOTION OF FEDERAL COURTS APPOINTING CLASS COUNSEL, AS IT'S DESCRIBED IN 23(G)(1).

LITIGANTS ARE ENTITLED TO RETAIN THEIR OWN COUNSEL, TO HAVE THEIR OWN COUNSEL FILE A LAWSUIT AND WHETHER IT IS AS A CLASS OR AN INDIVIDUAL ACTION. THEY SHOULD NOT HAVE THE RIGHT EXTINGUISHED BY AN ORDER THAT EFFECTIVELY REPLACES THEIR COUNSEL WITH ONE OR MORE ATTORNEYS THAT THEY DON'T KNOW, THAT ARE STRANGERS TO THEM. ABSENT EVIDENCE OF UNFITNESS THAT MIGHT MOVE ANY COURT TO LIMIT A LAWYER'S RIGHT TO PRACTICE, A LITIGANT'S CHOICE OF COUNSEL SHOULD BE LEFT ALONE.

WE ARE ALSO CONCERNED THAT ATTORNEY APPROVAL NOT BE INFLUENCED BY THE FEE-RELATED MATTERS ALLUDED TO IN 23(G)(2)(B) AND (C). ALTHOUGH IT'S IMPORTANT THAT A SMALL GROUP OF LAW FIRMS NOT DOMINATE CLASS ACTION PRACTICE, IT ALSO WOULD BE WRONG IF CLASS MEMBERS COME TO BE REPRESENTED BY LAWYERS UNKNOWN TO THEM THROUGH A LOWEST BIDDER OR AN AUCTION TYPE PROCESS. SUCH A CURE WOULD ENCOURAGE COLLUSION, WOULD -- COULD WELL BE FAR WORSE THAN ANY PERCEIVED COMPETITIVENESS PROBLEM THAT WE HAVE HEARD ABOUT.

WE KNOW THAT THE FEDERAL JUDICIAL CENTER'S RESEARCH DIVISION HAS CATALOGUED A NUMBER OF INSTANCES IN WHICH ACTIONS HAVE BEEN HELD -- AUCTIONS HAVE ACTUALLY BEEN HELD IN COURTS AND WE ALSO RECALL THE MAGNA CARTA, WHERE IF WE ASSUME THAT THOSE ASSEMBLING THERE AT THE GRASSY FIELD OF RUNNYMEDE HAD AN INKLING THAT THERE WOULD BE AUCTIONS FOR COUNSEL, WE THINK THEY WOULD HAVE OR MIGHT HAVE WRITTEN "TO NO ONE SHALL WE SELL OR AUCTION AND TO NO ONE WILL WE DENY OR DELAY JUSTICE."

WE SUPPORT, HOWEVER, THE NOTION IN 23(G)(2)(B) THAT CLASS ACTION COUNSEL MUST ADEQUATELY AND FAIRLY REPRESENT THE INTERESTS OF THE CLASS, BUT, AGAIN, THE INDIVIDUAL RIGHTS ARE TANTAMOUNT.

PROFESSOR MARCUS: COULD I ASK A SORT OF

BACKGROUND QUESTION ABOUT APPOINTMENT OF CLASS COUNSEL?

THE BACKGROUND, FROM MY PERSPECTIVE, IS THAT IF THE COURT CERTIFIES A CLASS, SHOULD PAY SOME ATTENTION TO WHO THE LAWYER IS THAT WILL BE ACTING ON BEHALF CLASS MEMBERS, IS IT OF CONCERN THAT IT'S INAPPROPRIATE FOR THE JUDGE TO PAY ATTENTION TO THOSE THINGS AND TO WORRY ABOUT WHO THAT PERSON IS? THAT WOULD SEEM TO OPEN THE DOOR TO MORE RISKS FOR CLASS MEMBERS THAN HAVING THE COURT ATTEND TO THE QUALITIES AND COMMITMENT OF THE LAWYER THAT'S BEING APPOINTED OR IS GOING TO BE IN CHARGE OF THE CASE.

MS. ALEXANDER: THANK YOU FOR ASKING THAT, BECAUSE I DON'T WANT TO BE UNCLEAR ABOUT THAT AT ALL.

WE DO THINK THAT THERE SHOULD BE JUDICIAL OVERSIGHT AND WITH THE APPROVAL. OUR CONCERN IS WE NOT GET INTO LOWEST BIDDER OR THE AUCTION TYPE SITUATION SO THAT COUNSEL COULD COME IN AND TRY TO -- OR IT MAY NOT BE THE BEST COUNSEL, WHOEVER IS THE LOWEST BIDDER. WE DON'T WANT THAT KIND OF SITUATION.

WE THINK IT'S VERY IMPORTANT FOR THE JUDGES TO OVERSEE AND TO MAKE SURE THAT CLASS COUNSEL ARE WELL QUALIFIED AND, THEREFORE, CAN REPRESENT THE INDIVIDUAL RIGHTS.

PROFESSOR MARCUS: SO YOU DON'T -- EXCEPT MAYBE AS TO FINANCIAL CONCERNS, YOU DON'T REALLY HAVE A PROBLEM

WITH THE NOTION OF THE JUDGE SCRUTINIZING THE EXPERIENCE AND BACKGROUND IN THE CASE AND COMMITMENT TO THE CASE THAT THE LAWYER HAS?

MS. ALEXANDER: NO. I DO WANT TO BE CLEAR ON THAT.

WE SUPPORT THE JUDICIAL REVIEW OF ATTORNEY'S FEES AS A MEANS OF ASSURING THAT EACH CLASS MEMBER RECEIVES VALUE FOR THE WORK PERFORMED ON THEIR BEHALF. HARDLY ANYONE CAN OBJECT TO THE CONCEPT THAT FEES WOULD BE REASONABLE OR THE COURT'S INHERENT AUTHORITY OVER FEES. OUR ONLY CONCERN IS THAT THE FEDERAL COURTS NOT INTRUDE INTO THE AREA OF ATTORNEY DISCIPLINE, WHICH ARE WITH THE STATE COURT AND WE FEEL SHOULD BE WITH THE STATE.

THE DRAFT PROPOSALS ON OVERLAPPING AND COMPETING CLASS ACTIONS, MY COLLEAGUE, GERSON SMOGER, WILL TALK ABOUT THOSE.

IN CONCLUSION, ATLA'S CONCERN IS FOR THE PROTECTION OF DUE PROCESS AND THE JURY TRIAL RIGHTS OF INDIVIDUAL PLAINTIFFS. THE CONSTANT PRESSURE OF THESE CONSTITUTIONAL RIGHTS ARISES FROM CONCERNS OVER THE COURT CONGESTION, THE NUMBER OF ACTIONS, BUSINESSES SAYING THAT THEY NEED FINALITY TO END THE LITIGATION AND SO COURTS ARE CONSTANTLY BEING ASKED TO MAKE RULINGS IN THE INTERESTS OF FAIR AND EFFICIENT RESOLUTION OF THIS LARGE-SCALE

LITIGATION, THAT SOMETIMES THESE REQUESTS MAY GO AGAINST THE INDIVIDUAL RIGHTS OF THE LITIGANTS.

ALL OF THE PROPOSED AMENDMENTS PUBLISHED THIS YEAR NEED TO BE EVALUATED WITH THIS KIND OF PROBLEM. ATLA ADVOCATES THE SAME JUST, SPEEDY AND INEXPENSIVE DETERMINATION OF EVERY ACTION THAT IS THE GOAL RULE 1 OF THE FEDERAL RULES OF CIVIL PROCEDURE, BUT WE ALSO STRONGLY ADVOCATE THE INDIVIDUAL RIGHTS. THEY MUST COME FIRST.

THE SUPREME COURT PUT IT VERY WELL SHORTLY AFTER RULE 23 WAS ENACTED. PROCEDURAL DUE PROCESS IS NOT INTENDED TO PROMOTE EFFICIENCY. IT IS INTENDED TO PROTECT THE PARTICULAR INTERESTS OF THE PERSON WHOSE POSSESSIONS ARE ABOUT TO BE TAKEN.

THANK YOU VERY MUCH FOR THIS OPPORTUNITY TO ADDRESS YOU. IT'S BEEN AN HONOR AND THANK YOU FOR YOUR LEADERSHIP.

CHAIRMAN LEVI: THANK YOU FOR COMING HERE TODAY.

JUDGE SHEINDLIN: ONE MORE QUICK QUESTION ON THE CHOICE OF COUNSEL ISSUE.

IT SEEMS THAT YOU WERE SAYING THAT WE USE THE WORD LEAD PLAINTIFF THAT WE HEARD A LITTLE EARLIER; THAT LEAD PLAINTIFF HAS CHOSEN THE COUNSEL HE OR SHE WANTS. WE THINK HER RIGHT TO CHOOSE COUNSEL SHOULD BE RESPECTED.

LET'S SAY THAT THAT COUNSEL IS QUALIFIED, MEETS

ALL THE TESTS OF HIS EMPLOYMENT. CAN THEN THE COURT IN YOUR VIEW STEP IN AND, IN ESSENCE, MAKE A FEE ARRANGEMENT THAT PROTECTS THE CLASS INTERESTS SO THAT WE GET THE RIGHT OF THE LITIGANT TO CHOOSE THEIR COUNSEL, ASSUMING IT'S QUALIFIED, BUT NOW THE COURT HAS WHAT THE PROFESSOR CALLED THE FIDICUARY OBLIGATION TO BE SURE TO MAXIMIZE THE RETURN OF THE CLASS?

AFTER THAT PERSON HAS CHOSEN COUNSEL, THEN THE COURT CAN, IN ESSENCE, GET INVOLVED IN NEGOTIATING A FEE, IN YOUR VIEW?

MS. ALEXANDER: NOT IN NEGOTIATION, BUT IN OVERSEEING THE SETTLEMENTS AND THE FEES THAT ARE THERE.

JUDGE SHEINDLIN: THAT'S BEEN AROUND A LONG TIME, BUT I THINK THIS IDEA OF A MARKET APPROACH, IS THERE ROOM AFTER THE SELECTION OF COUNSEL WHO TALKED ABOUT A DIFFERENT WAY OF ESTABLISHING WHAT THE FEE SHOULD BE FROM THE BEGINNING, FROM THE OUTSET, WHERE THE CHOICE OF COUNSEL IS PROTECTED?

MS. ALEXANDER: WELL, THAT'S WHAT PART OF OUR CONCERN IS; THAT IT COMES INTO VIEW THAT EARLY ON BEFORE THE CASE IS EVEN DONE TALKING ABOUT FEES, THAT'S HOW WE GET INTO THE -- MORE OF THE LOWEST BIDDER, THE AUCTION --

JUDGE SCHEINDLIN: I WAS TAKING YOUR POINT FIRST. I WAS SAYING FIRST YOU CHOOSE, BECAUSE THE PLAINTIFF HAS

CHOSEN. SO IF THE PERSON IS QUALIFIED, NOW IT'S THEIR LAWYER. THEY HAVE THE RIGHT TO CHOOSE THEIR OWN COUNSEL AND THE COURT IS NOT GOING TO GET INVOLVED IN BIDDING THAT WOULD FORCE THEM TO HAVE A STRANGER AS THEIR LAWYER.

I'M FOLLOWING UP ON YOUR POINT. THEY HAVE CHOSEN THEIR OWN COUNSEL, NOT FORCED TO ACCEPT A STRANGER; BUT DOESN'T THE COURT HAVE A ROLE AT THAT POINT TO BE SURE THAT THE BENEFIT TO THE CLASS IS MAXIMIZED BY SETTING THE FEE THAT'S MOST BENEFICIAL TO THE CLASS MEMBER?

MS. ALEXANDER: WELL, THE PROBLEM WITH DOING IT -- YOU ARE TALKING ABOUT IN THE EARLY STAGE?

JUDGE SCHEINDLIN: OH, YES. I'M TRYING TO COMBINE THE APPROACH OF WHAT THE PROFESSOR IS TALKING ABOUT WITH YOUR CONCERN THAT THEY NOT BE STUCK WITH A COUNSEL THEY NEVER CHOSE.

MS. ALEXANDER: COMBINING THOSE TWO AND LOOKING AT FEES EARLY, THE PROBLEM WITH LOOKING AT FEES EARLY IS THAT THERE MAY BE STILL THE OPPORTUNITY TO TAKE A LOOK AT WHAT THE FEES ARE, NOT IN RELATIONSHIP TO WORK DONE OR THE VALUE TO THE INDIVIDUAL PLAINTIFFS AND INDIVIDUAL LITIGANTS.

I THINK THAT NEEDS TO BE LOOKED AT AT THE END WHEN ALL DISCOVERY IS DONE AND THE CASE IS UNDERSTOOD WHAT IS RIGHT AND FAIR FOR THE INDIVIDUAL. SO I THINK THERE

WOULD BE PROBLEMS LOOKING AT IT THAT EARLY.

JUDGE SCHEINDLIN: YOU WOULD FAVOR THE LOAD STAR AT THE END, LOOKING BACK AT THE WORK?

MS. ALEXANDER: RIGHT.

JUDGE SHEINDLIN: THANK YOU.

CHAIRMAN LEVI: THANK YOU. WHY DON'T WE HEAR FROM MR. SMOGER, AND THEN WE WILL TAKE A FIVE OR TEN MINUTE BREAK.

MR. SMOGER, GOOD MORNING.

MR. SMOGER: GOOD MORNING. I PRACTICE LAW AS A PRACTICE IN TEXAS AND IN CALIFORNIA, BUT I HAVE APPEARED IN COURTS THROUGHOUT THE UNITED STATES. I AM HERE ON BEHALF, WITH MARY ALEXANDER, OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS FORMER CHAIR AND CURRENT VICE-CHAIR ON THE SECTION OF TOXIC ENVIRONMENTAL AND PHARMACEUTICAL TORTS WHICH IS, OBVIOUSLY, ONE OF THE AREAS THAT IS PUSHING THE REASON WE ARE ALL HERE, AND I'M ALSO CHAIR OF THE AMICUS CURIAE COMMITTEE FOR ATLA.

MY COMMENTS ARE GENERALLY -- I WILL DIGRESS IN A COUPLE AREAS YOU JUST QUESTIONED ABOUT -- GOING TO THE PRECLUSION PROCEEDINGS.

ATLA IS OPPOSED TO THE -- RATHER STRONGLY OPPOSED TO THE PRECLUSION PROPOSALS. THEY CONSTITUTE AN OVER-ARCHING CHANGE IN THE DIVISION BETWEEN THE FEDERAL

AND STATE JUDICIAL SYSTEMS.

GENERALLY IT'S ACKNOWLEDGED THAT THERE HAS BEEN LIMITED STUDY AND LIMITED ABILITY TO GET EMPIRICAL EVIDENCE AS TO WHAT IS PERCEIVED AS THE PROBLEM OF DUAL CLASS CLASSES AND HOW PERVASIVE THAT PROBLEM IS OTHER THAN THE HIGH PROFILE EXAMPLES THAT WE ALL HEAR ABOUT.

SO WE THINK IT'S DESIGNED TO AFFECT ONLY A MINORITY OF FILINGS, BUT IF IT'S PUT IN GENERALLY, IT WILL AFFECT ALL CLASS ACTIONS IN ALL STATE COURTS. AND SO IT SEEMS TO BE SOMETHING OF AN ATTEMPT TO KILL A RATHER PESKY FLY THAT IS SITTING ON A PIECE OF GLASS WITH A HAMMER. YOU MIGHT GET THE FLY, BUT DON'T WORRY ABOUT THE ENTIRE PIECE OF GLASS.

OVERALL IT'S -- I WAS ONCE AT AN ARGUMENT WHERE SOMEBODY WAS ARGUING FOR A HIGHER DEGREE OF JUDICIAL SCRUTINY AT THE SUPREME COURT AND JUSTICE SCALIA'S RESPONSE TO THAT WAS, SO WHAT YOU ARE ASKING US TO DO IS TELL JUDGES TO DO THEIR JOBS.

AND I THINK THAT A LOT OF THESE PROPOSALS REALLY GO TO ASKING THE JUDICIARY TO DO ITS JOB BECAUSE THE JUDICIARY HAS THE TOOLS TO DO THIS AND THE QUESTION OF DOING THIS IS SAYING THE JUDICIARY IS THE -- THE RULES ARE SAYING WE DON'T THINK JUDGES ARE DOING THE JOBS THAT WE WANT THEM TO DO.

AND I WILL GO INTO IS THAT MORE SPECIFICALLY, BUT IN TERMS OF THE -- IN FEDERALISM, IN THE FEDERAL STATE ISSUES, IT'S -- THE QUESTION IS AS TO THE LEGISLATION. REALLY, THIS IS LEGISLATION OVER STATE, THE STATE JUDICIAL SYSTEMS.

IT'S ACKNOWLEDGED IN THE REPORTER'S PAPER THAT THERE IS NOT A HUGE PROBLEM IN THE FEDERAL FEDERAL BECAUSE THERE IS A WAY -- THERE'S MECHANISMS THAT MULTIPLE CLASS IN FEDERAL COURTS CAN BE DEALT WITH AT OTHER THAN THE MDL PROCESS OR COORDINATION.

SO THE QUESTION IS TO WHAT THE -- THE EXTENT TO WHAT THE FEDERAL JUDICIARY WANTS TO TAKE CONTROL OF STATE COURTS. THAT'S A MATTER FOR STATE LEGISLATURES AND IT MIGHT BE A MATTER FOR CONGRESS, BUT IT'S AN EMPOWERMENT OF THE -- AT THE RULE-MAKING PROCESS, WHICH IS REALLY A LEGISLATIVE DECISION. THAT'S THE BASIC CONCEPT THAT WE HAVE OF FEDERALISM.

I ALSO WANTED TO SAY, IT SEEMS TO BE THAT THE REPORTS SAID THERE ARE FOUR BASIC REASONS THAT WE HAVE CLASS ACTIONS: ELIMINATE REPETITIVE LITIGATION, PROMOTE JUDICIAL EFFICIENCY, PERMIT SMALL CLAIMS TO FIND A FORUM, AND ACHIEVE UNIFORM RESULTS. AND ONLY ONE OF THOSE IS RELATED TO THE VICTIMS OF CLAIMS. THE REST IS EFFICIENCY.

AND I THINK THAT WHEN WE ARE TALKING ABOUT THIS,

THE FEDERAL STATE DIFFERENTIATION, WE ARE TALKING ABOUT TRYING EFFICIENCY, BUT NOT WITHIN THE CONSTITUTIONAL FRAMEWORK THAT WE HAVE.

SO THEN THE -- LET'S GO TO THE SPECIFIC PROBLEMS. ONE PROBLEM WE LOOK AT IS FORUM SHOPPING AND THAT'S FORUM SHOPPING OF SAYING SOMETHING IS NOT CERTIFIED. WELL, SURELY, THE JUDGE THAT SEES IT WASN'T CERTIFIED IN THAT COURT IS GOING TO BE TOLD BY THE DEFENDANT THAT IT WASN'T CERTIFIED IN THE OTHER COURT AND ALL THE BASES FOR THAT. THE BRIEFS ARE GOING TO BE THERE. THEY ALWAYS ARE. AND THERE IS GOING TO BE A BASIS FOR IT.

THE QUESTION IS THE SUPERVISION OF THE NEXT JUDGE SAYING, WHY ARE YOU UNDERTAKING THIS? BUT THAT'S, THAT'S A QUESTION FOR THAT JUDGE. TO SAY THAT THE JUDGE ISN'T DOING HIS JOB MAYBE THE QUESTION IS THEN JUDICIAL EDUCATION TO TALK ABOUT THAT AND COMMUNICATION, TOOLS OF COMMUNICATION BETWEEN THE COURTS.

THE SECOND ONE IS SETTLEMENT SHOPPING. WELL, SETTLEMENT SHOPPING IS DERIVED, MOVING AROUND BETWEEN TWO SOURCES. SETTLEMENT SHOPPING IS BOTH, IS ACTUALLY DEFENDANT DRIVEN, AND WE DON'T THINK ABOUT THAT, OR IT'S THE PERSON THAT'S PAYING THE MONEY BECAUSE THE ONE THAT'S SHOPPING A SETTLEMENT IS SOMEBODY -- IS WHOEVER WANTS TO PAY THE SETTLEMENT. THEY ARE THE ONE THAT SAID, WE DON'T

LIKE THE DEAL BECAUSE THE COURT SAID -- THE COURT HAS THROWN OUT THIS DEAL, WE ARE GOING TO GO TO ANOTHER STATE OR ANOTHER JURISDICTION.

IF THE DEFENDANT DOESN'T WANT TO SETTLE, THERE IS NO SETTLEMENT TO SHOP. SO THAT WE HAVE TO TALK ABOUT THAT. THAT'S WHERE THAT DRIVE IS.

AGAIN, IT'S THE JUDICIARY AND IN REVIEWING IT AND KNOWING THAT AND I THINK THAT THERE ARE SOME EGREGIOUS EXAMPLES THAT WE HAVE SEEN OF SETTLEMENTS THAT HAVE BEEN EXPECTED TO GO TO OTHER COURTS. AGAIN, THE QUESTION IS IN THE JUDICIARY.

CHAIRMAN LEVI: HOW WOULD YOU REACT TO AN INJUNCTION BY A FEDERAL JUDGE DIRECTED AT THE DEFENDANTS THAT YOU SHALL NOT SETTLE THIS CASE IN ANY OTHER FORUM WHILE IT'S PENDING IN THIS CASE, IN THIS COURT?

MR. SMOGER: THE PROBLEM IS THAT WE SEE THERE ARE SO MANY SEPARATIONS OF WHAT THIS CASE MEANS. THERE ARE SO MANY SEPARATIONS ABOUT WHAT THAT IS.

IT'S VERY HARD TO HAVE THE SPECIFICS, BECAUSE THE SETTLEMENT -- USUALLY THE SETTLEMENT MIGHT CHANGE, THE PROCEDURES MIGHT CHANGE. THEY MIGHT BE GOING FORWARD IN ANOTHER COURT AND MIGHT BE NOT THE SAME TYPE OF CAUSE OF ACTION. IT MIGHT BE UNDER STATE. IT'S VERY HARD TO SEE HOW THAT INJUNCTION IS GOING TO BE FORCED IN OVER-ARCHING

BASIS FOR THE INJUNCTION.

CHAIRMAN LEVI: YOU MIGHT HAVE AN ARGUMENT IN THE CONTEMPORARY, BUT YOU COULD PROBABLY FIGURE THAT ONE OUT.

WHAT ABOUT IN THE ABSTRACT? YOU KNOW, THE FEDERAL JUDGE MIGHT EVEN BE CONSIDERING A SETTLEMENT AND THE PARTIES -- AS YOU SAY, MAYBE IT'S DEFENDANT DRIVEN. I'M NOT CERTAIN, BUT LET'S SUPPOSE IT IS.

MR. SMOGER: IT COULDN'T HAPPEN IN THE ABSENCE OF THE DEFENDANT'S WILLINGNESS.

CHAIRMAN LEVI: RIGHT, AND THE DEFENDANTS ARE MORE IDENTIFIABLE I SUPPOSE. I HAVE SEEN AN ORDER LIKE THIS. THAT WAS IN A TEXAS CASE.

DOES THAT SEEM LIKE A GOOD THING TO YOU OR DO YOU PROPOSE THAT ON THEORETICAL GROUNDS?

MR. SMOGER: THE QUESTION IS THE CONTINUING CONTROL. THE ACTION IS NO LONGER BEFORE THE JUDGE. DOES THAT JUDGE HAVE TO -- NOW IT'S DISMISSED. THE CASE IS DISMISSED. HOW DO WE EFFECTUATE THE CONTINUING LIFETIME SUPERVISION OF THAT CASE UNDER THE JUDGE THAT'S ISSUING THE INJUNCTION?

I MEAN, ONCE A CASE -- DOES THAT CONTINUE ON WITH THE EXISTING JUDGE? I MEAN, HOW IS THE INJUNCTION MONITORED? DOES IT GO BACK TO THAT JUDGE FOR ENFORCEMENT? WHERE DO YOU GO?

HE ISSUES THE INJUNCTION. THE CASE IS NO LONGER BEFORE HIM. THERE IS SETTLEMENT TO ENFORCE. THERE IS NOTHING TO CONTINUE. HE HAS NO --

CHAIRMAN LEVI: YOU ARE ASSUMING THE INJUNCTION HAS BEEN VIOLATED, BUT LET'S SUPPOSE THEY DON'T. LET'S SUPPOSE THEY SAID, WELL, WE ARE NOT GOING TO VIOLATE AN INJUNCTION SO THE CASE CONTINUES BEFORE THIS JUDGE.

I'M SUPPOSING THAT THE JUDGE IS TRYING TO EXAMINE THIS SETTLEMENT UNDER OUR RULE AND IS DOING A TERRIBLY GOOD JOB AND FOR SOME REASON FINDS THAT THE SETTLEMENT IS NOT FAIR AND ADEQUATE TO THE INDIVIDUAL CLASS MEMBERS, LET'S SUPPOSE, AND THEN THE PARTIES SETTLEMENT IT. PERHAPS THEY ARE NOT EVEN THE SAME PLAINTIFFS THAT ARE BEFORE THE FEDERAL COURT, BUT THERE IS AN INJUNCTION ISSUED AGAINST THE DEFENDANTS SAYING YOU CAN'T TRY TO GET AROUND THIS RULING NOW BY JUST GOING INTO SOME OTHER COURT. PERHAPS IT WOULD HAVE TO BE STATE COURT. DOES THAT SEEM FAIR TO YOU?

MR. SMOGER: I SEE A GOOD PURPOSE TO IT. I'M TRYING TO SEE IF THE -- IF PARTIES THEN DISMISS THE SUIT BEFORE THE FEDERAL COURT. THE INJUNCTION IS IN PLACE. HOW DO --

CHAIRMAN LEVI: THAT'S HOW YOU WOULD DEAL WITH IT.

MR. SMOGER: WHAT'S THE ENFORCEMENT MECHANISM? I

AGREE AS LONG AS IT'S PROCEEDING IN THAT COURT, BECAUSE THERE HAVE BEEN TIMES WHERE IT'S BEEN REJECTED IN ONE COURT AND IMMEDIATELY THERE IS A FILING IN ANOTHER COURT, AND THAT COURT IS WILLING TO ACCEPT THE SETTLEMENT. THAT'S VERY PROBLEMATIC.

THE QUESTION IS, HOW DO YOU ENFORCE IT? THE OVERALL ACT IN SOME JURISDICTIONS IS ENFORCE AN ONGOING SETTLEMENT. NOW, WE HAVE NO ONGOING SETTLEMENT. WE HAVE NO ONGOING JURISDICTION. WE HAVE A DISMISSED CASE. DOES THE COURT AUTOMATICALLY HAVE JURISDICTION OF THE SUBJECT MATTER? SO I HAVE QUESTIONS ON HOW TO DO IT.

THE SECOND THING IS THE PROBLEM BEING -- THE PROBLEM THAT WE ARE OVERALL ADDRESSING ARE THE VERY LARGE CASES AND USUALLY THESE GO -- THESE MULTIPLE CLASS ACTIONS WITH 37 CLASS ACTIONS, USUALLY IT'S A SITUATION WHERE THERE IS HIGH STAKES AND VERY BAD ACTS.

NOT A LOT OF PEOPLE -- PEOPLE DON'T FILE 37 CLASS ACTIONS IN SMALLER CASES WHERE YOU DON'T THINK THAT THERE IS GOING TO BE A REWARD FOR DOING IT. THIS IS A TRANSACTION OF COSTS FOR ANYBODY BRINGING THESE CASES AND DOING IT AND A LOT OF IT GETS SORTED OUT REALISTICALLY FAIRLY SHORTLY ON.

IT'S CLEAR THAT MULTIPLE CLASS ACTIONS ARE GOING TO BE FILED, BUT THERE IS A SORTING PROCESS USUALLY OF

THOSE TYPE OF CASES IN THE PLAINTIFFS' BAR AND WHAT HAPPENS -- AND THERE IS A SELF-POLICING THAT IF WE REALIZE THAT IN A LOT OF THESE MASS TORTS, HUNDREDS OF THOUSANDS OF LEGITIMATE CLAIMS ARE -- CAN OFTEN BE SETTLED AND THEY ARE VERY LEGITIMATE, INDIVIDUAL CLAIMS AND WE REALIZE THE OVERALL TRANSACTION FOR THE SYSTEM OF A 100,000 CLAIMS OF, SAY, ONE CASE OF VERY SEVERE -- OF SEVERE HEART DAMAGE, WHERE THERE IS AN ACKNOWLEDGMENT, THEN REALLY YOU ARE LOOKING AT A VERY EFFICIENT PROCESS EVEN THOUGH THERE IS -- MULTIPLE CLASS ACTIONS HAVE BEEN FILED. IN THE END THE SYSTEM INFORMALLY AND FORMALLY GETS TO A POINT OF RESOLUTION.

JUSTICE HECHT: SO IS IT YOUR EXPERIENCE AND ATLA'S POSITION THAT OVERLAPPING AND DUPLICATIVE CLASS ACTIONS ARE NOT REALLY A PROBLEM FOR THE SYSTEM OR ARE THEY?

MR. SMOGER: IT'S A PROBLEM THAT'S BEING RESOLVED FOR THE MOST PART WITHIN THE SYSTEM. THE FACT THAT THERE ARE OVERLAPPING CLASS ACTIONS, YOU COULDN'T SAY THAT IN CERTAIN SITUATIONS IT'S NOT A PROBLEM; BUT THE SYSTEM HAS THE TOOLS NOW THAT'S RESOLVING AND THE OVERLAPPING CLASS ACTIONS ARE BEING DEALT WITH BY THE MECHANICS OF THE SYSTEM.

MS. BIRNBAUM: COULD YOU EXPLAIN THAT? I MEAN,

YOU HAVE A BUNCH OF FEDERAL ACTIONS THAT ARE MULTI DISTRICT.

WE DO UNDERSTAND THAT MECHANISM, THE FEDERAL COURT AND THEN HAVE CONTROL OVER ALL OF THE FEDERAL CLASS ACTIONS; BUT IF THERE ARE DOZENS OF STATE CLASS ACTIONS OUT THERE AS WELL AND THERE IS A RUSH TO GET A CERTIFICATION SETTING STATE A OR STATE B BEFORE THE MDL, DOESN'T THAT CREATE PROBLEMS; AND IF YOU WIN ONE, YOU CAN STILL BRING IT IN THE NEXT, OR LOSE ONE, YOU CAN STILL CONTINUE TO BRING IT UNTIL SOMEBODY CERTIFIES THE STATE COURT CLASS? ISN'T THAT A PROBLEM?

MR. SMOGER: THERE ARE SEVERAL QUESTIONS THERE. THE FIRST PROBLEM, THE QUESTION OF MULTIPLE CASES. THE RESOLUTION OF ANY OF THE CASES REALLY REST WITH THE DEFENDANT. IT DOESN'T REST WITH THE PLAINTIFF. IT RESTS WITH THE PARTY PAINED IN THE CASE.

SO HOWEVER THEY PROCEED, THERE IS SOME UNIFORMITY. THERE IS SOME ATTEMPT TO TRY TO HAVE RESOLUTION EVEN IF YOU HAVE MULTIPLE STATE COURT ACTIONS, CLASS ACTIONS AND FEDERAL COURT ACTIONS.

MS. BIRNBAUM: THAT ASSUMES THAT DEFENDANT NEVER WANTS TO TRY THESE THINGS BECAUSE THERE IS SO MUCH PRESSURE SO THEY HAVE TO SETTLE IT.

MR. SMOGER: AND IF ON TRIALS, SAY -- HOW MANY

TIMES HAVE YOU SEEN MULTI TRIALS LOST? FIRST OF ALL, YOU HAVE VERY FEW THAT GO TO TRIAL. ONCE THE FIRST TRIAL OR SECOND TRIAL IS LOST IN A CLASS-WIDE BASIS, THE AMOUNT OF RESOURCES THAT PLAINTIFFS ARE GOING TO PUT IN ON A CLASS-WIDE BASIS THE THIRD TIME GOES DRASTICALLY DOWN.

I MEAN, IT'S A QUESTION OF IF YOU -- IF THERE IS A REVIEW THAT THERE HAS BEEN A FULL AND COMPLETE ATTEMPT IN THE FIRST TRIAL THAT'S NOT SUCCEEDING, THEN THE TRANSACTION COSTS ARE VERY HIGH TO CONTINUE IF YOU THINK YOU ARE GOING TO BE AGAINST THE WALL AND NOT BE SUCCESSFUL.

IF YOU VIEW THAT THE FIRST TRIAL, THE EARLIER TRIALS WERE NOT WELL MANAGED AS A PLAINTIFF'S ATTORNEY, THEN YOU ARE TAKING A RISK; BUT THERE IS AN ENORMOUS AMOUNT OF RISKS FORGOTTEN FOR WHOEVER IS BRINGING THESE ACTIONS IN INITIATION BECAUSE THERE IS A LOT OF COSTS TO THE ATTORNEYS THAT ARE BEING SELF ABSORBED AND THE TIME IS BEING SELF ABSORBED AND THAT'S A DECISION THAT'S BEEN MADE. IT'S JUST NOT ON THE DEFENSE SIDE. IT'S ON THE PLAINTIFFS' SIDE BEFORE YOU GO FORWARD WITH THIS.

JUDGE SHEINDLIN: I DON'T KNOW THAT TRIAL IS THE KEY DECISION POINT, AS A LATER SPEAKER USED THE WORD DECISION POINT.

I THINK AN EARLIER SPEAKER SAID HOW MANY

CERTIFICATIONS DO WE HAVE TO WIN BEFORE WE FINALLY LOSE? AND THERE WAS ALSO A CONCESSION EARLIER BY A PLAINTIFFS' SIDE LAWYER THAT SAYS WE CAN'T WIN CERTIFICATION WHEN THE CASE IS OVER.

SO PUTTING THOSE TWO COMMENTS TOGETHER, IS IT FAIR TO KEEP ALLOWING OPPORTUNITIES TO WIN THAT CERTIFICATION MULTIPLE TIMES? IF YOU LOSE IT ONCE AND LOSE IT AGAIN AND LOSE IT AGAIN, CAN YOU KEEP SHOPPING UNTIL YOU FINALLY WIN A CERTIFICATION, WHICH ON THE PLAINTIFFS' SIDE, APPARENTLY, IS THE WHOLE BALL GAME? IS IT FAIR TO KEEP DOING THAT?

MR. SMOGER: WELL, IT IS -- WE HAVE GOT APPLES AND ORANGES. THERE'S LOTS OF TYPES OF CLASS ACTIONS.

IN A MASS TORT CLASS ACTION, IT'S NOT THE BALL GAME. THE BALL GAME IS THE REALITY OF THE EXISTENCE OF THE LARGE TORTS.

IN A SMALL CONSUMER CLASS ACTION WHERE YOU HAVE GOT VERY LOW -- WHERE YOU HAVE GOT VERY LOW PER CAPITA REWARD WHERE THEY COULDN'T BRING IT, THEN THE CLASS CERTIFICATION IS NECESSARY FOR THE EFFECTUATION OF THE ACTION.

JUDGE SCHEINDLIN: I THINK THAT'S FAIR BECAUSE THE SPEAKER THAT CONCEDED THAT THE CERTIFICATION WAS A BALL GAME I THINK WAS REFERRING TO THE CONSUMER ACTION, SO

THAT'S FAIR; BUT EVEN SO, HIS POINT WAS ON THE DEFENSE SIDE. HOW MANY TIMES DO WE HAVE TO WIN UNTIL WE LOSE? IT'S A MILLION DOLLARS TO DEFEND UNTIL CERTIFICATION. HOW MANY MILLIONS DO WE HAVE TO KEEP PUTTING OUT?

MR. SMOGER: WELL, I MEAN, IT'S NOT BECAUSE -- I MEAN, THE QUESTION IS CLASS-WIDE DISCOVERY THAT'S BEING DONE FOR PURPOSES OF CERTIFICATION. THAT DISCOVERY AND THOSE ISSUES ARE DONE, SO THE TRANSACTION COSTS GO DOWN WITH EACH TIME. YOU SAY, THEN, SHOULD THEORETICALLY THERE BE MULTIPLE TIMES?

THAT EXAMPLE WAS A STATE ACTION AND WAS A REFILING IN FEDERAL COURT. A FEDERAL JUDGE CERTAINLY HAS POWER AND CERTAINLY IS GOING TO SEE WHAT THE SUPREME COURT OF THE STATE OF OKLAHOMA DID.

AND THE QUESTION THEN THAT COMES TO ME IS THAT THAT WAS A COMPLIANT REFERRING, IS WHETHER THERE WAS A FEDERAL CAUSE OF ACTION THAT WAS NOT A PART OF WHAT WAS DECIDED BY THE STATE -- BY THE OKLAHOMA SUPREME COURT AND THAT WAS THE BASIS OF GOING.

SO THE LAW WOULD CHANGE AND EVEN THE PROPOSALS THAT YOU HAVE, IF THERE IS A CHANGE OF LAW, WOULD --

JUDGE SHEINDLIN: I THOUGHT THAT THE NATIONAL CLASS, A DIFFERENT SPEAKER, A NATIONAL CLASS WAS FILED IN MANY STATE COURTS.

MR. SMOGER: THAT SPEAKER SPOKE OF TWO DIFFERENT THINGS. I WAS GIVING THE OKLAHOMA EXAMPLE.

JUDGE SCHEINDLIN: OKAY.

MR. SMOGER: THE NATIONAL CLASS IS THE MASS ACTION AND I THINK WE ARE TALKING ABOUT SOME OF THE MASS PHARMACEUTICAL TORT ACTIONS WHERE YOU HAVE A SUDDEN FINDING THAT SOMETHING HAS CAUSED A LOT OF HARM.

JUDGE SHEINDLIN: THE NATIONAL CLASS IS FILED IN MANY STATE COURTS. HOW MANY TIMES DO YOU GET CERTIFICATION?

MR. SMOGER: YES. THAT GETS SORTED VERY QUICKLY AND IF YOU LOOK AT THOSE, YOU WILL FIND MAYBE -- IN ANY ONE OF THOSE, IN TERMS OF CLASS CERTIFICATION HERE, ACTUALLY GOING INTO CLASS CERTIFICATION IN ANY ONE OF THEM, YOU HAVE LESS THAN FIVE ACTUALLY GO TO CLASS CERTIFICATION IN ANY ONE I THINK.

IN REALITY, THE FILINGS ARE THERE, BUT I CAN'T SAY THAT PEOPLE POSITION THEMSELVES IN THE FILINGS; BUT THE REALITY IS THAT IN TERMS OF THE JUDICIAL RESOURCES, MOST OF THE FEDERAL ONES ARE GOING TO GET CONSOLIDATED IN THE MDL.

A LOT OF THE STATE ONES ARE GOING TO SIT BACK AND NOT HAVE ACTIVITY. A FEW STATE ONES WILL HAVE ACTIVITY, BUT YOU WILL NEVER HAVE AS MANY AS FIVE, USUALLY

LESS THAN TWO, ACTUAL FULL TRIALS ON CERTIFICATION.

MS. BIRNBAUM: THEN WHY DON'T WE STAY THEM ALL THEN? ONCE THE MDL IS THERE, THEN WHY DON'T WE STAY THOSE STATE COURT CASES AND LET THE MDL MAKE THE DECISION?

MR. SMOGER: THAT'S A QUESTION OF LEGISLATIVE POWER. I DON'T THINK IT'S A QUESTION OF JUDICIAL POWER ON AN ACTION THAT IS CLEARLY BROUGHT APPROPRIATELY WITHIN STATE COURT.

SO WHAT WE ARE SAYING -- WE ARE SAYING THAT THE FEDERAL COURT CAN OVERRIDE A STATE COURT FOR THESE SMALL NUMBER OF CASES BECAUSE WE ARE TALKING ABOUT A VERY FEW NUMBER OF MASS CASES.

MICROSOFT WOULD BE AN EXAMPLE WHERE YOU HAVE MULTIPLE FILINGS. MOST DON'T AND YOU ARE GIVING AN AWFULLY LARGE AMOUNT OF POWER FOR A VERY CONFINED PROBLEM.

JUDGE ROSENTHAL: ARE YOU ARGUING IN FAVOR OF A LEGISLATIVE SOLUTION?

MR. SMOGER: I HAVE SAID I THOUGHT THE SYSTEM WAS -- I THINK THE SYSTEM IS WORKING ITSELF OUT WELL.

I THINK THERE IS -- YOU KNOW, THERE WAS A QUESTION ABOUT THE INFORMAL CONVERSATIONS BETWEEN JUDGES, AND THAT IS TAKING PLACE.

AND IF THE COURT -- IF A JUDGE HAS THIS CASE IN -- THE FEDERAL MDL JUDGE, THAT JUDGE IS GOING TO BE

TALKING TO THE STATE COURT JUDGES AND THE QUESTION IS, THAT COORDINATION IS TAKING PLACE. WE ALL KNOW THAT.

JUDGE ROSENTHAL: IS THAT WHAT YOU MEAN WHEN YOU REFERRED TO THESE THINGS GETTING SORTED OUT; THAT THERE ARE INFORMAL MECHANISMS OR JUST COOPERATION THAT ENDS UP HAPPENING ON AN AD HOC BASIS AND THAT'S ENOUGH?

MR. SMOGER: IT'S WORKING. WE THINK IT'S WORKING. IT'S WORKING -- THE INFORMAL MECHANISMS ARE BOTH WITHIN THE JUDICIARY, WITHIN THE PLAINTIFFS' BAR, BECAUSE THERE IS A COALESCENCE OF THE PLAINTIFFS' BAR IN DETERMINATION.

USUALLY, IT COMES UP THAT THERE IS SOME AGREEMENT AS TO WHO TAKES WHAT ROLES AND THAT'S AN INFORMAL MECHANISM. IT'S NOT A FORMAL MECHANISM, EVEN THOUGH IT'S A MULTIPLE CLASS THAT'S FILED, AND IT HAPPENS BETWEEN THE DEFENSE PARTIES WHEN THERE IS MULTIPLE DEFENDANTS. DEFENDANTS GET TOGETHER AND APPORTION RESPONSIBILITIES AND APPORTION ROLES AND DECIDE WHO CAN TAKE THE LEAD.

SO ALL THESE ARE ACTUALLY JUDICIAL, BUT THEY ARE ALL HAPPENING. THEY HAVE TO HAPPEN BECAUSE IN TERMS OF THAT EFFICIENCY, EVERYBODY NEEDS THE EFFICIENCY. THE PLAINTIFFS DON'T NEED THOUSANDS OF HEARINGS TO ATTEND, SO THERE IS A WORKING -- THERE IS A WAY THAT IT'S -- THAT THE SYSTEM IS WORKING IT OUT.

CHAIRMAN LEVI: ANY OTHER QUESTIONS? DO YOU WANT TO TAKE A MINUTE JUST TO FINISH UP?

MR. SMOGER: YES. I HAD A COUPLE OF OTHER POINTS THAT I WANTED TO MAKE.

ON PREDETERMINED -- I THINK ON THE FEE QUESTION. TO PREDETERMINE A FEE, I THINK MARY ALEXANDER TALKED ABOUT THE POINT THAT THE FEE -- THERE IS POWER TO REGULATING FEES.

AND WHAT I HEARD THE PROFESSOR SAYING WAS HE DOESN'T LIKE THE FACT THAT THERE IS INSTITUTIONALIZATION OF A CERTAIN LEVEL OF FEE, BUT THE COURTS HAVE THAT POWER, AND THE POWER TO REGULATE THE FEE IS AT THE END BECAUSE THAT'S WHEN YOU CAN ASSESS THE WORK THAT'S DONE AND THAT'S THE BEST TIME TO ASSESS WHAT A FEE SHOULD BE; NOT IN THE BEGINNING WHEN THE COURT HAS ALMOST NO UNDERSTANDING OF WHAT TYPE OF WORK THIS IS GOING TO ENTAIL AND WHAT THE WORK WILL BE AND, FINALLY, THAT THIS -- THIS LOW BIDDER HAS TOTALLY MISUNDERSTOOD THE AMOUNT OF WORK AND EVEN THOUGH THEY ARE QUALIFYING COUNSEL, THEY CAN'T JUSTIFY THE TYPE OF LABOR THAT IT TAKES BECAUSE THEY DIDN'T UNDERSTAND THIS END. SO WE HAVE A SYSTEM IN PLACE.

AGAIN, IT'S THE SAME QUESTION. ARE JUDGES -- THE QUESTION IS: WERE JUDGES DOING THEIR JOBS? ARE JUDGES DOING THEIR JOBS IN REVIEWING THESE FEES?

IN SOME CASES, YOU KNOW, THERE HAS BEEN EXTRAORDINARY WORK, LOAD STAR PLUS OR CONTINGENCY BECAUSE YOU SEE THE AMOUNT OF WORK THAT'S BEEN DONE.

IN OTHER CASES, THERE HAS BEEN DE MINIMUS WORK, BUT YOU DON'T KNOW AT THE INITIATION OF THE PROCESS. WE HAVE THE TOOL AT THE END OF THE PROCESS TO MAKE THAT EVALUATION.

ALSO, THE QUESTION OF THE JUDICIAL ACTIVISM I THINK IS THE QUESTION OF SELECTION OF COUNSEL, AND IT'S NOT THAT WE DON'T HAVE APPROVAL OF COUNSEL IN CURRENT RULES, IT SEEMS TO GO TO THE ACTIVIST.

WHAT DOES THAT PROMOTE? IN SOME WAYS IT CAN POTENTIALLY PROMOTE CRONYISM AND IT'S A SMALL CLUB BECAUSE THE ONES THAT ARE MOST LIKELY CHOSEN ARE LAWYERS FAMILIAR TO THE PARTICULAR JUDGE THAT HAS THAT POWER TO NOT ONLY SELECT THE ONES WHO HAVE BROUGHT THE CASE, BUT TO SOLICIT PEOPLE INTO IT, AND THERE IS GOING TO BE A NATURAL TENDENCY TO SOLICIT THOSE PEOPLE THAT SOMEBODY IS FAMILIAR WITH.

THERE IS ALSO GOING TO BE AN INHERENT TENDENCY OF THE COURT, ONCE THEY -- THEY ARE SO INVOLVED IN THE SELECTION OF THE COUNSEL, IT'S HARD TO DISASSOCIATE ENTIRELY FROM THE COUNSEL YOU SELECTED IN TERMS OF THE WORK THEY ARE DOING BECAUSE YOU ARE RESPONSIBLE FOR

SELECTING THAT COUNSEL AND BRINGING IT IN.

SO WE CREATE SOME INHERENT PROBLEMS AND THE BIGGEST THING FOR ATLA IS IT TAKES AWAY THAT SELECTION PROCESS FROM THE CLIENT.

AND IN FINISHING, TO GO TO THE FINAL THING THAT I THINK IS VERY IMPORTANT IS I THINK 23(B)(3) AND THAT WOULD BE THE ALTERNATIVE 2 -- EXCUSE ME, 23(E)(3) ALTERNATIVE 2, AND THAT'S THE SECOND OPT-OUT.

IT IS TREMENDOUSLY UNFAIR TO PEOPLE TO HAVE AN OPT-OUT SITUATION AND THEIR ONLY OPT-OUT IN THE (B)(3) CLASS BEFORE THERE IS A SETTLEMENT. NOBODY ATTENDS TO IT. NOBODY LOOKS AT IT. THERE IS NO REWARD. THERE IS NO -- WHAT DO I GET OUT OF THIS?

SO WE GIVE NOTICE TO THE CLASS AND MOST PEOPLE WILL NOT DO ANYTHING BECAUSE THEY DON'T UNDERSTAND WHAT THAT NOTICE MEANS AND THEY DON'T UNDERSTAND WHAT THEY ARE LOOKING AT AND THERE IS NO REWARD TO TALK TO EVEN YOUR LOCAL LAWYER DOWN THE STREET THAT SAYS, WELL, YOU ARE IN A CLASS.

SO THEN YOU GET TO THE SITUATION, AND I HAVE SEEN IT MULTIPLE TIMES. MULTIPLE TIMES PEOPLE HAVE COME TO ME. THE CLASS IS CLOSED. THE SETTLEMENT IS EFFECTUATED AFTER THE CLASS AND NOW THEY HAVE NO CHOICE AND THEY DISAGREE WITH THE SETTLEMENT. THEY WANT TO HAVE

THEIR DAY IN COURT. THEY WANT TO BE ABLE TO CHOOSE THEIR OWN LAWYER, BUT THEY ARE FORECLOSED.

SO THE STRONGEST SUPPORT THAT WE CAN GIVE IS TO THE ALTERNATIVE 2. AND, AGAIN, I WOULD URGE IN ALL OF THIS TO ALWAYS THINK THAT THE MOST IMPORTANT PART OF CLASS ACTION IS FOR THE SMALL VALUE CASES AND TO PROTECT THOSE AND NOT DO ANYTHING TO HURT THOSE SMALL VALUE PER CAPITA BECAUSE THOSE ARE THE ESSENCE OF THE PURPOSE OF THIS SYSTEM; THOSE ARE THE ONES THAT PEOPLE ON THEIR OWN CAN'T GET REDRESS FOR IN THE ABSENCE OF THE JUDICIARY.

CHAIRMAN LEVI: THANK YOU, MR. SMOGER. THANK YOU VERY MUCH. WE WILL TAKE A BREAK UNTIL 10:45. WE WILL START PROMPTLY AT 10:45.

(BRIEF RECESS IN THE PROCEEDINGS.)

CHAIRMAN LEVI: LET'S TAKE OUR PLACES.

JOHN FRANK WAS A REVERED MEMBER OF THIS COMMITTEE AND WAS HERE AT THE CREATION OF RULE 23 AND THE CREATION HAS BEEN DESCRIBED IN DIFFERENT WAYS, BUT IT SEEMS TO HAVE BEEN FAIRLY HASTY, RULE 23(B)(3). HE HAD INTERESTING COMMENTS TO MAKE SINCE THAT TIME AND I UNDERSTAND HE IS ILL TODAY AND YOU ARE HERE ON HIS BEHALF.

MR. FRIEDLANDER: THAT'S RIGHT. MY NAME IS STEVE FRIEDLANDER. I'M FROM THE LAW FIRM OF COOLEY GODWARD IN SAN FRANCISCO. I AM HERE TODAY TO READ A STATEMENT OF MR.

FRANK FROM THE LEWIS AND ROCA FIRM OF PHOENIX AS BOTH A FAVOR AND A COURTESY TO MR. FRANK, WHO IS NOT ABLE TO ATTEND TODAY.

PLEASE NOTE THAT MY READING OF MR. FRANK'S STATEMENT DOESN'T IN ANY WAY ENDORSE HIS VIEWS BY COOLEY GODWARD OR MYSELF.

THIS IS NOW MR. FRANK'S STATEMENT. "MAY I INTRODUCE MYSELF BY SAYING THAT I SERVED ON THIS COMMITTEE THROUGHOUT THE 1960'S BY APPOINTMENT OF CHIEF JUSTICE WARREN AND HAVE APPEARED FAIRLY REGULARLY ON MANY HEARINGS IN SUBSEQUENT YEARS. MOMENTARY ILL HEALTH PRECLUDES MY BEING IN SAN FRANCISCO ON NOVEMBER 30, 2001. I HAVE BEEN IN CORRESPONDENCE WITH THE COMMITTEE AND ASK THE PRIVILEGE OF MAKING A STATEMENT FOR THE RECORD BY PROXY THROUGH MR. STEVEN L. FRIEDLANDER OF COOLEY GODWARD LLP IN SAN FRANCISCO AS A COURTESY TO ME AND NOT FOR HIS OWN FIRM.

IN THE 1960'S, ALBERT JENNER OF JENNER AND BLOCK AND I, THEN MEMBERS OF THIS COMMITTEE, DISSENTED FROM THE PROMULGATION OF RULE 23 AND I AM OF THE SAME OPINION STILL. I BELIEVE THAT SUBSECTION (B)(1) AND (B)(2) SHOULD BE PRESERVED, BUT SECTION (B)(3) SHOULD BE REPEALED. THE FUNCTION OF SOLUTION TO (B)(3) GROUP PROBLEMS SHOULD BE PLACED IN ADMINISTRATIVE AGENCIES APPROPRIATE TO THE SUBJECT MATTER, AS FOR EXAMPLE THE FEDERAL TRADE

COMMISSION ON COMMERCE MATTERS. I'M AUTHORIZED TO SAY THAT BOTH WILLIAM G. PAUL OF CROW & DUNLEVY IN OKLAHOMA CITY, A RECENT PRESIDENT OF THE AMERICAN BAR ASSOCIATION, AND FRANCIS H. FOX OF BINGHAM DANA LLP IN BOSTON AND A FORMER MEMBER OF THIS COMMITTEE HAS VIEWS SIMILAR TO THOSE THAT I AM EXPRESSING TO YOU TODAY.

PROFESSOR EDWARD H. COOPER OF THE UNIVERSITY OF MICHIGAN LAW SCHOOL HAS RECENTLY CIRCULATED TO ALL OF YOU MY SEPTEMBER 24, 2001 LETTER, WHICH MR. FRIEDLANDER WILL COVER SYNOPTICALLY HERE.

RULE 23, IN TOO MANY INSTANCES, HAS SIMPLY FUNCTIONED AS THE LAWYERS' RELIEF ACT IN WHICH THE DEFENDANTS BUYS RES JUDICATA FROM THE PLAINTIFF FOR A CONSIDERABLE SUM OF MONEY AND THE COURTS MERELY POUR HOLY WATER AND FINALITY ON THAT COMMERCIAL TRANSACTION.

YOU SEEK TO DEAL WITH THE ABUSE PROBLEMS AND THE PROPOSED CHANGES TO RULE 23. I COMMENT TO A PARTICULAR ASPECT OF THIS, THE DECISION POINT ASPECT. TO CLARIFY MY VOCABULARY, YOU MAY BE ACQUAINTED WITH MY LITTLE BOOK OF SOME YEARS AGO, MY WARREN LECTURES AT BERKELEY ON AMERICAN LAW. IN THOSE LECTURES, I NOTED THAT EVERY LAWSUIT IS A COLLECTION OF DECISION POINTS, EACH OF WHICH MAY TAKE A CERTAIN AMOUNT OF TIME AND COUNSEL ON EACH SIDE AND FROM THE COURT. I REMIND YOU OF THE OBVIOUS, THAT EVERY

ELEMENT OF THE LEGAL ACTION IS ALSO A TIME AND PERSON USER REQUIRING JUDGES, OR JURIES, OR COURT BUILDINGS, OR INSTRUCTIONS, OR MOTIONS, OR APPEALS WITH A NUMBER OF ISSUES, EACH OF WHICH MAY TAKE A LITTLE TIME FOR DISPOSITION.

WHILE MY VOCABULARY MAY BE MY OWN, THE UNDERLYING PREMISE IS WIDELY ACCEPTED. EVERYTHING WHICH ADDS TO THE TIME OF THE JUDICIAL PROCESS SHOULD BE INDIVIDUALLY EVALUATED TO BE SURE THAT THE GAME IS WORTH THE COST.

AGAINST THAT BACKGROUND, I TURN TO RULE 23, WHICH CREATES A MYRIAD OF NEW DECISION POINTS: WITHDRAWAL OF CLAIMS REQUIRES COURT APPROVAL; NOTICES OF SETTLEMENT MUST BE EVALUATED TO DETERMINE WHETHER THEY ARE, QUOTE, REASONABLE, END QUOTE; SETTLEMENTS ARE VOLUNTARY; DISMISSALS OR COMPROMISE MUST BE AFTER A HEARING (A COURTHOUSE, A JUDGE, ATTACHES, COUNSEL) AND ENOUGH TIME MUST BE CONSUMED IN THIS ACTIVITY TO SATISFY THE COURT THAT THE PROPOSAL IS, QUOTE, REASONABLE AND ADEQUATE, END QUOTE. PROPOSALS AS TO EXCLUSION FROM THE CLASS MUST BE SUBMITTED TO THE COURT AND CLEARED BY IT; IN THAT CONNECTION, THE COURT MUST DECIDE WHETHER THE TERMS OF EXCLUSION ARE SATISFACTORY, BUT MUST ALSO DECIDE WHETHER THE RELEVANT MATTER HAS BEEN CONSIDERED EARLIER.

THERE WILL BE VERY TIME-CONSUMING ACTIVITIES ON THE APPROVAL OF SETTLEMENT (AND, OF COURSE, IF THIS IS TO GO FORWARD, IT IS RIGHT THAT THIS SHOULD BE SO) BECAUSE ANY CLASS MEMBER MAY OBJECT TO THE PROPOSED SETTLEMENT, OR DISMISSAL, OR COMPROMISE. IF THAT OBJECTING CLASS MEMBER LATER WITHDRAWS THE OBJECTION, THE COURT MUST DECIDE WHETHER THE PARTY HAS BEEN UNDESIRABLY BOUGHT OFF. THE SETTLEMENT MUST BE EVALUATED IN TERMS OF WHETHER IT IS, QUOTE, SIGNIFICANTLY INADEQUATE, QUOTE, GIVING GROUND NOT ONLY FOR FACTUAL ANALYSIS, BUT ALSO FOR CONSIDERABLE INTELLECTUAL CHOPPING AS TO THE DIFFERENCE BETWEEN, QUOTE, INADEQUATE AND, QUOTE, SIGNIFICANTLY INADEQUATE.

THE REPORTS OF THE ADMINISTRATIVE OFFICE SHOW IN THE YEAR 2000 THERE WERE 2,393 CLASS ACTIONS. IF THIS PROPOSAL IS ADOPTED, WE WILL BE ADDING THAT MUCH WORKLOAD BY WAY OF ADDITIONAL DECISION POINTS TO THE FEDERAL COURTS DOCKET. THIS LEADS MY TO TWO CONCLUSIONS:

1. CHIEF JUSTICE REHNQUIST HAS FROM TIME TO TIME EXPRESSED CONCERN AT LEGISLATION WHICH MIGHT ADD MORE BURDENS TO THE FEDERAL COURT LOADS THAN THE VALUE OF THE PARTICULAR PROPOSAL MAY SEEM TO WARRANT. THESE PROPOSALS SHOULD BE EVALUATED FROM THIS POINT OF VIEW.

2. I THEREFORE PUT THAT QUESTION TO YOU AND,

THROUGH YOU, TO THE COMMITTEE. IF YOUR PROPOSED CHANGES GO THROUGH, HOW MUCH TIME AND COST BURDEN WILL IT PUT ON A SYSTEM WHICH ALREADY SEEMS AT LEAST SUFFICIENTLY WELL OCCUPIED? CONSIDER 2,393 CLASS ACTIONS WHICH ALREADY HAVE SOMEWHAT TURGID PROCEDURES.

SUCH AN ANALYSIS MAY SUGGEST TO YOU THAT THE TIME HAS COME TO CONSIDER THAT (B)(3) CLASS ACTIONS OUGHT TO BE MOVED OUT OF THE COURT SYSTEM ENTIRELY, PUT EITHER INTO EXISTING ADMINISTRATIVE AGENCIES OR CREATING NEW ONES. WHAT WOULD BE THE RESULT ON THE TIMING OF OTHER FEDERAL ACTIONS TRADITIONALLY BELONGING TO THE COURTS, THE CIVIL SUITS, THE EMPLOYMENT DISCRIMINATION MATTERS, THE LABOR RELATIONS CONTROVERSIES, IF THESE CLAIMS WERE DISTRIBUTED AMONG THE AGENCIES OR INTO A NEW ONE, SUBJECT TO JUDICIAL REVIEW ONLY FOR CLEAR ERROR? I BELIEVE IT UNWISE TO ADD ALL THESE DECISION POINTS TO AN INSTITUTION WHICH IS AT THE LEAST WELL OCCUPIED AND SO, INEVITABLY, PUT BACK TO SOME EXTENT THE TRADITIONAL DECISION-MAKING OF THE FEDERAL COURTS."

THAT'S THE END OF THE STATEMENT AND THANK YOU FOR ALLOWING ME TO MAKE IT.

CHAIRMAN LEVI: THANK YOU, MR. FRIEDLANDER. THANK YOU VERY MUCH. MR. FINBERG?

MR. FINBERG: GOOD MORNING. THANK YOU FOR PERMITTING ME TO TESTIFY THIS MORNING.

MY NAME IS JIM FINBERG. I'M A PARTNER WITH THE LAW FIRM OF LIEFF, CABRASER, HEIMANN & BERNSTEIN IN SAN FRANCISCO. I SPECIALIZE IN EMPLOYMENT DISCRIMINATION AND SECURITIES FRAUD CLASS ACTIONS.

IN THE PAST SEVERAL YEARS I HAVE BEEN THE PLAINTIFFS' PROGRAM CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMITTEE OF THE ADA LABOR AND EMPLOYMENT SECTION AND THE CO-CHAIR OF THE SECURITIES SUBCOMMITTEE OF THE CLASS AND DERIVATIVES COMMITTEE OF THE A.B.A.'S LITIGATION SECTION.

I WOULD LIKE TO FOCUS TODAY PRIMARILY ON A PROPOSAL TO AMEND RULE 23(C)(2)(A)(II) TO REQUIRE NOTICE AT THE CLASS CERTIFICATION STAGE IN RULE 23(B)(2) CLASS ACTIONS.

ACTIONS BROUGHT FOR DECLARATORY AND INJUNCTIVE RELIEF ARE OFTEN, PERHAPS, ALMOST ALWAYS BROUGHT BY PUBLIC INTEREST GROUPS AND GROUPS THAT HAVE LIMITED ECONOMIC RESOURCES. NOTICE IN SUCH CASES CAN BE VERY EXPENSIVE, AND IMPOSING SUCH A REQUIREMENT WILL DETER MANY MERITORIOUS CASES. ONE CAN LOOK AT SOME OF THE CASES THAT WERE FILED OVER THE LAST DECADE, SUCH AS THE PROP 187 CASE IN CALIFORNIA, WHICH LIMITED HEALTH, EDUCATION AND WELFARE

BENEFITS TO IMMIGRANTS WHERE IF IT WAS A VERY LARGE CLASS, IT WOULD HAVE BEEN VERY DIFFICULT TO NOTIFY THAT CLASS AT THE CERTIFICATION STAGE AND THAT LITIGATION MIGHT HAVE BEEN IMPOSSIBLE TO BRING WITH THIS TYPE OF REQUIREMENT.

NOW, THE NOTES TO THE PROPOSED RULE RECOGNIZE THAT BURDENS CAN BE IMPOSED BY NOTICE COSTS AND SUGGEST THAT THE COURTS LOOK AT THAT ISSUE.

UNFORTUNATELY, THE LANGUAGE OF THE RULE IS MANDATORY. THE LANGUAGE OF THE RULE SAYS THAT THE COURT MUST DIRECT NOTICE. IT DOES NOT GIVE THE COURT THE OPTION OF NOT GIVING NOTICE IN THE APPROPRIATE CASE, AND IT ALSO SAYS THAT THE NOTICE HAS TO BE CALCULATED TO REACH A REASONABLE NUMBER OF CLASS MEMBERS AND IT CITES LANGUAGE FROM LANGUAGE FROM MULLANE VERSUS CENTRAL HANOVER BANK.

WELL, IN A CASE SUCH AS THE PROP 187 CASE, PUBLICATION NOTICE SUCH AS REFERRED TO IN THE RULE WOULD BE EXTRAORDINARILY EXPENSIVE AND EXTRAORDINARILY BURDENSOME, AND IT COULD BE THAT IN A CASE LIKE THAT THAT COST WOULD DEFEAT THE ACTION AND THAT NO NOTICE IS WHAT IS APPROPRIATE AT THE CLASS CERTIFICATION STAGE.

AND PERHAPS THIS LANGUAGE SHOULD BE MODIFIED FROM "MUST DIRECT" TO "SHALL CONSIDER DIRECTING," OR AT THE END ALSO HAVE SHALL CONSIDER WHO SHOULD PAY FOR THE COST OF THE NOTICE AT THAT STAGE.

NOW, LET ME NOW SHIFT TO WHAT THE RULE WAS TRYING TO ACHIEVE AND SUGGEST THAT THE GOAL OF THE RULE IS ACCOMPLISHED ELSEWHERE, BECAUSE IN RULE 23(E) THERE IS ALSO A PROPOSAL THAT NOTICE BE GIVEN OF ALL CLASS ACTION SETTLEMENTS. AND IF UNDER RULE 23(E) NOTICE IS GIVEN OF A CLASS ACTION SETTLEMENT, EVEN IN A DECLARATORY AND INJUNCTIVE RELIEF CASE, THERE WILL BE AN OPPORTUNITY FOR THOSE AFFECTED BY THE RELIEF IN THAT CASE TO APPEAR IN COURT AND SAY, IF THEY BELIEVE SO, THAT THE RELIEF IS NOT ADEQUATE; BUT AT THAT STAGE, AT THE SETTLEMENT STAGE, THE BURDEN WOULD BE ON THE DEFENDANT TO PAY FOR THE NOTICE AND IT WOULDN'T DETER THE SUIT FROM HAVING BEEN BROUGHT IN THE FIRST PLACE.

SO I THINK THE PROPOSAL YOU HAVE IN 23(E) MAKES THE LANGUAGE IN 23(C)(2)(A)(II) UNNECESSARY.

CHAIRMAN LEVI: CAN'T YOU GIVE SOME NOTICE EVEN THOUGH -- MAYBE THE MOST EFFECTIVE NOTICE WOULD BE TERRIBLY EXPENSIVE, BUT YOU CAN PROBABLY THINK OF SOME THINGS YOU COULD DO EVEN IN A CASE -- THE EXAMPLE THAT YOU GIVE WHERE IT WOULDN'T COST TERRIBLY MUCH MONEY AND IT WOULD REACH A CERTAIN NUMBER OF PEOPLE AND IT WOULD BE -- IT WOULD BE AT LEAST BENEFICIAL TO HAVE THAT DEGREE OF NOTICE AT THE BEGINNING OF THE CASE AS OPPOSED TO SEVERAL YEARS DOWN THE ROAD?

MR. FINBERG: SOME NOTICE -- FOR EXAMPLE, POSTING ON THE INTERNET IS RELATIVELY INEXPENSIVE, BUT I DON'T THINK THAT WOULD MEET THE STANDARDS SET FORTH HERE TO REACH A REASONABLE NUMBER OF CLASS MEMBERS, DEPENDING HOW YOU DEFINE THAT PHRASE. IF IT'S DEFINED AS MULLANE DEFINES IT, YOU ARE NOT GOING TO ACHIEVE THAT IN THE PROP 187 CASE BY HAVING IT ENTER THAT POSTING BECAUSE MANY OF THE PEOPLE DON'T HAVE ACCESS TO COMPUTERS, MANY OF THEM AREN'T ENGLISH SPEAKERS, AND TO KNOW THAT YOU HAVE CONTACTED A MAJORITY OR EVEN A HIGH PERCENTAGE OF THE CLASS WOULD BE EXTRAORDINARILY EXPENSIVE.

SO I'M NOT OPPOSED TO SOME NOTICE. I DON'T THINK YOU SHOULD KEEP THESE THINGS SECRET OR QUIET, BUT I WOULD GIVE THE COURT MORE DISCRETION THAN IS GIVEN HERE ABOUT BEING ABLE TO ADDRESS HOW MUCH NOTICE IS APPROPRIATE AND LEAVE OPEN THE POSSIBILITY THAT IN CERTAIN CASES NOTICE SHOULD BE DEFERRED ENTIRELY UNTIL THE SETTLEMENT STAGE.

PROFESSOR MARCUS: MY RECOLLECTION IN THE PROP 187 CASE IS THAT THERE WAS NO SETTLEMENT, IS THAT INCORRECT?

MR. FINBERG: WELL, THERE WERE MULTIPLE CASES. SOME WERE IN THE CENTRAL DISTRICT, I BELIEVE, JUDGE PFAELZER, AND I BELIEVE THAT IT WAS STRUCK DOWN, THE STATUTE WAS STRUCK DOWN. SO YOU ARE RIGHT, THAT THERE

WASN'T A SETTLEMENT IN THAT INSTANCE.

PROFESSOR MARCUS: AND IT OCCURS TO ME THAT THE 23(E) OPTION DOESN'T WORK IF THERE IS NO SETTLEMENT, SO YOU ARE JUST ASSUMING ORDINARILY THERE WILL BE A SETTLEMENT?

MR. FINBERG: WELL, NO. YOU HAVE TO THINK ABOUT WHAT YOU ARE ACCOMPLISHING BY THE NOTICE, BECAUSE IN A (B)(3) SITUATION, THE NOTICE GIVES YOU THE OPPORTUNITY TO OPT-OUT. IN THE (B)(2) SITUATION, PEOPLE AREN'T GETTING THE OPPORTUNITY TO OPT-OUT, SO GIVING THE NOTICE DOESN'T ACCOMPLISH THAT OBJECTIVE.

AT THE SETTLEMENT STAGE YOU ACCOMPLISH ANOTHER OBJECTIVE. YOU ALLOW PEOPLE TO STEP FORWARD AND SAY, THIS PROPOSED SETTLEMENT IS FAIR OR UNFAIR. IF YOU DON'T HAVE A SETTLEMENT, IF YOU HAVE A JUDGMENT, PEOPLE DON'T HAVE THE OPPORTUNITY TO OPT-OUT AND THEY ARE BOUND BY THE RULE OF THE COURT. THAT'S, IN FACT, WHAT HAPPENED IN THE PROP 187 CASE.

PROFESSOR MARCUS: BUT THAT COULD HAPPEN WITH AN ADVERSE JUDGMENT, A JUDGMENT ADVERSE TO THE CLASS WITH NO NOTICE WHATSOEVER?

MR. FINBERG: YES, IT COULD HAPPEN. SO THE QUESTION IS, DOES GIVING SOME NOTICE OF THE CLASS STAGE, LET'S SAY, ENCOURAGE MONITORING, I GUESS IS WHAT THE NOTE

TALKS ABOUT? IS THE COST OF THAT BENEFIT GREATER THAN THE BENEFIT THAT YOU ARE PROVIDING? AND I WOULD SUGGEST THAT IT IS; THAT YOU WILL DETER MORE MERITORIOUS CASES BECAUSE OF THE COST OF NOTICE THAN YOU WILL GET ACTIVE MONITORING OF THESE CASES BY PEOPLE BY HAVING NOTICE WHERE THEY ARE.

PROFESSOR MARCUS: IF I COULD JUST FOLLOW THAT UP WITH ONE MORE. WOULD YOU CONCEIVE IT POSSIBLE THAT A, QUOTE, REASONABLE, UNQUOTE, NOTICE PROVISION OR NOTICE AT THAT STAGE COULD ACCOMMODATE THE INTEREST OF GIVING SOME NOTICE AND ALLOWING SOME MONITORING?

YOU JUST ARE CONCERNED THAT THIS MIGHT CALL FOR UNREASONABLE EXPENDITURES?

MR. FINBERG: YES. I THINK IF YOU EXCHANGE THE PHRASE "THE COURT MUST DIRECT NOTICE BY MEANS CALCULATED TO REACH A REASONABLE NUMBER OF CLASS MEMBERS" TO SOMETHING THAT GIVES THE COURT DISCRETION TO HAVE EITHER MINIMAL NOTICE OR IN SOME CASES NO NOTICE, THEN I WOULD NOT OBJECT TO THE PROVISION.

CHAIRMAN LEVI: I INDICATED TO YOU AT THE BREAK THAT I WANTED TO ASK YOU A QUESTION THAT WAS SOMEWHAT OFF POINT AND THAT WAS, WHETHER YOU ARE FINDING THAT IT'S DIFFICULT TO SETTLE CASES IN FEDERAL COURT AFTER AMCHEM AND ORTIZ BECAUSE WE HAVE HEARD SOME OF THAT.

MR. FINBERG: I HAVE NOT FOUND THAT. MY BELIEF IS

THAT ORTIZ IS DUE PROCESSED BASE AND APPLIES EQUALLY IN STATE COURT THAN IT DOES TO FEDERAL COURT AND THERE SHOULDN'T BE A DIFFERENCE WITH RESPECT TO SETTLING IT IN FEDERAL COURT AS OPPOSED TO STATE COURT.

I WOULD LIKE TO ALSO ADDRESS PROFESSOR GRUNDFEST'S OBSERVATIONS IN PART. AND YOU ASKED THE QUESTION, JUDGE LEVI, WHETHER ALL TYPES OF CASES ARE THE SAME. AND I HAVE AN UNUSUAL PERSPECTIVE PRACTICING BOTH EMPLOYMENT AREA AND THE SECURITIES AREA AND THEY ARE VERY DIFFERENT.

I AGREE WITH PROFESSOR GRUNDFEST THAT IN THE SECURITIES AREA MARKET FORCES CAN BE EXTREMELY USEFUL, AND YOU HAVE A SITUATION THERE WHERE THERE ARE MANY QUALIFIED COUNSEL. THE CASES ARE FILED WITHOUT A GREAT DEAL OF PRE-FILING INVESTIGATION AND THE COSTS OF PROSECUTING THEM ARE NOT EXTRAORDINARY AND THE RESULTS OF THE MARKET HAVE SHOWN THAT, IN FACT, CLASSES CAN BE BENEFITTED BY GETTING A HIGHER NET RECOVERY BY HAVING LOWER ATTORNEY'S FEES.

OUR FIRM DID THE WELLS FARGO SECURITIES LITIGATION FOR 20 PERCENT. WE DID THE NETWORK SECURITIES LITIGATION FOR 7 PERCENT, AND I THINK WE GOT EXCELLENT RESULTS IN BOTH CASES AND IT IMPROVED THE NET RECOVERY TO THE CLASS.

IN CONTRAST, IN THE EMPLOYMENT CASE, IT IS VERY

MUCH MORE DIFFICULT TO SHOW A PATTERN AND PRACTICE TO GET A CLASS CERTIFIED IN AN EMPLOYMENT CASE. YOU ARE NOT DEALING WITH ONE UNIFORM STATEMENT THAT AFFECTS ALL CLASS MEMBERS EQUALLY AND IT REQUIRES A GREAT DEAL OF PRE-FILING INVESTIGATION.

IN THE HOME DEPOT GENDER DISCRIMINATION CASE WE SENT LEGAL ASSISTANTS TO HUNDREDS OF STORES TO TAKE COUNTS OF WHAT GENDER PEOPLE WERE AND WHAT POSITIONS AND INTERVIEWED HUNDREDS OF WITNESSES BEFORE FILING THE CASE. AND IF YOU ARE GOING TO MAKE THAT TYPE OF INVESTMENT IN THE CASE, YOU WANT TO HAVE MORE SECURITY THAT YOU WILL HAVE A ROLE IN THE CASE, AND THROWING THAT TYPE OF CASE OPEN TO AUCTION, I THINK MIGHT DISCOURAGE PEOPLE FROM PUTTING IN THAT TYPE OF INVESTMENT UP FRONT.

THERE IS ALSO LESS OF A MARKET IN THOSE CASES BECAUSE YOU DON'T HAVE A LOT OF QUALIFIED FIRMS THAT ARE JUMPING FORWARD TO TAKE THE CASE.

AND SO ALTHOUGH I THINK THE MARKET IS APPROPRIATE IN SOME CIRCUMSTANCES, IT DOESN'T APPLY EQUALLY IN ALL CIRCUMSTANCES AND THERE I THINK THAT THE RULE (G) AS DRAFTED DOES GIVE THE COURT THE TYPE OF DISCRETION THAT IT NEEDS TO MAKE APPROPRIATE DECISIONS IN APPROPRIATE CASES.

JUDGE ROSENTHAL: I WANTED TO FOLLOW UP ON A

QUESTION JUDGE LEVI ASKED ABOUT SETTLING CASES AFTER AMCHEM. I'M TRYING TO FIGURE OUT HOW TO PHRASE IT SO IT DOESN'T SOUND SILLY.

HAVE YOU FOUND THE ABILITY TO SETTLE CASES IN FEDERAL COURT AFTER AMCHEM TO BE DIFFERENT IF THERE ARE OBJECTIONS TO THE SETTLEMENT?

MR. FINBERG: WELL, ONE OF THE --

JUDGE ROSENTHAL: OR TO TRY A DIFFERENT WAY OF FRAMING IT, IS THE SUCCESS THAT YOU HAVE ENCOUNTERED IN SETTLING CASES IN FEDERAL COURT, CLASS ACTIONS AFTER AMCHEM, ARE YOU SETTLING THESE CASES WITHOUT ANY OPPOSITION TO THE SETTLEMENT?

MR. FINBERG: WELL, I THINK THERE ARE PROBABLY MORE OBJECTIONS TO SETTLEMENTS NOW THAN THERE USED TO BE. THAT MAY NOT BE A BAD THING.

AFTER MATSUSHITA IT'S CLEAR THAT IN FEDERAL COURT OR STATE COURT ONE CAN SETTLE CLAIMS THAT WERE IN THE EXCLUSIVE JURISDICTION OF THE OTHER AND SO I THINK WE HAVE HAD SUCCESS HAVING GLOBAL SETTLEMENTS IN EITHER.

THERE IS MORE ATTENTION PAID TO SUB-CLASSING NOW AND MAKING SURE THAT YOU HAVE A REPRESENTATIVE WHO, IN FACT, WOULD HAVE STANDING TO ALLEGE THE CLAIM OF EACH CATEGORY OF THE PERSONS INVOLVED.

THE MOST COMPLICATED CASES ARE CASES THAT I

DON'T HANDLE INVOLVING PRODUCTS THAT INVOLVE FUTURES, DAMAGES IN THE FUTURE, AND EMPLOYMENT DISCRIMINATION AND SECURITIES FRAUD CASES. I DON'T ENCOUNTER THAT. SO MAYBE MY CASES ARE SIMPLER THAN SOME OF THOSE HANDLED BY MY COLLEAGUES.

JUDGE ROSENTHAL: THANK YOU.

CHAIRMAN LEVI: THANK YOU VERY MUCH. MR. MCGOWAN, ARE YOU HERE?

MR. MCGOWAN: GOOD MORNING AND THANK YOU FOR ALLOWING ME TO SHARE SOME OF MY EXPERIENCES. MY NAME IS JACK MCGOWAN. I'M A PARTNER IN THE LAW FIRM OF GORDON AND REES HERE IN SAN FRANCISCO AND I HAVE BEEN PRACTICING LAW, TRIAL WORK, FOR ALMOST -- ACTUALLY, 25 YEARS, 16 OF WHICH THE PRIMARY FOCUS HAS BEEN THE DEFENSE OF PHARMACEUTICAL AND MEDICAL DEVICE COMPANIES AND PRODUCT LIABILITY CASES.

THE TYPES OF PRODUCTS THAT MY CLIENTS HAVE BEEN INVOLVED IN OVER THE YEARS HAVE INCLUDED THINGS SUCH AS SILICONE GEL BREAST IMPLANTS, LATEX EXAMINATION GLOVES, DIET DRUGS, DECONGESTANTS AND OTHER PHARMACEUTICAL PRODUCTS.

CLASS ACTIONS HAVE BEEN FILED IN ALL THESE LITIGATIONS ALL OVER THE COUNTRY. I PRIMARILY HAVE BEEN INVOLVED IN THE CALIFORNIA CASES.

I HAVE BEEN REGIONAL COUNSEL FOR A CLIENT IN

BREAST IMPLANT LITIGATION WHERE WE HAD OVER 3,000 CASES FILED IN CALIFORNIA.

I AM CALIFORNIA TRIAL COUNSEL FOR THE LATEX GLOVE MANUFACTURER. THERE ARE MUCH FEWER CASES IN THAT LITIGATION HERE IN CALIFORNIA, BUT WE HAVE HAD THREE CLASS ACTIONS FILED AROUND THE COUNTRY. ONE CLASS ACTION ACTUALLY WAS FILED HERE IN CALIFORNIA AND MY CLIENT WAS NOT INVOLVED, BUT, AS YOU KNOW, IT WAS DISMISSED ON THE BASIS THAT THERE WERE NOT SUFFICIENT CRITERIA TO HAVE A CLASS ACTION IN THAT LITIGATION.

UNDERSTANDING THAT THIS COMMITTEE NOW IS NOT DEALING WITH THE ISSUE OF COMPETING PARALLEL CLASS ACTIONS PER SE, NOTWITHSTANDING THAT, I WOULD LIKE TO DIRECT MY COMMENTS BASICALLY TO THAT ISSUE.

THE BEST ANECDOTAL EVIDENCE I HAVE HAD IN MY EXPERIENCE HAS BEEN THE BREAST IMPLANT LITIGATION. IN 1984 I BECAME INVOLVED IN THE BREAST IMPLANT LITIGATION HERE IN CALIFORNIA WITH ONE OR TWO CASES. IN 1991 AND EARLY 1992 THE FDA ADVISORY PANEL CONCLUDED THAT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THE SAFETY OF SILICONE GEL BREAST IMPLANTS.

IN THIS COURTROOM IN LATE 1991 OUR CLIENT LOST A $7 MILLION VERDICT, AND FOLLOWING THAT WE BEGAN TO RECEIVE CASES ON THE NUMBER OF 200 OR 300 CASES A MONTH FILED ALL

ACROSS THE COUNTRY IN THAT LITIGATION.

WE ALSO WERE THE RECIPIENT OF 34 FEDERAL CLASS ACTIONS AROUND THE COUNTRY AGAINST THIS CLIENT FOR THE SAME ALLEGATIONS THAT WE HAD IN OUR CALIFORNIA CASE; PRIMARILY THAT SILICONE GEL BREAST IMPLANTS CAUSED AUTOIMMUNE DISEASE IN WOMEN WHO HAD BEEN IMPLANTED WITH THESE DEVICES.

BESIDES THE 34 FEDERAL CLASS ACTIONS, WE ALSO HAD THREE CANADIAN CLASS ACTIONS AND WE HAD AT LEAST ONE STATE COURT CLASS ACTION.

ONE THAT I KNOW OF IS A CLASS THAT WAS FILED IN LOUISIANA THAT ONLY DEALT WITH RESIDENTS OF THE STATE OF LOUISIANA. THE CLASS ACTIONS THAT WE HAD IN FEDERAL COURT DEALT WITH PERSONAL INJURIES, WITH MEDICAL MONITORING AND THEY WERE FILED ALL OVER THE COUNTRY.

AS THE LITIGATION PROCEEDED, IT WASN'T LONG BEFORE WE HAD OVER 17,000 LAWSUITS, INDIVIDUAL LAWSUITS AROUND THE COUNTRY, WHICH WE WERE DEFENDING ON MANY LEVELS AND VIRTUALLY EVERY STATE IN THE UNITED STATES AND IN MOST OF THE FEDERAL COURTS.

BESIDES THE GIGANTIC COSTS OF DEFENDING THESE INDIVIDUAL CASES, WE ALSO HAD TO BE CONCERNED ABOUT THE CLASS ACTIONS. MY FIRM PERSONALLY WAS NOT INVOLVED IN THOSE CLASS ACTIONS, BUT I KNOW, HAVING BEEN REGIONAL

COUNSEL AND HAVING PARTICIPATED IN DISCUSSIONS WITH THE CLIENT, THAT IT WAS A VERY, VERY SIGNIFICANT PROBLEM. IT WAS A PROBLEM THAT COST A LOT OF MONEY TO DEFEND AND IT RESULTED IN AMOUNTS THAT PROBABLY WHEN YOU ADDED UP ALL OF THE COSTS OF LITIGATION WERE IN THE BILLIONS OF DOLLARS.

AND ONE OF THE COMMENTS BY ONE OF THE EARLIER SPEAKERS WAS THAT CLASS ACTIONS OF THIS TYPE ALWAYS, IN EFFECT, BRING OUT MERIT CLAIMS, CLAIMS WITH MERIT. THAT IS NOT THE CASE IN THE SILICONE GEL BREAST IMPLANT LITIGATION.

AFTER TEN YEARS OR SO OF LITIGATING THIS TYPE OF CASE, IT HAS BEEN FAIRLY WELL ESTABLISHED THAT THERE WAS NO CAUSAL LINK BETWEEN THE GEL IMPLANTS AND THE AUTOIMMUNE DISEASE. NOT TO SAY THAT CLASS ACTIONS CAUSED THIS PROBLEM BY ANY MEANS, BUT IT JUST IS AN EXAMPLE OF ADDITIONAL COST THAT COMPANIES THAT ARE INVOLVED IN LITIGATION HAVE TO DEAL WITH ON A DAILY BASIS.

I WAS SURPRISED, FRANKLY, THAT WE DIDN'T HAVE MORE STATE COURT CLASS ACTIONS IN THE BREAST IMPLANT LITIGATION, BUT WE HAVE HAD STATE COURT CLASS ACTIONS IN OTHER LITIGATION I HAVE BEEN INVOLVED IN.

IN THE LITIGATION INVOLVING THE DECONGESTANT PRODUCT THAT MY CLIENT MAKES PHENYLPROPANOLAMINE, EASIER SAID PPA, WE STARTED OUT WITH TWO CLASS ACTIONS IN

CALIFORNIA, THE FIRST TWO CASES FILED IN CALIFORNIA; ONE WAS IN SAN DIEGO COUNTY AND THE OTHER WAS IN SONOMA COUNTY. THEY WERE BOTH CLASS ACTIONS ALLEGING VIOLATION OF BUSINESS AND PROFESSIONS CODE 17200 AND 17500, WHICH ARE UNFAIR COMPETITION STATUTES.

BASICALLY, THE ARGUMENT IS THAT IF OUR CLIENT FAILED TO WARN OF THE POTENTIAL HARM THAT COULD BE CAUSED BY PPA, WE HAVE DONE THAT AS AN UNFAIR PRACTICE AND THAT THESE LAWSUITS WERE FILED ON THAT BASIS.

THESE TWO LAWSUITS ARE IDENTICAL VIRTUALLY WHEN YOU READ THE COMPLAINT, DESPITE THE FACT THAT THEY WERE FILED BY TWO DIFFERENT PLAINTIFF'S COUNSEL IN TWO DIFFERENT COUNTIES. ONE OBVIOUSLY COPIED THE OTHER. AND WE ARE NOW DEFENDING THOSE CASES ALONG WITH AT THIS POINT I THINK WE HAVE 18 OR 20 PERSONAL INJURY CASES.

NOW, THESE CASES HAVE ALL BEEN RECENTLY COORDINATED BEFORE A JUDGE IN LOS ANGELES COUNTY, SO THERE IS HOPE, OBVIOUSLY, FOR COORDINATION OF ALL OF THOSE CASES, BUT THERE WILL BE, IN MY JUDGMENT, CLASS ACTIONS FILED, IF THEY HAVEN'T ALREADY BEEN FILED THAT I DON'T KNOW OF, IN FEDERAL COURTS IN THIS PPA LITIGATION. SO WE WILL HAVE A PARALLEL TRACK OF CLASS ACTIONS BOTH IN STATE COURTS AND FEDERAL COURTS.

JUSTICE HECHT: MAY I JUST ASK, IS THE

CONSOLIDATION PURSUANT TO CALIFORNIA PROCEDURE THAT ALLOWS THAT TO HAPPEN?

MR. MCGOWAN: YES. IT'S VERY SIMILAR TO MDL AND CALIFORNIA HAS BEEN VERY ACTIVE IN COORDINATION OF STATE COURT CASES. IN THE BREAST IMPLANT LITIGATION THEY WERE ALL COORDINATED BEFORE JUDGE O'NEILL IN SAN DIEGO.

AND JUDGE O'NEILL -- EARLIER COMMENTS WERE MADE ABOUT COORDINATION BETWEEN, CONVERSATIONS BETWEEN FEDERAL JUDGES AND STATE JUDGES. JUDGE O'NEILL WAS VERY ACTIVE IN HAVING CONVERSATIONS WITH JUDGE POINTER IN THE BREAST IMPLANT LITIGATION.

OUR JUDGE IN THE PPA LITIGATION, I ASSUME, WILL POTENTIALLY HAVE THOSE TYPES OF CONVERSATIONS WITH THE FEDERAL JUDGE IN THE ULTIMATE MDL, WHICH WILL PROBABLY HAPPEN.

I'M ALSO INVOLVED IN THE LATEX GLOVE LITIGATION. OUR JUDGE IN SAN DIEGO IS HAVING CONVERSATIONS WITH THE FEDERAL JUDGE IN PHILADELPHIA RESPONSIBLE FOR THE MDL OF THE LATEX GLOVE LITIGATION.

BUT I CAN TELL YOU THAT DESPITE THE BEST EFFORTS OF THESE JUDGES TO DISCUSS THESE ISSUES, IT DOES NOT STOP THE STATE COURTS FROM TRYING TO PUSH THE LITIGATION OFTENTIMES FASTER THAN HOW IT'S PUSHED IN THE MDL.

IN CALIFORNIA IN THE BREAST IMPLANT LITIGATION

JUDGE O'NEILL WAS PROUD TO SAY THAT WE ARE A -- IN SAN DIEGO A FASTRACK COUNTY WHERE WE GET CASES TO TRIAL IN SIX MONTHS AND HE WAS WAY AHEAD OF THE CURVE WITH THE FEDERAL MDL LITIGATION IN TERMS OF TRYING CASES.

WE TRIED CASES IN CALIFORNIA, BREAST IMPLANTS BEFORE. THEY WERE NEVER TRIED IN THE MDL. SO THERE IS THE OPPORTUNITY FOR SOME COORDINATION, BUT IT DOES NOT PREVENT THE PARALLEL TRACK OF STATE COURT CLASS ACTIONS AS THE RULES ARE NOW CURRENTLY DEFINED.

AND IN THE -- THE COST OF THIS IS -- I DON'T HAVE ANY NUMBERS TO SHARE WITH YOU, BUT THE COST IS PHENOMENAL, I'M SURE, AND MY CLIENTS OBVIOUSLY COULD PROVIDE THAT TYPE OF DATA.

IN THE DIET DRUG LITIGATION, WHICH WE ARE ALSO INVOLVED, NUMEROUS CLASS ACTIONS HAVE BEEN FILED AROUND THE COUNTRY. MOST HAVE BEEN MEDICAL MONITORING CLASS ACTIONS, BUT THEY HAVE BEEN FILED IN STATE COURTS AROUND THE COUNTRY.

SOME OF THESE CASES HAVE BEEN DISMISSED ON THE BASIS THAT THE STATE INVOLVED DID NOT RECOGNIZE MEDICAL MONITORING. IN SOME STATES, INCLUDING TEXAS, NEW YORK, WEST VIRGINIA AND WASHINGTON, THE CLASS FOR MEDICAL MONITORING WAS CERTIFIED. IN CALIFORNIA HERE AND IN ARKANSAS, THE MEDICAL MONITORING CLASS WAS CERTIFIED.

ALL OF THIS ACTIVITY WAS INCREDIBLY EXPENSIVE, I'M SURE, FOR MY CLIENT AND THESE ARE STATE COURT CLASS ACTIONS. THESE ARE CLASS ACTIONS THAT ALSO COULD BE BROUGHT IN FEDERAL COURT, BUT THEY ARE ALL DEALING WITH VIRTUALLY THE SAME THING.

SOME OF THE STATE COURT CLASS ACTIONS MAY LIMIT THE CLASS TO STATE RESIDENTS. OTHERS ARE NATIONAL.

IN THE CALIFORNIA CASES INVOLVING PPA, UNFAIR COMPETITION, THEY ARE LIMITED TO STATE RESIDENTS, BUT THERE IS NO REASON TO BELIEVE THAT ANY OF THESE STATE COURT CLASS ACTIONS CANNOT BE DESIGNED TO BE NATIONWIDE CLASSES AND IF THAT'S THE CASE, WHY ARE NOT THE PLAINTIFFS IN THE FEDERAL CLASS ACTION IN BREAST IMPLANTS ALSO PART -- OR, RATHER, WHY ARE NOT THE LOUISIANA RESIDENTS IN THE CLASS ACTION IN LOUISIANA NOT MEMBERS OF ONE OF THE 34 CLASS ACTIONS THAT WERE FILED AGAINST MY CLIENT IN FEDERAL COURT.

JUDGE ROSENTHAL: ONE OF THE PRIOR SPEAKERS EXPRESSED THE OPINION THAT THESE PROBLEMS GET SORTED OUT; THAT THE NATURAL FORCES OF LITIGATION WIND UP WITH SOME CASES MOVING FASTER THAN OTHERS AND ULTIMATELY THERE IS AN END POINT AND A FORUM OF RESOLUTION.

HAS THAT BEEN YOUR EXPERIENCE AND CAN YOU COMMENT ON WHETHER, IF NOT, WHAT YOUR EXPERIENCE HAS BEEN?

MR. MCGOWAN: WELL, I THINK YOU HAVE TO DEFINE "SORT IT OUT." MAYBE THEY ARE SORTED OUT AT GREAT EXPENSE.

FOR INSTANCE, IN THE DIET DRUG LITIGATION WHERE SOME OF THE CASES HAVE BEEN DECERTIFIED OR DISMISSED, YES, THEY ARE SORTED OUT, BUT IT COSTS A LOT OF MONEY TO GET TO THAT POINT. THE CLIENT HAD TO HIRE LAWYERS WHEREVER THAT MIGHT BE TO DO THAT. AND, AGAIN, I DON'T HAVE THE DETAILS ON THE COSTS, BUT I'M SURE THE COSTS ARE VERY, VERY HIGH.

IT SEEMS TO ME -- NOT BEING A CLASS ACTION SPECIALIST, BUT IT SEEMS TO ME IT DOESN'T MAKE A LOT OF SENSE WHEN YOU HAVE A CLASS ACTION THAT'S DEFINED AS ALL OF THE PEOPLE IN THE UNITED STATES THAT HAVE RECEIVED A DRUG AND HAD BEEN INJURED, THAT THERE SHOULD BE MORE THAN ONE OF THOSE. WHY NOT JUST ONE OF THOSE? I MEAN, WE ONLY HAVE ONE GROUP OF ALL THE PEOPLE. AND IT JUST MAKES NO SENSE.

AND I DON'T KNOW AND I SUSPECT THAT YOU MAY NOT BE ABLE TO DO ANYTHING ABOUT THIS BECAUSE IT'S NOT A RULE-MAKING ISSUE POSSIBLY, BUT I CERTAINLY WOULD RECOMMEND THAT YOU STRONGLY CONSIDER LEGISLATION TO CONGRESS TO TRY TO SORT OUT THIS PROBLEM BECAUSE IT IS COSTING HUNDREDS AND HUNDREDS AND HUNDREDS OF MILLIONS OF DOLLARS. I'M JUST TALKING ABOUT THREE OR FOUR CLIENTS.

I BET IF WE WANTED TO AND WANTED TO PUT ALL THE DATA BEFORE YOU, THAT THE AMOUNTS OF MONEY WOULD BE STAGGERING THAT HAS BEEN SPENT ON DEFEATING AND FIGHTING THE CERTIFICATIONS AROUND THE COUNTRY IN CASES THAT REALLY SHOULD BE RESOLVED IN ONE LOCALE.

THE RECIPE SEEMS TO BE THERE, IN MY EXPERIENCE, IN THESE SO-CALLED MASS TORT LITIGATIONS; THAT THERE WILL BE HUNDREDS AND THEN THOUSANDS AND MAYBE TENS OF THOUSANDS OF LAWSUITS, BUT THERE ALWAYS WILL BE CLASS ACTIONS AND THE CLASS ACTIONS HAVE A TENDENCY TO COME FIRST. AND MAYBE I'M BIASED, BUT IT SEEMS TO ME THAT THE CLASS ACTIONS WILL COME FIRST BECAUSE THERE IS A MAJOR INTEREST ON THE PART OF CLASS ACTION LAWYERS, PERSONAL INJURY LAWYERS AROUND THE COUNTRY TO BE THERE FIRST, TO GET ON THE COMMITTEE, TO BE A PLAYER IN THE DECISIONS AROUND THE COUNTRY -- NOT ONLY IN STATE COURTS, BUT IN FEDERAL COURTS -- TO PARTICIPATE IN THAT ACTIVITY. AND, AGAIN, IT JUST SEEMED TO ME THAT THERE DOESN'T NEED TO BE MORE THAN ONE NATIONAL CLASS ON ANY TYPE OF THESE CASES.

THOSE ARE ALL THE COMMENTS I HAVE. I HAVE A FEW OTHER ITEMS THAT I MENTIONED IN THE WRITTEN MATERIALS, BUT I WILL LEAVE THOSE FOR YOUR CONSIDERATION.

CHAIRMAN LEVI: THANK YOU. THANK YOU VERY MUCH. IS MS. SHIU, S-H-I-U, HERE? PATRICIA SHIU?

UNIDENTIFIED SPEAKER: SHE'S NOT HERE.

CHAIRMAN LEVI: HOW ABOUT MR. STURDEVANT? IS MR. STURDEVANT HERE?

MR. STURDEVANT: YES.

CHAIRMAN LEVI: GOOD MORNING.

MR. STURDEVANT: GOOD MORNING. GOOD MORNING. MY NAME IS JIM STURDEVANT. I AM THE VICE-PRESIDENT OF THE CONSUMER ATTORNEYS OF CALIFORNIA, AN ORGANIZATION MADE UP OF NEARLY 3500 ATTORNEYS WHO REPRESENT CONSUMERS THROUGHOUT THE STATE.

I AM ALSO THE PRINCIPAL OF MY OWN LAW FIRM IN SAN FRANCISCO, A SMALL FIRM WHICH SPECIALIZES AND HAS DONE SO FOR MORE THAN 20 YEARS IN CONSUMER CLASS ACTIONS AND IN A BROAD VARIETY OF SUBSTANTIVE AREAS.

I APPRECIATE VERY MUCH THE OPPORTUNITY TO SPEAK BRIEFLY BEFORE YOU TODAY AND WOULD RESERVE THE OPPORTUNITY, IF THE ORGANIZATION PERMITS, TO SUBMIT ADDITIONAL COMMENTS ON A NUMBER OF PROVISIONS, BUT I WANTED TO ADDRESS TWO IN PARTICULAR TODAY.

ONE, THE ISSUE OF MANDATORY NOTICE IN (B)(1) AND (B)(2) CLASS CASES, WHICH MR. FINBERG TALKED ABOUT SOME. I HAVE PRACTICED FOR NEARLY 30 YEARS. WHEN I BEGAN AS A LAWYER, I SPECIALIZED IN AND BEGAN TO SPECIALIZE IN CLASS ACTIONS MOSTLY IN THE 70'S AND EARLY 80'S IN CIVIL RIGHTS

CASES, IN PUBLIC INTEREST CASES, IN CASES ON BEHALF OF INDIVIDUALS AND CONSUMERS WHO I HAD CERTAIN ENTITLEMENTS UNDER FEDERAL AND STATE PROGRAMS. SO MOST OF THE CASES THAT I LITIGATED THEN WERE (B)(1) OR (B)(2) CASES.

SINCE THAT TIME I HANDLED MOSTLY CONSUMER PROTECTION AND EMPLOYMENT CLASS ACTION CASES, AT LEAST ON THE CONSUMER SIDE. THOSE WOULD BE TRIED AS (B)(3) CASES FOR NOTICE PURPOSES.

I AGREE WITH MR. FINBERG THAT ADDING A MANDATORY REQUIREMENT FOR NOTICING THESE CASES WILL ELIMINATE A NUMBER OF THE COURT CASES FROM BEING BROUGHT. IT'S NOT SIMPLY THE PUBLIC INTEREST CASES THAT HE MENTIONED INVOLVING PROPOSITION 187, BUT A NUMBER OF CASES THAT ARE BROUGHT ON A DAILY BASIS BY PUBLIC INTEREST ORGANIZATIONS CHALLENGING POLICIES AND PRACTICES OF GOVERNMENTAL AGENCIES, BOTH STATE AND FEDERAL, WHICH VIOLATE FEDERAL LAW OR A MIXTURE OF STATE AND FEDERAL LAW THAT SIMPLY WILL NOT BE BROUGHT IF NOTICE IS REQUIRED AND ALMOST NO MATTER IN WHAT FORMAT, AND LET ME GIVE YOU SOME EXAMPLES.

I RECENTLY -- MY FIRM RECENTLY FILED A CASE AGAINST AT&T WITH THE TRIAL LAWYERS FOR PUBLIC JUSTICE. WE CHALLENGED A PROVISION IN A NEW AGREEMENT REQUIRED BY THE DETARIFFING OF THE TELECOMMUNICATIONS INDUSTRY OF AN ARBITRATION PROVISION THAT WAS MADE MANDATORY BY AT&T.

THE CASE WAS BROUGHT ON BEHALF OF A CALIFORNIA CLASS OF AT&T'S LONG DISTANCE CUSTOMERS. SO OUT OF THEIR NATIONAL LONG DISTANCE CUSTOMER BASE OF APPROXIMATELY 60 MILLION, THE CLASS INVOLVED SOMEWHERE IN A RANGE OF ESTIMATES BETWEEN 7 AND 9 MILLION MEMBERS.

THE CASE WAS FILED ON JULY 30TH. TRIAL BEGAN ON NOVEMBER 13TH AND THE EVIDENCE HAS ALREADY BEEN COMPLETED.

ADDING ANY FORM OF NOTICE COST IN WHAT IS AGREED TO BE A (B)(2) TYPE OF CASE -- IN OTHER WORDS, SEEKING PREDOMINANTLY INJUNCTIVE RELIEF TO RESTRAIN OR ENJOIN THE ARBITRATION PROVISION -- WOULD HAVE ADDED TENS OF THOUSANDS, PERHAPS HUNDREDS OF THOUSANDS OR MILLIONS OF DOLLARS OF COSTS DEPENDING ON WHAT NOTICE FORM WAS SELECTED.

IF ANY KIND OF INDIVIDUALIZED NOTICE FORM WERE REQUIRED, IT WOULD HAVE BEEN AT LEAST FIVE TO A MILLION DOLLARS FOR INDIVIDUALIZED NOTICE. ANY KIND OF PUBLICATION DESIGNED TO REACH THAT AUDIENCE WOULD HAVE APPROXIMATED IN CALIFORNIA MAYBE 30,000 TO $60,000.

INTERNET NOTICE MIGHT HAVE BEEN OF SOME ASSISTANCE, BUT I THINK CURRENT STATISTICS SAY THAT ONLY 45 PERCENT -- 40 TO 45 PERCENT OF AMERICA'S HOUSEHOLDS HAVE INTERNET CONNECTIONS AND THAT IN ORDER FOR THE NOTICE TO BE EFFECTIVE, OF COURSE, YOU WOULD HAVE TO BE PLUGGED

INTO A PARTICULAR WEBSITE, WHETHER IT BE AT&T OR SOME OTHER WEBSITE, IN ORDER TO GET THE BENEFIT OF THAT NOTICE.

SO I THINK CONSISTENT WITH MR. FINBERG'S COMMENTS, SINCE THERE WAS NO OPPORTUNITY TO OPT-OUT IN THOSE CASES AND SINCE IF THE COURT CERTIFIES THE CLASS IS MAKING A DETERMINATION UNDER RULE 23(A), THAT AMONG OTHER THINGS CLASS COUNSEL ARE ADEQUATE TO HANDLE THE CASE, THAT THAT IS SUFFICIENT PROTECTION TOGETHER WITH THE COURT'S EXERCISE OF ITS OWN FIDICUARY DUTY TO ABSENT CLASS MEMBERS AND PROTECT -- TO PROTECT THE INTERESTS OF ABSENT CLASS MEMBERS IN THOSE TYPES OF CASES.

SO I WOULD URGE THE COMMITTEE TO THINK HERE ABOUT THE PRACTICAL EFFECTS THAT THE NOTICE OF REQUIREMENT WOULD HAVE, EITHER AT THE PRECERTIFICATION STAGE OR IF THERE IS SOME SETTLEMENT -- AND MOST OF THESE CASES, THESE TRUE PUBLIC INTEREST CASES, DO NOT SETTLE UNTIL, UNTIL THERE IS SOME CERTAINTY AS TO HOW THE LIABILITY HAMMER IS GOING TO FALL, EITHER FOR THE PLAINTIFF OR FOR THE DEFENDANT.

THE SECOND ISSUE I WANTED TO ADDRESS IS THE CLASS COUNSEL'S SELECTION CRITERIA IDENTIFIED BY RULE 23(G), WHICH, AGAIN, IS A -- WHICH IS A NEW RULE AND WHICH IS IN ADDITION NOT ONLY TO THE REQUIREMENTS OF RULE 23(A)(4) ON THE ADEQUACY OF COUNSEL, BUT ON THE MORE THAN 30 YEARS OF JURISPRUDENCE WHICH HAS DEVELOPED ACROSS THE COUNTRY TO

GUIDE FEDERAL JUDGES TO DETERMINE WHETHER CLASS COUNSEL IS ADEQUATE BASED ON THE FACTS, CIRCUMSTANCES AND ISSUES IN A PARTICULAR CASE.

IT HAS BEEN MY EXPERIENCE, PARTICULARLY IN THE LAST TEN YEARS, THAT IF THESE CRITERIA WERE APPLIED IN ALL TYPES OF CASES -- AND THEY ARE, AS I UNDERSTAND IT, TO BE APPLIED IN ALL TYPES OF CASES UNDER THE RULE -- THEY WOULD DETER NOT ONLY THE FILING OF IMPORTANT PUBLIC INTEREST CASES, BUT I THINK THEY WOULD DETER AS WELL A NUMBER OF STATEWIDE OR EVEN NATIONWIDE CONSUMER CLASS ACTIONS BY SMALL FIRMS, PARTICULARLY THOSE WITHOUT OVERWHELMING RESOURCES TO HANDLE CASES.

BECAUSE AT SOME STAGE IN THE PROCEEDINGS A JUDGE WILL INQUIRE OF THE RESOURCES AND INVITE, PERHAPS, SOME KIND OF BIDDING OR AUCTION PROCESS AND IT IS MY EXPERIENCE NOW AND IT WOULD BE MY ANTICIPATION THAT IF -- IF THE ULTIMATE VALUE OF THE CASE IN THE AGGREGATE IS IN ANY WAY SUBSTANTIAL, THAT A RELATIVE HANDFUL NUMBER OF FIRMS IN THE COUNTRY WILL BID ON AND BASED ON THEIR RESOURCES AND, PERHAPS, DEMONSTRATED EXPERIENCE BE SELECTED TO BE CLASS COUNSEL IN THOSE CASES AND THAT WILL DETER SMALL FIRMS, INDIVIDUAL PRACTITIONERS, PUBLIC INTEREST ORGANIZATIONS FROM EXPENDING THE TIME AND THE RESOURCES NOT ONLY TO DEVELOP THE LEGAL RESEARCH NECESSARY TO DEAL WITH ISSUES

IN THOSE CASE, WHICH I THINK ARE DIFFERENT THAN THE NUMBER OF THE SECURITY CASES THAT THE COMMITTEE HAS HEARD A LOT ABOUT WHERE -- WHERE, PERHAPS, THE ISSUES ARE MORE MARKET DRIVEN, THE ISSUES ARE WELL KNOWN IN ADVANCE, BOTH FACTUALLY AND LEGALLY, AND THERE IS A PARADIGM FOR HANDLING THESE CASES.

IN LOTS OF OTHER CONSUMER CASES, THERE ISN'T THE SAME PARADIGM. THE ISSUES ARE EVOLVING. THEY ARE NEW, BOTH FACTUALLY AND LEGALLY. AT LEAST IN MY EXPERIENCE FOR THE LAST 20 YEARS THE EXISTING SYSTEM HAS WORKED WELL.

TRIAL JUDGES, BOTH STATE AND FEDERAL, WITH SOME EXCEPTIONS, WHICH WE ARE ALL WELL AWARE OF, HAVE EXERCISED THEIR RESPONSIBILITIES WELL. THEY HAVE INQUIRED OF COUNSEL BEFORE THEM AS TO THEIR -- MANY OF THE -- MANY OF THE CRITERIA THAT ARE ENUMERATED IN (G) BUT, AGAIN, APPLYING THEM TO THE FACTS AND CIRCUMSTANCES OF PARTICULAR CASES AND THE ISSUES BEFORE THEM AND HAVE AT VARIOUS STAGES ALONG THE WAY, FROM THE FILING TO ADJUDICATIONS OF LIABILITY ON AWARDS OF DAMAGES, OR TO APPROVAL OF SETTLEMENTS IN SOME CASES, ASSURED THEMSELVES THAT THE SETTLEMENTS -- THE SETTLEMENTS OR THE ACTIVITIES AND UNDERTAKINGS OF CLASS COUNSEL WERE APPROPRIATE, PROFESSIONAL, ADEQUATE AND IN THE BEST INTERESTS OF THE CLASS.

AND FOR THOSE REASONS, I THINK THAT SETTING FORTH A NEW RULE, EVEN THOUGH THE NOTE SUGGESTS THAT ITS APPLICATION IS DISCRETIONARY, WILL SEND AN UNMISTAKABLE SIGNAL TO FEDERAL JUDGES ACROSS THE COUNTRY THAT IT IS MORE THAN DISCRETIONARY AND THAT THE CRITERIA SHOULD BE TAKEN VERY SERIOUSLY IN DETERMINING THE SELECTION OF CLASS COUNSEL.

PROFESSOR MARCUS: I'M LOOKING --

JUDGE MCKNIGHT: COULD I ASK ONE QUESTION, PLEASE?

MR. STURDEVANT: YES.

PROFESSOR MARCUS: EXCUSE ME. I'M LOOKING --

JUDGE MCKNIGHT: I'M SORRY.

CHAIRMAN LEVI: I THINK RICK HAD THE PRIOR QUESTION, THEN YOU MAY ASK.

JUDGE MCKNIGHT: I'M SORRY. I DIDN'T HEAR YOU.

PROFESSOR MARCUS: I'M LOOKING AT THE CRITERIA IN (G) AT THE MOMENT. THERE ARE ACTUALLY THREE THAT ARE SPECIFICALLY MENTIONED. ONE OF THEM IS THE WORK COUNSEL HAS DONE IN IDENTIFYING OR INVESTIGATING POTENTIAL CLAIMS IN THIS CASE. I WOULD THINK THAT CRITERION WOULD FAVOR THE PERSON THAT YOU WERE DESCRIBING WHO HAS WORKED UP THE CASE.

I'M WONDERING IF WHAT YOU ARE SAYING IS THAT THAT SHOULD BE THE ONLY THING THAT COUNTS AND NOT

COUNSEL'S EXPERIENCE IN HANDLING CLASS ACTIONS AND OTHER COMPLEX LITIGATION OR ANY ATTENTION TO THE RESOURCES COUNSEL WILL COMMIT TO REPRESENTING THE CLASS, OR ARE YOU JUST SAYING YOU DON'T WANT TO STIR THE ASHES?

IN TERMS OF WHAT THE RULE SAYS, IT STRIKES ME THAT ONE OF THE THREE CRITERIA PRECISELY EMPHASIZES SOMETHING THAT SOUNDS LIKE WHAT YOU ARE CONCERNED ABOUT, AND I WONDER IF THAT'S INCORRECT AND IF THERE IS SOMETHING WRONG WITH THE OTHER CRITERIA, OR IT'S JUST THAT YOU ARE WORRIED THAT A SPECIFIC RULE PROVISION WILL CAUSE JUDGES TO BEHAVE DIFFERENTLY WHERE THEY ARE NOW DOING EVERYTHING JUST RIGHT.

MR. STURDEVANT: I THINK THAT -- I THINK THAT THE PROCESS WORKS WELL NOW, BUT I THINK YOUR QUESTION IS A GOOD ONE.

I THINK THAT BASED ON THE FACTS AND CIRCUMSTANCES OF THE CASES THAT JUDGES MAY NOW INQUIRE GENERALLY OF COUNSEL'S EXPERIENCE AND IT'S BEEN MY EXPERIENCE AS CLASS COUNSEL SEEKING TO REPRESENT A CLASS DETAILED FOR TRIAL COURTS, BOTH FEDERAL AND STATE, THEIR EXPERIENCE IN HANDLING COMPLEX CASES, INCLUDING CLASS CASES.

BUT THIS ALSO IMPOSES A MANDATORY REQUIREMENT OF THE COURT INQUIRING INTO THE RESOURCES COUNSEL WILL COMMIT

TO REPRESENTING THE CLASS AND MAY CONSIDER ANY OTHER MATTER PERTINENT TO COUNSEL'S ABILITY TO FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE CLASS.

THE COURT MAY DIRECT POTENTIAL CLASS COUNSEL TO PROVIDE INFORMATION ON ANY SUCH SUBJECT AND TO PROPOSE TERMS FOR ATTORNEY'S FEES AND NON-TAXABLE COSTS AS WELL, WHICH COMES INTO HOW MUCH WILL THE CASE COST, PERHAPS HOW LONG WILL IT TAKE.

I THINK -- AS I TRIED TO EMPHASIZE BEFORE, I THINK THERE ARE DISTINCTIONS IN DIFFERENT TYPES OF SUBSTANTIVE CATEGORIES OF CASES. I THINK WITH RESPECT TO CERTAIN TYPES OF PUBLIC INTEREST CASES, CONSUMER CASES -- THERE MAY BE OTHERS AS WELL, PARTICULARLY WITH RESPECT TO THE CLASS REQUIREMENTS -- IT WOULD BE VERY DIFFICULT GIVEN THE NUMBER OF ISSUES THAT ARISE TO TRY TO QUANTIFY THAT FROM BOTH A COST BASIS AND A TIME OR FEE BASIS.

SO THAT'S ONE OF MY CONCERNS ABOUT IMPOSING THAT AS A MANDATORY REQUIREMENT AS OPPOSED TO THE DISCRETIONARY WAY THAT I THINK THE COURTS ARE ADEQUATELY HANDLING THAT ISSUE NOW UNDER (A)(4).

JUDGE MCKNIGHT: THAT WAS ESSENTIALLY MY QUESTION. THANK YOU.

MR. KASANIN: IS IT THE WORD "MUST" THAT YOU OBJECT TO?

MR. STURDEVANT: YES.

MR. KASANIN: IF THE WORD "MUST" WERE CHANGED, WOULD THAT REMOVE THE OBJECTION?

MR. STURDEVANT: I THINK THE WORD "MUST" MEANS THAT IT IS MANDATORY.

I THINK BY ADDING THESE NEW CRITERIA, THAT THERE IS A STRONG SUGGESTION THAT THE ADEQUACY REQUIREMENT NOW COVERED IN (A)(4) IS SOMEHOW INADEQUATE, IF YOU WILL, AND THAT THE EXPERIENCE OF FEDERAL JUDGES HANDLING CLASS CERTIFICATION AND THE RESPONSIBILITIES THAT GO ALONG WITH IT HAS BEEN INSUFFICIENT AND NEEDS SPECIFIC CRITERIA TO INFORM THEIR DECISION MAKING.

MR. KASANIN: DON'T YOU THINK IT WOULD BE USEFUL FOR A NEW JUDGE AND JUDGES, PERHAPS, WHO HAVEN'T HANDLED CLASS ACTIONS TO HAVE THESE CRITERIA SET FORTH IN THE RULE?

MR. STURDEVANT: WELL, THAT'S CERTAINLY BEEN TRUE. THAT WOULD CERTAINLY BE TRUE SINCE 1966 WHEN RULE 23 CAME INTO PLAY.

I HAVEN'T FOUND IN MY EXPERIENCE THAT JUDGES BEFORE WHOM I HAVE APPEARED HAVE HAD DIFFICULTY GETTING UP TO SPEED VERY QUICKLY ON THE REQUIREMENTS OF RULE 23 AND THE CASE LAW THAT'S GROWN UP THAT HAS INFORMED THEIR DECISION MAKING ON THE ADEQUACY REQUIREMENT.

MR. KASANIN: ONE OTHER QUESTION I MISSED AT THE BEGINNING. DID YOU SAY YOU ARE APPEARING ON BEHALF OF THE CONSUMER ATTORNEYS OF CALIFORNIA?

MR. STURDEVANT: I DID, YES.

MR. KASANIN: THANK YOU.

JUDGE ROSENTHAL: YOU SEEMED TO BE READING THE APPOINTMENT PROCEDURE RULE IN PARTICULAR AS ENCOURAGING AUCTIONS OR SOME FORM OF BIDDING.

IS THERE ANY PARTICULAR LANGUAGE THAT YOU ARE CONCERNED ABOUT AS SENDING THAT SIGNAL, BECAUSE THE LANGUAGE OF THE RULE IN PARTICULAR DOESN'T SPECIFICALLY MENTION ANY PARTICULAR METHOD OF USING FEES TO SELECT COUNSEL. IT SIMPLY SAYS THAT, "THE COURT MAY DIRECT THE POTENTIAL CLASS COUNSEL TO PROPOSE TERMS FOR ATTORNEY'S FEES." IT DOESN'T HAVE TO BE IN A COMPETITIVE SITUATION.

MR. STURDEVANT: NO. I THINK THAT QUESTION IS A GOOD ONE, YOUR HONOR.

IT'S SIMPLY THE LANGUAGE IN SUBDIVISION 3(I), WHICH TALKS ABOUT THE RESOURCES THAT COUNSEL WILL COMMIT, AND THEN MAY CONSIDER ANY OTHER MATTER PERTINENT TO COUNSEL'S ABILITY, THE REQUIREMENT THAT THE COURT MAY DIRECT CLASS COUNSEL TO PROVIDE INFORMATION ON ANY SUCH SUBJECT. I THINK COURTS HAVE THAT ABILITY AND AUTHORITY NOW.

AND WITH RESPECT TO PROPOSING TERMS FOR ATTORNEY'S FEES AND NON-TAXABLE COSTS, I THINK THAT IN A PRACTICAL SITUATION -- LET'S ASSUME A SMALL FIRM OR A PUBLIC INTEREST ORGANIZATION COMES BACK WITH AN ANSWER, YOUR HONOR, BASED ON OUR EXPERIENCE WITHIN THE LEGAL ISSUES IN THIS CASE THAT WE HAVE DISCUSSED AT SOME LENGTH IN OUR BRIEFING, WE ARE UNABLE TO, YOU KNOW, SPECIFY WITH ANY CERTAINTY WHAT WE THINK AT THIS STAGE OF THE PROCEEDINGS, BECAUSE CERTIFICATION IS HAPPENING VERY EARLY IN THE CASE, WHAT THE NON-TAXABLE COSTS MAY BE IN TERMS OF THE EXPERT WITNESS FEES THAT WOULD BE NECESSARY, DEPENDING ON HOW MANY EXPERTS THE DEFENSE CALLS OR WHATEVER, IN TERMS OF WHATEVER THE SCOPE OF THE EVIDENTIARY SHOWING MAY BE AND WE ARE UNCERTAIN EVEN TO SET A RANGE OF WHAT WE THINK THE ATTORNEY'S FEES MAY BE.

THAT MAY CAUSE SOME COURTS A CONCERN, PARTICULARLY UNDER THE LANGUAGE OF THIS RULE, AND ENCOURAGE THAT JUDGE TO INVITE OTHER COUNSEL TO COME IN OR ANY PUBLICITY ABOUT THESE RULES MAY, OF COURSE, ENCOURAGE OTHER FIRMS WHO HAVE NOTICE OF A PARTICULAR CASE TO ENCOURAGE THAT JUDGE TO ALLOW SOME KIND OF BIDDING PROCESS.

CHAIRMAN LEVI: THANK YOU VERY MUCH.

MR. STURDEVANT: THANK YOU VERY MUCH.

CHAIRMAN LEVI: THANK YOU. THANK YOU FOR YOUR TESTIMONY.

MISS RICHO, IF I'M SAYING THE NAME RIGHT?

MISS RICHO: RICHO.

CHAIRMAN LEVI: GOOD MORNING.

MISS RICHO: GOOD MORNING. MY NAME IS ANNA RICHO AND I AM VICE-PRESIDENT OF LAW FOR THE BIOSCIENCE DIVISION OF BAXTER HEALTHCARE CORPORATION. I WANT TO THANK THE COMMITTEE FOR THIS OPPORTUNITY TO TESTIFY ON BEHALF OF BAXTER AT THIS HEARING.

BAXTER HEALTHCARE CORPORATION, WHICH IS HEADQUARTERED IN DEERFIELD, ILLINOIS, HAS BEEN MANUFACTURING AND SELLING MEDICAL PRODUCTS FOR OVER 70 YEARS. WE EMPLOY 45,000 PEOPLE WORLDWIDE IN 250 FACILITIES. OUR PRODUCTS ARE SOLD IN OVER 110 COUNTRIES.

BAXTER'S MISSIONS IS TO DELIVER CRITICAL THERAPIES TO PEOPLE WITH LIFE-THREATENING CONDITIONS. BAXTER'S BIOSCIENCE DIVISION, WHICH IS HEADQUARTERED HERE IN CALIFORNIA IN GLENDALE, PROCESSES THERAPEUTIC PROTEINS, SUCH AS RACOMIC CLOTTING FACTOR FOR HEMOPHILIACS, IMMUNOGLOBULINS FOR PEOPLE WITH COMPROMISED IMMUNE SYSTEMS AND VACCINES.

IN ADDITION TO BIOSCIENCE, BAXTER'S MEDICATION DELIVERY DIVISION MANUFACTURES SYSTEMS FOR THE INTRAVENOUS

AND NON-INTRAVENOUS OF DELIVERY OF LIFE-SAVING DRUGS, NUTRITIONAL SYSTEMS AND ANESTHESIA PRODUCTS.

BAXTER'S RENAL DIVISION MANUFACTURES PRODUCTS AND PROVIDES SERVICES PATIENTS SUFFERING END STAGE RENAL DISEASE.

RECENTLY BAXTER HAS INCREASED ITS INVOLVEMENT IN THE IMPORTANT AREA OF ONCOLOGY, DEVELOPING PRODUCTS FOR TREATMENT OF CANCER.

AS A RESULT OF THE BUSINESS WE ARE IN, BAXTER HAS OVER THE YEARS EXPERIENCED ITS SHARE OF CIVIL LITIGATION, INCLUDING FEDERAL AND STATE CLASS ACTIONS. IT IS FROM THIS PERSPECTIVE THAT WE BELIEVE THE EFFORTS OF THE CIVIL RULES ADVISORY COMMITTEE TO ENHANCE THE EFFECTIVENESS OF RULE 23 AND ELIMINATE ABUSES OF THE RULE CONSTITUTE A SALUTARY BEGINNING TO THE PROCESS.

WE BELIEVE, HOWEVER, THAT MUCH MORE REMAINS TO BE DONE. I HOPE IN THE FEW MINUTES THAT I HAVE ALLOTTED TO ME TO COMMENT BRIEFLY ON THE PROPOSED AMENDMENTS AND TO EXPRESS BAXTER'S VIEW WITH RESPECT TO THE ESSENTIAL ADDITIONAL REFORMS WHICH ARE NEEDED TO FULLY ADDRESS THE ABUSES PRESENT TODAY IN FEDERAL CLASS ACTION LITIGATION.

LET ME BEGIN BY TURNING TO THE AMENDMENTS WHICH THE CIVIL RULES ADVISORY COMMITTEE HAS PROPOSED FOR OUR CONSIDERATION TODAY.

BAXTER BELIEVES THAT THESE PROPOSALS ARE FOR THE MOST PART NONCONTROVERSIAL AND WILL SERVE TO ACCOMPLISH THEIR INTENDED PURPOSE OF IMPROVING THE ESTABLISHMENT AND ADMINISTRATION OF FEDERAL CLASS ACTIONS, IMPROVING REVIEW OF CLASS ACTION SETTLEMENTS, AND PROVIDING FOR APPOINTMENT OF CLASS COUNSEL AND APPROVAL OF THE AWARDS.

IN THE INTEREST OF TIME, I WILL SIMPLY STATE THAT BAXTER SUPPORTS THE AMENDMENTS TO THE FEDERAL RULE OF CIVIL PROCEDURE 23 AS PROPOSED BY THE CIVIL RULES ADVISORY COMMITTEE. I WILL, HOWEVER, PROVIDE FURTHER WRITTEN COMMENTS DETAILING OUR SUPPORT FOR THE AMENDMENTS.

WHAT I REALLY WOULD LIKE TO TALK TO YOU ABOUT IS BAXTER'S EXPERIENCE IN CLASS ACTIONS WHICH SUPPORTS THE NEED FOR THIS COMMITTEE TO PURSUE ADDITIONAL MEASURES TO REMEDY CLASS ACTION ABUSES. WHILE THE PROPOSED NEW RULES BEGIN TO ADDRESS THE PROCESS OF CLASS ACTION ABUSE, MUCH MORE DOES NEED TO BE DONE.

I STATED EARLIER THAT BAXTER HAS BEEN INVOLVED IN ITS SHARE OF CLASS ACTION LITIGATION. LET ME GIVE YOU A FEW EXAMPLES.

IN THE SILICONE BREAST IMPLANT LITIGATION WHERE BAXTER NEVER MADE A DIME OFF THE BREAST IMPLANT LITIGATION, BUT MERELY INHERITED THE LIABILITY FROM A DIVISION THAT USED TO EXIST FROM A COMPANY WE HAD

ACQUIRED, BAXTER WAS NAMED IN 14 SEPARATE LAWSUITS THAT CONSTITUTED CLASS ACTIONS FILED IN TEN STATE COURTS, FOUR FEDERAL DISTRICT COURTS, AND FOUR IN CANADA. NONE OF THE STATE CLASS ACTIONS RESULTED IN CERTIFICATION OF A CLASS, YET BAXTER WAS REQUIRED TO CONTEST THE ISSUE IN EACH JURISDICTION.

THE FEDERAL ACTIONS WERE EVENTUALLY CONSOLIDATED BY THE MULTI-DISTRICT PANEL BEFORE JUDGE POINTER IN THE NORTHERN DISTRICT OF ALABAMA. JUDGE POINTER APPROVED A SETTLEMENT AMONG THE DEFENDANTS AND THE CLASS WHICH RESULTED IN THE RESOLUTION OF OVER 150,000 CLASS MEMBER CLAIMS.

BAXTER THEN HAD TO TRY TO SETTLE APPROXIMATELY 6500 OPT-OUT LAWSUITS. THE BREAST IMPLANT LITIGATION, WHICH WAS GENERATED BY HIGHLY QUESTIONABLE SCIENCE, HAS LASTED NEARLY TEN YEARS, INVOLVED HUNDREDS OF LAWYERS AND COST THE HEALTH CARE INDUSTRY AND ITS INSURERS OVER $10 BILLION. THE BREAST IMPLANT LITIGATION WAS BEST OF COMPANY LITIGATION FOR BAXTER AND FOR SEVERAL OTHER COMPANIES AS WELL.

ULTIMATELY, THE SCIENCE EXONERATED THE MANUFACTURERS, HOWEVER, THE SCIENCE CAME IN TOO LATE FOR SOME COMPANIES. BAXTER MANAGED TO SURVIVE TO CONTINUE TO PROVIDE CRITICAL THERAPIES FOR LIFE-THREATENING

CONDITIONS.

BECAUSE BAXTER EXISTS TODAY, WE ARE ABLE AND, INDEED, HONORED TO ASSIST OUR FEDERAL GOVERNMENT IN ITS PREPAREDNESS EFFORTS AGAINST BIOTERRORISM BY PROVIDING A SMALLPOX VACCINE IN CONJUNCTION WITH ANOTHER COMPANY.

IT WAS, HOWEVER, THE PRESENCE OF MULTIPLE CLASS ACTIONS THAT THREATENED OUR EXISTENCE. THE PRESENCE OF THE MULTIPLE CLASS ACTIONS FILED IN THE BREAST IMPLANT LITIGATION EXACERBATED THE RISKS TO BAXTER AND FORCED US INTO A SETTLEMENT SITUATION DESPITE THE FACT THAT THE SCIENCE WAS ON OUR SIDE.

BAXTER, IN FACT, DID TAKE -- EMPLOY A STRATEGY OF TRYING SEVERAL OF THESE CASES AND IN THE TIME THAT I MANAGED THAT LITIGATION, WE WON, I THINK, CONSECUTIVELY INDIVIDUALLY OVER 20 CASES; BUT THAT COST US ANYWHERE FROM 1 TO 2 MILLION A CASE.

ANY PUBLICLY-TRADED COMPANY CAN'T AFFORD TO DEFEND THEMSELVES ONE-BY-ONE IN THESE CASES. AND WHEN YOU HAVE THE PRESENCE OF A CLASS ACTION FILED, CERTIFIED OR NOT, THAT'S THE LEVER FOR SETTLEMENT. IT DOESN'T MATTER WHAT'S CLEANED UP LATER. THE LEVER FOR -- THE LEVER FOR FORCING THE SETTLEMENT IS A FACT OF THE CLASS ACTION THAT HAS BEEN FILED.

MOST OF THE STATE ACTIONS WERE FILED AS

NATIONWIDE CLASS ACTIONS. THEY DON'T TEND TO LIMIT THEM TO THE STATES.

MANY OF THEM WERE FILED AS WORLDWIDE CLASS ACTIONS WHERE WE HAD CITIZENS FROM AUSTRALIA AND CANADA WHO WERE REPRESENTED WITHIN THE CLASS ACTIONS FILED WITHIN THE STATES.

IN THE HIV FACTOR CONCENTRATE LITIGATION, BAXTER WAS SUED IN EIGHT SEPARATE CLASS ACTIONS FILED IN THREE STATE COURTS AND FIVE FEDERAL DISTRICT COURTS. THE FEDERAL CLASSES WERE CONSOLIDATED BEFORE JUDGE GRADY IN THE NORTHERN DISTRICT OF ILLINOIS, BUT NO CLASS WAS CERTIFIED FOR TRIAL IN ANY COURT. JUDGE GRADY APPROVED A SETTLEMENT AMONG DEFENDANTS AND CLASS CLAIMANTS WHICH RESOLVED 6500 ELIGIBLE CLASS MEMBER CLAIMS. ABOUT 300 FEDERAL AND STATE OPT-OUT LAWSUITS REMAIN TO BE RESOLVED.

THIS EXPERIENCE DEFENDING MULTIPLE OVERLAPPING CLASS SUITS SIMULTANEOUSLY IN STATE AND FEDERAL COURTS HAS LED BAXTER TO TWO INDISPUTABLE CONCLUSIONS.

FIRST, THE MULTI-DISTRICT PANEL PROVIDES AN EFFECTIVE MECHANISM FOR THE CONSOLIDATION PRETRIAL COORDINATION AND, WHEN APPROPRIATE, SETTLEMENT OF CLASS ACTIONS IN A SINGLE FORUM.

THE SECOND CONCLUSION IS THAT COMPETING MULTI-STATE, MULTI-PARTY CLASS ACTIONS FILED IN STATE

COURTS SHOULD BE REMOVED TO FEDERAL COURT WHENEVER POSSIBLE.

FOR THESE REASONS, BAXTER STRONGLY SUPPORTS THE CURRENT PROPOSED FEDERAL LEGISLATION, THE CLASS ACTION FAIRNESS ACT. THIS IMPORTANT ACT WOULD AMEND THE DIVERSITY JURISDICTION REQUIREMENT BY REQUIRING MINIMAL DIVERSITY FOR REMOVAL TO FEDERAL COURT OF STATE CLASS ACTIONS INVOLVING MULTI-STATE PARTIES. THE FEDERAL COURTS ARE THE APPROPRIATE FORUM AND THE FEDERAL JUDICIARY ARE THE APPROPRIATE JUDGES TO DECIDE MULTI-STATE CLASS ACTION CASES.

IN THE REPORTER'S CALL FOR INFORMAL COMMENTS ON THE ISSUE OF OVERLAPPING CLASS ACTIONS SEVERAL CREATIVE AND FAR-REACHING PROPOSALS ARE SET FORTH. THEY REPRESENT THE THOUGHTFUL ATTEMPT TO ADDRESS THE SITUATION OF MULTIPLE, INCONSISTENT AND OVERLAPPING CLASS ACTIONS PENDING SIMULTANEOUSLY IN FEDERAL AND STATE COURTS.

AS THE ADVISORY COMMITTEE HAS RECOGNIZED, IT IS SAFE TO SAY THE EMINENT AUTHORS OF RULE 23 HAD LITTLE CONCEPTION IN 1966 THAT A MERE RULE OF JOINDER DESIGNED TO ACHIEVE ECONOMIES OF SCALE, TIME, EFFORT AND EXPENSES AND PROMOTE UNIFORMITY OF DECISION AS TO PERSONS SIMILARLY SITUATED WOULD BECOME SUCH A PROMINENT FEATURE IN THE LANDSCAPE OF MODERN LITIGATION, DRAMATICALLY ALTERING THE

STATUS AND SCALE OF CLASS ACTION LITIGATION.

TODAY, HOWEVER, MULTIPLE OVERLAPPING CLASS ACTIONS HAVE OVERREACHED THE SALUTARY GOAL OF PROVIDING ACCESS TO THE COURTS FOR SIMILARLY SITUATED CLAIMANTS. SUCH ABUSES HAVE IGNORED CLAIMANTS AND ENRICHED THEIR ATTORNEYS. THEY HAD IGNORED FUNDAMENTAL JURISPRUDENTIAL ISSUES OF DUE PROCESS AND SINGLE RECOVERY. THEY HAVE PRESENTED INCONSISTENT AND UNCERTAIN RESULTS AND HAVE CONTRIBUTED TO THE FINANCIAL CRISIS IN WHICH CORPORATE AMERICA, THE INSURANCE INDUSTRY AND THE AMERICAN CONSUMING PUBLIC FIND THEMSELVES.

I WILL CITE ONE COGENT EXAMPLE OF CLASS ACTION ABUSE WHICH IS CURRENTLY PENDING AGAINST BAXTER AND A HOST OF OTHER VACCINE MANUFACTURERS. TO DATE, AND THIS IS AS OF THIS YEAR, FIVE SEPARATE CLASS ACTIONS HAVE BEEN FILED AND SERVED ON BAXTER IN FOUR DIFFERENT STATE COURTS. WE ARE AWARE OF OTHER CLASS ACTIONS WHICH HAVE BEEN FILED IN OTHER JURISDICTIONS.

THESE CASES SEEK DAMAGES FOR ALLEGED PERSONAL INJURIES TO CHILDREN INOCULATED WITH THE CHILDHOOD DPT VACCINE CONTAINING THIOMEROSOL. THE NATIONAL CHILDHOOD VACCINE INJURY COMPENSATION ACT OF 1986 PROVIDES AN ADMINISTRATIVE REMEDY FOR CLAIMANTS AND PRECLUDES THOSE WITH CLAIMED DAMAGES EXCEEDING $1,000 FROM PURSUING

LITIGATION OUTSIDE THE STATUTORILY ESTABLISHED CLAIMS PROCESS.

THE COMPENSATION ACT WAS PASSED BECAUSE LITIGATION RISKS PREVENTED VACCINE MANUFACTURERS FROM OBTAINING INSURANCE COVERAGE AND, THUS, POTENTIALLY RENDERING THESE PREVENTIVE MEDICATIONS UNOBTAINABLE.

NEVERTHELESS, IN AN EFFORT TO CIRCUMVENT THAT STATUTE AND STILL RECEIVE CLASS COUNSEL FEES, SOME OF THESE PLAINTIFFS' ATTORNEYS ARE SEEKING TO REPRESENT NATIONAL CLASSES OF PERSONS WITH CLAIMED DAMAGES, EACH OF THEM UNDER $1,000.

THE OTHERWISE DE MINIMUS CLAIMS WHEN BROUGHT AS A CLASS ACTION COULD, ONCE AGAIN, THREATEN TO CRIPPLE THE INDUSTRY AND MAKE UNAVAILABLE THESE LIFE-SAVING PRODUCTS.

THE CIVIL RULES ADVISORY COMMITTEE'S PROPOSED PRECLUSION RULES PROVIDE AN EFFECTIVE MEANS OF ADDRESSING THE PROBLEM OF OVERLAPPING CLASS ACTIONS.

FOR EXAMPLE, PROPOSED RULE 23(C)(1)(D) PROVIDES THAT A COURT WHICH REFUSES TO CERTIFY OR DECERTIFY A CLASS FOR FAILURE TO SATISFY RULE 21 -- RULE 23(A)(1)(2) AND/OR 23(B)(1) OR (2) OR (3) MAY DIRECT THAT NO OTHER COURT MAY CERTIFY A SUBSTANTIALLY SIMILAR CLASS TO PURSUE SUBSTANTIALLY SIMILAR CLAIMS UNLESS A DIFFERENCE OF LAW OR CHANGE OF FACT CREATES A NEW CERTIFICATION ISSUE.

THE SAME COULD BE SAID WITH RESPECT TO 23(E)(5), WHICH SEEKS TO REDUCE SETTLEMENT OF FORUM SHOPPING BY PRECLUDING ANOTHER COURT FROM APPROVING A SETTLEMENT WHERE THE INITIAL COURT HAS REFUSED TO DO SO.

TO US, THE WISDOM OF THESE PROVISIONS IS CLEAR. EACH SIDE WILL HAVE ONE OPPORTUNITY TO MAKE ITS BEST CASE ON THE ISSUING OF CLASS CERTIFICATION OR CLASS SETTLEMENT. THE INFORMED WELL-REASONED DECISION OF THE COURT BEFORE WHICH THE ISSUE IS PRESENTED WILL HAVE THE FINAL WORD ON THE SUBJECT.

MULTIPLE COMPETING INCONSISTENT AND OVERLAPPING PROCEEDINGS WILL NOT BE COUNTENANCED TO ADDRESS AN ISSUE ALREADY DECIDED. THIS IMPORTANT CHANGE WILL PREVENT ABUSE OF FORUM SHOPPING, AS WELL AS PRESERVE JUDICIARY RESOURCES.

WE BELIEVE THAT THIS COMMITTEE HAS THE AUTHORITY TO ADOPT THE PROPOSED PRECLUSION RULES, BUT, IN ANY EVENT, WE DO BELIEVE IT IS THE RESPONSIBILITY OF THE COMMITTEE TO RECOMMEND TO CONGRESS THAT SUCH LEGISLATION BE ADOPTED.

WE BELIEVE THAT STRUCTURAL CHANGES TO RULE 23 REQUIRING OPT-IN FOR TRIAL OF INDIVIDUAL CASES AND OPT-OUT ON OPTIONS FOR SETTLEMENT ARE APPROPRIATE.

HOWEVER, WE BELIEVE A MORE ENLIGHTENED APPROACH TO RULE 23 WOULD BE TO ELIMINATE CLASS CERTIFICATION FOR

TRIAL PURPOSES FOR ANY PERSONAL INJURY CLAIM, WITH THE EXCEPTION OF THOSE CLAIMS ARISING OUT OF MASS DISASTERS.

I WOULD LIKE TO CONCLUDE MY COMMENTS BY BRIEFLY QUOTING CHIEF JUDGE POSNER FROM A 1995 CASE INVOLVING CERTIFICATION IN THE AIDS LITIGATION. HE STATED THAT JUDGE FRIEND, WHO WAS NOT GIVEN TO HYPERBOLE, CALLED SETTLEMENTS INDUCED BY A SMALL PROBABILITY OF AN IMMENSE JUDGMENT IN A CLASS ACTION BLACKMAIL SETTLEMENTS.

THANK YOU FOR YOUR TIME AND I APPRECIATE ANY QUESTIONS.

JUDGE ROSENTHAL: ONE QUESTION. ON YOUR LAST PROPOSAL THE ELIMINATION OF CLASS CERTIFICATION FOR TRIAL FOR ANY PERSONAL INJURY FOR A DISPERSE MASS TORT AS OPPOSED TO SINGLE INJURY MASS TORT, ARE YOU SUGGESTING THAT WE SHOULD, NONETHELESS, PERMIT CERTIFICATION FOR CLASSES FOR SETTLEMENT ONLY PURPOSES?

MISS RICHO: YES, YES. I MAKE A DISTINCTION BETWEEN FOR TRIAL VERSUS SETTLEMENT.

JUDGE ROSENTHAL: DOES THAT LOGIC LEAD YOU TO THINK WE SHOULD HAVE A SEPARATE MASS TORT SETTLEMENT CLASS RULE?

MISS RICHO: YES, IT DOES. THANK YOU.

CHAIRMAN LEVI: THANK YOU VERY MUCH. MISS LARKIN?

MISS LARKIN: I WANT TO THANK YOU, THE ADVISORY

COMMITTEE, FOR THIS OPPORTUNITY TO SPEAK TO THE PROPOSED CHANGES TO THE FEDERAL RULES.

MY NAME IS JOCELYN LARKIN AND I SERVE AS THE LITIGATION COUNSEL TO AN ORGANIZATION KNOWN AS THE IMPACT FUND. THE IMPACT FUND IS A UNIQUE LEGAL NON-PROFIT. WE PROVIDE STRATEGIC RESOURCES FOR LAWYERS SO THEY CAN BRING PUBLIC INTEREST CLASS ACTION CASES. WE PROVIDE GRANTS. WE ALSO PROVIDE TRAINING PROGRAMS AND CONSULTATION TO LAWYERS WHO WANT TO BRING PUBLIC INTEREST CLASS ACTION CASES.

THROUGH THE STATE BAR TRUST FUND WE ALSO SERVE AS A SUPPORT CENTER ON ISSUES OF COMPLEX LITIGATION FOR THE 120 LEGAL SERVICES ORGANIZATIONS IN CALIFORNIA.

THE IMPACT FUND ALSO HAS ITS OWN CASELOAD AND WE DO PRIMARILY CLASS-WIDE EMPLOYMENT DISCRIMINATION CASES.

WE SPEND A LOT OF TIME TALKING TO PRIVATE LAW FIRMS, AS WELL AS LEGAL SERVICES GROUPS, AROUND THE COUNTRY ABOUT THE PRACTICAL SIDE OF CIVIL RIGHTS CLASS ACTION PRACTICE, WHETHER FROM DEVELOPING A VIABLE LEGAL THEORY TO FINDING FINANCIAL RESOURCES AND CO-COUNSEL OR TO SIMPLY GETTING THROUGH THE YEARS OF APPEALS AND CLAIMS PROCEDURES.

BEFORE JOINING THE IMPACT FUND I WAS IN PRIVATE PRACTICE FOR ABOUT 15 YEARS DOING EXCLUSIVELY CIVIL RIGHTS

CLASS ACTIONS ON THE PLAINTIFFS' SIDE. I HAVE WORKED ON A VARIETY OF CIVIL RIGHTS CASES. I HAVE ALSO SERVED -- I CURRENTLY SERVE AS THE CO-CHAIR OF THE EMPLOYMENT SUBCOMMITTEE FOR THE A.B.A. LITIGATION SECTION'S CLASS ACTION AND DERIVATIVE SUITS COMMITTEE. AS A RESULT, I HAVE A LOT OF EXPERIENCE DEALING WITH THE ECONOMICS OF CIVIL RIGHTS PRACTICE.

THE ADVISORY COMMITTEE UNDERTOOK THIS WORK A DECADE AGO IN RESPONSE, IN PART, TO THE DRAMATIC INCREASE IN MASS TORT CASES AND SMALL CONSUMER CASES AND THE COMMITTEE HAS HAD TO GRAPPLE WITH SOME PRETTY DIFFICULT ISSUES.

WHILE MANY OF THE CHANGES PROPOSED BY THE COMMITTEE WERE PROMPTED BY THE EXIGENCIES OF THOSE CASES, OBVIOUSLY, THE CHANGES EFFECT ALL CLASS ACTIONS AND FOR THIS REASON I THINK IT'S IMPORTANT TO HIGHLIGHT THE IMPACT ON CIVIL RIGHTS CASES THAT I BELIEVE THE NEW RULES WILL BRING.

UNLIKE CLASS ACTIONS OF THE MASS TORT AREA THE NUMBER OF CIVIL RIGHTS CLASS ACTIONS HAS DECLINED OVER THE PAST THREE DECADES. THE ADMINISTRATIVE OFFICE OF THE COURTS HAS -- KEEPS STATISTICS. IN 1979 THERE WERE OVER A THOUSAND CIVIL RIGHTS CLASS ACTIONS FILED IN FEDERAL COURTS. BY 1989 THAT NUMBER DROPPED TO 172. IN 1999

THERE WERE MERELY 211 CIVIL RIGHTS CLASS ACTIONS CASES FILED.

THAT DECLINE HAS TAKEN PLACE DESPITE THE FACT THAT CONGRESS HAS PASSED MAJOR NEW CIVIL RIGHTS LAWS, THE AMERICANS WITH DISABILITIES ACT, AS WELL AS A MAJOR OVERHAUL OF TITLE VII IN 1991 WHICH ADDED COMPENSATORY PUNITIVE DAMAGES. SO DESPITE THE FACT THAT THERE ARE THESE NEW LAWS, THE NUMBER REMAINS FLAT.

THERE IS NO SINGLE REASON FOR WHY THAT HAS OCCURRED. THERE IS A NUMBER OF REASONS. ONE OF THEM IS FEDERAL RESTRICTIONS ON THE LEGAL SERVICES ORGANIZATIONS THAT RECEIVE LEGAL SERVICES CORPORATION MONEY. ANOTHER IS THE INCREASING EXPENSE OF STATISTICAL EXPERTS AND OTHER EXPERTS THAT ARE REQUIRED. THERE HAS BEEN SOME APPELLATE DECISIONS THAT HAVE MADE CLASS CERTIFICATION HARDER IN CIVIL RIGHTS CASES.

I THINK ANOTHER FACTOR HAS BEEN SORT OF WHAT I WOULD CALL PROGRESSIVE BRAIN DRAIN. THERE ARE FEWER CASES BEING BROUGHT. THERE ARE FEWER OPPORTUNITIES FOR ME TO TRAIN YOUNGER LAWYERS ON HOW TO BRING THESE KINDS OF COMPLEX CASES. SO WHAT WE SEE ARE FEWER AND FEWER CASES. YOU MAY BE THINKING TO YOURSELF, WELL, WAIT A MINUTE. YOU KNOW, WHAT ABOUT TEXACO? WHAT ABOUT COCA COLA? WHILE IT'S TRUE THAT THE AMENDMENTS TO THE CIVIL RIGHTS ACT IN

THE EARLY '90S ADDED COMPENSATORY AND PUNITIVE DAMAGES TO TITLE VII AND THAT THOSE HAVE ATTRACTED WELL-FUNDED PRIVATE COUNSEL, THAT'S ONLY THAT VERY, VERY -- VERY, VERY RARE CASES. THOSE ARE THE VERY LARGEST CASES AND THOSE CASES PROBABLY REPRESENT LESS THAN ONE PERCENT OF THE CIVIL RIGHTS CASES THAT ARE BROUGHT EVERY YEAR.

THE CASES THAT ARE INVOLVING THE SMALL AND MIDDLE SIZE COMPANIES AGAINST GOVERNMENT AGENCIES AND THE LIKE ARE MUCH MORE TYPICAL CIVIL RIGHTS CASES AND THEY REMAIN RELATIVELY FEW IN NUMBER.

ONE FURTHER POINT I WANT TO ADD ON THAT, THE ADDITION OF COMPENSATORY AND PUNITIVE DAMAGES TO TITLE VII. I THINK IN RECENT YEARS SOME APPELLATE COURTS HAVE ACTUALLY STARTED TO THINK OF CIVIL RIGHTS CASES AS SIMPLY ANOTHER KIND OF PERSONAL INJURY CASE; THE ANALYSIS BEING, WELL, IF YOU CAN GET COMPENSATORY DAMAGES, IT'S JUST LIKE A PERSONAL INJURY CASE. AND I WANT TO UNDERSCORE THAT THE CIVIL RIGHTS CASES REALLY ARE DIFFERENT THAN PERSONAL INJURY MASS TORT CASES.

THE PRIMARY PURPOSE OF A --

JUDGE SHEINDLIN: ONE QUICK QUESTION. YOU WROTE CASES INVOLVING SMALL TO MEDIUM SIZE COMPANIES REPRESENT A FAR MORE TYPICAL CASE. WE HAVE PLENTY OF THOSE. WE ARE FLOODED WITH THOSE. THEY ARE JUST NOT BROUGHT AS CLASS

ACTIONS.

ARE THERE REALLY ENOUGH PLAINTIFFS, SO TO SPEAK, TO WARRANT CLASS TREATMENT? ARE THEY GETTING GOOD TREATMENT IN THE COURTS BY INDIVIDUAL ACTIONS? I DON'T THINK OUR NUMBERS ARE DOWN AT ALL IN THIS AREA OTHER THAN IN THE CLASS DIVISION.

MISS LARKIN: WELL, FIRST LET ME CLARIFY. WHEN WE TALK ABOUT CIVIL RIGHTS CLASS ACTIONS, I'M NOT JUST TALKING ABOUT EMPLOYMENT CASES.

JUDGE SCHEINDLIN: I THOUGHT YOU WERE THERE BECAUSE YOU PUT IT RIGHT AGAINST TEXACO AND COCA-COLA AND YOU SAID TITLE VII, THESE CASES ONE OR TWO PER YEAR.

SO YOU PERCEIVE THEM BEING IN THE EMPLOYMENT AGREEMENT?

MISS LARKIN: THERE ARE MANY CASES THAT I AM INVOLVED IN WHERE WE HAVE A CLASS OF TYPICALLY, YOU KNOW, BETWEEN 100 AND 800 EMPLOYEES. THOSE CASES, I THINK, BENEFIT WELL FROM CLASS ACTIONS, PARTICULARLY IF YOU ARE TALKING ABOUT PROMOTION CASES.

JUDGE SCHEINDLIN: I AGREE. YOU MENTIONED SMALL TO MEDIUM SIZE COMPANIES. I JUST DIDN'T KNOW WHETHER YOU THOUGHT THEY LENT THEMSELF TO CLASS ACTION TREATMENT.

MISS LARKIN: I THINK THEY DO PARTICULARLY WHEN YOU ARE TALKING ABOUT PROMOTION CASES, PROMOTION AND

HIRING CASES.

JUDGE SHEINDLIN: THANK YOU.

MISS LARKIN: OKAY. CIVIL RIGHTS CASES ARE UNIQUE IN THAT THE REALLY PRIMARY FOCUS OF IT IS INJUNCTIVE RELIEF. THE PURPOSE IS TO ELIMINATE WHATEVER THE POLICY OR THE PRACTICE IS THAT HAS RESULTED IN THE ILLEGAL CONDUCT OR DISPARATE TREATMENT OF PROTECTED GROUPS. THE DAMAGE REMEDIES ARE STILL REALLY IMPORTANT, BOTH TO COMPENSATE VICTIMS AND DETER DISCRIMINATORY CONDUCT, BUT THEY COME AS PART OF THE OVERALL PACKAGE, THE FOCUS OF WHICH IS INJUNCTIVE RELIEF.

I THINK A SECOND REALLY IMPORTANT DISTINCTION ABOUT CIVIL RIGHTS CASES IS THAT THE CLASS ACTION DEVICE IS EXTREMELY IMPORTANT BECAUSE OF THE RELATIVE ANONYMITY THAT COLLECTIVE ACTION PROVIDES.

IN MANY, MANY TITLE VII CASES, THE CASES WOULD NOT BE BROUGHT BECAUSE THE WORKERS ARE SIMPLY RELUCTANT TO TAKE ON THEIR EMPLOYER IN ANY EGREGIOUS CASE BECAUSE THEY FEAR PUTTING THEIR WEEKLY PAYCHECK ON THE LINE. I DON'T BLAME THEM. THAT'S WHY CLASS ACTIONS HAVE BEEN SO IMPORTANT TO THE ENFORCEMENT OF THE CIVIL RIGHTS LAWS.

I DON'T THINK THAT THAT RISK RETALIATION EXISTS IN THE MASS TORT OR SECURITIES AREA. MY POINT BEING SIMPLY THAT I WANT THE COMMITTEE TO KEEP IN MIND SORT OF

THE UNIQUE CHARACTER OF CIVIL RIGHTS CASES.

TURNING TO THE CHANGES. WE WELCOME MANY OF THE CHANGES OF THE COMMITTEE. WE VIEW THEM VERY POSITIVELY AND I SPEAK PARTICULARLY OF THE CLAIM LANGUAGE NOTICES, STANDARDS FOR ADEQUACY OF REPRESENTATION, SETTLEMENT REVIEW AND THE OPTION FOR SECOND NOTICES AND OPT-OUT. THESE ARE ALREADY PART OF OUR PRACTICE FOR THE MOST PART. WE UNDERSTAND THEM AND THEY ARE WELCOME.

THAT BRINGS ME TO THE TWO ISSUES THAT I HAVE THE GREATEST CONCERN ABOUT, SOME OF WHICH YOU HAVE ALREADY HEARD ABOUT FROM MR. STURDEVANT AND MR. FINBERG, THE MANDATORY NOTICES OF RULE 23(B)(2). VERY SIMPLY, THIS PROVISION WILL DETER THE FILING OF MANY WORTHY CIVIL RIGHTS CLASS ACTIONS.

BASED ON MY DAILY EXPERIENCE TALKING TO CIVIL RIGHTS LAWYERS ACROSS THE COUNTRY, ADEQUATE RESOURCES IS THE NUMBER ONE PROBLEM FACED BY CIVIL RIGHTS PRACTITIONERS, PARTICULARLY IN THE LEGAL SERVICES AND NON-PROFIT SECTOR. THEIR CLIENTS ARE NOT FINANCIALLY ABLE TO ADVANCE THE COSTS FOR THEIR CASES.

THE IMPACT FUND, WHICH IS UNIQUE, PROVIDES GRANTS THAT AVERAGE ABOUT $10,000. THERE IS TYPICALLY NO OTHER KINDS OF FOUNDATION FUND THAT'S AVAILABLE TO PAY FOR LITIGATION COSTS.

SO I'M TALKING HERE ABOUT, YOU KNOW, SMALL CASES INVOLVING PUBLIC BENEFITS, ENVIRONMENTAL JUSTICE CASES, CRIMINAL JUSTICE CASES, VOTING RIGHTS CASES AND SMALLER EMPLOYERS THAT I REFERRED TO.

WE ROUTINELY REVIEW LITIGATION BUDGETS FOR THESE CASES AND THESE APPLICANTS ARE TYPICALLY STRUGGLING TO PULL TOGETHER $100,000 TO PAY FOR DEPOSITION COSTS AND EXPERTS. ADDING A BIG TICKET COST LIKE NOTICES IS SIMPLY GOING TO MEAN THEY DON'T BRING THOSE CASES.

JUDGE ROSENTHAL: IF THE RULE LANGUAGE WAS MODIFIED OR THE NOTE LANGUAGE WAS MODIFIED TO ENCOURAGE COURTS TO CONSIDER THE COST FACTOR AND THE BURDEN THAT THAT WOULD IMPOSE IN THE APPROPRIATE CASE, WOULD THAT TAKE SOME OF THE EDGE OFF OF YOUR CRITICISM?

AND, IN PARTICULAR, IN LOOKING THROUGH YOUR WRITTEN STATEMENT SOME OF THE EXAMPLES THAT YOU PROVIDE WOULD SEEM -- QUITE EASILY WOULD SEEM TO BE VERY EASILY SATISFIED BY VERY CHEAP NOTICE.

FOR EXAMPLE, IF YOU HAVE A SMALL EMPLOYER, POST THAT NOTICES. IF YOU HAVE A GROUP OF INDIVIDUALS WHO ARE HOMELESS, POST THE NOTICES AT VARIOUS PLACES OR PROVIDE SOME MECHANISM THAT WON'T BE VERY EXPENSIVE BECAUSE YOU ARE NOT REQUIRING INDIVIDUALIZED NOTICES.

MISS LARKIN: IN CIRCUMSTANCES WHERE YOU HAVE

PEOPLE CENTRALIZED IN A PLACE, LIKE AN EMPLOYER, YOU MAY BE ABLE TO PUBLISH THAT WITH A SIMPLE POSTING OF NOTICE AND THAT WOULD BE FINE.

THE CASES THAT WORRY ME THE MOST ARE THE CASES WHERE -- AND WE SEE THESE QUITE FREQUENTLY, WHERE PEOPLE HAVE GONE TO APPLY FOR A JOB AT A PARTICULAR EMPLOYER AND THEY ARE TURNED AWAY AT THE GATE AND TOLD THAT WE ARE NOT ACCEPTING APPLICATIONS. THE ONLY WAY YOU CAN REALLY FIND THOSE PEOPLE IN THE END IS TO DO FAIRLY EXTENSIVE KIND OF NOTICE.

ANOTHER EXAMPLE, A RECENT CASE THAT I WAS FAMILIAR WITH WAS A LOCAL PUBLIC AGENCY HAD STOPPED TAKING APPLICATIONS FROM DISABLED PEOPLE FOR PARTICULAR PUBLIC HOUSING. THEY DID NOT HAVE RECORDS OF THOSE PEOPLE. IF YOU WERE GOING TO TRY TO DO ANY KIND OF NOTICE TO THOSE GROUPS, IT WOULD HAVE TO BE, I THINK, A FAIRLY BROAD KIND OF NOTICE.

JUDGE SHEINDLIN: LET'S JUST ADD FOR THE RECORD, AND I HAD ONE, RELATING TO ALL BLACKS AND HISPANICS IN THE CITY OF NEW YORK WHO WERE ALLEGEDLY STOPPED BASED ON RACIAL PROFILING. I MEAN, HOW DID YOU DEFINE ALL BLACKS AND HISPANICS IN THE CITY OF NEW YORK?

MISS LARKIN: THAT'S ANOTHER EXAMPLE. SO THAT'S A CONCERN TO ME.

THERE IS ALSO -- THIS MORNING ON THE TRAIN I READ THE CARLISLE CASE AGAIN AND THERE IS LANGUAGE IN THERE THAT WORRIES ME BECAUSE IT SAYS NOTHING IN RULE 23 -- THERE IS NOTHING IN RULE 23 TO SUGGEST THAT NOTICE REQUIREMENTS MAY BE TAILORED TO FIT THE POCKETBOOKS OF PARTICULAR PLAINTIFFS.

I DON'T KNOW WHETHER YOU CAN HANDLE THIS SUFFICIENTLY IN THE NOTICES TO THE RULES, BUT I THINK IT'S ABSOLUTELY CRITICAL THAT YOU DO DO THAT.

I AM ALSO -- I AM ALSO CONCERNED ABOUT HOW MUCH BENEFIT YOU ACTUALLY GET FROM THIS NOTICE. I MEAN, NOTICE SOUNDS GOOD, BUT WHAT'S THE PRACTICAL REALITY?

OBVIOUSLY, THEY DON'T HAVE THE RIGHT TO OPT-OUT, AND THE COMMITTEE ENVISIONS THE CLASS REPRESENTATIVES BEING ABLE TO MONITOR THE CONTINUING PERFORMANCE OF CLASS REPRESENTATIVES AND CLASS COUNSEL AND I MUST RESPECTFULLY SUGGEST THAT THAT'S JUST NOT A REALITY.

CLASS MEMBERS IN CIVIL RIGHTS CASES DON'T HAVE THE INTEREST, THE TIME, THE RESOURCES OR THE CAPACITY TO MONITOR THE PROGRESS OF A CLASS ACTION OR HIRE THEIR OWN ATTORNEYS TO DO IT. AND THAT'S NOT TO SUGGEST FOR A MOMENT THAT CLASS COUNSEL SHOULD NOT BE CLOSELY MONITORED IN THESE CASES.

AS MR. STURDEVANT NOTED, WE DO HAVE THE ADEQUACY

OF REPRESENTATION ALREADY BUILT IN AND THE COMMITTEE IS PROPOSING RULES THAT WILL STRENGTHEN THAT AND I THINK THAT JUDICIAL SCRUTINY IS ABSOLUTELY CRITICAL.

I THINK, THOUGH, YOU SHOULD ALSO NOT IGNORE THE FACT THAT CLASS THE REPRESENTATIVES OFTEN DO A HAVE AN INTEREST IN MONITORING THEIR CLASS COUNSEL.

I WILL GIVE YOU ONE EXAMPLE. RECENTLY A GROUP OF CLASS REPRESENTATIVES IN A GENDER DISCRIMINATION CLASS ACTION CAME TO THE IMPACT FUND BECAUSE THEIR LAWYERS NEGOTIATED A SETTLEMENT THAT THEY THOUGHT WAS WRONG. WE TOOK A LOOK AND AGREED. WE WERE ABLE TO SUBSTITUTE IN AS CLASS COUNSEL AS A RESULT. THEY, BECAUSE THEY WERE CLASS REPRESENTATIVES, HAD A VERY STRONG INTEREST IN WHAT WAS GOING ON IN THE LITIGATION AND LET US KNOW WHEN THE LAWYERS WEREN'T DOING A GOOD JOB.

SO THAT'S ANOTHER ASPECT THAT'S ALREADY BUILT INTO THE SYSTEM THAT PROVIDES SOME PROTECTION, I THINK, AND PROTECTION, I THINK, MAY BE MORE EFFECTIVE THAN THE NOTICE THAT THE NEW RULE PROPOSES.

SO I GUESS MY BOTTOM LINE IS, DON'T CHANGE THE RULE BECAUSE CHANGING THE RULE WILL EFFECTIVELY CLOSE THE DOOR OR MAY EFFECTIVELY CLOSE THE COURTHOUSE DOORS TO THE LEAST POWERFUL MEMBERS OF OUR SOCIETY.

LET ME TURN QUICKLY NOW TO THE APPOINTMENT

PROCEDURE FOR CLASS COUNSEL. I THINK MR. STURDEVANT HAS COVERED SOME OF THE POINTS THAT WERE CERTAINLY OF CONCERN TO ME.

GOING BACK TO WHAT'S HAPPENED IN THE CIVIL RIGHTS AREA, WE TYPICALLY DO NOT HAVE MULTIPLE CASES FILED AND I AM ONLY AWARE OF ONLY ONE OR TWO CASES EVER WHERE THERE HAS BEEN MULTIPLE LAWYERS INVOLVED IN OR COMPETING IN. SO IT'S NOT BEEN A PROBLEM FOR US AT ALL.

FROM OUR STANDPOINT THE CURRENT SYSTEM WORKS FINE, WHEREBY CLASS COUNSEL ARE EVALUATED AND CONFIRMED AS PART OF THE CLASS CERTIFICATION PROCESS.

THE PROPOSED RULE CREATES AN APPLICATION PROCESS AND I THINK, JUDGE ROSENTHAL, MAY INVITE COMPETITION IN SOME SENSE. I THINK I SEE SORT OF POSSIBLE SCENARIOS COMING IN THE CONTEXT OF THE CIVIL RIGHTS AREA.

THE FIRST IS THAT BY VIRTUE OF THE NEW RULE WE WILL HAVE COMPETITION FOR THE FIRST TIME; THAT THIS WILL BE THE NEW REALITY.

THE WAY I READ THE RULES, AND I'M NOT SURE THAT THIS IS WHAT YOU INTENDED, A LAWYER -- I SEE THAT A LAWYER DOESN'T HAVE TO FILE HIS OWN CASE OR EVEN HAVE HIS OWN CLIENT IN ORDER TO FILE AN APPLICATION TO REPRESENT AS CLASS COUNSEL. I'M NOT SURE THAT THAT'S WHAT YOU INTEND, BUT I THINK THAT'S TROUBLESOME TO ME BECAUSE IT CREATES AN

OPPORTUNITY FOR SOMEONE TO SHOW UP AND TAKE ADVANTAGE OF WHAT MR. FINBERG DESCRIBED AS THE YEARS -- OR THE MONTHS AND MONTHS OF PREPARATION AND INVESTIGATION WE DO. I THINK MR. STURDEVANT ALSO FOCUSED ON SOME OF THE CONCERNS ABOUT THE WAITING AND ECONOMIC FACTORS.

THE CIVIL RIGHTS AREA I THINK IS VERY IMPORTANT THAT THERE BE RELATIONSHIPS OF TRUST BETWEEN THE LAWYERS AND THOSE CLIENTS. THOSE ARE CASES THAT ARE NOT GOING TO BE BROUGHT BECAUSE THOSE CLIENTS ARE NOT FAMILIAR WITH THE LEGAL SYSTEM UNLESS THEY REALLY, REALLY TRUST THEIR LAWYERS.

IT'S ALSO VERY IMPORTANT FROM A LAWYER'S PERSPECTIVE THAT THEY HAVE RELATIONSHIPS WITH THE COMMUNITIES THAT ARE EFFECTED BY THESE ISSUES SO THEY CAN DRAFT INJUNCTIVE REVIEW THAT WORKS, THAT MAKES SENSE AND SO THAT RELATIONSHIP BETWEEN LAWYERS AND CLIENTS, I THINK, MAY NOT BE FULLY RECOGNIZED IN THE FACTORS THAT YOU ASK THE DISTRICT COURT JUDGE TO LOOK AT.

I AM ALSO CONCERNED ABOUT SORT OF THE COMPETITION BETWEEN A LEGAL SERVICES ORGANIZATION AND A WELL-FUNDED PRIVATE FIRM. I DON'T KNOW WHETHER THAT COMPETITION IS GOING TO BE OCCURRING, BUT CERTAINLY A LEGAL SERVICES ORGANIZATION WILL NEVER BE ABLE TO MATCH THE RESOURCES THAT THE BIG FIRMS HAVE, EVEN THOUGH THEY

MAY HAVE A MUCH GREATER KNOWLEDGE AND COMMITMENT TO THE PARTICULAR ISSUE.

THE BOTTOM LINE ON ALL THAT IS THAT I THINK THAT IT'S ANOTHER WAY IN WHICH RISKS ARE HEIGHTENED IN CIVIL RIGHTS CASES AND MAY ALSO BE A DETERRENT OR DISINCENTIVE FOR THOSE CASES TO BE BROUGHT AS CLASS ACTIONS.

THE OTHER POSSIBLE SCENARIO OF THE RULE IS THAT I'M WRONG AND NO ONE -- NOBODY WANTS THE CASES. WHAT THEN HAPPENS UNDER THE OLD RULES?

WELL, UNDER THE CURRENT PRACTICE, THE LAWYERS DURING THE PRECERTIFICATION PERIOD EFFECTIVELY ACT AS CLASS COUNSEL. I UNDERTAKE CLASSWIDE DISCOVERY. I DEFEND MOTIONS ON BEHALF OF THE CLASS. I COMMUNICATE WITH CLASS MEMBERS. I INVESTIGATE THE CASE AND I DO THAT UNDER THE PROTECTION OF THE ATTORNEY/CLIENT PRIVILEGE.

AS PART OF THE CLASS CERTIFICATION MOTION, THE DISTRICT COURT REVIEWS MY FITNESS TO SERVE AS CLASS COUNTRY RELYING IN PART ON HOW WELL I HAVE DONE SO FAR IN THE EARLY SETTLEMENT. YOU DO THAT AS PART OF THE CLASS CERTIFICATION AS REQUIRED BY AMCHEM.

UNDER THE NEW RULE AND THE COMMITTEE'S NOTES, CLASS COUNSEL NO LONGER MAY ACT ON BEHALF OF THE CLASS WITHOUT AN ORDER OF THE COURT. AND I QUOTE THE NOTES, "UNTIL APPOINTMENT AS CLASS COUNSEL, AN ATTORNEY DOES NOT

REPRESENT THE CLASS IN A WAY THAT MAKES THE ATTORNEYS' ACTIONS LEGALLY BINDING ON THE CLASS."

THAT STATEMENT, I THINK, HAS ENORMOUS IMPLICATIONS AND I THINK CONCERNS -- IT IS A CHANGE --

JUDGE SCHEINDLIN: DO YOU THINK THE WAY IT'S WRITTEN MEANS YOU COULDN'T BE APPOINTED UNTIL CERTIFICATION? IN OTHER WORDS, THERE COULDN'T BE AN EARLIER ORDER THAT SAYS YOU ARE COUNSEL TO THE PUTATIVE CLASS AND YOU MAY ACT ON BEHALF OF THE PUTATIVE CLASS AND, THEREFORE, YOUR PRIVILEGES ARE PROTECTED? COULDN'T THAT BE HANDLED THAT WAY?

MS. LARKIN: I CERTAINLY -- THE WAY -- I AM SO CONCERNED ABOUT THAT, THERE IS NO QUESTION. I'M GOING TO FILE THE APPLICATION WITH MY COMPLAINT.

JUDGE SCHEINDLIN: AND THE COURT COULD APPOINT YOU PRIOR TO CERTIFICATION?

MISS LARKIN: ABSOLUTELY. ABSOLUTELY. BUT I STILL THINK THAT THAT DOESN'T ENTIRELY TAKE CARE OF THE PROBLEM AND IF YOU LET ME, I WILL JUST EXPLAIN THAT.

AS IT IS NOW, I GET STARTED WITH DISCOVERY AND I TAKE THE POSITION THAT THIS IS A CLASS ACTION, YOU HAVE GOT TO GIVE ME DISCOVERY FOR PURPOSES OF CLASS CERTIFICATION. I FORESEE THE DEFENDANTS TELLING ME THAT I DON'T HAVE A CLASS ACTION AND I REPRESENT THREE CLIENTS

AND THAT IN MY EMPLOYMENT DISCRIMINATION CASE I CAN HAVE THEIR THREE PERSONNEL FILES AND FORGET ABOUT STATISTICS, FORGET ABOUT THE RELATION. THAT'S THE POSITION I THINK DEFENDANTS MAY WELL TAKE.

I'M ALSO CONCERNED ABOUT THE COMMUNICATIONS THAT I WILL HAVE WITH THE CLASS MEMBERS AND WHETHER I ACTUALLY HAVE A PRIVILEGE TO COMMUNICATE WITH THEM INDIVIDUALLY IN TERMS OF INVESTIGATING MY CASE. I AM ALSO CONCERNED ABOUT ONE OTHER CIRCUMSTANCE, WHICH IS PARTICULARLY A PROBLEM IN EMPLOYMENT DISCRIMINATION, WHICH IS DEFENDANTS GO OUT AND SORT OF TRY TO COMMUNICATE WITH THE CLASS. THAT CAN BE A TACTIC WHICH IS VERY ABUSIVE IN AN EMPLOYMENT CONTEXT WHERE PEOPLE ARE VERY MUCH AT THE MERCY OF THEIR EMPLOYER.

NOW, AS IT IS, I RUSH IN AND GET A T.R.O., BUT IF THOSE COMMUNICATIONS AREN'T DIRECTED AT MY THREE CLIENTS, IS THE COURT GOING TO GIVE ME -- I HAVE NO STANDING TO TRY TO STOP THE DEFENDANT FROM COMMUNICATING WITH THE CLASS BEFORE I HAVE BEEN APPOINTED TO SERVE AS CLASS COUNSEL. I THINK AT THE VERY LEAST IS THROWN INTO JEOPARDY.

SO LET'S ASSUME THAT I DO FILE MY APPLICATION RIGHT AT THE OUTSET. MY WORRY IS THAT THE WAY THE FEDERAL RULES WORK NOW, YOU TYPICALLY DON'T SEE THE COURT FOR 90 TO 120 DAYS UNTIL THE SCHEDULING CONFERENCE. AT THAT

POINT THE PARTIES ARE SUPPOSED TO HAVE DONE A LOT OF WORK IN TERMS OF INITIAL DISCLOSURE AND THE LIKE.

WE GET TO THE SCHEDULING CONFERENCE. THE COURT THEN UNDER THE RULE HAS TO PROVIDE NOTICE SO THAT OTHER PEOPLE CAN COME IN AND POTENTIALLY FILE THEIR APPLICATIONS AS CLASS COUNSEL. THAT, I THINK, ADDS ANOTHER 30 TO 60 DAYS. SO --

JUDGE ROSENTHAL: IT SAYS MAY, NOT MUST.

MISS LARKIN: OKAY, MAY. I GUESS MY CONCERN IS THAT EVEN IN THE BEST CASE THE APPOINTMENT PROCESS WILL BUILD IN A THREE TO SIX-MONTH DELAY WHERE I CAN BE DOING CLASS CERTIFICATION DISCOVERY, BUT INSTEAD I'M WAITING ESSENTIALLY TO BE APPOINTED AS CLASS COUNSEL EITHER THROUGH THE PROCESS OR WHATEVER MEANS THE COURT DECIDES.

SO THOSE ARE MY THOUGHTS. THANK YOU VERY MUCH.

CHAIRMAN LEVI: THANK YOU. MR. CORTESE?

MR. CORTESE: THANK YOU VERY MUCH, YOUR HONOR, AND MEMBERS OF THE COMMITTEE. IT'S A PLEASURE TO APPEAR HERE AND I APPRECIATE THE OPPORTUNITY TO DO SO. I WILL TRY TO ZIP THROUGH THESE COMMENTS. PERHAPS I MIGHT EVEN READ SOME JUST TO SAVE TIME AND PREVENT MYSELF FROM BEING DRAWN OFF THE POINT.

I WOULD LIKE TO ASK YOU TO SUBMIT WRITTEN COMMENTS FOLLOWING THE HEARING, CERTAINLY PRIOR TO THE

FEBRUARY DATE, AND I SUPPOSE THAT IT'S IMPORTANT TO NOTE THAT THIS COMMITTEE HAS BEEN AT THIS FOR A LONG, LONG TIME. THE RULES COMMITTEE HAS BEEN CONSIDERING CLASS ACTION ISSUES IN THE 70'S AND 80'S AND IN MY EXPERIENCE, I GUESS, THE FIRST EXPERIENCE I HAD WITH THIS IS WHEN SAM POINTER WAS CHAIRMAN IN THE LATE 80'S AND EARLY '90S. THE PROBLEM CONTINUES TO DEEPEN AND WORSEN.

IT'S STILL, IN MY OPINION, DIFFICULT TO TRY A CLASS ACTION WITHOUT VIOLATING FUNDAMENTAL RIGHTS OF FAIRNESS AND DUE PROCESS AND, YET, WE PRETEND THAT THE CIVIL JUSTICE SYSTEM EXISTS TO FAIRLY RESOLVE INDIVIDUAL DISPUTES BETWEEN PARTIES WHEN, IN FACT, WHAT HAS HAPPENED IN THE CLASS ACTION AREA IS THAT WE HAVE A BURDENSOME, EXPENSIVE, INEFFECTIVE METHOD OF TRANSFERRING WEALTH FROM ONE SEGMENT OF THE ECONOMY, THE WEALTH CREATORS, THE TARGET DEFENDANTS THAT I GENERALLY REPRESENT, TO ANOTHER SEGMENT OF THE ECONOMY AND VERY LITTLE OF THAT WEALTH ENDS UP WITH THE ALLEGED VICTIMS. THAT'S A VERY SERIOUS PROBLEM AND IT'S A MUCH DEEPER AND MUCH MORE SERIOUS PROBLEM THAN IS EVEN ADDRESSED, AS MANY OF THE COMMITTEE MEMBERS KNOW, IN THE PROPOSED AMENDMENTS.

I THINK THAT WE HAVE HEARD THIS MANY TIMES BEFORE, PARTICULARLY AT THE CHICAGO CONFERENCE, THAT CLASS ACTION PROBLEMS HAVE BECOME WORSE, PARTICULARLY WITH

REGARD TO THIS MATTER OF OVERLAPPING, DUPLICATIVE CLASS ACTIONS AND THE QUESTION IS, THEN, WHAT DOES THE COMMITTEE ABOUT IT, SINCE THESE PROBLEMS ARE MAGNIFYING SINCE YOU BEGAN TO STUDY THIS AND THERE IS AN ENORMOUS AMOUNT OF INFORMATION WHICH YOU HAVE DEVELOPED AND MADE SOME VERY SIGNIFICANT PROPOSALS TO DEAL WITH THESE PROBLEMS.

I WAS TAKEN BY THE FACT THAT JOHN FRANK, NOTWITHSTANDING HIS CURRENT CONDITION, SAW FIT TO SEND THE COMMITTEE A STATEMENT AND BASICALLY HIS RECOMMENDATIONS WHICH AS, PERHAPS, I THINK THE SOLE SURVIVING MEMBER OF THE 1966 COMMITTEE SHOULD CARRY CERTAIN WEIGHT.

PERHAPS HIS RECOMMENDED SURGERY IS AT THIS LATE DATE TOO BOLD, BUT I THINK IT DOES REFLECT VERY IMPORTANTLY THE FEELING FROM BOTH ENDS OF THE POLITICAL, ECONOMIC AND PHILOSOPHICAL SPECTRUM A REAL CONCERN THAT WE NEED TO DO SOMETHING ABOUT CLASS ACTIONS IN ONE WAY OR ANOTHER.

WITH REGARD TO THE PENDING AMENDMENTS, I WILL HAVE SOME MORE COMMENTS. THEY ARE A START, I THINK, AND A MODEST IMPROVEMENT IN THE PRACTICE OF THE CLASS ACTION RULE. YOU HAVE ALREADY HEARD SOME SUGGESTIONS FOR IMPROVEMENT AND, NO DOUBT, THERE WILL BE MORE. I WOULD URGE YOU NOT TO STOP THERE.

MORE COMPELLINGLY, I THINK, IS, FIRST, FOR THIS

COMMITTEE TO ADDRESS THE JURISDICTIONAL ISSUES IMPLICATED BY THE PRECLUSION RULES WHICH ARE REFERRED TO IN THE REPORTER'S CALL AND THAT WERE ORIGINALLY APPROVED BY THIS COMMITTEE. WITH RESPECT TO THAT, AGAIN, I WILL HAVE SOME COMMENT, BUT AT THIS POINT I WOULD SUGGEST THAT THE COMMITTEE, AS TO THOSE PRECLUSION RULES, DOES HAVE THE POWER UNDER THE ENABLING ACT TO AMEND THE RULES THAT PROTECT FEDERAL JUDGE'S ARTICLE III POWERS AND JURISDICTION.

I THINK THAT IS THE ESSENCE OF FEDERALISM. IT'S NOT INCONSISTENT WITH FEDERALISM BECAUSE AS ANOTHER JUDGE HAS MENTIONED, THE FEDERAL COURTS WERE CREATED TO PROVIDE PROTECTION TO OUT-OF-STATE RESIDENTS AND TO PROVIDE PROTECTION AGAINST THE EXTENSION OF STATE LAW TO OTHER STATES TO THE DETRIMENT OF OTHER STATE RESIDENTS, AND I THINK THAT'S EXACTLY WHY THERE OUGHT TO BE AND THERE IS POWER TO, TO PROTECT THE FEDERAL JURISDICTION AND FEDERAL COURT ARTICLE III POWERS.

PERHAPS, THOUGH, THAT IN LIGHT OF SOME OF THE PRACTICAL CONSIDERATIONS THESE ARE VERY CONTROVERSIAL ISSUES. THEY INVOLVE EXCEEDINGLY IMPORTANT POLICY CHOICES AND THEY HAVE SUBSTANTIAL IMPACT ON SUBSTANTIVE RIGHTS, AND THAT'S ONE OF THE REAL CONCERNS WITH CLASS ACTIONS. BECAUSE, AS YOU WELL KNOW, THIS IS A PROCEDURE THAT HAS

SIGNIFICANT IMPACT ON SUBSTANTIVE RIGHTS.

PERHAPS IN LIGHT OF THOSE CONSIDERATIONS, THAT OUGHT TO BE LEFT TO CONGRESS. THAT'S A JUDGMENT YOU WOULD MAKE. I WOULD URGE THAT IF YOU MAKE THAT JUDGMENT, THAT IT CARRIES WITH IT AN OBLIGATION; AND THAT IS, A RESPONSIBILITY TO PARTICIPATE IN THE PROCESS IN WHATEVER WAY YOU CAN WITHIN, OBVIOUSLY, THE CONFINES OF SEPARATION OF POWERS TO ENSURE, FRANKLY, THAT CONGRESS GETS IT RIGHT.

AS A VERY WISE JUDGE, THE MOST RECENT PAST CHAIRMAN PAUL NEIMEYER, HAS OBSERVED IN HIS LETTER TO THE CHIEF JUSTICE TRANSMITTING THE REPORT OF THE MASS TORTS LITIGATION GROUP IN 1999 -- I'M QUOTING JUDGE NEIMEYER -- "IF WE ARE TO READ THE SERIOUS PROBLEMS OF MASS TORTS THROUGH THE EMPLOYMENT OF THE TRADITIONAL TOOLS OF JUDICIAL RESOLUTION, THE BEST CHANCE OF SUCCESS LIES IN AN APPROACH TAKEN UNDER THE LEAD OF THE THIRD BRANCH WITH A SENSITIVE INTERACTION WITH CONGRESS."

I SUBMIT THAT THIS COMMITTEE IF IT CHOOSES NOT TO EXERCISE ITS RULE-MAKING POWER TO CORRECT THE ABUSES IT HAS SEEN, SHOULD AT LEAST DEVELOP A PACKAGE OF LEGISLATIVE RECOMMENDATIONS AND RULE PROPOSALS THAT WILL DEAL EFFECTIVELY WITH THOSE PROBLEMS.

AND THAT BRINGS ME, REALLY, TO THE SECOND ASPECT OF THE JURISDICTIONAL TYPES OF REFORM THAT I THINK THIS

COMMITTEE SHOULD SUPPORT AND, PERHAPS, RECOMMEND AND THAT IS THE MINIMAL DIVERSITY LEGISLATION THAT HAS BEEN PENDING IN CONGRESS AND HAS BEEN REFERRED TO BY OTHER SPEAKERS HERE TODAY. THAT SHOULD RIGHTLY BE A VERY HIGH PRIORITY FOR THIS COMMITTEE; THAT IS, TAKING A POSITION WITH RESPECT TO THAT KIND OF LEGISLATION.

OBVIOUSLY, THAT IS IMPORTANT BECAUSE AT PRESENT THE JUDICIAL CONFERENCE IS ON RECORD OPPOSED TO THAT LEGISLATION AND THERE REALLY OUGHT TO BE A WAY TO RESOLVE THAT QUESTION AND BECAUSE THE LEGISLATION IS OPPOSED BY THE CONFERENCE AS PRESENTLY DRAFTED, AND IT MAY BE POSSIBLE TO WORK THAT OUT SO THAT NATIONWIDE CLASS ACTIONS ARE TRIED OR HANDLED IN NATIONWIDE COURTS, FEDERAL COURTS.

THE SECOND POINT IS A SET OF PRECLUSION RULES THAT WOULD BE APPLICABLE AND FIT WITHIN THE SCHEME WHERE MOST NATIONWIDE OR REGIONAL CLASS ACTIONS WOULD BE REMOVABLE TO FEDERAL COURT. SO THAT I SEE A USEFUL PURPOSE TO BE SERVED IN A RECOMMENDATION THAT WOULD DEAL WITH THE ISSUES OF MINIMAL DIVERSITY AND THAT WOULD FIT WITHIN THAT SCHEME PRECLUSION RULES THAT WOULD BE APPLICABLE TO THOSE -- TO THOSE CASES, BECAUSE YOU ARE GOING TO GET A CERTAIN NUMBER OF COMPETING STATE CLASS ACTIONS EVEN IF THEY ARE LIMITED TO WITHIN THE STATE'S BOUNDARIES.

I THINK THAT IT WOULD BE NECESSARY TO DEAL WITH THE OVERLAPPING SITUATION FOR THESE THREE REASONS: TO AVOID OR MINIMIZE THE WASTE AND INEFFICIENCY OF DUPLICATIVE LITIGATION; TO PREVENT THE USE OF SUCH LITIGATION FOR INTERIM STRATEGIC EFFECTS, THE NEED TO WIN 50 SEPARATE CLASS ACTION HEARINGS UNTIL YOU REALLY HAVE RES JUDICATA AND THAT'S JUST NOT FAIR; AND TO MINIMIZE THE FORUM SHOPPING AND WHAT WE HAVE NOW IS BASICALLY NATIONWIDE VENUE FOR CASES LIKE THIS.

AND SEQUENTIAL FORUM SHOPPING, I THINK, IS MUCH MORE INVIDIOUS IN A CLASS ACTION THAN WOULD BE INVOLVED IN INDIVIDUAL DIVERSITY ACTION, AND WE KNOW THAT THERE ARE RULES AGAINST THAT ON THE BOOKS. I THINK THAT THE COMBINATION OF CAREFULLY CRAFTED MINIMAL DIVERSITY LEGISLATION AND PRECLUSION RULES WOULD GO A LONG WAY TOWARD REDUCING THE BURDENS AND INEFFICIENCIES AND ABUSES IN THE CURRENT CLASS ACTION LITIGATION.

HOWEVER, I DO THINK THAT MANY OF THE PROBLEMS THAT WE HAVE HEARD ABOUT TODAY AND HAVE HEARD ABOUT FOR YEARS WOULD REMAIN AND THAT IT'S, THEREFORE, ESSENTIAL THAT THE COMMITTEE CONSIDER MAJOR ADDITIONAL REFORMS, AT LEAST IN TERMS OF LEGISLATIVE RECOMMENDATIONS. SOME OF THOSE PROBLEMS ARE, FOR EXAMPLE, WHERE THERE IS A WIDE-RANGING -- A WIDE RANGE OF INJURY OR DAMAGES AMONG

INDIVIDUAL CLASSES -- AMONG INDIVIDUAL CLAIMS, EXCUSE ME.

THERE ARE MANY SIGNIFICANT PROBLEMS INVOLVING FUNDAMENTAL FAIRNESS, DUE PROCESS AND THE RIGHT TO TRIAL BY JURY. BECAUSE THE DEFAULT MECHANISM UNDER (B)(3) IS OPT-OUT RATHER THAN OPT-IN, THE INERTIA IS, IN EFFECT, SHIFTED IN FAVOR OF INCLUSION IN THE CLASS AND THE INDIVIDUAL PLAINTIFF'S RIGHT TO CONTROL LITIGATION IS UNDERMINED.

I WAS WONDERING WHETHER I COULD CUT A DEAL WITH MR. SMOGER THAT WE WOULD ALL AGREE TO CHANGE THE MECHANISM FROM OPT-OUT TO OPT-IN AND WE WOULD ALL BE HAPPY.

CHAIRMAN LEVI: WHAT HAPPENED?

MR. CORTESE: I'M NOT PERMITTED TO SAY.

ANOTHER POINT IS THAT AS TO DEFENDANT'S CLASS ACTIONS ARE REALLY -- DEFENDANTS ARE PRECLUDED FROM RAISING INDIVIDUAL DEFENSES AND WE HAVE A SITUATION WHERE INDIVIDUAL CAUSATION LIABILITY DISAPPEAR IN THE CRUSH TO GET A RESULT, AND THAT'S REALLY TRULY LEGALIZED BLACKMAIL.

THERE ARE SOME STRAIGHTFORWARD STRUCTURAL SOLUTIONS. FIRST, REQUIRE OPT-IN FOR TRIAL AND POSSIBLY OPT-OUT FOR SETTLEMENT. I PERSONALLY WOULD PREFER THAT WE JUST HAVE OPT-IN FOR TRIAL AND LET THE SYSTEM OPERATE THE WAY IT'S OPERATED FOR YEARS BEFORE WE HAD THESE OPT-OUT SETTLEMENTS.

I KNOW THERE ARE A NUMBER OF PEOPLE, LAWYERS AND CORPORATE COUNSEL, WHO BELIEVE THAT, AS ONE PUT IT, WE SHOULD BE WEANED FROM SETTLING THESE CASES BECAUSE THEY JUST GET WORSE AND WORSE AND WORSE.

AND TO RESPOND FOR A MOMENT TO JUDGE LEVI'S QUESTION ABOUT THE EFFECT OF AMCHEM AND ORTIZ, IT DOESN'T SEEM TO HAVE MADE ANY DIFFERENCE AND I GUESS THAT'S BECAUSE IF YOU PUT ENOUGH MONEY ON THE TABLE, SOMEBODY IS GOING TO FIND A WAY -- GOOD LAWYERS ARE GOING TO FIND A WAY TO SETTLE CASES NO MATTER WHAT THE LAW IS AND THAT HAPPENS.

YES, JUDGE?

JUDGE SHEINDLIN: DO YOU HAVE A VIEW ON THE SECOND OPT-OUT PROPOSAL?

MR. CORTESE: I THINK THAT'S PROBABLY THE MORE BENIGN OF THOSE PROPOSALS.

JUDGE SHEINDLIN: WHICH, THE SECOND --

MR. CORTESE: THE DOUBLE OPT-OUT, YES. THE SECOND OPTION, DOUBLE OPT-OUT.

I WOULD SUGGEST AND HOPE THAT THIS COMMITTEE WOULD TURN ITS CONSIDERABLE TALENTS AND EXPERIENCE TO TRYING TO DEVELOP A COMPREHENSIVE APPROACH THAT WOULD BE A COMBINATION OF RULES CHANGES, LEGISLATION AND POSSIBLY PRACTICE RECOMMENDATIONS AND THAT THAT WOULD BE AN

ENORMOUSLY USEFUL ENTERPRISE BASED ON THE LENGTHY EXPERIENCE THAT THE COMMITTEE HAS HAD AND ALL OF THE INFORMATION WHICH YOU HAVE DEVELOPED.

I THINK IT WOULD BE VERY MUCH WELCOMED BY CONGRESS, WHICH I THINK IS AWARE OF HOW MANY OF THESE PROBLEMS ARE GOING TO END UP. I THANK YOU FOR YOUR TIME.

CHAIRMAN LEVI: THANK YOU VERY MUCH. THANK YOU ALL FOR COMING TODAY. ON BEHALF OF THE COMMITTEE, THANK YOU VERY MUCH. WE APPRECIATE YOUR HELP.

THERE ARE TWO MORE PUBLIC HEARINGS THAT WILL BE HELD, ONE IN WASHINGTON AND ONE IN DALLAS. WE WILL BE RECEIVING PUBLIC COMMENT UNTIL FEBRUARY 15, 2001. WE TAKE THE PUBLIC COMMENT VERY SERIOUSLY.

THE WRITTEN COMMENTS ARE TRANSMITTED TO ALL COMMITTEES MEMBERS, A TRANSCRIPT IS PREPARED OF THE HEARINGS, ALSO GIVEN TO ALL COMMITTEE MEMBERS.

THE ENTIRE COMMITTEE IS NOT HERE TODAY, BUT ALL COMMITTEE MEMBERS WILL RECEIVE A COPY OF WHAT WAS SAID HERE TODAY AND WE WILL THEN -- AT THE END OF THE HEARING PROCESS, THEN WE WILL BE MEETING AGAIN TO CONSIDER WHAT WE HAVE HEARD AND, PERHAPS, TO ALTER WHAT WE HAVE PREPARED.

THEN THE PROGRAM GOES TO THE STANDING COMMITTEE WHERE MUCH OF THE SAME KIND OF CONSIDERATION IS GIVEN AGAIN AND THEN IT GOES ON FROM THERE.

THANK YOU VERY MUCH. WE ARE IN RECESS.

(WHEREUPON, FURTHER PROCEEDINGS IN THE ABOVE MATTER WERE ADJOURNED AT 12:35 P.M.

--OO--

CERTIFICATE OF REPORTER

I, DEBRA L. PAS, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

Debra L. Pas

DEBRA L. PAS, CSR 11916, RPR, RMR

THURSDAY, JANUARY 3, 2002