OFFICIAL TRANSCRIPT PROCEEDINGS

PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

A WORKSHOP PRESENTED BY:

THE FEDERAL TRADE COMMISSION AND

THE GEORGETOWN JOURNAL OF LEGAL ETHICS

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The above-entitled workshop was held on Monday, September 13, 2004, commencing at 9:00 a.m., at the Federal Trade Commission, First Floor Conference Room, 601 New Jersey Avenue, N.W., Washington, D.C., 20001.

Reported and transcribed by Deborah Turner, CVR

P R O C E E D I N G S

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MS. KOLISH: Good morning, everyone. I'm the Associate Director for the Division of Enforcement in the Bureau of Consumer Protection. My division, along with many colleagues from other offices, have had the pleasure of putting together this event today.

Before we start we want to go over a few important housekeeping matters for your safety. Security. If you leave the building for lunch or any other time you will have to be rescreened through security to reenter. So that may be something you'll want to consider. And if you come back tomorrow, as we very much hope you will, you'll have to sign in again.

For security reasons we also ask that you wear your name tags at all times and if you notice anything suspicious please report it to the guards in the lobby.

Now, in the unlikely event of an emergency, we want you to know where the fire exits are and where to go. You can go through the main doors that you came in or you can go out this hallway and there's a pantry, go through that little hallway, turn left and go to G Street. And then our practice is we all congregate at the Union Life

building. It's the tall black building over there. So we all check in and make sure everyone's safe.

We also ask that you would turn off your cell phones and pagers. Bathrooms and the water fountain are across the lobby that you came through. You don't have to go through security to use those.

Process issues. There are going to be ten minutes at the end of each panel for questions and you'll find question cards in your packets and if you need more there's a pile in the back of the room. Please fill out the card with your question and hold it up and someone will collect it and then it will be read from the podium so everyone can hear it.

We would also ask that you fill out the evaluation forms that are provided in your folders. These give us critical feedback that can help us in planning future workshops. We'd also recommend that you visit the tables in the foyer. There's a lot of consumer education materials we provide as well as materials from other organizations, including information from the Georgetown Journal of Ethics, which is cosponsoring today's event.

We would also like everyone to thank Hogan & Hartson; Paul, Weiss, Rifkin; Wharton & Garrison; Mayer, Brown and Rowe; O'Melveny and Myers; and Gibson, Dunn &

Crutcher for providing coffee for all of us at this conference and for hosting a cocktail reception that will immediately follow our program today at Georgetown University Law Center, which is directly across the street.

We would also like to thank Georgetown University for hosting this special event for us to get together informally.

And now, I'd like to introduce the new chairman of the FTC, Deborah Platt Majoras. As you know, Chairman Majoras is a distinguished antitrust practitioner who also has experience doing class action litigation but in the short few weeks she has been here she has demonstrated a great deal of interest in the consumer protection law that we practice here and she's rapidly becoming a master of those issues.

Now, this comes as no surprise to me because I believe that all antitrust lawyers, whether they know it or not secretly want to be consumer protection lawyers. And why not? After all, it's the stuff that vividly directly and personally affects all of us. And I think it just has to be more fun than figuring out whether paper cups or Styrofoam cups are in the same market. So that's my take on consumer protection and antitrust. And with that, Chairman Majoras. (Applause.)

CHAIRMAN MAJORAS: Good morning and welcome to the Federal Trade Commission's workshop on Protecting Consumer Interests in Class Actions. I'd like to extend a special welcome to our fellow enforcers with the states and I'd also like to recognize our distinguished members of the judiciary who are here with us today.

The Honorable Diane Wood, Circuit Court of Appeals judge for the Seventh Circuit; the Honorable Brock Hornby, U.S. District Court judge for the District of Maine; the Honorable Vaughn Walker, U.S. District Court judge for the Northern District of California; the Honorable Lee Rosenthal, U.S. District Court judge for the Southern District of Texas; and the Honorable Ann Yahner, Administrative Law judge for the District of Columbia, Office of Administrative Hearings. We're very grateful for your participation in our workshop.

I'd also like thank the Georgetown Journal of Legal Ethics, our cosponsor, and in particular, Jaimie Kent, the editor of the Journal. The Journal will be publishing a transcript of our proceedings and I understand also that if you are inspired by our workshop to write, that they will, in fact, be accepting articles for publication.

I am particularly pleased to open this workshop,

my first as FTC Chairman. As most of you know and as Elaine has reminded us, I am an antitrust lawyer and I've long understood that the goal of antitrust is to protect and enhance consumer welfare.

Since joining the FTC -- Elaine is right -- I have immersed myself also in the FTC's vital consumer protection mission which has the same goal. And as I have learned in just the last month, FTC should be the acronym For The Consumer, which aptly summarizes the joint goal of both our competition and our consumer protection missions.

In holding this workshop, we continue the FTC's practice of hosting fora to discuss issues of concern to consumers. Private litigation in both the competition and consumer protection fields has always played a significant role in compensating consumers and in deterring wrongful conduct. Managed appropriately, consumer class actions can be an effective and efficient way to do both.

As consumer class actions have evolved over time however, concerns have been raised about whether some of these actions, and in particular some of the settlements of these actions, truly serve consumers' interests by providing them appropriate benefits.

Under the leadership of my predecessor, former Chairman Tim Muris, the Commission sought to address these

concerns by initiating the Class Action Fairness Project. The goal of that project was simple: to ensure that when consumers have meritorious claims they get meaningful, not illusory, relief.

It's now time to evaluate the results of this project as well as to examine the benefits and shortcomings of the class action mechanism. As my colleague Commissioner Tom Leary has stated, the FTC is a very small agency with a very large mission. And as such we have never been shy about asking for help.

To this end here, we have enlisted an impressive array of experts from the bench, the bar and academia to help us explore the complex issues raised by class actions. And I know that the Commission will benefit from the expertise of our assembled panelists and we hope those of you in the audience.

Since the FTC began the project many observers have asked why the FTC is involved in the consumer class action area at all. Contrary to what some may have concluded, the FTC is not opposed to class actions. Rather, the FTC is interested in consumer class actions and in particular consumer class action settlements because they raise issues that are at the core of the FTC's consumer protection mission.

In fact, in recent years we have seen numerous consumer class actions related to cases that the FTC has already brought and in some instances we've worked closely with class attorneys to obtain effective relief for consumers.

Unfortunately, however, in some cases class actions may have been an impediment to truly protecting consumers. The Commission therefore has participated as an amicus in cases where it believed the interests of consumers were inadequately represented or in some instances not represented at all.

The FTC's primary concern has been whether coupon and other non-pecuniary redress provide adequate relief to consumers. Such settlements are notoriously difficult to value yet their face value is typically used as a basis for setting fees.

This can pose two related problems. First, consumers may not get meaningful relief or the amount of relief claimed. And second, class counsel's compensation may be inflated due to the overly optimistic value of the coupon settlement.

In our first panel today, we'll specifically address this type of relief and provide an opportunity to discuss these issues in a broader context than an

individual case may allow.

Amicus briefs are not the only activity within the Class Action Fairness Project. As the Commission has done with respect to a host of important issues, it has used its educational platform to provide helpful information to consumers.

Specifically, the Bureau of Consumer Protection has published a piece entitled, "Need a Lawyer? Judge for Yourself." And the purpose of this piece is to ensure that consumers who need a lawyer are fully informed of their rights and their options.

Among other recommendations, this piece advises consumers to carefully scrutinize opt-out notices and class action settlement terms and particularly attorney fee awards that may reduce the total compensation available to consumers.

And in addition to this education, the Commission has also offered the consumer perspective on the proposed amendments to Federal Rule of Civil Procedure 23 to the Federal Judicial Conference.

Our panels over the next two days will address the question of attorneys' fees and how consumer class actions can fairly compensate lawyers while protecting consumers. In other panels we'll address equally important

issues such as special ethics concerns which is particularly apt considering our cosponsor, the Georgetown Journal of Legal Ethics.

Through this dialogue we hope to gain insights on a full range of issues but there are four in particular relating to the Class Action Fairness Project. First, we would like to explore strategies for making class action settlement information available in a more systematic and comprehensive way.

It may surprise you to learn that one of the greatest challenges for the project has been identifying potentially troublesome class settlement terms with sufficient lead time to permit evaluation and, if perceived necessary, action.

In some instances interested parties, attorneys, objectors, consumer advocacy groups have provided us with this information but more often settlements have come to the Commission’s attention by chance, for example, through an FTC staff member reading about a particular settlement in the newspaper or actually as a member of a class receiving a notice.

Other interested parties may be also finding it difficult to obtain this information and we would like to talk about that.

Second, we would like to solicit feedback on the amicus component of our project. To date, the FTC settlement objections have focused particularly on two issues: coupon settlements and excessive attorneys' fees. The Commission's briefs have also raised to a lesser degree such issues as insufficiently clear notices, burdensome claims procedures and so-called piggyback class actions.

Are these the issues that raise the greatest consumer concerns? Are there other issues on which we should be focusing our attention?

Third, we'd like to solicit input on the empirical research component of our project. In addition to our capabilities in law enforcement, we have substantial policy analysis and research capabilities which we implement not only using our attorneys but also the Bureau of Economics, one of the world's preeminent teams of industrial organization economists.

The FTC strives not only to ensure that we improve the procedures directly under our control but we also work with public bodies to promote the development of approaches that would enhance consumer welfare.

And we hope that this workshop will provoke discussion about how we can use our research resources to bear on important questions.

And finally, looking beyond the limited role of our own agency, we would like the panels to explore opportunities for more effective coordination among all of the parties involved in the class action process.

More participation and especially parallel participation by states and private attorneys may be helpful in some cases. And we hope that the workshop will provide an opportunity for all entities to discuss the fundamental issue of coordination.

Before concluding I would like to acknowledge the FTC staff who have worked so diligently in planning this workshop. First, in the Bureau of Consumer Protection's Enforcement Division, Elaine Kolish from whom you've already heard this morning; Assistant Director Robert Frisby; attorneys Pat Bak, Adam Fine and Angela Floyd and paralegal, Heather Thomas.

In the Office of Policy Planning, Maureen Ohlhausen, Acting Director; and John Delacourt, Chief Antitrust Counsel. In the Bureau of Economics, Joe Mulholland and finally in BCP's Office of Consumer and Business Education, Erin Malick and Callie Ward.

And now I will turn this over to John Delacourt to begin our first panel. Thank you again for being here.

(Applause.)

MR. DELACOURT: Thank you, Chairman Majoras. I think we're ready to begin. Our first panel this morning is on the use of coupon compensation and other non-pecuniary relief in class action settlements.

All of our panelists have done quite a bit of thinking on this issue and some of them have extensive experience both in court and in settlement negotiations so rather than standing in the way of their collective wisdom I will try to keep my own initial remarks pretty brief.

To date, the FTC's Class Action Fairness Project has consisted primarily of a series of amicus objections to particularly problematic class action settlements. Even in these early stages of the project, however, the use of coupon compensation has already become a recurring target.

One reason for this is that coupons, much more so than cash compensation, are difficult to value and may offer class members only speculative relief. This was the situation that confronted the Commission in Erikson v. Ameritech.

In that case, the defendant was alleged to have made deceptive representations regarding its voice mail service and proposed to settle the case by offering to class members coupons for one free month of speed-dial service.

FTC staff objected to this arrangement, however, noting that among other problems, after the initial free month, class members that took advantage of this offer would be enrolled in a speed dial program on a continuing basis at the full subscription rate unless they took active steps to cancel the service. In other words, the proposed settlement was more akin to a promotional gimmick than to a genuine effort to provide injured consumers with relief.

A second reason for heightened FTC scrutiny of coupon compensation is that due to their speculative value coupons can be used in certain situations to inflate attorney fee awards. This was the situation that confronted the Commission in Haese v. H&R Block.

In that case, the defendant was alleged to have made deceptive nondisclosures regarding its arrangements with other financial institutions when issuing refund anticipation loans. The defendant proposed to settle this case by offering class members coupons for a variety of products and services including H&R Block tax preparation services, do-it-yourself tax preparation software and do-it-yourself tax preparation books and worksheets.

Though the use of many of these coupons was mutually exclusive, for example, if you’re a do-it-yourselfer you don’t have any need for H&R Block tax

preparation services, class counsel proposed to base its fee on the total value of all of the coupons. That factor as well as various flaws with the coupons themselves ultimately triggered an FTC objection.

Perhaps the best example of the stark contrast between cash and noncash compensation, however, is a case that is both more recent and likely more familiar to many of you, that is, the music CD minimum advertised price litigation.

In order to resolve the variety of antitrust charges, the defendant music distributors in that case agreed to a hybrid settlement that included both a cash and a noncash component. Defendants agreed to pay $67 million in cash directly to consumers. They also pledged to distribute 5.6 million CDs to governmental and nonprofit organizations such as public libraries.

While I can’t claim to have any particular knowledge of an official consensus on the settlement, my own anecdotal experience was that the cash component was very well received. I spoke with a number of acquaintances just in the ordinary course of things who indicated that they thought the claims procedure was very easy. You could file online. They were happy with the fact that they received their compensation right away and many of them

were actually amazed that they received a check. That had not been their experience in other cases.

So though the checks were relatively small, in the range of $13 to $16, they were very happy to receive a check. So that was the cash component which received high marks all around.

The noncash component, that is, the 5.6 million CDs that were distributed to public libraries, was another story. That portion of the settlement continues to be subject to criticism.

In a recent news story, for example, an official from the Milwaukee public library described some of the CDs that his institution received. Among the take for the settlement are the following: not one but 104 copies of Will Smith's "Willennium.

For those of you who are not Will Smith’s fans, there are also 188 copies of the Michael Bolton classic, "Timeless". And finally, there were 1,235 copies of Whitney Houston’s 1991 recording of the national anthem. So I can only conclude that the defendants must have regarded this particular single as an underappreciated work.

So anyways, subsequent reporting on this portion of the settlement revealed that in fact Milwaukee’s

experience was not an anomaly, that in Virginia, for example, they received 1600 copies of the Whitney Houston single and in Maryland they received 1200 copies.

Adding insult to injury, defendants valued this noncash component of the settlement at almost $76 million. So that was more than the $67 million in cash. Furthermore, this $76 million figure was incorporated into the total settlement value from which class counsel's attorney fee was ultimately derived.

So clearly, there is room for improvement with respect to coupon compensation in class action settlements and for that I will ask the assistance of the panelists.

Before I begin, however, I should raise one final issue and that is that we will be taking questions today. I believe there are 3 x 5 index cards included in the folders that you received this morning, so if you have a question, please write it down on the card and get the attention of an FTC staff person and they will make sure that those cards are passed to the front so that I can read and pass them on to the panelists.

So with that out of the way, I will turn to our first panelist, Professor Christopher Leslie, immediately to my left. Professor Leslie is an Associate Professor of Law at Chicago Kent College of Law. His current research

focuses on antitrust and business law as well as class actions.

In particular, I would like to commend to you his article, “A Market-based Approach to Coupon Settlements in Antitrust and Consumer Class action Litigation,” which was published in the UCLA Law Review and recently, because of our program, was also added to the FTC's web site. Professor Leslie.

PROF. LESLIE: I would like John and his colleagues at the FTC for holding this important workshop and for inviting me to participate.

Like most private litigation the primary purposes of class action litigation are to compensate individuals for their injuries and to deter misconduct by disgorging ill-gotten gains. The success of any class action lawsuit should be evaluated based primarily on whether or not it achieves one or both of these goals.

Also like most private litigation, most class action litigation settles. However, unlike private litigation, class action settlements run a significant risk of collusion between opposing counsel. This is particularly the case with coupon settlements.

When the class members are paid in coupons, each class member will have one of four outcomes. First, the

class member might not use the settlement coupon at all. This nonuse outcome results in the class member receiving nothing of value from the settlement. There is no compensation. Similarly, the defendant pays out nothing to that class member and there is no disgorgement.

Second, the class member could use the coupon because the settlement coupon induced her to make a purchase that she otherwise would not have made. This induced purchase outcome occurs when the class member makes a purchase with her settlement coupon simply to avoid the feeling of getting nothing from the settlement.

The defendant is actually in a better position in this scenario because it makes a sale that it otherwise wouldn’t have made and gets that additional marginal profit. The settlement coupon operates as a promotional coupon. This is the antithesis of disgorgement.

Third, the class member could use her coupon for a purchase that she was planning to make anyway. This noninduced purchase outcome shows that settlement coupons are not inherently worthless. The class member who uses the coupon for a planned purchase receives, in essence, a payment equivalent to the face value of the coupon. The defendant loses money if that purchase would have taken place without the settlement coupon. Thus, there is some

level of both compensation and disgorgement.

Fourth and finally, the class member could transfer the settlement coupon to a third party who uses it. This transferred use outcome is a variant of the third only someone other than the class member is redeeming the coupon making a noninduced purchase. The class member receives value if she sells that settlement coupon to the person who eventually uses it.

Because defendants prefer outcomes where the class member either does not use the coupon, and thus the defendant pays nothing, or the class member uses the coupon for an induced purchase and thus the defendant earns additional revenue, defendants often structure settlement coupons to increase the probability of one of these first two outcomes occurring.

Defendants do this by imposing often one of five common restrictions in settlement coupons. First, there are limits on transferability. Settlement coupons are sometimes nontransferable. In some cases, they limit transfers of the coupon to within households or they limit the number of times that the coupon can be transferred. Or they reduced the value of the coupon if it is transferred to a nonclass member.

All of these transfer restrictions reduce the

value of the settlement coupon and reduce the probability of the settlement coupon ever being used.

Second, short settlement coupon expiration dates reduce the probability of use. Settlement expiration dates can be as short as a few months, such as the 120 days in the Cuisinart case.

This is particularly a problem with durable goods where class counsel and defendants had proposed settlement coupons in heavy trucks where the consumers had to use the coupons within 15 months even though the trucks they had bought to qualify for class membership would last a lot longer than that.

Third, restrictions on coupon aggregation reduce the value of settlement coupons. Coupon aggregation would allow class members to combine settlement coupons with other available discounts or to combine multiple settlement coupons in a single purchase. Defendants commonly structure settlement coupons to preclude both types of aggregation. This negates the value of the settlement coupon.

For example, in the recent Schneider v. Citicorp mortgage case, the proposed settlement coupon was for $100 and could not be aggregated with any other discounts. Yet, a $500 discount was widely available. Thus any class

member who actually used the coupon would be foregoing a $400 net discount available to everybody who was not a member of the class.

Fourth, redemption restrictions are common. Some class action settlements have involved class members receiving multiple coupons that can only be redeemed over time in specific intervals. For example, one settlement provided each class member with 40 coupons that could only be used once a quarter over the next ten years.

Fifth and finally, product restrictions are common. For example, in the Cuisinart settlement the settlement coupons could be used for anything except food processors.

In the much-hyped antitrust airlines litigation, the coupons to be redeemed for discounts on airlines couldn’t be used during blackout dates, such as Christmas, Thanksgiving, holidays, i.e., when people would actually want to use the discounts.

The net effect of these restrictions is low redemption rates of settlement coupons, as low as 3 percent, 1 percent, and in one famous case, 0.002 percent redemption rates.

Besides these restrictions, other problems with settlement coupons include that most settlement coupons

require the class member to continue doing business with the very defendant in order to receive any compensation.

Also, defendants can set settlement coupon values so that the defendant still makes a profit on each sale in which the class members redeem settlement coupons.

The Haese v. H&R Block case that John referred to is typical here when after the settlement was announced H&R issued a press release that assured people that the settlement really wouldn't do anything because they were going to make money on every sale that involved a settlement coupon.

Finally, there is the risk that defendants can negate the value of settlement coupons either by increasing the price of their product or by reducing the quality.

The class action system is designed with three potential safeguards to prevent these inadequate settlements.

First, the class counsel is supposed to negotiate a settlement in the best interest of the class. Second, class members are given the opportunity to object to any proposed settlement and third, the proposed settlement must be approved by a judge who determines whether it is fair, adequate and reasonable.

Unfortunately, evidence suggests that the

safeguards may fail in the context of coupon settlements. First, because of agency cost, class counsel may pursue their own interests instead of those of the class. Because the class counsel are paid in cash, often based on a percentage of the face value of the settlement coupons, the class counsel may maximize their attorney fees by negotiating a coupon settlement even if that settlement provides little real value to the class.

Defendants have a strong incentive to laden settlement coupons with restrictions that increase the probability of either the nonuse outcome or the induced purchase outcome. And the class counsel have insufficient incentive to prevent this so long as the aggregate face value of the coupons is high and the class counsel is being paid in cash.

Rational defendants will be willing to pay higher attorney fees in exchange for class counsel agreeing to allow restrictions on settlement coupons. Unfortunately, the interests of the defendant and the class counsel are more aligned at this point than the interest of the class counsel and the class members.

Second, class members appear ill-equipped to monitor the class counsel and to protect their own interests. The class counsel controls the relevant

information. Notices of the proposed settlement are often opaque and the terms of the coupon settlements are often too confusing to understand. In some cases, class members have thought that they were the ones being sued instead of they were the ones being offered the coupons.

Many judges appear unreceptive to class member objections as well. Furthermore, given the low stakes for each individual class member it is perfectly rational for class members to remain silent even if they think the coupon settlement is not worth anything.

Third, with a few notable exceptions reviewing judges may be loath to reject proposed coupon settlements. Some judges treat the face value of coupons as their true value even though this is not the case.

Judges cannot be faulted. It is exceedingly difficult to calculate the true value of settlement coupons, especially when they are laden with restrictions. Add to that both the defense counsel and the class counsel are singing the praises of the coupon settlement.

Systemic pressures also play a role here. The judge must accept or reject a proposed settlement in its entirety and there is some level of traditional deference to class counsel who, after all, is there to protect the interests of the class. All of these make it difficult for

a judge to reject a coupon settlement.

In sum, despite the safeguards in place to protect class members, the problem remains that class action litigation is often settled with settlement coupons that are largely worthless.

In my scholarship, I have discussed potential responses to this, including banning settlement coupons, restructuring them, imposing minimum redemption rates and even having the class counsel paid with the exact same currency as the class. Thus, the class counsel would receive coupons if the class does.

In this forum I would like to consider two new potential solutions. First, collecting greater data so that we can study the problem and get a better understanding of what restrictions are imposed on settlement coupons and the effects of these restrictions. And second, encouraging greater FTC intervention and fairness hearings to evaluate coupon-based settlements, including having the FTC receive notice of all proposed settlements, especially those that involve coupons. And I will save the discussion of those for the group discussion, which I am very much looking forward to.

MR. DELACOURT: Thank you very much, Professor Leslie. Our next panelist is Judge Brock Hornby. Judge

Hornby is a United States District judge for the District of Maine. He has dealt with class action issues extensively from the bench and most recently has presided over the much-maligned MDL music CD cases, although I must note that I was very happy with the cash component as well as the new motor vehicle Canadian export antitrust litigation. Judge Hornby.

JUDGE HORNBY: Thank you. Good morning. I'm here on the panel to give you the judge's perspective. I hope you find it helpful but remember what George Burns said. He said, I was married by a judge. I should have asked for a jury.

Many of the positions that you're going to hear on this panel and at this conference are what I call political with a small P. They represent substantive policy preferences about how money or goods should be distributed among plaintiff class members, defendants, lawyers and others. And typically, they either endorse or they bemoan class actions or class action lawyers.

Well, as the judge on this panel I'm not going to take a position on those issues. Instead, I'm going to speak from a judge's perspective and try to tell you what a judge looks for when he or she is presented with a proposed settlement involving coupons or other nonmonetary relief.

I'm also going to talk about some of the baggage that a judge brings to the task because I think many of you have an unrealistic expectation of what we judges are capable of. In fact, I'm reminded of the psychiatric evaluation that I commissioned for a defendant whose competence was in question for trial and the Bureau of Prisons psychiatrist at the customary interview was asking him what the role was of all the various participants in the courtroom. And when it came to the judge his response was, and this is a direct quote, the role of a judge was "takes the facts presented to him and makes everybody happy, justice or something."

I think some of you think that's what judges are capable of. We're not. Remember first that American judges are accustomed to resolving disputes in an adversary system. Originally, we were umpires. When a judge is called upon to decide a case or a conflict we're trained to do so by applying legal rules, attempting to limit our individual value preferences.

Yet, over the last 25 years we have become case managers and we've learned to manage litigation and settle cases but even there we start from an adversarial perspective. For us, a good settlement in the typical case is one that first and foremost makes the lawsuit go away, a

settlement that will stick, not come unglued.

If we suggest an appropriate settle amount in such cases we come up with a number not by determining what's good for the plaintiffs or what the defendant ought to pay but by asking what's the overall financial exposure of the defendant in a collectible judgment? In other words, what amount could the plaintiff actually put in his or her pocket after a trial and an appeal and then we discount it by the risk of losing the case and the transaction costs of getting there, things like legal fees, expert fees, administrative downtime, things like that.

In encouraging the parties to settle a typical case we're merely trying to bring the particular dispute to a conclusion. We're not expressing a viewpoint about litigation or justice or particular kinds of litigation or settlement categories.

And then suddenly we're told that things are different in settling a class action, that there judges are fiduciaries for the entire class. It's a catchy label but it's dangerously misleading as a description of what trial judges are able to do.

Lawyers are fiduciaries. Trust officers are fiduciaries. Certain kinds of agents are fiduciaries. Fiduciaries have a duty of loyalty to a particular client

that supercedes other obligations. In fulfilling their role they go out and investigate on their own. They acquire an expertise. They hire professionals to do work for them. They follow certain standards and they are sued when they fail.

That's not what most judges do for a living. In fact, some of you suggested a judge should turn down a coupon settlement even though it might have a small benefit to the class, should turn it down for institutional reasons or so that other class actions might be better in the future. A fiduciary could not do that.

So what does a so-called fiduciary judge do when he or she is presented with a proposed settlement in a class action? All the lawyers, the adversaries with whom he's accustomed to deal, are lined up on the same side defending the settlement.

The judge wonders, how am I to evaluate this proposed settlement? Should I accept what they say or should I independently gather evidence? Shall I subpoena witnesses or documents? Shall I commission experts to conduct independent studies at substantial expense?

If I want assistance or advice I can't just pick up the phone and call a professor I know. That would probably be unethical. I can only consult a colleague or

law clerks who, like me, are trained only in law.

In other words, the judge who's faced with a class action settlement is more than ordinarily anxious. Now, Judge Posner of the Seventh Circuit suggested a dozen years ago that perhaps a different model is needed. He said, and I'm quoting, "Judges in our system are geared to adversary proceedings. If we're asked to do nonadversary things we need different procedures."

In class actions -- Judge Posner was speaking of attorney fee requests -- lawyers are not like adversaries in litigation. They are like artists requesting a grant from the National Endowment for the Arts. Grant-making organizations establish nonadversarial methods for screening applications. Perhaps we need something like that for cases like this, the case he was referring to.

I suggest that Judge Posner hit upon a much broader problem than attorney fee requests. His observation applies to class action settlements in general. It applies to consent decrees proposed by the parties in government-initiated litigation like environmental lawsuits. And it applies to other instances where the adversarial systems no longer work.

I've not seen a good response to his observation. I can assure you that I've not seen judicial education that

focuses on this unique role for a judge, and most judges do not get a steady diet of these kinds of cases so as to become self-taught.

So what does the anxious judge actually do in this context where he's asked to make a decision without legal rules and with no parties arguing the pros and cons? We don't like to subpoena witnesses. If we do we may prejudice our ability to try the case later. We look for some kind of checklist of items against which to measure the application for settlement approval.

It may not actually tell us where to come out on a question but it gives some comfort that we're engaging in a rational assessment that can be defended. So perhaps instinctively we are behaving somewhat like a grant-making organization that promulgates criteria and measures applications against them. But I'm sure we could learn or be taught a lot more about improving those techniques.

What does a judge do in particular when presented with a settlement involving coupons and other nonmonetary relief? First, we look to the Rule 23 language and the case law and they both tell us that neither device is absolutely prohibited.

And that's appropriate. Never say never. There are limited cases where these devices can add value to

everyone's benefit but they are certainly greeted now with emphatic skepticism by judges given all the public and appellate criticism. After all, with or without life tenure we don't like to be publicly criticized. We live in communities just like all of you do.

So we look for additional factors or criteria against which to measure the proposed coupons or cy pres relief. We look carefully at what the appellate courts say about them too because we don't like being reversed on appeal.

I've summarized in my outline that's online what the cases and commentators say are the important factors and other panelists refer to them as well. I'm not going to list them all here. If necessary, during the discussion we can talk about them but most judges, most federal judges will consider each of these factors. So if you are supporting or opposing a proposed settlement you'd be well advised to take them into account as well.

Just a comment about the valuation problem. A judge is hard pressed to put a dollar value on coupons or alternative relief but remember that what Professor Leslie has called noise in his written remarks is already present, that a judge already has to do a lot of guessing in evaluating even a straight dollar settlement of a class

action.

After all, we don't see all the discovery materials. We don't see the witnesses' performance at deposition. We don't know which witnesses are available or unavailable for trial. We don't know what the weaknesses are in the expert's opinion. We haven't seen the e-mails and the documents.

We can make a pretty good assessment of the status of the law but on the facts we have to make an informed guess or go by instinct. Coupons and cy pres just add more uncertainty to the uncertainty that's already there in that context.

Greater FTC involvement as an amicus or perhaps as an intervener would certainly be welcomed by most judges that I know as consistent with the adversarial universe that we're accustomed to. In other words, the FTC's presence presenting evidence and argument to the Court would restore some of the balance currently lacking.

It would also be a useful antidote to a growing unease some of us have about the role of objectors, professional objectors who first appear and then they disappear, perhaps being bought off, we're told, or perhaps pressing a narrow or broader political or policy objective.

The FTC role would be somewhat like the role of

state attorney generals who prosecute civil lawsuits in some of our courts although I realize that some of you here are distinctly unenthusiastic even about their role.

But there is also this other risk that if the FTC intervenes or files an amicus more than occasionally to attack coupon settlements will there be an inference that its failure to do so is somehow tacit approval? I just raise that question.

In conclusion, let me say that unlike the Rand study authors of a few years ago, the class action one, an excellent analysis that you ought to read if you haven't done so, but I do not volunteer judges as the solution to what some of you call the class action problem. We're not ombudsmen. We're not trained for it. We are not information gathering judges like are civil law counterparts. We're not trained for that either. We will do our best but you won't be satisfied.

Remember, the public, Congress, the legislatures are not even satisfied with how we sentence criminals. We've been doing that for hundreds of years and we can't get that right. So if you think that we're going to do better in this more open-ended job of settling class actions, I think we need to think again. Thank you.

MR. DELACOURT: Thank you, Judge Hornby. Our

next panelist, as some of you may have noticed, is a last minute replacement. We had originally scheduled Steven Hantler from DaimlerChrysler but now we have in his stead Leah Lorber.

Leah is of counsel in the public policy group in the Washington, D.C. office of Shook, Hardy & Bacon. And I also have a note here that she was named a legal reform champion by the America Tort Reform Association in 2004. Leah.

MS. LORBER: Thanks. I wanted to first thank the Federal Trade Commission and the Georgetown Journal of Legal Ethics for having this symposium. I also wanted to thank Steve Hantler for getting sick so I could show up and talk at it, although I think he'll get well pretty quickly and I'd like to refer everybody to his remarks that are online.

I'm glad that John described to you my background a little bit so you have some context for my remarks. I'm a defense attorney. I've done public policy tort reform work for the last five years so I take a pretty predictable approach.

I think that coupon settlements create a perverse incentive for over-lawyering. They waste litigant and court resources to no real consumer benefit. Attorneys

bring them so they can get high fee awards and some courts, particularly in state courts -- just so Judge Hornby doesn't get mad at me -- know that companies will settle class actions rather than litigate them. So I think it encourages courts to certify weak cases.

Basically, what I wanted to do was tell you about some of my favorite coupon settlement stories today. Professor Leslie had already talked a little bit about the airline price-fixing case in the early 1990s. This is a case where a number of different airlines were sued for price-fixing because they used a consumer-accessible database in order to track ticket prices.

The settlement resulted in $408 million in discount airline tickets and $50 million in attorneys fees and administrative costs. The reason I like this one is this is the first time I'd ever heard of a class action lawsuit.

I was right out of college in a very low-paying job and I had a long-distance boyfriend. We flew back and forth constantly. I had huge credit card bills because I couldn't afford to pay them off and I thought I was going to get some money to pay off my debt.

Well, when the settlement was announced, it wasn't worth anything to me as a consumer. There were

blackout dates. I couldn't combine the discounts with any kind of other ticket discounts and at most it was good for 10 percent off a flight.

The critics, including some of the counsel for the objectors, said that this was a promotional scheme to induce travelers to fly and a deal worked out so plaintiffs' lawyers could collect fees of up to $1400 an hour.

Some of the other coupon class settlement cases that I've been interested in reading about include the case against the makers of Cheerios. In this case, General Mills was sued because pesticides approved for use on other grains other than oats had come into contact with the oat grains for Cheerios. The plaintiffs' counsel admitted that nobody had been hurt. The lawyers got $1.35 million in fees and class members got a coupon for a free box of Cheerios, if they had kept their grocery store receipt proving that they had bought one in the first place.

A similar case was the Poland Springs case. Poland Springs was sued for allegedly selling bottled water that was not pure. The lawyers got $1.75 million in fees and the class got more bottled water.

These can go on and on. The earmarks of coupon settlements that cause the problems for us is basically

that as these stories show, the consumers don't get value and the plaintiffs' lawyers do. Often, consumers have to buy more of the product or service in order to get some benefit from the coupon settlement in the first place.

Several people today have already talked about the H&R Block case. H&R Block was sued for allegedly taking kickbacks from a bank that issued loans to H&R Block's tax preparation customers. The lawyers got $49 million and the class got up to $45 per year in coupons for tax software and planning materials. To get the benefit of a $20 coupon to run your tax return preparations the typical plaintiff would have to spend $102.

Other cases include a suit against Blockbuster Video for inflated overdue video fees where the class got a dollar off of future coupon (sic) rentals. In a case against a computer manufacturer for allegedly misrepresenting the size of the computer monitor the class got $13 rebates on new computers and monitors or $6 in cash.

A lot of times these lawsuits aren't necessary in the first place. Sometimes, we believe that they are just cooked up by plaintiffs' lawyers who want to make a big fee. A Florida trial judge has called coupon settlement cases the class action equivalent to squeegee boys who at

urban intersection splash water on your windshield, wipe it off and then expect to get paid for it. They create the problem; they provide the solution and you really don’t get any benefit.

In other cases defendants have already acted to resolve the problems and the settlement provides no additional value to the class. One example is the Intel Corporation case. Intel found a minor computer chip flaw that created about once in every 9 billion random division operations there was a small error. Intel created a program for its consumers to see if their computer indeed had that flaw, expanded its toll-free hotline for inquiries and offered free lifetime replacements.

When Intel publicized this problem and the solution widely, 13 class actions were filed. Plaintiffs’ lawyers took in $4.3 million and the plaintiffs' class got nothing more than what was already going on by Intel, its continuation of existing company solutions.

Also in coupon settlements courts too often don’t make sure that the settlements don’t mean something. This has been getting a lot better since the coupon settlement problem has been publicized but there is still too much availability for plaintiffs’ attorneys to be litigation tourists and forum shop their cases around to what the

American Tort Reform Association has called judicial hell holes and what some prominent plaintiffs' attorneys have called magic jurisdictions where plaintiffs are always going to win regardless of what the facts and the law might be.

There is going to be some discussion, I'm sure, today about what can be done. A couple of solutions that have come up in the materials or in our past reading have been creating a secondary market for the coupons, which we don't think tends to work. Some of the studies have shown that the coupons actually have to be worth $250 in order for the consumers to get a benefit on the secondary market.

Another solution has been to share the class award with charities and government, and this is kind of a feel-good resolution but it doesn't really do anything if it's not very carefully scrutinized and also may be an incentive for courts to certify more class actions if they know that the public is going to benefit.

Good solutions include when the parties and courts make sure that the settlement actually means something. I think one of Lisa's cases that she discussed was the Mercedes-Benz suit in which it was alleged that Mercedes had failed to warn their customers about using nonsynthetic motor oils in the engine in their cars because

the suit said that this could cause engine wear.

The settlement that was reached was targeted at the problem. The consumers got a $35 coupon for an oil change and they got revised warranty protections that said if you have a problem you can take your car in and we'll fix it.

Another way to resolve these problems is to have defendants fight, not settle, frivolous lawsuits. There was a case in Illinois involving a Jeep Cherokee where there were allegations of excessive engine noise at idle in the SUVs. The suit was filed after one of the named plaintiffs got buyer's remorse and wanted to have his car upgraded to a V-8 engine. The second named plaintiff had 135,000 miles on his vehicle when he said that it was defective and the third named plaintiff was just afraid that her car would develop the problem. The court certified the class as a nationwide class but found that the plaintiffs were unable to prove their case and entered judgment for the defendant.

In sum, I think there are a number of different solutions that will be discussed today but we encourage very close scrutiny of coupon settlements and fighting lawsuits where they're frivolous. Thank you.

MR. DELACOURT: Thank you very much, Leah, and

thank you in particular for pinch-hitting at the last second. Our next panelist is Lisa Mezzetti. Lisa is a partner with Cohen Milstein where she works exclusively on consumer litigation and securities regulation matters. In that capacity she has had the opportunity to serve as lead counsel or principal attorney in dozens of class actions. Lisa.

MS. MEZZETTI: Thank you. I am a plaintiff's class action attorney and I feel compelled --

UNIDENTIFIED SPEAKER: Yay.

MS. MEZZETTI: Thank you. And I feel compelled to note that when I walked in the door this morning I was five foot, three inches tall and I'm going to keep track of how short I am when I leave this table.

One other thought that I want to open with is that I was interested to see in one of the academic papers prepared for today's workshop that only 24 percent or so of class actions lead to settlements. The rest of them go through the judicial process and they are dismissed or they go to trial.

An earlier academic report indicated that a very small percentage of those settlements, in the single digit percentages, actually provide only coupon benefits. So I'm not sure, truth be told, why there is such an emphasis on

coupon settlements because, in fact, there is a long list of the benefits that are given to class members in today's settlements.

The list includes and is not limited to injunctive relief, changes in corporate day-to-day operations, changes in corporate structure and governance, credit programs to give automatic credits to the class members, settlement research funds, coupons for free products, coupons for discounts, charitable contributions at the election of a class member if they choose not to take a coupon, ADR processes for claims if class members choose not to settle, monitoring programs, cy pres funds. The list does not end there.

So an emphasis on only one part of all of those benefits would seem to ignore at least three points. All nonmonetary benefits provide a value and we have to look at them all. All of them allow for the very important adjudication of class members' rights, rights that then lead to the return of damages. And they also allow for the recognition that there is no settlement that does not change behavior prospectively for the better.

All of that, I think, brings value from the class actions and for every class action that can be listed here as a bad class action, I could, but I don't have anywhere

near the amount of time I need, I could list all the good class actions.

The laundry list also allows class members choices. They choose their value so they're showing us that they think there is value in some parts of this buffet of choices that they are given.

And in addition, this choice, this list also acknowledges what the Supreme Court recognized in 1980, that the opportunity given to class members is of value even if they choose not to avail themselves of it in the Boeing Corp. case.

So I think we have to focus on all of the values. And as I noted, the laundry list includes the very valuable injunctive relief. Now, my written paper for the workshop talks a lot about changes in corporate structure and changes in day-to-day operations.

And these include for corporate structure new management positions, education committees, the requirement that certain issues raised by line workers are reviewed by executive committees, independent executive committees.

Day-to-day operations can also be changed, geared specifically to the class action allegations. So, for example, in a credit card case we arranged for, where the credit card company was alleged to have charged fees

inappropriately and too quickly and charged products to class members when they didn't know that they were being purchased, we were able to get 12 changes, right down to the script used for the telemarketing.

The jurisdiction was maintained by the court. Reports were given to the court to confirm that the changes were made. And some people can wave their arms and say, well, but they're only temporary. How many years of changes did you get?

But I submit that first off, it's possible that it can be permanent and if it is not permanent then either -- if illegal actions occur -- then another class action can be brought and should be brought in certain circumstances or more specifically, government agencies like the FTC can step in and make sure that the appropriate actions are taken long term, or longer term than the class action attorneys have brought about.

I also want to note that these changes in corporations and these laundry lists of benefits came about because settlements with nonmonetary benefits have changed over the years.

In the 1980s when these started, these coupons were the very essence of the definition of coupons. Here's a piece of paper. You get a free product or you get a

discount. You won't have to pay your bill this month, Mr. Businessman, because you have a coupon.

They changed. There's no question. Sometimes businesses wanted to use this for business generation. Sometimes, in large part what happened was the economies of the country changed. Because there were hundreds of thousands of class members in a case or because there were hundreds of millions of dollars of damages, each individual coupon became less valuable in and of itself.

So criticisms, whether they were valid or not, grew and the parties to class actions, the plaintiffs, the defendants and the courts all listened and learned and we changed class actions. We changed coupon settlements.

We put secondary markets in. We have minimum distributions. We have cy pres funds. We have coupons for only certain types of products, less-expensive products that we know the individual is going to buy like the music club CDs cases. The settlements are bolstered by the laundry list but they are also bolstered by these changes. So the process moves and the process grows.

And looking back at old settlements does not necessarily mean that they are all bad. Indeed, I believe and I've seen and I think I have never personally been involved in a bad settlement. That just gets weeded out.

Criticisms are lodged and the system works.

The courts put pressure on the parties or the objectors and the FTC whether government or private objectors put pressures on the parties, usually on the defendant, truth be told, to make a settlement better. I have had settlements become better after they were disapproved. Bad settlements that are never approved are weeded out by the system and I don't think we should lose sight of that.

Even with all of this, however, I do want to say that we shouldn't run from coupon settlements. We shouldn't run from redemption rates, which seems to be a very big concern for the FTC and for a lot of different critics.

And indeed, already plaintiffs and defendants and courts do not run from them. Courts already discount the value of the face of the coupons when they are valuing settlements and they grant fees on the lower amount.

Courts also, especially in the recent past, the last three to five years, courts demand reports on redemption rates. This has happened significantly in the Microsoft case where redemption rates will be reported not only to the court but to a newspaper in the local area. And although defendants are sometimes hesitant they're now

changing because the courts and the objectors are requiring this.

So although I believe compiling these types of statistics is already occurring and a special process for it, such as Professor Leslie talks about, is probably not necessary, if we are going to do it, then I think we have to do it on an even and fair ground.

Every class action settlement is different based on the class members, based on the coupon, the product, the terms, whether there's a secondary market, whether separate terms, separate contracts can be negotiated with class members. And that actually happened in the airline antitrust case where the businesses that received the very large bulk of those coupons used those coupons to a very high percentage of, I believe, over 85 percent.

The thought of using redemption rates and statistics from one class action to determine whether another class action is valid is, I think, wrought with problems unless we recognize the differences among the class actions and among the coupons because looking at a settlement value in hindsight without all the facts will always result in an unfair analysis.

Thus, I believe we cannot lose sight of the total value of these settlements, of all of the benefits. We

shouldn't lose sight of the value of coupons and their redemption rates. And I think we should maintain a correct focus on recognizing all of the values of the different types of benefits and the restrictions and the protections that are already in place for these settlements. Thank you.

MR. DELACOURT: Thank you, Lisa. Our next panelist is Phillip Proger. Phil is a partner with Jones Day where he serves as coordinator of the firm's government regulation group. His practice, which focuses on antitrust matters before the U.S. and international enforcement agencies, as well as antitrust litigation, has given him frequent exposure to both the litigation and settlement of so-called follow-on class actions. Phil.

MR. PROGER: Thank you. I'm going to try and be brief because I think it would be good to get to some questions and the panelists ahead of me have been excellent and covered a lot of the territory. I do want to thank the FTC for holding this.

I guess I come at this a little bit differently. One, I think a lot of the problems we're talking about here are problems inherent in class action litigation and not inherent with noncash settlements. And I want to be clear, when I think about this I'm not thinking about just

coupons. I'm thinking about the broad array of noncash settlements.

I start with one sort of basic theme which is a lot of the criticism on cash settlements are that they bring very little value to the individual class member. And that strikes me as kind of an odd thought when class actions, in essence, in many cases, are designed to allow people who have had very small individual injuries to aggregate them so you can overall as a society redress the problem.

So why are we surprised now that individual class recovery is relatively small? And Lisa, I thought, makes a good point when you say that we -- and I think this is the point you were trying to make -- that we're undervaluing injunctive relief. I think injunctive relief in a lot of these cases is very powerful.

I will say that I think in some cases we ought to have the courage to just have injunctive relief. I think too often we throw in noninjunctive, noncash parts to frankly dress it up so it can be settled. Class actions are very difficult to settle. There's a lot of divergent interests involved in the settlement. And while some people say that the defense counsel and the plaintiffs' counsel have similar interests, I'm not sure that's really

true.

A, the plaintiffs' counsel often have very diverse interests as has been pointed out when it comes to fees with defense counsel. In some cases that are vertical, defense counsel have very divergent issues. There are, frankly, lawyers who specialize in objecting to these cases and can bring an adversarial position to them so these are very, very difficult cases to settle.

And one of the things I'd like us all to think about is there is a societal value in settlement. You know, Your Honor, when you made the remark that as a judge what you think about is making the case go away as a defense lawyer reminded me of Renee Zellweger's comment in Jerry Maguire, "You had me with hello." We're trying to now make a case go away.

And one of the other problems with this is a fundamental premise -- well, look, class actions are neutral in the sense of what they do. The problem is with the case itself. If it's a meritorious case and a meritorious case where the individual harm is so small that it would have never made any sense to bring it in the first place, Rule 23 is a very good idea.

The problem is there are also cases where, frankly, there are no real meritorious individual claims

but the sheer weight of the size does produce an extortionary effect on the defendants who are not willing to bear the risk of going to litigate what they believe to be dubious claims but because of the sheer size the risk could virtually put them out of business.

So what does noncash do in this situation? Well, it provides some ability to deal with the divergent risks and their assessments. The plaintiffs assess their risks of litigation and the value of the settlement. The defendants do the same and often there is a large difference between those assessments.

What noncash permits the parties to do, and if we view settling these cases as having a societal value, what noncash does is often allow them to bridge those differences so that the plaintiffs feel that they are getting more value for the class. The defendants, frankly, feel that they’re providing a lower cost.

I don’t think you have to have this exclusively. You can combine injunctive, cash and noncash into settlements. You can include cy pres. But I think to try and criticize noncash and think about excluding it would, in fact, make the class action process even more difficult than it is.

The last thing I would just say on this is, with

all due respect to the courts, that I do think that there has to be some system within the process, maybe the parties at the court's direction retain as you do in mediation a master or someone like that.

But I think that we have to do a more aggressive job at really sorting out through the judicial process the adequacy of the settlement, keeping in mind the various factors that have been discussed here today.

But I would hope that as we deal with the difficulties of Rule 23 and its administration that we not limit to the parties in the litigation creativity in settling the class while at the same time retaining a vigorous standard of review for that settlement as to the consumers. Thank you.

MR. DELACOURT: Thank you very much, Phil. Our final panelist is Paul Kamenar. Paul is Senior Executive Counsel of the Washington Legal Foundation. WLF has a very active class action amicus program and has filed objections to class action settlements, most recently in the MDL music CD case, the magazine antitrust litigation and the Ninth Circuit's Microsoft case. Paul is also Clinical Professor of Law at the George Mason University School of Law. Paul.

MR. KAMENAR: Thank you, John. I want to also thank the FTC and the Georgetown Journal of Legal Ethics

for sponsoring this. We are a public interest law and policy center here in Washington, D.C. and we not only file amicus but we also file actual objections on behalf of many class members.

Our focus, though, is on fighting what we think are excessive attorneys' fees where class members get very little if anything but the attorneys reap millions because in a typical common fund case for every dollar that doesn't go to the attorneys that's an extra dollar that does go to the class members.

The Washington Post, I think, aptly characterized the class action system as "an extortion racket that needs to be fixed." And Leah described some of the examples of some of these abusive class actions.

Other chronic problems we see with the class action will be on later panels probably today are the adequacy of the notice, the class administrator's claim that oh, 90 percent of the class members received notice about the lawsuit but these are notices buried in the back pages of newspapers and magazines.

I'd like to say that they really say that 90 percent are exposed to the notice, not actually receive it. And like I say, being exposed to these notices are like being exposed to carbon monoxide. You don't know about it

until it's too late. And it is too late to object or opt out of these settlements and you only have like a week or two to do that.

I'd like to discuss briefly a couple of pros and cons of some of the relief in the form of coupons, cy pres and tie it in a little bit to attorneys' fees. Generally thinking, money does seem preferable to coupons but if a coupon is for a consumer product you normally regularly buy, a $20 coupon may be more valuable to the consumer than its cash equivalent of, say, $10.

In other words, if it's a hundred percent markup that the company is giving they would settle for the $10 cash. You might say, well, I'd rather have the $20 coupon because if I only get $10 cash and have to buy a $20 product I have to come up with another 10 bucks in cash to do that.

I'd like to discuss briefly two cases to illustrate this phenomenon. One is the CD case you've already talked about and another one is one that we're in litigation right now. Actually, Phil is representing the defendant and that's the cosmetics settlement case that involves not providing coupons but for providing actual sample size or bigger cosmetics to those who purchased what are called high-end cosmetics from the department stores,

Estee Lauder, Clinique, Lancome over the years.

And there you're not getting a coupon but you are going to get the opportunity to get an actual cosmetic product that's valued between $18 and $25.

On the CD case, one little thing on background about that briefly that John didn't mention. Actually, the FTC got a settlement against the compact disc industry on May 10th, 2000, an injunction, a consent decree.

And amazingly, that same day, the first of 52 class action suits were filed by the plaintiffs' attorneys. Well, obviously, there's no coincidence what was going on there.

That CD case actually involved two cases, one involving those who purchased the CDs through the CD club and they got vouchers that Judge Hornby, I think, alluded to which are 75 percent off the CD and then those who purchased the CDs at retail stores, there you got a check in the mail, as John indicated, and I think the check was for approximately $13.80. And basically the class members were fairly happy with that.

But what is interesting there is that you had a cash fund of $67 million depending upon pro rata how many people registered to get the claim. So if 67 people registered to get the claim everyone would get $1 million

out of the $67 million fund.

As it turned out, there was also a clause in the settlement agreement that said if too many people filed a claim such that each person would get less than $5 the whole entire $67 million would be transferred over to the cy pres fund. So there was kind of a game going on here and as it turned out, four million people did register and pro rata into $67 million each got a check for $13.80.

We objected on behalf of several class members. The cy pres also, we objected about the evaluation. Of course, the defendant and the plaintiffs' attorney wanted to blow up the value of the CDs, the Michael Bolton CDs, the Whitney Houston CDs to around $17.38 apiece. We said, look that's got to be discounted considerably. I think Judge Hornby did discount them to about 20 percent off of that.

Now, if you look at that case and compare it to the cosmetic case that we're in court about now, as I said, it proposes to provide up to the class size is 38 million women who bought cosmetics over the last ten years and the settlement now allows you to get an opportunity but not a guarantee to show up at a department store one week in January in the middle of winter and pick up your product that you may not even use but -- and it's only when

supplies last, so you're not even guaranteed actually getting anything there.

Now, Phil argued and I kind of agree, that this suit was a meritless lawsuit. The plaintiffs' own expert said they only had about a 7 percent chance of winning this antitrust case. So the question is from the defense point of view, well, this is the best we can do. This is what the case is worth.

But from the consumer point of view you had this problem. So we objected in that case saying perhaps maybe the consumers might rather have a coupon where they could go in within a six-month period, redeem it as a voucher towards cosmetics they actually purchase as opposed to waiting in line as the plaintiffs' attorney said, there's going to be a stampede at the stores during this one-week period to get your free cosmetics and then you might not even get a guarantee that you'll get anything.

I understand that during the settlement negotiations one of the cosmetics companies was amenable to the coupons but interestingly, the plaintiffs' attorney said no, we don't want to have coupons because the courts won't like it and they said if we give you cash you're only going to get a 15-cents check. I don't know where he came up with that number, either.

But it seems to me that what was really going on here was that the plaintiffs' attorneys would like to have this product, which is valued at $175 million at retail in order to tell the court, gee, our attorney fee request of only $24 million is only like about 15 percent of this $175 million product fund and therefore that is within the ballpark of the 15 to 25 percent range.

However, if that product was reduced to an actual cash value, let's say the $175 million worth of cosmetics is really only worth $25 million in cold cash to the company, let's discount the cosmetics some 80 percent, well, the attorneys are asking for about $25 million. Obviously, their fee would look too high if they took cash in that case, even though the consumer might want that $25 million. If you have two million filed claims they'll get $12 checks. That may be preferable.

Solutions. How do we control this? Well, there was some talk about having special masters, waiting until the fee is redeemed -- I mean, the coupons are redeemed before the fees are paid.

One actual example that the courts are using is paying the attorneys' fees in coupons. A couple of quick cases. One where a securities settlement ended in both cash and stock and the court said that if counsel, quote,

expressed faith and confidence in the value of the settlement for their clients it's not unreasonable to require them to some extent to stand equally with plaintiffs in sharing the distribution in kind and awarded part of the fee in stock warrants. The airline travel case awarded $200,000 in nontransferable credit to the law firm for air travel. They do a lot traveling so I guess they could use it. A cruise line case, the court in Florida awarded a chunk of the attorneys' fees in these vouchers for cruise line trips.

And finally, with respect to statutory solutions you have in Texas for the first time, any case filed after September 1, 2003, in Texas, a class action case, says in a class action if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorneys' fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

And currently before Congress is the Class Action Fairness Act of 2004 and a couple of provisions there require that the fees, quote, attributable to the award of coupons shall be based upon the value the class members of the coupons that are redeemed and therefore there's some kind of a check there in order to determine whether the

fees should be reasonable. And certainly courts can do that by waiting until the coupons are redeemed.

Another is to use the lodestar fee where you look at the lodestar rate, the hourly rate that the attorneys are making rather than a percentage of this overinflated coupon settlement.

In conclusion, courts should carefully scrutinize all these class action cases, paying particular attention to settlements that provide for coupons and other nonmonetary relief to ensure that the settlement is fair, reasonable and adequate. And courts should also ensure that attorneys' fees in coupon cases are not excessive, perhaps unless the special master, as Phil mentioned, in fact, there is a special master in the cosmetic case right now, and to make sure that the fees are not greater than the lodestar amount. Thank you.

MR. DELACOURT: Okay. Paul, thanks very much. And I'd like to thank all the panelists for staying within their time. Thanks to that we do have a good bit of time here for questions and answers.

I'd like to start off with a first question that ties back to Chairman Majoras' introductory remarks. She mentioned that one of the big purposes of this workshop, we have kind of a general objective of informing ourselves

about the class action mechanism and what are the issues and what can we do to improve the class action mechanism.

But a more specific objective is what can the FTC do? Which of these problems can be addressed by the FTC and specifically for this panel, what can the FTC do about some of the problems with coupon compensation and non-pecuniary relief that we've identified?

So I guess I would break that down into two more specific questions. One is the way we've addressed this problem so far is by filing a series of amicus briefs. And my question would be are there certain types of coupon compensation settlements that should raise red flags, that we should be particularly concerned about and focus on?

And second, should we be taking other steps? Should we be looking beyond the amicus filings we've been doing and look to other ways of remedying the problem? Chris, would you like to start off?

PROF. LESLIE: Sure. It seems to me what you look for for red flags are the restrictions that you see on many settlement coupons. So you look for nontransferability. That's a huge red flag. You look if there are product restrictions. You look if there is an expiration date that seems relatively short, especially if it's a durable product.

But I think more importantly what we need is more data. We've got a lot of anecdotal data of coupon settlements that don't look so good. We've got some anecdotal data of coupon settlements that were fine. What we don't have is any systematic collection of data whereby we can actually look coupon by coupon and see what redemption rates are and try to get a sense of what are the restrictions in settlement coupons that are associated with low redemption rates so we can have an empirical basis for figuring out what the real red flags are.

Currently, there's no requirement that there be reporting of redemption rates or the coupons. And it seems to me that that's the first step so that we can systematically understand settlement coupons and try to separate the good from the bad.

MR. DELACOURT: Do any of the panelists have thoughts on that? Phil?

MR. PROGER: Well, I think first and foremost, you can do what you're doing, having a workshop like this and commenting in amicus in certain cases I think it's very important.

I think one thing you could do, and I think that this workshop starts that process, is to take a step back and try and think through what the problem is and try and

properly analyze what the problem is.

With all due respect to those who want to look at redemption rates, transferability, counsel taking it, they may be appropriate. I'm not saying they're not but I'm not sure that we're really focusing on the cause. I think we may be focusing on a very small part of the effect, the end.

And I think we need to look at the more fundamental questions under the system whether there is adequacy, reasonableness and fairness in this process and whether or not consumers are being protected. And to go back to a point I made earlier, whether we maybe should be looking at less what did this consumer receive in this case and more what was the overall relief to society? What was the injunctive relief? What was the cy pres? And what were the benefits from that?

MR. DELACOURT: Lisa, do you have a comment?

MS. MEZZETTI: I don't agree with everything you're saying but the plaintiffs' side is not going to run away from that any faster than the defense side. So looking at those types of analyses are probably not a bad thing and the FTC may be, maybe with other groups, the right entity to do those types of analyses.

I do agree with Chris that looking at coupon-only

settlements and looking at the restrictions on those coupons is very important. I have already said using each coupon settlement as an example for the next, I think, is very dangerous.

If we're going to collect this data we have to do it very carefully and judges and the FTC and anyone else, academics who are going to use it in addition to the parties and the courts need to know that there has to be some true version of comparison among the cases.

Having said that however, it will show why certain coupons are used dramatically. And I want to make a correction to one misstatement I made during my remarks. I talked about the airline coupon settlement and the percentages used there. What I should have said is that is an example of businesses using coupons.

And the statistics that I've read indicate that indeed when businesses are the class members well over 80 percent, the number I quoted, are used, not necessarily in just the airlines case but in business class member cases in general.

In a good consumer case, one where a coupon allowed -- although litigation was involved with only one product, the coupon allowed purchase of any product in any store in a nationwide department store, over 99 percent of

the coupons were used.

So there are coupons out there that get used and getting data on why, I agree, is a good idea. But we need to compare apples to apples all the way through, historically.

MR. DELACOURT: Paul, did you have a comment?

MR. KAMENAR: Well, I think that in terms of trying to get this information I suggested in my written comments that all class actions be filed or registered on an FTC web site.

Right now, many class actions have their own web site but I daresay everybody in this room is a class member of two or three class actions and you don't even know about it. You don't have the time to surf the web and go through every product you purchased, gee, am I a member of a class action?

On Saturday I got in the mail, some of you may have a notice, in a case dealing with life insurance and typically it's in this microprint of 40 pages and so forth right here. The point size is about 7-point or 8-point. But the point I'm trying to make is if the FTC had a web site where all the web sites of the class actions were there with a hotlink to those cases, everybody would at least have better notice.

Number two, since the attorneys and the parties have to file those things and are required to file on their own web site for that case that, too, can then be available to everyone to monitor what is going.

And finally, the judges should require that the fees don't be paid until the coupons are redeemed. If there's a 99 percent redemption rate like Lisa mentioned, great. You attorneys did a good job of getting good coupons. If the redemption rate is less than 1 percent because of the restrictions, why should the attorneys get the value of the whole amount?

So that kind of information, I think, should be on a centralized web site so that way for academics, practitioners, objectors we have a way to find this rather than have a hit-or-miss system.

MR. DELACOURT: Judge Hornby.

JUDGE HORNBY: I think the more the FTC can be involved in the actual litigation as an amicus or otherwise the better because at least from the judicial point of view we think we know whom you represent just like we do for state attorneys general. We're less certain often in terms of objectors. We're not sure of the parties when they've settled who the presenting -- if they have an FTC role is a great help to the judge who's reviewing a proposed

settlement.

MR. DELACOURT: All right. I'm going to turn now to a question from the audience. This one was submitted. The question is, if baseless class actions are filed, why don't defendants take a principled stand and fight them with motions to dismiss, et cetera instead of settling to save litigation costs? In other words, don't pay the guy with the squeegee.

So I take that one as being directed to the defense bar. So maybe, Phil, if you want to take the lead on that and then others can chime in?

MR. PROGER: Actually, not particularly. Well, look, I mean, I understand the point but you have to deal with reality in life and the defendants aren't the only ones in sole control of the situation. In the case that Paul mentioned the cases were filed in state court. There is under the state court procedure the equivalent of an MDL.

The judge is a very competent, intelligent person but from the very beginning she told one, the panel, that she didn't want the case; two, she had never tried a class action; three, she had never had a competition case.

Before discovery was commenced the court ordered the parties into mediation, ordered the parties to retain a

mediation expert which the parties did from one of the firms that provided an individual who is a former state court judge. Mediation lasted 18 months and there was enormous pressure, frankly, on both plaintiffs and defendants to settle the matter, the court made it very, very clear.

A principled approach, frankly, would have cost more than a settlement. A principled approach would have cost consumers more than the settlement. And at least in my view the case had no merit and the plaintiffs have been fairly forthright in the settlement review, which by the way, there are numerous objectors including 13 state attorney generals. And so this is fairly vigorously contested.

I think, again, when we start isolating the particularities of an individual settlement and we do so without the context of the value and the merit of the underlying claim you get into dangerous territory.

There is, however, injunctive relief and the injunctive relief, I believe, is very beneficial to consumers and plaintiffs' counsel are entitled to some benefit for taking on a difficult case and bringing the case home where overall, I believe, consumers benefit from the injunctive relief.

But I don't think defendants always have the ability to decide to go forward and just contest it. By the way, there were motions to dismiss. There were summary judgment motions. They haven't been ruled upon.

MR. DELACOURT: Does anybody else have a comment on that one? Professor Leslie?

PROF. LESLIE: I'd like to focus on this injunctive relief notion because it seems to me it's a little bit of a red herring at a certain level, that when the class counsels say look at what we're bringing, it's injunctive relief and we'd like these high attorneys fees they try to justify it by saying but we're also bringing all these coupons and look at the face value of the coupons are so high.

And then when you say but the coupons aren't worth very much money, the response is yeah, but we're getting injunctive relief, too. They're bouncing back and forth between them.

The coupons often are worthless such as in the case of Schneider v. Citicorp Mortgage, which is just going down right now where the settlement coupons are the ones that are for $100 but you can't aggregate it so you can't use the $500 coupon that's available. To use it you have to get a new mortgage or refinance your mortgage within two

years, which would require a great loss of money because you'd have to refinance at a higher rate in order to use the coupon. The coupons are nontransferable at a public sale.

So the response might be yeah, but there's injunctive relief, too. The injunctive relief that the attorneys are trying to justify their attorneys' fees on are if HUD adopts a new rule, Citicorp will follow it. And actually, at court the judge asked, what do you understand -- to the defense counsel -- what do you understand that the provisions of the settlement require your client to do that they otherwise don't have to do? The response? Nothing.

So I just want to make sure that we're not buying this notion of there's coupons and injunctive relief because it's possible that neither one of them gives a whole lot of value to the class and we still run the risk that the settlement coupons have a high face value that's being used to justify higher attorneys' fees than are warranted.

MR. DELACOURT: Leah, did you have a comment on that?

MS. LORBER: I wanted to follow up on the injunctive relief argument a little bit. I think there is

a basic policy controversy over whether or not you want plaintiffs' lawyers in class action lawsuits setting policy and regulating businesses or if you want the government agencies who are trained in doing the regulation and are familiar with the information that is needed to regulate the companies and the industries doing the regulation.

A lot of the class action lawsuit settlements or if there's a jury award this all comes up in an adversarial process where there's very little opportunity to collect all the information that you need to make a good public policy decision about what's best for the country as opposed just to what's best for the particular litigants and the attorneys on both sides and the company in the particular case.

Also, you get, and this I'm sure is going to be discussed at length tomorrow but you can get contradictory results if you've got class action versus state attorney general regulation versus government agency regulation. So I can see that injunctive relief is appealing in some cases but I don't think it's a blanket panacea for everything.

And just to follow up really quickly about the companies why don't they settle -- or excuse me, why don't they fight the cases instead of settling them, we wish the companies would not just because they would pay us to

litigate them but also because you're just encouraging more and more lawsuits to happen if you're going to settle stuff that isn't worth a suit in the first place.

I mean, you look at Madison County, Illinois, where there's this huge class action lawsuit industry going on and there's just this little industry there where the defense attorneys are charging what they charge in New York and D.C. to litigate things in rural Illinois and it's just encouraging the growth of a problem.

MR. DELACOURT: If we could have one comment from Judge Hornby and then one from Paul, we'll wrap up on this question.

JUDGE HORNBY: It is important to distinguish between distaste for attorneys' fees and distaste for the small amount of a settlement or distaste for injunctive relief.

Typically, we get them altogether and so we're unhappy because there's coupons plus attorneys' fees or small settlement plus attorneys' fees but as I think it was Phil Proger pointed out the whole point of class actions is to permit the small claims to be brought. It's a separate question from the attorney fee issue. Even an individual can get injunctive relief, may or may not get attorneys' fees. That too, is a separate issue. I think it's

important not to collapse these in our discussion.

MR. DELACOURT: Paul?

MR. KAMENAR: Yeah, just briefly, I think actually, Your Honor, with all due respect, I think there is a connection there to collapse the two because the fees are such that they are able to get higher fees for very little value to the class.

Just one case in the paper on Saturday, the Halliburton securities class action case, federal judge there in Texas rejected the settlement. You would get up to 62 cents for each hundred shares of stock you own. That's less than half a cent a share.

And one of the lead plaintiffs said, we don't want this proposal. And it quoted their attorney saying, "It conferred no benefit on anyone but the lawyers. We're not going to become poster children of the ridiculous settlement." So this is what Leah was kind of saying is, "hey, just say no."

One final thing was an injunctive case was the In Re Magazine Antitrust Litigation case. Magazine prices were being too high on your subscriptions. There was just an injunction only, not even a free magazine. And the court there in the Southern District of New York this year, earlier this year said, look, you just got an injunctive

relief that was minor.

It didn't provide a substantial benefit on the class and therefore you attorneys when you're trying to use what's called a common-benefit system as opposed to a common fund where you get your fees since there was no substantial benefit, your fees are hereby denied entirely.

And we think judges should start cracking down on this and that might prevent some of these kind of worthless results for consumers.

MR. DELACOURT: I'm going to take the moderator's prerogative now and combine two questions. Both of them will be directed to Judge Hornby. To what extent in the approval process does the court have access to a neutral economic report evaluating the settlement, especially the nonmonetary aspects it contains?

And a related question is why don't judges more often appoint experts under Federal Rule of Evidence 706 to assist in valuing coupons and other nonmonetary benefits in a class settlement?

JUDGE HORNBY: Well, those are related. Automatically, you don't have any access. In other words, it's not presented to you just off the bat by definition because instead you're being presented with expert reports that have been put together by the plaintiffs' or the

defendant's lawyers.

There is appointing authority under Rule 706 and I note that the 2004 edition of the Complex Litigation Manual suggests that courts may have the authority to appoint a special master to help evaluate settlements.

I think you have to remember the context in which these things come up. The litigation has been pending usually for several years and the court is presented with a complex settlement proposal that is defended by the lawyers in written submissions that are both legal argument and probably affidavits and analyses of various sorts.

Hearing is held. If the court is to appoint its own special expert there has to be a procedure set up for first finding an independent expert. That having been done then new studies have got to be undertaken, perhaps empirical studies or whatever. There will be expense involved and there will be delay and so we're probably talking about a very considerable delay period after the litigation has already been pending for a long while.

So all of a judge's instincts are to the contrary, maybe not correctly so, but they're to the contrary in the sense of here is a lawsuit that's been pending. It's time to resolve it. If I now have to consult with the parties about getting an independent

expert how long will that take? How long will the expert take? We probably ought to do it more but bear in mind it will mean these things will take even longer to resolve before the consumer does get a payback.

There have been efforts made. Justice Breyer's been involved, I know, with setting up panels of independent experts that courts can select from. Probably that ought to be given more attention. The money will come out, of course, of the proceeds that are involved as to what takes place because courts don't have any independent authority on their own to pay such fees but we ought to do it more, probably.

MR. DELACOURT: Lisa, did you have a comment on that?

MS. MEZZETTI: The expense of these types of masters is always a concern because the court system cannot accept, probably, the expert costs, and imposing it on the parties means that, in fact, you're imposing it on the class members.

It does not mean, however, that it shouldn't be used and in the appropriate case I have seen it used very well. And in that circumstance it was another example of the system working because the court said I need more information and I need some analysis, not unlike the

analysis that Professor Leslie is looking for on data and information. It's part of the system working.

And, in fact, I noted that Paul started his last comment about a settlement that you found unacceptable by noting that the court found it unacceptable and did not approve the settlement. So the system works and it works for coupon settlements and it works based on data and it works based on all of the information provided to the court.

And as a plaintiffs' counsel I doubt that Phil will disagree with me. I can tell you this: when a court asks me for information I get it and I give it to the court. So everything that the judge has talked about is true in terms of delay and cost but it doesn't mean that in the right case it shouldn't be done.

MR. DELACOURT: I think we have time for one more question if everyone can give a relatively quick response to this one. It's actually one of the more challenging issues that the FTC faces when we are evaluating a settlement, a coupon settlement and trying to determine whether we should file an amicus objection or not.

And the question is when you face a case where the underlying harm is questionable or maybe it's very minimal and the coupon that is proposed by way of relief

also provides minimal relief, is that a situation that we should be concerned about or is that appropriate? Do claims of low value merit coupons of low value as a solution or is there a problem with approval of such settlements going forward? Judge Hornby?

JUDGE HORNBY: I think it's important to distinguish between small injury and small likelihood of injury. Just because an injury is small doesn't mean it doesn't deserve redress. The principle of our system is that every injury does get some kind of redress. But if it's a small likelihood of injury then you're weighing the frivolous versus the meritorious lawsuit and that ought to pay an important role.

MR. DELACOURT: Phil?

MR. PROGER: I think that's a very good point and I think one of the problems we have in class actions for the courts and the parties is that often there's no easy way to separate that out and there's no efficient way to do it.

And so when we talk about these settlements and we talk about the benefits, it is an adversarial system between the defendants and the plaintiffs and the objectors and the opt-outs and the court.

Hopefully -- I don't know if I'd go as far as

you, Lisa, to say the system is working. As a matter of fact, I'd probably say it's not but in this process there certainly is the mechanism to try and reach what is a fair resolution.

I want to add one other thing from the parties' standpoint. We need to understand that parties in litigation should have the right to settle the cases and to now put an additional burden on them beyond what Rule 23 provides of more litigation, more proof on some of these issues, I think, is going to create more expense, more problems.

Maybe we need more vigorous use of masters. Maybe what we need to do is in some state courts you know that only certain judges handle complex cases. Maybe in the judicial system, federally and state, we can get judges who are interested in this area and want to do only class actions. I don't know. I don't know if that's a good solution but I hope we don't leave this area without keeping in mind that the parties do have a right to settle their cases.

MR. DELACOURT: Okay. Everyone wants a taste of this one. Leah, what do you think?

MS. LORBER: Just real quickly, at first glance it sounds like a good idea: frivolous claims get coupons

that aren't worth much but to get there you have incredibly huge transaction costs, large defense costs, large imposition on the court's time. You're slowing claims of people who are legitimately injured who may have to be backed up behind these class action suits that are taking a while. Even if they settle, they're still taking several years again in court, taking the court's attention and resources.

In turn, these large transaction costs turn into things like increased consumer prices, decisions to pull products from the market because they're being the target of class action lawsuits, the loss of money that would go into R&D, all kinds of things that have an effect on society. So overall, I would say it sounds like a good idea or a cute idea but it's not something that I'd be in favor of.

MR. DELACOURT: Lisa and then Paul and if you could keep it brief, please.

MS. MEZZETTI: I agree with Phil that the parties, because of the professionalism of their counsel, will always seek appropriate results. When parties are not acting professionally then those settlements get weeded out.

So given the judge's distinction between a

frivolous claim and a small injury, and recognizing that the parties are seeking to equitably and appropriately reach a resolution with the help of the court, I think we can reach good settlements and sometimes those are small coupons.

MR. DELACOURT: Okay, Phil, you get the last word -- I'm sorry, Paul.

MR. KAMENAR: Just briefly, I mean with respect to small claims there used to be a principle in the law, de minimis non curat lex, the law does not consider itself with trifles. The class action takes that principle and discards it and now makes these little trifles to be class actions.

With respect to the merits of the case, meritorious cases, I think judges should look at these very carefully. As Phil said in the cosmetics case, there were motions for summary judgment that were pending. The plaintiffs' attorneys said, their own expert said that we only have a 7 percent chance of winning.

The court should decide those motions right off the bat rather than forcing the defendants to settle these things where the attorneys, sad to say, or for the plaintiffs they like to say, they get all the money out of this and the consumers get very little.

MR. DELACOURT: Okay. Well, thank you very much to everyone. (Applause.) And we're going to be taking a short break right now and we'll reconvene at 11:00 for a panel on insuring that settlements are fair, reasonable and adequate.

(Whereupon, a short recess was taken.)

MR. FRISBY: My name is Robert Frisby. I'm an Assistant Director in the FTC's Bureau of Consumer Protection, Division of Enforcement and I'll be moderating our second panel of the day which is on tools for ensuring that settlements are fair, reasonable and adequate.

We plan to cover the role of third-party objectors and amicus filers as well as the impact of the Rule 23 amendment allowing parties to appeal orders granting or denying class certification, the recent Rule 23 amendment addressing second opt-outs and the more general question of whether bad cases lead to bad settlements and the implications of this.

Finally, we'll close with a discussion of some common fund case issues involving the practice of determining class counsel fees separate and apart from the common fund.

We have assembled a very distinguished group of

panelists for today's panel number two, including the Honorable Diane Wood of the United States Court of Appeals for the Seventh Circuit in Chicago; the Honorable Ann Yahner, Administrative Law Judge in the District of Columbia Office of Administrative Hearings; Professor Samuel Issacharoff, Harold R. Medina professor in procedural jurisprudence, Columbia Law school; Brian Anderson, a partner at O'Melveny & Myers; Neil Gorsuch, a partner in Kellogg, Huber, Hansen, Todd & Evans; and finally Arthur Bryant, executive director of the Trial Lawyers for Public Justice.

You will find much more detailed information about the panelists in your workshop folders and on the Commission's workshop web page. We plan to spend about 60 minutes talking about the issues of the panel and then we'll spend about ten minutes or so on questions from the audience.

If you all have a question, please write it down on one of the cards in your folder and hold it up so that our staff can collect the cards and we'll make sure we ask as many of those questions as we can at the end of the panel.

As I said, our first sub-topic of the panel will be the role of third-party objectors and amicus filers and,

Arthur, would you mind starting off with some background discussion about the role of objectors and some of the value they provide and costs they may impose?

MR. BRYANT: I'd be happy to. First, let me say that I have an assigned role at this particular workshop. I actually have been class counsel in a wide range of class actions. I've actually consulted with and advised defendants in some class actions but just about eight years ago we launched a special project to object to class action settlements that we thought were abusive. So I've been assigned the role here of representing objectors.

I will say that it is true that before we started objecting to class action settlements I did not have an eye patch, I did not need a cane, and you can draw your own conclusions from that. It was a meeting of plaintiffs' and defense counsel that I attended.

I will say that part of what the role of objectors and amici becomes very important in class action settlements because of some structural problems in the way class actions are structured. And let me mention three in particular.

The first is that when you settle a class action, of course, the really fair, reasonable, adequate settlement should be an appropriate discounting of your likelihood of

success when you go to trial. That's not just true in class actions but in all litigation. It's sort of what could we get if we get to trial discounted by the reasonable likelihood of that and the value of the case.

One structural problem that affects some settlements in class actions -- and I have to say at the outset here, of course, I don't know exactly how the FTC defines consumer class actions and how it determines which those are. So I may be talking about some that don't involve that.

I'm thinking of the Bridgestone/Firestone litigation. But the Bridgestone/Firestone litigation is sort of the prime example of this structural problem which is the Seventh Circuit came out and said you cannot certify this case as a class action for litigation purposes anywhere in nation. And then the case was settled as a class action nationally in Texas state court.

The structural problem with that is of course the plaintiffs' counsel don't really have the full threat of what they could get if they went to trial if everyone knows they can't ever go to trial. And that was the problem in that litigation. But it's also a problem that's increasingly coming up much more, frankly, in mass tort and large consumer class actions than the cases where small

dollar amounts are involved.

The second structural problem that sort of cries out for the need for often objectors and amici is, as the judge on the last panel talked about, when we come in it is that the deal has already been reached. The plaintiffs' counsel and the defense counsel are going to the judge, who often is thinking, I just want to get this off my docket, and saying we've got a deal. We're all happy. You should be happy. We can go home.

And we are the ones who come in and say, now just hold on and everything, which explains the joyous reaction of all the parties to our arrival. And the role we play there is in some ways helpful to what Judge Hornby, I think, was talking about is the third structural problem.

And this is something I hope the FTC and the Federal Judicial Center, among others, would address is that many judges aren't prepared to play the role of the fiduciary and evaluate the class action. They may not have even had a class action in front of them. So I mean this presentation, this panel is entitled "Tools for Ensuring that Settlements are Fair, Reasonable and Adequate." Objectors are one such tool. I've been called a tool by a lot of people but that's a little different. (Laughter.)

Now, the amici and the objectors can play that

role, but you have to understand, when we go in the deal's already done. The only question is whether it's going to be approved and often it is not only a case that the judge is looking to get rid of but almost always, and there's a couple of exceptions, it's a case where the judge has already reviewed the proposed settlement, approved it preliminarily as being within the range a reasonable person could approve finally, and ordered notice out to the class. That's usually how we found out about it.

So the judge is already partly committed to the settlement in addition to the parties being very committed to the settlement. And we are viewed as problematic troublemakers. And at the same time there are some very important roles that objectors can play.

First, obviously, we can focus the judge's attention on problems in the settlement that neither the plaintiffs' nor the defense counsel want to call the judge's attention because they want this thing approved.

Second, we can force the settling parties to therefore justify these weaknesses in the settlement or not but at least try to justify them.

And third, we can therefore either prompt an improvement in the settlement's terms of the refusal to approve a settlement, and the settlement is disapproved and

the case goes back to litigation.

Now, I will say I was asked to talk a little bit at the start about costs and benefits of objectors and so I told you the benefits. The costs, in terms of amici, I think the costs are relatively minimal. I mean, it's a little time. You have to read their brief, consider the arguments, the settling parties respond to the argument perhaps in the brief but there's not a lengthy delay caused or anything by amici.

In terms of objectors, however, well, we not only can delay the resolution but because we can act in some respects like parties and most particularly we can seek discovery, we can challenge the proceedings in the way they're being structured and what's being done and we can appeal we can dramatically delay the resolution of the case.

Our impact on the timing can be dramatic and we also can cost the defendant or the class counsel or both a significant amount of money. And that really gets to what I think is a real problem. I will say it's our goal when we get in there, there are some settlements where we're just looking to kill the deal, because, for example, I'll give you one that's in Mississippi right now.

There's a Federal District Court in Mississippi

where there's a proposed settlement. The terms of the settlement are, and I'm not going into the dollars amounts because from our perspective they're interesting but don't really matter to this point, the terms of the settlement are everybody in the settlement, in the class gets compensatory -- an amount of money that they categorize as a settlement of compensatory damages and an amount as settlement -- I'm sorry, amount of money they characterize as punitive damages.

Anybody who opts out is free to seek compensatory damages but is not free to seek punitive damages and because they opted out of their compensatory damages is not allowed to get a portion of the punitive damages settlement. So structurally it's just wacky and we're objecting to that.

There's another settlement, for example, right now in Maryland we objected to successfully six months ago. It ended up with the deal being $108,000 total to the class, $13 million to class counsel. We objected, the settlement was disapproved.

We are now going back in because they've negotiated and they've reached a new deal. The class will get $12.5 million -- that's a lot better than $108,000 -- but the key part of the negotiations were class counsel has

the right to still recover $12.5 million themselves for getting this $12.5 million for the class.

Now, I will say, even there, the dynamics you have to understand is we are fighting both Bell Atlantic's counsel who favored the first settlement and favored the second settlement and the class counsel who, of course, favored each of the settlements that would get them $12.5 or $13 million. And we are the ones, as well as some others, who are causing trouble.

And yes, we have already in that case, for example, cost the defendants an increase in payout from $108,000 to $12.5 million minimum. So if we are successful we end up costing them money not so much for our fees because we rarely seek fees but much more for paying the class.

But also, we will cost class counsel fees because even in this litigation as just one example, because we are objecting to them getting a 50 percent fee in the entire class action, another $12.5 million. And if we succeed the class will get much more and they will get much less or the settlement won’t be approved.

The problem is, and I think it’s a serious problem, I can’t just paint objectors as these pure, lily-white people doing just the public’s good because there

really are, to overstate the extremes, two different kinds of objectors.

There are a set of objectors that really are motivated by a desire to improve the settlement for the class, to protect the class members from having an unfair deal made. But there is another type of objector and there is a type of objector that understands that if they hold up this deal they can get paid off to go away, period.

I first heard the term of them being called professional objectors and I took it a little personally. What am I? An amateur? (Laughter.) But their motive is dramatically different. They're looking to get paid to go away. And I will tell you as class counsel in cases we've had to deal with people like that.

And the most dramatic example I had of this problem -- well, I was going to say there are two types objectors -- and none of them announce that they're the second type. Right? They all pretend to be, and some of them probably are in their heads even though I think they're not, people out just to make a better deal for the class.

But I will tell you sort of where an example of a real education took place. We went down to object to a proposed class action settlement in Mississippi Federal

court before, actually, a judge who's now become famous, Judge Pickering.

And the settlement provided, basically it was for people who were in mobile homes, primarily, on forced-placed insurance. I don't remember the precise dollar amounts but let's say the claims were worth a couple of thousand dollars per person. No one was going to sue individually except for maybe punitive damages to Mississippi.

And the settlement provided that each class member get, let's say, $500 or $1,000 per person and that it was no opt-out as to punitive damages. You could not opt out and seek punitive damages separately. You got $1,000; that was the end of it.

And so we went down to object and we appear before Judge Pickering. We have three clients, class members who had mobile homes and were treated like this. And he calls a conference a week before the fairness hearing, the final fairness hearing.

And our lawyer goes in and the judge walks in and he says, now, listen, I have to tell you, this is my very first class action settlement. And I've been thinking about this and there are only three people objecting and I can't tell the defendants to settle those individual claims

but it seems to me if those three people were satisfied as to their recoveries this case would be much easier to approve because there would be no objectors at all.

And I am not making this up. You know, I'm sitting up here in Washington, D.C. having sent our lawyer down there and the defendants put enough money on the table that these three, poor African-American clients who live in mobile homes, you know, they're talking about over $100,000 total for three people on a settlement that would pay a thousand bucks apiece if they stay in the class and they buy out the case at the judge's urging, in some respects.

And then another settlement within six months along very similar lines is struck in front of Judge Pickering. And this time I fly down and I walk in the room -- literally, I go in the courthouse and there's about 40 lawyers sitting out in the courtroom and I'm waiting for the judge.

And the judge's law clerk comes out to see me and she says the judge would like to meet with you and counsel. And I said okay, and I started up and she walks me back in and nobody else gets up. I said, well, what about the other counsel? She says, oh, they've been in there with him for the last half an hour.

And I get in there and he says, look, the deal

has been improved dramatically as a result of your objections. Here's the new settlement but it still didn't let anybody opt out. And you know last time you guys were here your clients got paid off and everybody went away.

And I've decided that's a mistake because all it does is it encourages people who are looking to get bought off -- meaning me -- to come back again and again. And I've decided that's a mistake and it's not going to happen again.

And I said to him, thank you, so much. We're not looking to get bought off. We want a better deal for the class. We were so angry the last time that we waived the fee we could have gotten from our clients. And he sat back and said, would you repeat that last part?

And I explained again. He said, I've never heard of a lawyer waiving a fee in a class action. What are you talking about? And I explained to him about the organization.

He said, well, you're a very different sort of person. Your organization is very different than the way you've been painted to be by these other guys who painted me as a professional objector. And we ended up finally getting the whole deal corrected.

It was actually written up by Rand. In the Rand

book of class actions we're the only group, both talked about for a case we prosecuted and for a case we objected to.

But I will say that there's no way to parse out which kind of objector is which kind of objector for certain. And so the solution, I think, to that, there's really two. One is you've got to focus on the content of the objections. It doesn't matter who they're coming from. Ultimately, they're either valid or they're not valid and the judge has to look at them.

Second is, I think the federal rules changes that have gone into effect should help prevent the buyout objectors and expose them and help a judge stop them from getting paid off to go away in some respects.

MR. FRISBY: Thank you, Arthur. Why don't we move on to Judge Yahner? Would you like to weigh in on this subject?

JUDGE YAHNER: Sure. I should make clear that I'm weighing in as an ex plaintiffs' lawyer, not as a judge. I litigated antitrust class action cases as a plaintiff for nigh on 20 years and that's the basis of experience I'm speaking from.

I partially agree with Arthur and partially disagree. I think it's very important, just as the first

panel showed, to distinguish among class actions. I believe that class actions are not as a group bad things. There can be bad subsets of class actions but the purpose that a class action was designed to meet is generally met.

And giving Arthur the benefit of the doubt, I will contend that there are good objectors and that they all should not be tarred with the same brush but the presence of objectors can cause a whole lot of problems both from a practical and a philosophical point of view.

I think that if an objector comes in with the idea as Arthur said to look to kill the deal then it's not helpful. Looking to kill the deal is a kind of blanket condemnation of what has happened during the course of the litigation and the settlement process which may be an appropriate outcome but isn't really helpful to the parties.

I think having third-party objectors come in does impose considerable costs on the litigants and as a consequence class members see their recovery pushed down the line. It can run up costs. There is a possibility of extortion, to put it bluntly. There are people who go around the country and object to class action settlements. They are generally well-known and it is still generally very difficult to deal with them because they can impose

costs on the process.

And I don't think that there are any courts that have really said Mr. So-and-so, we know how you've operated in the past and therefore we're not going to hear the kind of objections you're raising in this case.

I think that a third-party objector can raise legitimate issues that have gotten lost in the adversarial process. I think they can bring in points of view from different class members that are helpful, and one of the objectives of a useful objector should be not kill the deal but if this has to go back to a negotiating table, what can be done to deal with the problem that we've identified?

Just their presence, however, can make reasonable compromises very difficult because to justify their presence many times they have to be able to say we killed the deal or we killed 50 percent of the deal or this is the reason why we're here and either we should be compensated for it or we should get a good press release for it. So they complicate the dynamic of the negotiations that have been going on.

I think generally if it is a public-interest group, if it is a state government, if it is a federal entity they come in with a higher degree of respect. That's appropriate, but I think that litigants usually look

at state and federal interveners and objectors with somewhat of a jaundiced eye because they may be coming into a particular piece of litigation with a policy objective that may not be appropriate to work out in the context of a particular class action.

I'm not going to say that this could be the Federal Trade Commission since we are sitting here in its building but I think it's important that if an agency is pursuing a policy objective that it be careful about the case that it gets involved in to make the point. So just like all class actions aren't bad I think all objectors are not bad and some can be very useful.

MR. FRISBY: Thank you very much. Why don't we hear now from someone who's represented the defense side? Brian, would you care to weigh in?

MR. ANDERSON: Well, I've gotten some class action settlements approved. I've gotten some class action settlements rejected. I've won some class actions and I've lost some class actions so I think in the course of my defense career I've seen this from many different angles.

When a client wants me to negotiate and obtain approval of a class action settlement the client is looking for two things. First, it's looking for compromise. A settlement is, by definition, a compromise, which means

that the plaintiffs are not going to get everything that they think they should have gotten had they successfully pursued the lawsuit to the very end.

And the second thing the client is looking for is finality, a termination of the cost and the disruption associated with high-stakes litigation.

Into that arena comes the objector. And I agree with both of the panelists that there are good objectors and bad objectors and you cannot just look at their name tag and determine before they have spoken whether they are a productive source of third-party information to help the judge keep me honest and the class counsel honest or whether they are motivated by some personal agenda that is inconsistent with what the purpose of a class action settlement ought to be.

Interest group objectors, like the Trial Lawyers for Public Justice or the Washington Legal Foundation, or potentially a government agency, can quite often provide the judge with a useful, appropriate perspective and, frankly, keep the lawyers honest so they can be a productive role in the settlement implementation process even if they do drag out the process and make life uncomfortable for the lawyers who are pursuing the settlement.

Conversely, if the interest group is one that does not believe in compromising the issue that is being litigated, they are a destructive force. And so, if they are an interest group that believes that the only fair settlement is one that involves complete capitulation by the defendant, they are acting inconsistently with the purpose of a settlement in the first place.

Other lawyers who have a financial interest in killing the settlement, either because they are professional objectors or as is often the case when we have multiple class actions filed around the country on the same issue, are lawyers who are prosecuting other lawsuits and they have been left out of the settlement tent, often because their fee demands were exorbitant, come in and try to kill the settlement in one of two ways: either get the judge to order exhaustive discovery of the settling parties, which is tantamount to having to litigate the lawsuit in order to get it settled, which is not what you're trying to accomplish when you're settling.

Or they are taking the position that if you will kill the settlement and let me pursue my class action in some other court I will get more recovery. That, too, is inconsistent with the notion of a settlement.

So you can't trust the hat that the objector is

wearing. You do, as a judge, I think, have to listen very carefully to the nature of the objection that is being made and try to promptly make a decision whether this is somebody who's bringing a productive point to the table or simply being mischievous.

MR. FRISBY: Thanks very much. Let's turn now to Neil and perhaps you could also address the point made by the two previous panelists about the role of amicus filers like the FTC in particular.

MR. GORSUCH: Sure. I come at this from someone who's litigated all three sides of this awful triangle we've discussed: plaintiffs, defendants and objectors. I should make that clear.

I think what's underlying all of this and has not yet been fully explained is that in the normal adversarial process the parties have strong interests against one another and give the judge the benefit of that adversarial interaction.

When it comes to class action settlements, that disappears or at least it can be diminished significantly. You have on the one hand defendants who want to buy peace and the threat of certification can mean the destruction of their companies. They have to buy peace even sometimes of what some folks would consider less than fully meritorious

claims.

The other side of the triangle -- and to buy peace they don't care how that money gets split up. They don't care whether it goes all to the attorneys, whether it goes to class members or how the settlement is structured. They are indifferent to that.

And that's an important structural difference between the normal private litigation scenario that most judges see from day to day and assume is going on where the parties are clashing and the class action settlement arena.

On the other hand, plaintiffs' lawyers, who frequently don't have to report to their clients in a meaningful way that normally exists in private litigation, have no particular interest to structure the settlement to favor the class as opposed to them. That's the incentive problem that you find in the class action litigation arena, I think. And how you correct it is an interesting problem.

As to objectors, there is, in my mind, there is no question that they can serve a useful role though there are professional objectors, no doubt. One example of this is what the FTC is doing and has been doing for some years and under the initiative of this particular leadership, and you can go online and look at the cases that they have, in fact, pursued.

Some astonishing results, including situations where class members were going to receive telephone services that they had never subscribed to at an additional cost. And they could only get out of those additional services by later asking to be removed. But in the interim they were going to be charged for them. This is an astonishing settlement and I encourage you to go look at it.

The problem that the FTC confronts and that legitimate objectors, excluding some we've represented, CalPERS, Council of Institutional Investors, is that they have absolutely no notice of what is going on until after it's often too late.

Class members get notice sometimes with three to four weeks before the class settlement hearing, the final class settlement hearing. Arthur's talked about the preliminary one that's already done by the time objectors hear about the case.

So you have four weeks to put together an analysis of a case. Who amongst us has done that on a regular basis? It's like a PI hearing or a TRO hearing. It's extraordinarily difficult. You don't have an opportunity to conduct any discovery and so you walk into court really handicapped. Four weeks of notice and you

have no opportunity to put together any evidence or often present it.

Nonetheless, the statistics are telling. In the Devlin v. Scadelletti case where we represented the Council of Institutional Investors we looked at 30 years worth of history of nonparty objector appeals and we found that fully 32 percent of the cases in which nonparty objectors had participated were reversed. This compares with about a 12 percent reversal rate of average civil litigation. So the participation of objectors proves itself by the statistics.

The FTC has proposed a rule amendment to Rule 23, which I think is too modest. Under that proposal they would require litigants to notify the FTC or the appropriate governmental agency of any class settlement that's about to occur involving a case where the government has an ongoing investigation.

So if the FTC has already initiated an enforcement proceeding against the company and the plaintiffs' lawyers are merely piggybacking on that, the FTC wants to know about it in order to see whether the settlement that's going to be achieved for the class is fair and reasonable or whether it's winding up just benefitting plaintiffs' counsel and defense.

I think this is too modest because it limits the notice to cases where the government is already active. Why isn't government being notified of cases where it hasn't acted yet but perhaps should?

I would also just note that the FTC so far has limited its activities to consumer class actions. I'm not sure how it defines consumer class actions either but one has to ask, why stop there? What about mass tort cases? What about securities cases? I think it's a useful function that they can serve and should be expanded.

MR. FRISBY: Great. Thank you very much. Could we turn now to Professor Issacharoff?

PROF. ISSACHAROFF: I think what this discussion shows is that it's very hard to categorically assess objectors under a one-size-fits-all model. We can look at the Supreme Court cases of Amchem and Ortiz, the leading class action cases of the last decade and you can say that both of them were the result of objectors who litigated successfully all the way through the Supreme Court.

At the same time, anybody who has been in a courtroom in a significant class action settlement knows that there is a predictable group of characters who will show up in every case with standard pleadings only sometimes adjusted for the facts of the particular case who

seek a payment to go away.

And the parties being both friends of the deal have an incentive to pay them to go away. And very often they come into the courtroom and the first question they ask is how much can I get. And everybody knows that that's what they're there for.

So the question is how can we differentiate between these two groups? How can we do so in a way that protects consumers. And let's be frank about this. When parties know that they will face professional objectors they have to withhold some of the funds that would be potentially available for settlement and for payment of the class in order to pay off extortionate amounts. So there is a transaction cost associated with this. There is a drag on the system.

I think the key point to remember in this is the point that Judge Hornby made in the first panel which is it is very difficult to assess the bona fides of a settlement unless one has full information about the record.

Courts are poorly positioned to retry the case, to go through the discovery that has been had, to appoint masters, to get into all the internal workings on an ex poste basis, which is increasingly what objectors push us to, to assess the merits of the settlement as the

settlement is structured.

I think we have to go back to first principles and to go to the Amchem insight which is are there structural assurances of fairness in the way that this was done? I think it is important to tell courts that the only way that they can judge the bona fides of a settlement is on an ex ante perspective.

Are the incentives of class counsel properly aligned with those of the class? Is there an incentive to litigate this as fully as possible? A lot of this is going to turn on the way the fees are structured because that's what disciplines the class.

I think it is a mistake to say we don't like this provision; we don't like that provision. We think the settlement could be improved because very often those settlements, if they are the product of arm's length negotiation, were a compromise. And of course it doesn't give everyone everything they want.

One final last small point. Arthur has a philosophical objection to punitives not being available in every single case. That is a fine point of principle. I happen to think that punitives do have to be resolved once and for all basically and what the procedural structure is.

That is a very complicated question. That's a

legitimate position for an objector to take in a case because that's a position saying you should not be able to close out certain kinds of third-party claims going into the future.

That is very different from what one sees in the bulk of these class action settlement objections where you get microscopic tweaking of the settlement so that you have, as the objector, a hook to get in there to demand some kind of fees to be paid off.

And if you look at these cases it may be that after the fact the objectors do succeed but in most instances there is a cosmetic change to the settlement with a dollar figure attached to it.

MR. FRISBY: Thanks very much. Why don't we finish off with Judge Wood? I'm sure we'd all like to hear more about how objectors and amicus filers can do a better job for the ultimate decision-makers such as yourself.

JUDGE WOOD: Thank you. It's a real pleasure to be here and I do appreciate the opportunity. I'm going to speak very briefly separately about amici and objectors because from my point of view at least they present quite different issues.

In general, for any kind of case, whether it's a class action case, whether it's an antitrust case, any kind

of case where we might expect you see amicus briefs we really in the Seventh Circuit anyway ask one question, which is, are you going to add anything to our understanding of this case before us that we have not already gotten from the briefs of the parties?

And sometimes the answer is a very easy yes. You discover that somebody comes in with a perspective on the legal issue before us that we would not have expected to see from the parties and it's plain that it's really helpful.

Sometimes the answer is equally obviously no. I have seen cases where there's Party A and Party B. Party A is the appellant; B's the appellee, and let's say the appellant comes in with, well, five amicus briefs come in from organizations purportedly trying to come in as amici and then you look at who's writing the brief and it's the same lawyer as filed the brief for the appellant.

Well, I'm sorry, that really doesn't advance the ball for us. It's a waste of time and frankly we are not in want of reading material, to put it mildly. So we ask that question: what are you adding? I think there's a special consideration if it's a governmental party, whether it's the FTC, whether it's a state attorney general's office.

In that instance you at least have a presumption that there is a public interest motivation for coming in with this brief and interest in letting us know what the position of someone with broad-based responsibility for a particular area is.

So I'm not saying we wouldn't take -- of course we'd take an amicus brief from a governmental authority but the question is how much weight would it carry with us. Unless you rebut that presumption for us we're very interested in the point of view of the governmental parties.

So in terms of amicus briefs you can see actual specific Seventh Circuit opinions on the criteria that we apply. We probably turn down more amicus briefs than any other court of appeals but that's because of this failure to add anything to the set of information that we already have. And we will also similarly reject an amicus brief if somebody else has already come in and made the point.

When I'm motions judge and I'm on the motions panel, and that's what this comes before, I look at the other briefs that have been filed and I look at this and I say is this something I want to inflict on my colleagues as more reading material or is it already covered? And I make the call that way. And that is in fact laid out in

published opinions that we have.

In terms of objectors, I see it as quite differently, as a somewhat different problem anyway. Let me preface this remark by sharing with you an experience I had a couple of years ago when I went to France at the invitation of the State Department to participate in a seminar that their highest court, the Cour de Cassation, was having on the common law system.

And the panel they had invited me to participate in was on what they called roughly translated third-party interveners. So I, you know, got ready and actually took more than the usual care because I had to do this in French, which was a bit of an intimidating challenge for me. But anyway I was looking at third-party interveners, les tier intervenent. If you speak French that's what they called it.

It turned out they meant unnamed members of classes. Very interesting conceptual difference. They saw unnamed members of classes as much more in the box of third parties who are involved in cases than they did direct parties, which takes me to this point.

When we are thinking about the role of objectors, in a sense what we're doing is we're checking on the validity of the class certification to begin with. Have

we, in fact, got before us the right parties? Are the parties representing the class normally a plaintiff class really speaking for everybody who is out there?

And, of course, if the 23A process has happened the way it's supposed to, the answer ought to be yes. But we find out from the objectors whether there are below-the-surface differences of opinion about the commonality of the class and we certainly can find out whether the attorneys as representing the class properly, all of the things that we've been through in 23A. I think that's part of the insight that lay behind the choice in this recent amendment to Rule 23 to have the second stage opt-out.

And I suppose from my point of view the question of objectors really is a merits question. I don't really care if they come in every day or if they come in only on occasion. I want to know what they're saying. And even the professional objectors may now and then hit on a meritorious point. Fine. If they have, then we'll listen to it.

I know it's a costly matter but the fact is people have the right to point out different things to the courts and we don't want to approve settlements if, in fact, they are not a reasonable compromise. That doesn't mean it has to have every last thing that the plaintiff

class would have wanted had they litigated to conclusion. We know that. But we have rejected settlements, even at the Court of Appeals level, that we thought were not fairly representative.

MR. FRISBY: Thanks very much. I know we could spend a lot more time on this subject but we are running a little behind schedule so I think we'll move on to the next topic, which is whether bad cases lead to bad settlements.

But before going into that I thought we could spend just a few minutes on some recent amendments to Rule 23 starting with the older amendment providing for the appeal of orders granting or denying class certification. And Brian, would you mind starting off on that with a little introduction?

MR. ANDERSON: Sure. Rule 23F had its fifth birthday last December. Before December of 1998 there were 18 published decisions by Federal Courts of Appeal on an interlocutory basis reviewing orders that either granted or denied class certification over a ten-year period. So that was about two decisions per year.

Basically, it was very, very difficult to get an interlocutory appeal of an order by a District Court certifying or refusing to certify a class action. And that was because the only ways you could get into the appellate

system on an interlocutory basis was through a Section 1292 certification or a writ of mandamus, both of which are very difficult.

This led to a lack of robust appellate court guidance to Federal District Courts regarding the standards that they should apply when entertaining class certification motions. And because many state courts look to the federal system for guidance about how to handle class certification motions, the lack of federal appellate guidance trickled down to the state courts.

And so as a result you had trial court decisions standing for virtually any proposition that a proponent or an opponent of a class classification motion might want to advance.

The federal courts decided that this was an unhealthy regime and it would be a good thing to develop a more robust body of case law concerning class certification standards and so Rule 23F was enacted in December of 1998.

Earlier this year I published an article in which I went back looking through LEXIS at published orders resulting from Rule 23F petitions. And that article was published by the Washington Legal Foundation. You could either pick up a copy out in the lobby or get it on its web site.

Bottom line, what we did is look at the use of the rule in the five years after its enactment and we found the following: Rule 23F has led to a fourfold increase in the number of published appellate court decisions at the federal level concerning the grant or denial of class certification. There had been 44 appellate decisions in five years or roughly nine per year. Contrast that again with 18 rulings in a ten-year period or two per year.

During the first five years the circuits, at least according to the published decisions that we found, were quite generous in granting requests by litigants for interlocutory review of class classification orders. Eighty percent of the time those petitions were granted.

Six of the circuits granted every one of the petitions that were submitted and 11 of the 12 circuits granted at least one petition. So you've got 11 of the 12 circuits now with at least one class certification ruling in the last five years.

Defendants who are challenging class certification orders have filed roughly twice as many requests for interlocutory review as have plaintiffs who are challenging the denial of class certification but courts have been even handed as between plaintiffs and defendants in terms of the percentage of the petitions that

they grant.

At the end of the day expanded interlocutory review of classification of rulings has benefitted defendants more than plaintiffs but both sides have benefitted from the tool.

Defendants have won 70 percent of the interlocutory appeals that have occurred over the last five years, either because they obtained a reversal of a trial court order certifying a class or they sustained a trial court order denying class certification. Plaintiffs, of course, have won 30 percent of the time either by winning affirmance of a class certification order or reversing the denial of class certification motion.

The most common outcome in these 44 cases in the last five years has been reversals of class certification orders. That has occurred 26 times but there have been nine decisions affirming class certification, five affirmances of orders denying class certification and four rulings reversing the denial of class certification, if you can keep up with all those double negatives.

Interestingly, the Fifth Circuit, the Seventh Circuit and the Eleventh Circuit have been at the center of the appellate action on this issue. Fully 28 of the 44 published cases have emanated from those circuits.

And in those circuits which are thought by some to be marginally more defense-oriented than plaintiffs oriented on these issues it is true that defendants have won 22 of those 28 cases in the three circuits. Plaintiffs have at least one victory in each of the three circuits.

So bottom line, Rule 23F has certainly led to a larger flow of appellate guidance on class actions. I think this has been to the benefit of district court judges as well as practitioners and certainly state court practitioners as well.

My hunch is that over time the rate of petition approval will decline as circuit courts perceive the issues to have been largely resolved and perceive that there are fewer newer issues coming down the pike. But I certainly hope that circuit court judges will use the tool to take interlocutory appeals of clearly problematic orders either way or to resolve new issues that come down the pike.

MR. FRISBY: Thanks. Judge Wood, would you mind telling us a little bit about the procedural issues in your circuit and your views on this?

JUDGE WOOD: Sure. Well, just mechanically, the way a 23F petition is handled in the Seventh Circuit is that the petition comes in and it’s handled in precisely the same way a 1292B motion might be handled or any other

thing other than a full-blown appeal of either -- and I'm including in full-blown appeals anything that one is entitled to appeal either from a final judgment or a preliminary injunction, namely, it goes first to a motions panel.

We have just rotating motions panels, an extremely rigid rotation that we set out a year in advance so it's always clear whether you're on the motions panel or not and exactly who presides over it. So they'll present the 23F petition to us. The motions panel will consider, one judge at a time, whether this particular effort to bring an interlocutory appeal is worth taking and we'll just vote informally one at a time.

Obviously, the real question is which ones should we take? In which instances should we deviate from the rule that we normally don't want to hear an interlocutory appeal? There is so much that is not developed about the case at a rather early stage when many class certification orders come along that interlocutory appeals are disfavored in that sense.

The other point I would make is that if somebody has erroneously denied class certification there is only one person whose rights are going to be affected by that, not to say that that isn't important for that person,

especially if it's a $15 case and it may go away, but that will take me in a minute to what the standards are anyway for 23F.

There's no preclusion effect on the other members of the class if it really is going to be a good class. There's a self-correction built into the system because someone else is probably out there with the same class action.

So the costs of making a mistake in some instances are addressable unless we are in one of the areas where we would take it. You know that in the Seventh Circuit the leading case is Blair against Equifax in which we'll look on one side or the other whether the class certification decision is really a surrogate for the whole case. Is it the death knell of the plaintiffs' case not to be able to have the class? Is it a loss to the company case on the defendant's side if there is a class? So one side or the other of that coin.

So either one of those we try to pick up and see if those are the cases where this really is, in effect, the whole case. And that is an instance in which we would grant the 23F petition.

The third category that's outlined in Blair talks about unsettled questions getting more appellate law on the

issue. And I just want to spend one second saying what is the issue. We have tried at least to focus on points specific to class actions rather than to the extended distinguishable points specific to the underlying litigation.

So we're not going to be as taken with the question whether there is some underlying merits issue. Maybe you think that the plaintiffs' theory is frivolous anyway or maybe you think something about the merits. The point of 23F is to clarify class action law issues such as what kinds of choice of law rules.

That was one of the things in the Bridgestone/Firestone case that the court pointed out. Is this going to be suitable for a class from that point of view? The precision of the class definition process if there's anything general you can say about how closely interests should be aligned for someone to be in the same class.

How many common issues? Is one enough if it's a big issue, a dispositive issue? What about issues of law, issues of fact? What are you doing with subclasses? How much do you want to rely on ancillary procedures to resolve issues that are not in that common issue box? Anything like that which is a class action specific thing would be

something that would seemingly justify taking this on a 23F basis.

So at least in terms of the way we try to think about 23F it's not just a quick and early look at the merits of the case. It's really does this case qualify as a class action or should it be handled in individual litigation?

The only final thing I want to say is just to cross reference over to another debate that's raging in the federal courts of appeals, namely, published and precedential decisions.

The vast majority of our rulings on 23F motions are not published. It just happens quietly in the chambers of the judges and we normally don't take them so you're going to have a distorted view of what's going on if you're looking only at the published opinions.

MR. FRISBY: Thank you. Judge Yahner, any downside to these appeals that we should be thinking about?

JUDGE YAHNER: Yeah. I think to use a technical term they're a real pain in the neck. I think in many ways the Rule 23F phenomenon is like the Daubert or Daubert case phenomenon, that when that case came down there was a sense of now we're going to see these motions in every case down the pike. And that happened for awhile.

And very frivolous Daubert motions were filed and I think very frivolous Rule 23F motions have been filed. As the courts deal with them there will be an established set of opinions that will discourage some nonsensical or frivolous motions but there are some people who are always going to do it as a litigation tactic because it ups the ante and puts plaintiffs through one more hoop of showing that they're serious about the litigation. So I think at times they're very meritorious; at other times they're not and over the course of time these things will shake out.

MR. FRISBY: Thank you. We need to move on to the second opt-out issue fairly soon but do the rest of the panelists want to say anything quickly about this topic?

MR. GORSUCH: Robert, just one thing and it also applies to the second opt-out rule. Whatever you think of them as changes to the federal rules I think it bears asking to what extent they're actually going to impose a restraint or a constraint on the settlement process, given that in fact so many of these cases often in the securities area I'm thinking of particularly are settled before the class is ever certified. The deal is done.

So having an interlocutory appeal for a class certification hearing that hasn't happened doesn't impose, I think, one might argue, a heck of a lot of constraint on

the parties in terms of how they craft their settlement.

MR. FRISBY: Why don't we move on now to the second opt-out issue. The recent amendment to Rule 23 authorizes courts to reject settlements that do not provide members withe a second opt-out opportunity. Professor, would you like to start off on this one?

PROF. ISSACHAROFF: Well, this is actually a pretty easy one. I think that this rule has had no effect whatsoever. And I think that's for two different reasons. Actually, there's a third which I'll start with which is the empirical one. As best I can tell it's never been used.

It's hard to get the data to make sure you have all the cases covered but I have not seen any decision in which a second opt-out has gone out as a result of the new rule. And I think that is true for two reasons, one conceptual and one practical.

The first is, the conceptual one is that, as we saw the Supreme Court address in Amchem, it is very often not enough protection for individual class members to simply be given the right to opt out.

There are all sorts of structural reasons why class members don't opt out. It may not be worth their while. They may not know they're members of the class.

They may not understand the full implications of what the class action gives them or what effect it might have on them so giving them two chances to do this when they haven't opted out the first time is unlikely, in my view, to get a lot of correction back into the system.

But the second reason is more of a practical one which is that, as Neil just said, the overwhelming number of class actions after some initial discovery where the merits discovery invariably gets infused in part into the class question discovery the cases will settle prior to the certification process. And so the first notice to the class will be the notice of the class settlement and therefore this second opt-out is not triggered.

In those cases in which a class is certified for litigation purposes which is the only time you could have a second opt-out unless the strange experience of the Seventh Circuit recently where you have a first settlement rejected and then a second settlement, leave that aside because the rule really doesn't address that, in cases where you have a litigation class settle and then there is the question potentially of a second notice after settlement something has happened in between.

And that's what Brian was just addressing. We have Rule 23F. These cases get appealed and the uptake

rates in the court, from as best we can tell on certifications for litigation purposes, is very high, which means that before any notice has gone out the courts of appeal are willing to entertain the certification order.

Now, it's true, as Judge Wood says, that the formal law in most circuits, including the Seventh Circuit, is that the courts will take up only the certification decision and not the merits on Rule 23F.

It is also true as the Seventh Circuit has written by Judge Posner that it's really hard to tell the difference between the two in a whole lot of these cases. So the parties will infuse the certification decision with a great deal of the merits of the underlying controversy, which means that an appellate decision on the certification question, whether it's upheld or reversed, will heavily inform the parties as to what the likely litigated prospects of the case will be.

As a result parties will settle on the basis of that information obtained through the 23F appeal. That is why I think we have no cases where there is this two-track process. So I think that, sure, give people more information, give them more of a chance. This is a proposal that my colleague Jack Coffee came up with originally. In practice I think it's had very little

bearing.

MR. FRISBY: Thank you. Arthur, what do you think about this issue?

MR. BRYANT: Well, I generally agree with the professor's comments. I want to distinguish, though, there is one set of cases or type of class action where a second opt-out becomes very important and they are not ones where they were litigated.

And that is some kind of mass tort settlements, particularly where you're talking about toxic torts and exposure to a chemical that can, over time, cause different injuries. One example is the Fen-Phen litigation is where there was a second opt-out, actually more than that, in the settlement agreement itself.

They reached a settlement, said here's what you get but if it turns out you have another illness three years from now or whatever the time is that you didn't have at the time the settlement first went through, then you have a new right to opt out and there are certain limitations on that right.

And actually, there are settlements that at least I've seen in the proposed fashion have that even further where they were not litigated -- I mean, at the start they were but the opt-outs were built in because we were talking

about a mass tort exposure where the injuries change over time. And I think it's a great addition in that respect. Otherwise, I agree entirely.

MR. FRISBY: Thanks. Does anyone else want to add anything quickly on this topic before I move on?

MR. BRYANT: I just wanted to add one thing about this and the other topics. I just think it needs to be flagged at this program which is at least up to now the percentage of class actions that we are talking about is minuscule in the big picture, that is, coupon settlements was the first panel.

The statistics you showed us you'll hear later from the reporters the number of cases that have objectors or amici is actually, at least according to the statistics, a very small percentage. The Rule 23F cases, the second opt-out cases is a very small percentage.

And I think it's critically important that the FTC does want to do something to make class actions fairer for consumers but I'm very concerned that the eye is not on the real ball here and that we're looking at tiny little pieces here and there.

I'd raised in a conference call at some point when we get to this and I'll just flag a couple of places and I don't know if this is the right time or not but you

told me to raise it so I will.

MR. FRISBY: Could we save those until closer to the end --

MR. BRYANT: Sure. Be happy to.

MR. FRISBY: So I can get to the other topics? But that is a great segue to our next topic which is to what extent bad cases lead to bad settlements and this topic came up very vividly in the first panel.

What happens when there's a case that may not be very strong but the parties want to settle it? What are the implications and what do we do about it? Brian, do you want to start off on that one?

MR. ANDERSON: Well, I think bad cases absolutely make bad settlements. I think every day there are class actions filed that I would call junk lawsuits that complain about the world as it is and will always be an attempt to exploit that situation to justify a lawsuit, that exploit a situation where the company has made a mistake, often has rectified that mistake and then the plaintiffs' bar seeks to exploit that mistake by filing one or often multiple lawsuits over the same issue.

The defendant then has a decision to make. In a perfect world the defendant would vigorously contest that lawsuit, explain its conduct, explain why there is no good

public interest to be served by spending lawyers fees and employee time litigating this issue and in a perfect world judges would quickly spot these lawsuits for what they are and dismiss them properly.

Unfortunately, we don’t live in a perfect world. Companies that are faced with these kind of class action lawsuits have to recognize that even if they think they’re frivolous the plaintiffs’ bar has the ability to impose great cost and great disruption on the company’s processes by subjecting its senior management to depositions, by requesting huge amounts of document and computer discovery and it is often in the company’s short-term economic interest to pay off the plaintiffs’ lawyers, provide something to the class members even if they have not really been injured in order to make the lawsuit go away.

And it is also regrettably true that not all judges spot junk lawsuits quickly and get rid of them. Plaintiffs’ lawyers have become quite adept at filing class actions in these so-called magnet courts, often state courts, often where there is a very close relationship between the elected state court judge and the plaintiffs’ lawyer who brought the case and it is, as a practical matter, impossible for the defendant to get rid of even the most frivolous lawsuit.

Those are the kinds of cases where you get these kinds of coupon settlements, where the class members did not get anything of value and the plaintiffs' lawyers got millions or tens of millions or even hundreds of millions of dollars of attorneys' fees.

Now, are those settlements ipso facto unfair? In a sense they are not because if the class members really were not injured by the conduct at issue or they don't care about the issue that is being litigated they weren't injured, the settlement isn't giving them much, why is that unfair?

But in the long run it is unfair because these kinds of junk lawsuits, if encouraged through settlements that reward the plaintiffs' lawyers richly for bringing them, impose a litigation tax upon our economy. The cost in fees and the cost in coupons and the cost in overhead litigating and then settling these cases ultimately gets built into the price of every product and every service that is sold that is subjected to one of these class actions.

And to the extent that these class actions make corporations risk-averse, make corporations not want to admit a mistake and correct the mistake because they know that they are going to get hit with class actions

thereafter we, in the long run, I think, harm the public interest by rewarding these kinds of lawsuits with these kinds of settlements.

MR. FRISBY: Thank you very much. Judge Yahner, would you like to respond to that? I suspect you might have some disagreement with --

JUDGE YAHNER: I'm sorry. I just can't control myself. I think we have to work from the presumption that lawyers are ethical and even plaintiffs' lawyers are ethical and they don't walk around filing junk lawsuits day in and day out.

I think you can just as easily say, for example, in the antitrust area, that there's a big problem because companies get together and fix prices. And if they didn't do what they did then we wouldn't have an issue about antitrust price-fixing cases.

I don't think that the coupon junk lawsuits scenario that you're painting is a typical scenario. I don't think that there are a lot of bad cases out there that we have to worry about where we don't already have some very good tools built into the system to deal with it.

We just as well have very good cases that are litigated without fees for years and years against defendants who are in my mind as a plaintiffs' lawyer

clearly culpable but they're not going to give up.

I mean, you can exaggerate on either side of this and I think that it is better to look at solutions when we come more to the middle scenario of what are the vast majority of cases like. And thank you for my rant.

MR. FRISBY: Thank you very much. I do want to spend some time on the last topic and the Q and As from the audience but does anyone else want to chime in on this last part of the topic before we move on?

MR. GORSUCH: Very briefly, Robert, I just want to say I think both points of view have their merits but I think it's hard to say that there is no merit to the view that we are overincentivizing certain of these suits.

To take just an example, since the passage of the PSLRA in the securities context in 1995 over 2000 securities fraud suits have been brought on a class action basis. Only 1 percent have gone to trial.

The incentives to settle these things by defendants cannot be underestimated. You're essentially risking your company, staking it on the outcome of a single jury verdict. You're going to settle even cases -- you have a strong incentive to settle even cases that may lack merit. And that's a fundamental structural feature of the system that I don't think we can overlook if we want to

make settlements fairer.

MR. FRISBY: Anyone else with a last comment on that? If not, let's move on to our final subtopic, the common-fund issue. Here we're interested in the practice in common-fund cases of negotiating attorney fees separate and apart from the common fund. Professor, would you like to start off on this one, please?

PROF. ISSACHAROFF: Yes. One quick comment. The latest data indicate that roughly about 2 percent, maybe even a little less, of the cases filed in federal court go to trial. So if the data are going to set up the presumption that all class actions are presumptively frivolous then we should carry that forward and say all litigation is presumptively frivolous and try to disincentivize that. On the --

MR. BRYANT: Neil and Brian may want to speak to that.

PROF. ISSACHAROFF: The issue that's here, very quickly, is should we require class counsel to negotiate their fees separately from the common fund in cases where the recovery is not on a statutory fee basis but on a common fund basis?

And the law on this has gone back and forth from a presumption that it should always be done differently,

separately to a recognition that it's likely to be handled all at once to a redirection toward a requirement, more or less, in many courts that there be a two-stage discussion on this issue.

I think that is a high point of formalism that sophisticated parties know has no meaning. It has no meaning first of all as an economic matter because as both Neil and Brian have mentioned, in the past companies want two things out of these cases. They want peace and they want to know what the price is.

And you can split the price up into 14 parts or two parts or one part but at some point you're in the Yogi Bera scenario of wanting your pizza cut in six slices rather than eight because you're not that hungry.

Everybody understands that it's the bottom-line figure and all sophisticated parties in the room recognize that. And so if you say we're going to negotiate the fee secondly, subject to court approval, the parties understand that a certain amount has to be withheld from the initial offer in order to cover that. And so there's a great deal of formalism to that.

The second reason is that it's again an attempt to regulate how class counsel performed ex poste. And I think that we should really be trying to get courts to look

more carefully at what the incentives of the parties were in the litigation as they approach the certification decision, as they took on the lawsuit in the form that their compensation will be tied to the recovery of the plaintiffs' compensation, will be tied to the recovery of the plaintiff class.

Attempts to flyspeck the actual terms of the settlement and the question of how the negotiations were conducted in a very ritualized, formalized way, I think, are going to be unavailing ultimately.

MR. FRISBY: Thank you. Neil, would you want to respond to that? Also I'm curious if you have any views about the potential problem posed by calculating attorney fees based on common funds where the class does not end up getting very much of the common fund?

MR. GORSUCH: Well, there's a recent case that kind of illustrates that. It involved AT&T and Lucent and they settled a class action lawsuit setting up a $300 million fund. It sounds like a lot of money. The plaintiffs' lawyers took $80 million of it. And then of course you had to wait to see who was going to actually claim on the fund.

And at the end of the day they found out class members found the fund so unattractive that they redeemed

only $8 million worth of the fund. So plaintiffs' lawyers were rewarded with literally ten times the amount the class recovered. I think something has to be done about that.

Now, what do you do? One, it seems to me that judges all too often fail to take account of redemption rates or whether there's a cy pres aspect to the award which they could do to see if the money is actually going to be redeemed by class members or put to some sort of public purpose that's identifiable and concrete so that money's actually going to be spent other than by the defendant's and the plaintiffs' lawyers.

Second thing, I do think it's valuable to consider taking the fee award separate from and after the settlement process approval. And the reason there is, again, the incentive structure behind class settlement.

If defendants normally don't care how the money, settlement fund is allocated one way to make them care is if it comes more directly out of their pockets and they can scrutinize bills and they have an adversarial incentive to reduce the bill rather than having it all lumped in as part of the overall common fund.

Plaintiffs' lawyers submit their hours and rates and the judge is left to scrutinize it himself without the

benefit of defendant's commentary. If you put it outside the process defendants have something to say about it.

MR. FRISBY: Thanks very much. I'm afraid we're out of time and I apologize to those who submitted questions and Arthur for not getting to your issues but perhaps those with questions can bring them up to the panel during the break or at the first start of the lunch break. And thank you all very much for participating and sharing your insightful views about this topic. (Applause.)

(Whereupon, a lunch recess was taken.)

AFTERNOON SESSION

(1:48 p.m.)

MR. FINE: My name is Adam Fine and I'm an attorney with the Bureau of Consumer Protection's Division of Enforcement and I'd love to welcome everyone back from lunch. If this is the first program that you're attending today, welcome. So far it's been an exciting program and we're looking forward to an excellent panel.

This panel discussion focuses on clear notices, claims administration and market makers. The format of

this panel is going to be that of a moderated guided discussion and we have a lot of time at the end of the panel question-and-answer period for your questions. And that should be the final ten minutes or so.

One thing I do want to note, a housekeeping reminder that the materials that people have alluded to in earlier panels plus materials by these panelists are posted on the FTC's web site in the workshop web page. So please take a look and print those out and you will see a lot of the main components of what we've discussed some of these panelists have addressed.

And with that it is my pleasure to introduce the following panelists all of whom bring different perspectives and experiences regarding the topics at hand. Immediately to my left is Todd Hilsee. Todd is the president of Hilsoft Notifications and is regarded by courts and practitioners as one of the leading class action notice experts.

Bob Niemec is a senior researcher and project director at the Federal Judicial Center. Howard Yellen is the CEO of the Settlement Recovery Center, a leader in fund recovery from class actions.

James Tharin is the CEO of Chicago Clearing Corp., the preeminent market maker of class action

certificates and in-kind settlement awards and Deborah Zuckerman is a senior litigation attorney at the AARP Foundation.

And with that we're going to get started. First, Bob, let me start with you. The Federal Judicial Center has been spearheading a class action notice project for some time now. Can you provide some background of the project's goals and objectives?

MR. NIEMEC: Sure. I'd be very happy to, Adam. First of all, let me apologize that I'm going to be speaking pretty much in this direction because I understand that there's a transcription that will be done based on a tape recording and if I deviate too much from side to side apparently the tape cannot pick up my voice. So I'm not ignoring those people who are on either end.

I'd be very happy to describe our project. It started with a request from the Advisory Committee on Civil Rules, which for those of you who are not familiar with the committee process in the federal judiciary, that's an advisory committee of the Judicial Conference, which is like the board of directors that runs the federal judiciary made up, of course, of federal judges on that Judicial Conference.

So there was within the Advisory Committee on

Civil Rules a subcommittee on class actions that had been looking at lots of different areas of class actions generally. And one thing in particular was that they were looking at a rule change, a change to Rule 23, which is the civil rule that governs class actions.

And that rule change, which eventually was approved by that Advisory Committee and all the way up the process in the judicial branch so that it's now effective as of December 1, 2003, that rule required plain language notices.

More particularly, it said that class action notices, quote, must concisely and clearly state in plain, easily-understood language, close quote -- and then I paraphrase the rest of it -- specific information about the nature and terms of the class action and how it might affect potential class members' rights.

Given that that was the rule that was being considered and it looked very likely that it would be approved, the subcommittee on class actions asked us to take a stab at drafting what we would consider and experts would consider to be plain language notices.

And we did that and I just want to give a little advertisement here for the Federal Judicial Center. You can go to our web site. We don't get any rewards for each

of your hits or anything like that when you go to the site but I think you might find it interesting to look at the notices that I'm talking about here and we might talk about a little bit more. I know we're pressed for time.

If you got to www.fjc.gov, that's FJC standing for Federal Judicial Center, you will see on the homepage, on the first page in the lefthand column there's a link called Class Action Notices Page. Pretty straightforward.

And if you click on that you'll see a description of the process that we went through to devise these illustrative class action notices and you'll see notices themselves.

And I can go into more detail on that as time allows later. But they're in three different areas: securities, products liability, and employment and they cover notices of certification and settlement. And they include full notices, publication notices and also information to include on envelopes for the eye-catching part of this process.

MR. FINE: In a few minutes, actually, Todd Hilsee's PowerPoint presentation is going to show examples of both good and bad notices. But before we turn to that, Bob, let me ask you another question. During the process when FJC was involved in drafting plain language notices

did you guys conduct studies, have focus groups to see the effects that plain language notices could have in increasing redemption rates?

MR. NIEMEC: Yes, we did. And I'll describe that very briefly and, Adam, tell me when you think that it's time to move on to Todd because I certainly don't want to take too much time because I could probably talk for this entire hour that's allocated to us about this process.

Focus groups was just one of the research methods that we used to determine what might best be the format and the wording of a plain language notice. But I do want to very briefly thank those who without their assistance and their work and their taking on a major role in this project this project could not have been done. And those include in no particular order my colleague at the Federal Judicial Center, Tom Willging; also Shannon Wheatman who was a colleague at the Federal Judicial Center but she got hired away by Hilsoft in the process; Todd Hilsee from Hilsoft; and also a professor from the United States -- from the University of Texas law school in Austin. Forget the United States. Which is in the United States. Terry LeClerc.

They were very helpful in this process and brought different types of skills to the table and we were

able to come up with these notices.

We also hired an expert who helped us with our focus groups that we wanted to hold. The expert helped us with the methodology but also more importantly was the moderator during these focus groups because that takes some very special talents.

And we did them in Baltimore, Maryland. We did four separate focus groups on two different types of class action notices. And there, of course, was a selection process. We went through a professional facility where they assisted in the selection of a diverse group of participants and it was fascinating to see what they did.

We showed them what our then preliminary drafts of the plain language notices were. We gave them a summary notice and we gave them a more detailed notice. Again, this was in the securities area and the asbestos products liability area and we got their feedback.

And we found -- I'll just try to summarize a little bit of what we found because that whole process itself is a long one, which if you're interested in that you'll find the text describing that process again on our web site on the Class Action Notices Page.

We found that the notices even in that preliminary stage, and they've been much improved since by

many other methods that we used, appear to succeed primarily as a result of the following elements: the nonlegal plain language throughout the notices in the summary form and in the full notice form. We also had claims forms attached to the notices and we color-coded them and we did some very interesting things.

There was a benefit from the concise opening page that makes very specific points that are important up front. We had a detailed table of contents that, of course, was keyed to the section headings for each of the sections.

We used a question and answer format for the table of contents listing and the section headings which proved to be very valuable to the focus group people.

We also had a summary chart or table of the most important information including dates by which certain things needed to be done and we had the color-coded response forms. And again, you can see those notices on the web site.

MR. FINE: Thank you, Bob. Howard, do you have something you want to add?

MR. YELLIN: Yeah. A very quick question, Bob. Has there been any subsequent empirical work done where one of the advantages of notices as in a direct mail context is

being able to do a split test? Has anyone taken on a single case and sent out one form of notice as opposed to a purportedly better form of notice and compared the response rates among the recipients?

MR. NIEMEC: Yes. We did that. It's a very good question. It’s difficult to do such empirical research because we didn’t want to deal with a live case because then you would have a denial of due process if you gave one notice to one portion of the class and another notice to another portion.

So Shannon Wheatman devised a survey on the Internet because also survey research is very expensive and we have a limited budget and limited time, and we did have a comparison notice, which was the best of the securities notices that we could find that were out there in the sets of notices that we looked at, and gave that to a portion of the sample and then the other portion received our at that point still preliminary plain language notices that at that point had benefitted from the focus group. And we did find significant increase in comprehension and understandability for the plain language notices.

MR. FINE: Thank you. Todd, let’s now turn to you. Certainly, and as your paper that’s posted on our web site points out, obviously a critical issue is not just

writing notices in plain language but also making sure that notice is received by all or at least a very high percentage of the class. Can you tell us what additional changes you think the courts and counsel need to make to address this ongoing problem?

MR. HILSEE: Yes. Well, first, what was so wonderful about working with the Federal Judicial Center on the illustrative notices was a recognition that despite the rules speaking to clear, concise plain language, they really wanted to do the types of things with notices that we were championing and talking about for years.

And when I talk to the Advisory Committee -- when I spoke to the Advisory Committee on Civil Rules I said plain language is awesome. It's great. Nobody should be against it. Nobody was against it but before you can have a positive effect from plain language you actually have to reach people with the notice. You have to get it to them, in front of them. And then once you've accomplished that, they have to notice it.

And so you should have notices that are designed to be noticed. And they liked that idea. So working with Bob and Tom and Shannon was tremendous and Terry because we could do those types of things. And you'll see that in the illustrative notices that are at the FJCs web site.

I have always approached class action notice development from the perspective that the main issue is -- and I think the standards are not new, they just haven't been followed as well as they should have been for years because I think that due process has always, in the class action notice context, required that the people doing the notice programs do the notices and issue them, disseminate them in a way that you would do if you really wanted to inform someone.

And having worked in this field in so many cases and I see the arguments back and forth and obviously the Mullane case from 1950 which is a significant due process case on notice says exactly that. It says when notice is a person's due, process which is a mere gesture is not due process and means employed must be such as one desirous of actually informing the absentee.

And it goes on to say the notice should be reasonably calculated to inform. And so you actually have to want to do a good job is really where it comes from.

And I will tell you that I get phone calls a couple of times a week, a month, what's the least we can get away with? We want to do the minimum amount of notice that will get us the best notice practicable.

And there's some kind of non sequitur there. We

don’t think the judge will require us to do more than X. Or we don’t anticipate objectors so we’re not sure the notice needs to be -- we’re not worried that much about the notice.

I think the problem with these sentiments is that they seem to me in violation of due process. If you really wanted to inform someone would you put out a notice in fine print if you really wanted to tell them about a settlement, about their rights, about being able to file a claim, get the benefits? No, you wouldn’t.

And if you really took to heart the fact that you should be reasonably calculated, what about the fact that in the communications field, and we brought this to the field way back in the late ‘80s, actually in the case that was mentioned this morning, Domestic Air, which became famous for coupon issues, but on a notice front, the issue was how do we know this notice program is going to actually reach people?

And there’s a long-standing science in the field of communications advertising that we can figure it out. We can say, based on this universe of class members we can figure out the net effect of different methods of notice whether it be mailing, publication, media because the data’s there.

The audience data is there on who's reading these things and we can figure out what percentage of a class is reached. It's used by 95 percent of all advertising media departments that figure this stuff out. It is used in 3000 different agencies in hundreds of countries. It's been so for years.

The Audit Bureau of Circulations' data has been around since 1914. MRI data, which is audience data, which tells us how many people are you going to reach with this campaign against targeted demographics, which we can often get down to matching up with specific settlement classes. We can figure out of prescription drug takers what percent are going to read this mixture of outreach methodology.

Now that data's there. I think courts need to know it and I think when they're presented it in the context of class action, when they're given this evidence whether a point during the litigation, preliminary approval, when they get from us the detailed notice plans saying this is why this plan is good.

I think if they saw that from a lot of plans where you see a notice, it gets mentioned this morning, notices are all alike. They get slugged in the back of the paper. Somebody slugs it in the USA Today and lets the judge think that, hey, you know, this is a national paper.

It’s the biggest national paper. It’s out there for all the world to see. Surely, it’s good enough notice.

But you can crunch the numbers and it's pretty easy to see that that’s going to reach about 3 percent of your class and 97 percent will have had no opportunity at all, let alone come in at the end and be able to file a claim from that.

MR. FINE: And how easy is it to get data-specific information for a particular class? How long does that take and what are the costs?

MR. HILSEE: Well, you get what you get from the parties and the defendant has a lot of information in terms of its mailing list and such. But in terms of the data available there’s secondary source data for media vehicles for sure that we have readily accessible that other professionals do.

And it’s not a time-consuming process. It’s done -- when we work with the parties we do it in a matter of weeks in preparing for submission of a sophisticated notice program. It can be done in a fairly short time frame.

MR. FINE: Do you do that with all of your notice programs or is it case specific?

MR. HILSEE: We do it with all of our notice programs. I think the courts need to have the information

available. We provide a detailed analysis of why the program we're recommending is going to be effective and we show the forms of notices and design not just the words but design them so that they are visible and noticeable. And that's sort of a no-cost issue really.

And oftentimes, we can find a way of reaching more people that is even cheaper than the parties might think is otherwise not affordable.

MR. FINE: Well, let's now turn to your PowerPoint presentation, if you want to start that up.

MR. HILSEE: I am going to give you some examples of what we still see, quite frankly. And I brought a stack of these with me. These are the types of things we see on a daily basis.

I mean, this one, I think, is intending to reach people who bought a certain insurance policy. And it starts off with notice of class action certification and settlement hearing thereon. And nowhere in the notice is it mentioned what you can get from the settlement. And I think a mention of the claims process is buried way down at the back end. I mean, it goes through a lengthy description of the settlement hearing to begin with.

Another one. I mean, these things, we see them every day not just in the newspaper. Here's one, this one

sort of in the left-hand side at the top you can sort of see the print that's even smaller, way smaller than the print in the bomb scare story, that is to reach, believe it or not, juveniles who smoked cigarettes.

And so it's not hard to figure out that they're not big newspaper readers to begin with and number two, that they're not going to read this fine print notice and there's nothing to call itself to their attention, to a notice like this in the mail with blocks and blocks of strung-together, all-capitals type when every single marketing or advertising or communications person will tell you that people don't read long strings of all capital type.

That belongs in legal pleadings for a courtroom, not to mailers where you're not sure what it is. I mean, there's a lot of statistics on junk mail. The volume of junk mail is extraordinary. The Postal Service documents it. Even the Postal Service survey says that 86 percent of people don't open or read all the mail that they get that they perceive to be junk mail. They're looking for a reason to throw it in the trash.

This notice would -- we got this and we don't have a Sears account. Okay? So right away you're thinking I don't have a Sears account. This is obviously a pitch.

And so it turned out it was notice. We save them because I'm in the notice business but otherwise I can't imagine a lot of people would.

The differences sometimes are pretty obvious. I'm going to click to this slide. Here's a notice we did in a case involving Progressive Auto Insurance that settled a case that we put in some things like a bold headline that said, and you'll see this in the model notices that Bob's talking about, we put in a headline: if you bought Progressive Insurance you could get benefits.

We put a claim form right in the notice, published it, mailed it and all the nine yards. We got 680,000 claims in this case and there's -- just to see if I can go backwards here -- compare that to this which is a similar type of case when what's different? I mean, there's nothing to stand out. It arguably has a claim form. It has a headline that I have trouble reading here but it's somewhat similar and this makes all the difference.

Although it may seem like to some parties the notice, how you do it, what it looks like is sort of the last piece of the pie, it's critical. I don't know what response that other case will get or did get but you can see a headline, simple words, subheads, organize things,

claim form, fairly short, easy to fill out, response mechanisms.

You can focus notices on different types of class members. When we had the Hospital Corporation of America settle billing practices case we focused notices on the entities as well as consumers. And if you could see a notice that gets mailed to entities we actually mailed a summary notice so they would be more likely to actually take the time to read a brief message about it.

The outside of the envelope told them why they should read it, not like a Sears notice. It says exactly and the backside of it says -- you could read this -- this comes from an example case that we used in an ABA seminar last year for a prescription drug. These types of techniques on the outside of these envelopes are in and have been supported by and in the model notices at the FJC site.

Some other cases, Synthroid marketing litigation. If you bought it you may have a claim. We're telling people, this many claimants; this is what your payment could be. Here's the phone number. About 800,000 women came forward and filed claims in that case.

In the Swiss Banks case is an example of what courts will do and let professionals be creative and do the

right thing to really try to get notice. We went out all over the world. Other groups of experts along with us did a great job at different parts of the notices. We did the advertising all over the world in 36 different languages. We figure out what language people are most likely to read, what the best ways to reach them. We put clip-out forms in here.

Others on our team went to -- and with me went to countries in the former Soviet Union, figured how we could put a notice in a food package to go out to poor communities in Belarus.

Courts can look for this kind of stuff and within each case is different, obviously, what can be afforded and what can be done but there's creative ways you can get and here's a graphic that helps you, the purchaser of a Cooper tire determine whether they're in the settlement.

For the International Organization Migration compensation for victims of Nazi persecution with imagery and many courts are approving photographs and the model notices themselves suggest you can even use photographs in a legal notice to capture people's attention, help them understand whether they're affected that they may be part of it.

An interesting case I wanted to tell you is

Thompson v. MetLife, which is a race-based pricing litigation, one of the largest insurers, obviously a number of the insurance companies are involved in these cases involving whether they charged African-Americans too much, basically.

And one of the interesting points about this case is when this went to preliminary approval in the Southern District of New York, Judge Baer actually did, at preliminary approval, say I want to have an independent review panel look at this settlement, look at whether it's right, whether the settlement notice procedures are right.

We actually reviewed our extensive notice efforts with an independent reviewer before he granted preliminary approval, which this morning was suggested maybe that's never been done, but we looked at the best ways to reach people.

It wasn't just sending it out, which of course we mailed it to everyone we could, but of course in a noticeable, clear fashion we also did newspapers, African-American newspapers, reached out on urban radio stations and other mass media including a television. You can do this kind of thing. (Whereupon, a videotape was played.)

So that gives you an example of some of the things you could do. During maybe some of the other

questions I want to show that Masonite spot.

MR. FINE: Sure. I think we'll do that at the end should we have some time. Next I'd like to turn to Howard Yellin. Howard, there are certain types of class actions that despite counsels' best efforts for whatever reason class members have trouble with participation. What services does the Settlement Recovery Center offer?

MR. YELLIN: Well, class participation is really sort of in many cases the seamy underbelly of the class action system. This morning references were made to the Lucent/AT&T case where $8 million representing about 2.5 percent of the available claimants participated. Someone referenced the case where there was .0025 percent participation.

There is an intrinsic problem, I believe, which is that once a case receives preliminary approval there is no party involved whose financial interests are directly aligned with the plaintiffs, with the class of plaintiffs, to actually participate in the settlement except in those cases, of course, where counsels' fees are tied to ultimate participation, which we support.

Settlement Recovery Center works for individuals, for businesses, for securities entities, for nonprofits in many cases in an attempt to drive participation in a

settlement. And bottom line, that is our job is to get people to participate in settlement.

In a sense, we pick up where Todd leaves off with official notice. And notice is so deeply rooted in notions of substantive due process that while I certainly applaud the work that Todd has done and I think it's really meaningful and tremendously effective in driving more members to participate in classes, we still know that in broad class actions, a 30 or 40 percent participation rate would be tremendous.

So the way that we work is clients come to Settlement Recovery Center through our outreach programs and we help them participate in the class. It's as simple as that. In some cases where there are a significant number of individual claimants involved this may involve actual advertising on our part.

We've been working extensively on the Microsoft litigation around the country. We're working actively in six of the states that settled and have run a substantial number of radio spots, of TV spots. We have done extensive earned media PR work and have gotten tremendous publicity for the cases.

The advantage we have, of course, as compared with Todd is that while we have an obligation to be honest

and truthful and fair and transparent in our communication with our audience, we don't have to run it by plaintiffs' counsel. We don't have to run it by defense counsel. We don't have to run it by the judge.

We are, in effect, a marketing agency. The way that we work is we sign up clients. We collect a fee, typically a contingency fee, that's paid only on the back end, only based upon the amount that an entity recovers. And we have seen really tremendous effects. I'll just give you an example.

In California, where we are involved in the Microsoft claims cases, we have brought in claims totaling at this point approaching, I should say, about half a million claims that have come in through us out of a total of just over ten million potential claimants and I believe about two million actual claimants. So we represent about a quarter of the class that is actually participating in the settlement.

In Florida, where we have not been active because of the nature of the settlement and the structure of it, the claims rate is languishing at an incredibly low number and at this point the case appears virtually to be on hold because participation is so low.

MR. FINE: Why would an individual use you for

one class action? Why wouldn't they just file the claim form themselves?

MR. YELLIN: Well, there are a couple of answers to that. We are moving toward sort of a subscription model where both individuals and companies can sort of participate through us and any potential claim that they're entitled to, sort of giving folks an opportunity to -- I apologize Todd -- to substantially ignore the notice that they get and know that we're going to keep them affirmatively informed of what they may be entitled to.

The challenge, of course, I think implicit in your question is what about in the CD cases where someone is going to receive $14 or in the Microsoft case if an individual is claiming just a hundred bucks? And there what we've looked for are novel ways of aggregating, and I think this will tie into James' work as well, aggregating claimants in positive ways to encourage them to participate.

Specifically, we have a program called Donate Direct and how that works is we sign up nonprofits to be the beneficial recipients of folks' claims under settlements. And then they use their connections to their membership to get folks to participate in the settlement and then donate their recovery back to the nonprofit.

MR. FINE: Certainly in securities class action cases it's easier to monitor them just based on what Stanford has done and what others have done. In consumer class actions, certainly the FTC and others that we have spoken with have found it difficult to monitor class action settlements and oftentimes we hear about a settlement after it's already been approved and perhaps the claims period has ended. How do you monitor that to make sure that you service your clients' needs?

MR. YELLIN: That certainly is a challenge. We do a lot of independent research. We have a number of folks who do nothing but scan public databases, the Internet, LEXIS-NEXIS, West Law, all over the place, obviously the Stanford site, for progress on cases and trying to track them.

We call courts frequently. When we hear a rumor of actions we try to stay as involved as possible. We do have one secret weapon, though, which is we have clients. We have subscribers. And frequently we hear about cases through our clients. They receive the notice and they pass it on to us. And if we've missed it, it's a great way for us to know about a case and then dig in and see what we can do for our clients in that regard.

MR. FINE: So in part a business client would

hire you to find out about class actions they don't know about but also for class action settlements that they do know about just so they don't have to do the administrative aspect of filing it and they basically say you guys take care of it for us. Is that right?

MR. YELLIN: That's exactly right. It's a fundamental outsource kind of thing. There's no company that has a chief officer responsible for claims filing, or not one that I've found. The cases very obviously, there are cases where clearly the value that we can add is de minimis. If all that's involved is filling out a simple form and your membership in the class is predetermined and what you're going to recover in the class is predetermined, all that we can do is make sure that that is filed by the claimant.

In other cases, certainly the Microsoft cases are good examples, all securities cases where you have to analyze substantial trading data, I know that we may see Todd's Masonite ad although we were not involved in Masonite cases, folks needed help in the Masonite cases to determine whether they had the right products, what their extent of damage was, et cetera.

So the value add that we bring varies really substantially based on the type of case. But that's fine.

I mean, at the end of the day, the simple reality is that even in the simplest cases, even when we look at notice like Todd showed us that was really tremendously clear and there's a simple form for people to fill out at the bottom, the claims rates are still tremendously low and everyone who we get to sign up who would not otherwise is one more member of the class who is benefitting from the settlement. And that, frankly, is our mission in a nutshell.

MR. FINE: Okay. I think that's a good segue now to James Tharin who is the CEO of Chicago Clearing Corp. James, basically let me ask you this question. What do you look for in a coupon settlement in deciding whether Chicago Clearing Corp. should get involved as the market maker and can you provide a couple of examples of your involvement?

MR. THARIN: Yeah. Thank you, Adam. I'd also like to thank the FTC for inviting Chicago Clearing Corporation here. Naturally we're a strange fit when there are a bunch of academics and attorneys since we are an entrepreneurial organization that buys and sells coupons for profit, and of course we're not afraid to admit that.

When we look at a settlement to value it, to determine if we're indeed going to make a market in the settlement there are five or six basic tenets that we look at.

First, of course, we look at the notice and the claims process. We look at the transferability of the coupon. We look at market maker access to the class, the marketability or economics of the case, the rules of redemption in reimbursement and the oversight and enforcement that exists in the case.

We also, of course, take note of who the players are, who the plaintiffs' attorneys are, who the defense attorney are, who the defendants are and what court it's in to make a determination of whether we can figure out a way to buy and sell these coupons from class members.

The threshold issue for us, initially, is who can we buy these from? Who can we sell them to and what's the spread and what's the transaction cost in between?

So naturally, lower-priced coupons are more difficult for us because they present certain hurdles as far as transaction costs go. So we look at cases, but we don't exclude those cases, but we tend toward the more expensive cases or cases that have higher coupon values.

Over the course of the last ten years, CCC was founded in 1993, we've made markets in ten unique certificate settlements. Currently, we're making a market in the auction houses settlement, which was a settlement against Sotheby's and Christie's and we're making a market

in the Lloyd's litigation, which, of course, was a settlement against Lloyd's of London.

So if we've made markets in ten coupon cases and this is our primary business, why haven't we made markets in the hundreds and hundreds and hundreds of other coupon cases that have been out there?

Well, to get to the points that I just raised and let me say something first. Coupon redemption is low generally. In other words, there are billions and billions of dollars of coupons that are issued by corporations as marketing tools. The average redemption rate for those is around two percent. So it's no wonder that class action coupon redemption rates inherently are very low.

But the goal here is to increase those redemption rates, it seems to me so that the class members who are harmed, because naturally the consumers that are being solicited to buy a product by the defendants themselves were not harmed, but in the case of a class action settlement there is presumably a harm to the class and there's an obligation, it seems to me, by the parties to make sure that the class members, the consumers, can get what they bargained for or what their attorneys bargained for them for.

So what we have found, of course, over time is

that class action coupons do not get redeemed at any higher rates than marketable coupons, especially in the absence of a market maker.

So let me first talk about my first point, notice and process. Naturally, I don't have to belabor notice after this panel because what was said prior was exactly true. Most notices are very difficult.

There are a couple of other points though. Many cases are claims-made cases. Claims-made cases' redemption rates are very, very low. That's all there is to it. Little more needs to be said. So if you can avoid a claims-made, and I probably should be careful because I'm going to be giving some defendants some tips, but you should probably keep the claims-rate processes as minimal as possible. It dramatically reduces the redemption rate.

As an example, someone earlier today said there was a certain redemption rate in a case, quoted the redemption rate. Well, they forgot to also mention that there was a claims rate and the claims rate was far, far lower. So therefore, the redemption rate of the class itself was far, far lower.

Also in this process it was mentioned also earlier and I'll touch on it briefly, reversion cases, of course, benefit the defendant dramatically. So we look and

see if there's a reversion. If there's not a reversion we're far more tempted than if there is a reversion. If there's not a claims we're far more tempted than if there is a claims process.

Transferability, of course, is our minimum threshold. We cannot operate without transferability. If it is a nontransferable coupon we won't even approach it. We may object but we won't try to make a market in it.

Secondly, with transferability -- transferability alone is illusory and a lot of people try to make transferability, they try to lean on transferability. Well, transferability does not always mean freely transferable. It can mean restrictive transferability. That's naturally very bad or reduces redemption rates if that's the goal is to have a high redemption rate, which of course we believe it should be.

But transferability alone doesn't do it. You need somebody there to buy and sell these coupons from the class members or they simply don't redeem them. I can cite numerous cases where redemption rates with transferability without a market maker are nearly identical to redemption rates of nontransferable coupons. If there's not a market maker they are essentially nontransferable.

So what does a market maker do? We need access

to the class, naturally, and there are various degrees which are better than others as far as access to the class goes. We can be -- in the past we've been on the coupon. Our 800 number has been on the coupon. We've had our mailing put in with the class mailing. We've been on a web site. We've had access to the class by getting the list. All of those things are important, but in terms of degree getting access to the class is by far the most important feature for us.

Defendants will argue, well, this is a proprietary list but it's also a public class action so is this list really proprietary or is it in the public realm? We think it's in the public realm. Naturally, we need access to the class in order to inform everyone equally of what we're offering otherwise you're prejudicing certain members of the class if we can't reach them.

The other thing we look at is marketability and economics. In other words, how many coupons are chasing what products? If you have a massive amount of coupons being issued and very few products to redeem it against, that's not a very marketable coupon. The economics are not good.

Marketability also goes to is it easy to buy and sell? Who can we sell it to? What are some of the

processes? Economics would also include what kind of product or service is this good against. Is this a product or service that can be made obsolete quickly? Is this a product or service that is going to be made obsolete quickly? Is there anyone -- well, that gets to the next point. So what we look at is is there a market here for us to sell these, someone to sell these to en masse?

The next point is rules of redemption in reimbursement and Howard touched on this, I thought, well. One of the issues that we have, this is not a securities settlement. People are not receiving cash in the mail. Cash redemption rates aren't a hundred percent. Cash redemption rates are far below a hundred percent. People don't open their mail. This was pointed out earlier. People don't cash these checks.

But this is not a securities class action where cash is being sent out. For the consumer, the class period really begins when they receive the coupon. That's when they can actually use their award. They can't use it before.

This aspect is lost, it seems to me, in the process quite often. The rules are rarely laid out ahead of time. They're almost always deferred or in the past they have been, it's getting better, but they in the past

were always deferred to the defendant who was also served most often as the administrator.

So what is the defendant’s goal? Well, as was pointed out earlier today, if they can’t get an incremental sale their goal is to squash redemption, period. So if they can control the rules the devil does become in the details.

The devil is found in this case in the details because there is nobody there. There’s no police. There’s nobody there to oversee and enforce these rules. The plaintiffs’ attorneys, by and large, have been paid in cash, have moved on to their next case. The judge isn’t going to proactively oversee the class. They need people to brief them to get issues to them, which brings me to the next issue, which is oversight and enforcement.

Somebody's got be there to oversee these rules and somebody has to be there to enforce these rules. One of the inherent problems with a certificate settlement is certificates expire. And the legal process is not developed for that.

In other words, if you have a coupon that’s two years in length, as you all know, to brief fully a problem in a case like this in front of a judge can easily take more than two years. Coupon’s expired. So where is the

redress? There is none. So that's pretty much how we decide to value certificate settlements.

MR. FINE: Thank you. Before I turn to Deborah I just want to remind everyone that if you have questions, Robert is walking around and is picking up the question cards. Thank you.

Deborah, even if there is clear notice and efficient markets there are sometimes specific target audiences that have unique interests such as AARP's members. AARP plays a role in class action settlements both in terms of providing notice to consumers as well as in filing amicus briefs. Can you discuss both of these components including describing the two amicus briefs that you have placed on our web page as your materials?

MS. ZUCKERMAN: Sure. I'd be happy to. I do need to start out with a disclaimer which I think is appropriate in an FTC-sponsored event since I'm used to being in the audience at an outside event where an FTC speaker always says, I need to say at the outset I'm speaking -- my views are my own. I don't necessarily speak on behalf of AARP or the AARP foundation which is actually the entity that I work for.

And perhaps more importantly I need to say I don't work in membership. If any of you or your relatives

or friends has just turned 50 the membership application did not come from me.

But in my position I have several different roles. I do co-counsel consumer class actions. I do represent -- where I'm representing individuals obviously. I do also represent AARP when I file amicus briefs and then I have as the materials I included indicate represent objectors. They actually were not amicus briefs. We did represent class members who wanted to object to the settlements.

In terms of what role an advocacy group can play in getting the word out it seems as though it's a simple question but the more I thought about it the more I realized it's somewhat complicated.

On some level that may be because of AARP and the way AARP operates, which I'll get into a little bit, but I think even some of those issues can be more generalized to other advocacy groups.

But let me give the short answer first, just by reading a letter to the editor that is in the current bulletin which is sort of the newspaper-type publication that AARP sends out on a monthly basis.

It says, thank you, thank you, thank you. I so appreciated the article in the May 2003 issue regarding the

BuSpar antitrust settlement with Bristol-Myers Squibb Company. My mom who had just died in April took BuSpar from January 1998 through July 1999. I called the phone number in your article, followed the directions and then forgot all about it.

Yesterday I received a check for more than $3,000. What a wonderful surprise. I plan to share the money with my grown kids but they have to promise to be part of AARP in 20 years or so when they qualify. Thank you again and keep up the good work.

So that's sort of the simple answer that, yes, advocacy groups can play a useful role but part of the problem or the issue, I think, depends on at least again in AARP if I'm co-counsel in a case then obviously I have signed off on the proposed settlement and the notice and I can try and get AARP to publish that notice or information about that notice because I'm supporting the proposed settlement.

But if I'm not in that role then basically all I can try and do is get the word out that there is this proposed settlement in this class action. You should get information about it and then decide what to do. In other words, I don't represent the class members. I can't advise them on what they should do whether they should

participate, whether they should opt out, whether they should object, anything of that nature.

The other thing that I think is important at least again in terms of AARP is this woman mentions an article. Sometimes, particularly where my colleagues or I are class counsel, we can ask the bulletin to put in a notice about the settlement.

Now a lot of people's eyes are going to roll because they always do when I say this. When we do that that's considered an advertisement and we need to pay the bulletin to run that notice. In this case, it was actually an article about the case and the proposed settlement, which is free. I think it also has a much greater chance of people reading it because it's an article just like any other as opposed to what looks like an ad.

But there's a disadvantage there in that while I may have spent time working on this case or my colleagues have and we think it's really important we have to convince the writers and editors that it's newsworthy and that our members have something to gain by the publication of this article.

The downside either way is, as I alluded to before, if we're not class counsel we run the risk of creating the false impression that once people hopefully do

see the information that we'll be able to help them further and even if we don't put in a contact name or phone number we do end up getting letters and phone calls saying I saw this. I've got more information. What should I do? And unfortunately again, we're not really in a position to do much for them.

Now other organizations may have better avenues where they can publish this type of information but again, if they're not class counsel their role is going to be somewhat limited.

The other thing, no matter which organization it is, that I think is really critical and I'm not sure how to address this, except I would urge counsel in the cases, particularly where there is a particular type of group demographically that makes up the class, that you think ahead in terms of how you might want to get the word out, because obviously every publication has a publication schedule.

And in order for the notice, whether it be a typical kind of box notice or an article to really be effective it has to get into the publication in a timely enough fashion that people will be able to see the information, get whatever additional information they may need and then take the necessary steps to either make a

claim, opt out, object, whatever they feel is important for them.

But it's important to keep in mind that again every group has a publication schedule and sometimes it's months in advance of when it actually is going to hit people's mailboxes.

MR. FINE: Todd, do you have something you want to interject?

MR. HILSEE: Yeah. I wanted to say that that's a very common component of class action notice programs, the formal notice programs approved by courts is finding those demographic groups. And we work with the AARP in that regard in putting notices into their publications and putting it into the notice plans asking courts to approve that as part of a notice program but also press releases, press efforts, prepared news articles, outreach to lots of third party groups.

Or a lot of times you may not see it in the types of notice programs that you might perceive to be the normal course of notice programs but these are part of good notice programs all the time. And I think that's a really important aspect of good notice is the type of outreach to groups like the AARP and, for example, our Synthroid notice program reaching a somewhat older demographic took

advantage of that.

MR. FINE: Great. Well, we have three excellent questions. Unfortunately, we'll only be able to get to one. I encourage the drafters of the other two to speak with our panelists at some point during a break but I do want to ask this one question.

The question is: Please comment on the role of minimum payments in creating adequate incentive for consumers to bother making a claim. Is anyone aware of any research done showing what constitutes adequate payment to be a tipping point for claims rates? Howard?

MR. YELLIN: Well, not research but we've today referred repeatedly to the CD cases and their payment was $13, $13.86 or whatever it was and was received well. So I think that at least as far as cash payment goes on broad-based consumer class actions the threshold is surprisingly low. You wouldn't think that people would get excited about a $13 check and yet participation has been surprisingly high.

MR. HILSEE: I think participation in these cases has a lot to do with a lot of different factors that go to how important is this to your life? How concerned are you about this issue? Is this important to you? Is it your house? Does it relate to your health? Is it something you

live with daily?

I mean, in a case like Microsoft one of the things that enters into your mind is this an issue that people are concerned about the price they paid for their software? And I'm not certain that they are.

But look, I mean, the response rates come and I want to just take the opportunity to touch on the fact that in the context of court notice programs, the attorneys, and I think there are many situations where attorneys are doing the right thing and trying to do outreach on their own to get claims rates up. And that's something that doesn't come out quite often. I wanted to play a spot that --

MR. FINE: Sure. Deborah's going to say one final note and then we're going to play your spot. Deborah.

MS. ZUCKERMAN: Just quickly, one point I would like to make and this was something that I think was brought out in the objections that I included in our materials is while I agree that to some degree participation rates have to do with how important this is to you, I think a really big issue that hasn't been addressed enough, although briefly, is what, if any, claims process there is.

And when I got an e-mail from a friend of mine

about the CD settlement and all I had to do was click on a link and I think put in my name and address and that was basically it, I mean, that was a pretty good way to get $13 as opposed to the objections in the Publishers Clearinghouse settlement that we included in the materials people had to -- and these were the sweepstakes promotions where people bought magazines and other fairly worthless products -- they had to send those products back or they had to sign a sworn affidavit explaining that they hadn't got any value from the products, that they had given them away as gifts. I mean, I think there are sort of two issues -- let me just say really quickly.

One is, I think the more cumbersome the claims process the harder it is to have an understandable notice. But the other thing is, and maybe it's a question of sort of not so much semantics but just word usage, claims rate and participation rate I think are two different things.

And in the cases that I've been involved in as counsel, we try to do our best not to have a claims process. And to a large extent there is really no reason to. If it's a situation where the defendant has all the customer information in its computer it knows exactly who made a purchase or opened an account or whatever the situation is during the class period it generally knows

exactly how much they spent. There is really no good reason to have a claims process other than, frankly, to reduce the claims rate.

MR. FINE: Well, why don't we finish this off. Todd, why don't you show us your final video?

MR. HILSEE: Well, just to end on a positive note, I think to say, to show one thing let me show you first one thing that defendants do in terms of are we really willing to try to reach people, defendants in this -- I'm not sure if you can see this -- in the Blockbuster case the defendants wanted to put the notice and agreed with us we could put the notice right on the store receipt and they gave automatic credits of certificates.

Of course, it was on appeal for so long that we're just getting started. But we gave out 25 million notices this way. And I think that shows a willingness to really try to desire to reach people. From a plaintiffs' attorneys' side after final approval, $580 million has been paid so far in this Masonite siding case and after final approval, plaintiffs' attorneys are still willing to put, invest money in reaching more class members because they think that there's more people out there. So you can do this kind of thing within the context of formal notice.

(Whereupon a videotape was played.)

So we've been getting thousands of calls a week when that's been running. The claims rate has been going, went from about 530 million to about 580 million in the last couple or six months.

MR. FINE: Well, we're going to take a ten-minute break before the next panel but please join me in thanking these five panelists. (Applause.)

(Whereupon, a short recess was taken.)

MS. BAK: If you take your seats I think we'll start our next panel. I'm Pat Bak. I'm an attorney with the FTC's Bureau of Consumer Protection Enforcement Division. Welcome. This is Class Action Attorney Fees, something I'm sure some of you have been waiting for. Our goal here is to bring some light to what is sometimes an area of heated rhetoric. So with that let me tell you a little bit about how we are going to structure this.

First, we are going to review some of the latest empirical work that's been done in area on class action settlements and class action attorney fee awards.

We have Professor Geoffrey Miller and Professor Deborah Hensler with us today. These are two individuals who have done some of the most recent and detailed empirical work in the area. It will help us to understand

what the data actually shows.

Are class action attorney fees rising exponentially as the press would have us believe or is it myth? So we will first turn to them and following their presentation have an open discussion among all our panel members about their findings.

Thereafter, all the panel members are going to engage in examining a number of particularly challenging problems in the area of attorneys fees. First, we're going to turn to exploring some innovative approaches to appointing, managing and compensating class counsel and certain means by which to ensure that counsel are adequately and reasonably compensated for their work and that the results they obtain are reflected appropriately in their fees and that those fees reflect a market rate of some sort.

Next we're going to discuss some of the special challenges posed in determining reasonable attorneys' fees in the context of non-pecuniary settlements or settlements where total payment to the class depends on the number of class members who file a claim.

After that we're going to hear our panelists' views as to whether they believe the amendments to Rule 23 are going to make any substantial difference.

And finally, we're going to touch just briefly, because we've spent a lot of time on it in other panels, on the value and function of objectors, that is fee objectors in this case, how that process might be better managed to inform a court with an adversarial voice as to the appropriateness of fees.

And then finally, best of all, we're going to leave some time to actually answer your questions. So please if you see somebody walking up and down the aisles holding up a card, jot down your questions so we're sure that we're able to ask it.

So without further ado, I think I'm going to do a little bit of introducing even though I hope you'll turn to your packets because there's extensive information on the bios of each of our esteemed panelists.

Professor Geoffrey Miller, who's going to be presenting his work that he co-authored with a future panelist who will be appearing tomorrow, Ted Eisenberg, is the Stuyvesant and William T. Comfort Professor of Law at NYU.

Prior to joining NYU Geoff was the Kirkland and Ellis professor at the University of Chicago Law School where he also was associate dean, editor of the Journal of Legal Studies, the director of the university's Law and

Economics program. He has extensive background in class actions, having written widely in the area and he also teaches on that subject.

Our next speaker, Deborah Hensler is the John W. Ford Professor of Dispute Resolution at Stanford University Law School. She is the director of the Stanford Center on Conflict and Negotiations. Deborah teaches complex litigation and she's written extensively on complex litigation, class action litigation, asbestos litigation -- something near and dear to my prior life -- and mass torts.

She is the lead author of Class Action Dilemmas, Pursuing Public Good for Private Gain, and she was the Director of Rand Institute for Public Justice prior to joining the Stanford faculty.

And let me introduce our remaining panel members as well. The Honorable Judge Vaughn Walker is a United States District judge for the Northern District of California. He was appointed to the bench in February of 1990. He was nominated by President Bush and earlier by President Reagan.

Judge Walker is a pioneer in the development of innovative approaches to selection of lead counsel and the ex ante determination of fees, having been the first judge to utilize and to champion the auctioning of class counsel.

Just immediately to his left is Mike Denger. Mike is the antitrust partner at Gibson, Dunn & Crutcher where he co-chairs the firm's antitrust and trade regulation practice.

Mike has been litigating and handling all manner of antitrust and trade regulation matters for over 30 years. He currently serves on the ABA's Antitrust Section's antitrust remedies task force and has previously served on section task forces which have presented reports and recommendations to both the Clinton and Bush administrations.

Howard Langer, immediately to his left, is a partner with the firm of Langer & Grogan in Philadelphia. Howard has litigated large complex commercial and class action cases on behalf of plaintiffs for over 25 years.

He is an adjunct professor at the University of Pennsylvania Law School. He teaches antitrust. He most recently won an approximately $203 million, I believe it was, recovery on behalf of the plaintiff class in the liner board antitrust litigation. He obtained a $60 million fee for plaintiffs' counsel and high praise from the court for his management of that case.

And last but not least at the very far end, I can barely see him myself, is Lloyd Constantine. He's the

managing partner of Constantine and Partners. Lloyd was lead counsel in the VISA check MasterMoney antitrust litigation which resulted in a $3.4 billion settlement and historic injunctive relief that benefitted U.S. businesses.

Lloyd has been involved in numerous class action and multistate antitrust litigations over his entire career. He served as assistant attorney general in charge of antitrust enforcement for the State of New York from 1980 to 1991. So with such an esteemed panel I know we want to get down to it so without further delay, Geoff Miller.

MR. MILLER: Thank you Pat. I've got a PowerPoint here. When I try to do this with my students I always fail so I'm sure the FTC is more technologically sophisticated.

Well, it's often been observed that class action and especially large-scale, small claim cases are a form of lawyer-driven litigation dominated by entrepreneurial attorneys. Because counsel plays such an overwhelming role in these cases the economic incentives facing counsel are going to be critical. Attorneys' fees are the fuel of the internal combustion engine that drives modern group litigation.

And because of the pervasive conflicts of

interest between class counsel and the class fees must be set by the court. But how is the court to go about this task of setting fees?

So the ultimate objective a court looks to in deciding on an attorney's fee is whether the fee is reasonable. That sounds like that's pretty easy but how do you know what a reasonable fee is? You need some more information than that because reasonableness, in itself, is a pretty amorphous concept.

So the courts have come up with, as many people know, several methodologies for calculating a reasonable fee. One is the percentage approach which emulates the standard contingency fee in a personal injury case, just a percent of the class recovery. Lodestar approach, which emulates the hourly fee, that is reasonable hours put in on the case times a reasonable hourly rate.

More jurisdictions actually use a mixed approach which either permit the trial court to use in his or her discretion, the percentage approach or the lodestar approach, or require that the trial judge compare one to the other, let's say, award a percentage fee but check it against the lodestar.

And then some jurisdictions just use an unvarnished form of judicial discretion. The judge just

looks at the case and decides what a reasonable fee would be.

Now, because the test is reasonableness it would seem that one important piece of information for assessing a fee is the fees awarded in comparable cases. Just like you'd want to know the comps in a real estate deal you'd want to know the comps in an attorney's fee-setting context as well.

Traditionally, the comps have been provided by counsel in their briefs but there's an obvious problem with counsel bringing prior cases to the attention of the judge, namely, that counsel is only going to bring to the attention of the judge cases that benefit them.

So the judge is going to see either only the good cases if it's a settlement where the fee isn't in dispute by the defendant or, if it is in dispute, only the outlier cases that are either very high fees or very low fees and the judge isn't really going to have the ability to make an informed decision based on the range of cases that aren't in front of the judge.

But luckily today there's a fairly large amount of empirical information available to help courts in making fee decisions without having to rely on partisan briefing. So I'm going to present a little bit of that data now in

the brief time we have.

This slide is from a study by the National Economic Research Associates, an economic think tank, and it's a study of fee awards in settled securities class actions from 1991 to 1996, 434 settlements. And it divides these according to size as you can see.

What is interesting about this is the far right-hand column where you'll see that -- or the next to far right-hand column if you want the average -- where the fee awards are extremely tightly bunched between about 30 and 32 percent. They really have a very strong result here that fee awards in settled securities class actions are quite tightly bunched together.

This includes fees and expenses as a percent of the settlement. I'll skip that because of time. Next, what can you tell about fee awards across jurisdictions? Well, this same National Economic Research Associates study looked at fee awards in all of the federal circuits, that is district courts in all of the federal circuits, and divided up the awards across circuits.

And again, you can see from the far right-hand column that there's a really extraordinarily tight bunching of the awards, that is, they run from about again 30 to about 32, 33 percent across the jurisdictions. So it's

kind of a remarkable result that in each of these different circuits the fee awards are just about the same when calculated as a percent of the recovery.

What about how fees vary over time? Has there been significant changes along that dimension? This is the same outfit, NERA, but it's an update of the study I just showed you that goes through 1999 and looks at, I guess, 1991 to 1999, so a nine-year period.

And the bottom row is the relevant one there. You can see that, again, there's a pretty tight bunching of the awards. There is an outlier in 1992 where the average award was 24 percent. But in general, the awards still stay in that category, that range of 30 to 32 percent. So this is a fairly close bunching of outcomes across time. So we have across jurisdictions a close bunching and across time a close bunching and in the first slide across case size a close bunching of outcomes.

Now, this information so far is only about securities class actions, so it might be that we get different results if we looked at other types of class actions. So we're looking now at a Federal Judicial Center study results, Mr. Willging's study, and here we can see that this group of researchers looked at four federal district courts and they did an in-depth study of the

outcomes of cases in the four federal courts.

And again, you can see that even in this area where the cases are not solely securities cases but they're cases of a variety of different types, you get a tight bunching. Although the percentages in this study are a little bit lower than in the securities study they range between about 26 and 31 percent. But still, quite close to that 30 percent category.

Now, so far the information that I've presented has been based on fairly narrow data sets, either securities cases only or a relatively small number of cases in these federal courts.

As you can see on this slide the numbers are quite small: about 45 cases, something like that. So this isn't going to give you a statistically valid picture but there have been two more recent studies that looked at quite broad databases so these studies are going to give a much more comprehensive picture of how fees are actually awarded in class action cases.

One is the class action reports data. This is a study of something around 1120 cases, I think exactly 1120 cases that have been reported in that journal. Not a systematic or comprehensive selection of cases, these are cases that were selected for being reported in the journal.

But you can see here that we again get fees and costs as a percent of the recovery. And here we do get that bunching between 30 and 32 that we observed in the prior slides until you get to a certain size, that is about $10 million of class recovery.

And once you reach $10 million the percentage fees begin to fall off. So it looks like there's something of a scale effect playing a role here that didn't show up in the other studies. It looks like as the size of the recovery goes up the percentage fees that are awarded, at least over certain threshold, begins to go down.

Now, another study was done by myself and Professor Theodore Eisenberg of Cornell University. This study is a comprehensive review of all of the reported decisions in any public reporting media over a ten year period, 1993 to 2002. So any decision that was reported in any of the official or unofficial reporters where we could determine the size of the fee and the size of the class recovery went into this database.

There are two lines here. The dotted line is for common fund cases and you can see it reaches a peak, again, at that area of 30 to 32 percent, around there. So that's the probability distribution of the fee awards in common fund cases.

It drops off precipitously after about 33 percent and that's because many of these cases are decided on a percentage basis and courts don't award percentages much over 33 percent. So that's why you get the drop-off in the dotted line.

The solid line is fee-shifting cases, such as civil rights cases, and you see this being consistent with what you'd expect because in fee-shifting cases the fee award is not intrinsically tied to the size of the class recovery. And here we can see a whole range of fees including some where the attorney's fee was 95 percent of the total recovery in the case.

Now, this graph looks into how fee awards vary by type of case because so far we only looked at securities cases and cases generally. And you can see here that this data has been divided up, this is the published opinion data I referred to, divided up into case categories.

And you can see a fairly wide dispersion of fee percentages, the highest percentage being in civil rights cases. Some civil rights cases' fees are awarded on a common fund basis. And there the average is 37 percent. And in tax cases, tax refund cases, 13 percent. So we are beginning to get a dispersion of results in place of that tight bunching that we saw.

Now, lest this be interpreted as meaning that this type of dispersion has a great deal of significance, I should inform you that we tested this result with regression analyses and couldn't reject the hypothesis that this is just due to chance. But nevertheless, it's instructive. It seems to be that there are differences going on here.

How about based on the methodology -- okay, this is the same result in the class action reports data. How about based on the methodology? Do attorneys fees vary depending upon whether the fee is calculated on a percentage basis or on a lodestar basis?

The first box at the top is published opinion data. This shows that there is a variance between the two methods of determining fees with fees being somewhat larger when calculated according to the percentage method than when calculated according to the lodestar method, 22 percent versus 17 percent.

The class action reports data, which is the lower box, doesn't find a significant difference between those two methods and finds a higher average percentage fee in those two cases.

Now, what about scale effects? I mentioned that when we just eyeballed the class action reports data we

tended to observe a scale effect, that is, the fees seemed to go down as a percentage of the recovery as the amount of recovery goes up.

This is all of the different large-scale databases with the results plotted and regression lines drawn through them. Now, this is really a remarkable outcome, I think, a remarkable finding. And what's remarkable about this finding is that these cases are bunched just extraordinarily tightly around a straight line.

There's very little deviation here which suggests that what's really going on, no matter how the courts claim to be assessing the fee, no matter what factors seem to be playing a role, what really goes on in determining a fee is the size of the recovery for the class. That is the single overwhelmingly most important factor that determines the attorney fee.

The size of the recovery explains between 89 and 94 percent of the entire variance of these data sets. So no one expected that. We didn't expect that. There's no reason intrinsically to expect that fee-shifting methodology should be the same as common fund cases but they are. This is really to my mind a remarkable outcome. Almost the only thing that ultimately decides the fee is

the size of the class recovery.

Now, what about fee percent as relation to recovery? If there's a scale effect we'd expect that the fee percent would go down as the class recovery goes up. And as you can see by the negative slope of these lines, we find that to be true. There's a significant scale effect and the percentage goes down as recovery goes up.

Now, what about effects over time? We saw the NERA data looking at a limited time frame of securities cases. There were effects over time.

This data shows effects over time in the broader data sets, that is, class action reports and the reported cases. The large dotted line is fee-shifting cases. Those look like they go up a little bit but you can see in the two studies of common fund cases there's virtually no change. That is, there's virtually no change whatsoever in fee percents as awarded over time.

Now, given the remarkable strength of the relationship between size of the recovery and attorneys' fees, we might draw the inference that courts could actually receive some help from this by just looking at the size of the recovery in a case and then looking at the mean or average fee percentage that's awarded in cases of similar type and then using that information to assess

whether the fee is reasonable.

And this simply does this, dividing up the class action reports data into ten deciles where you get the average recovery, the mean fee percent and we've also calculated here the standard deviation, which is the simple measure of variance from a mean for each of these deciles.

The suggestion is that a court might wish to, in a given case, to check the reasonableness of a fee request to look at what the average recovery is for cases of this dimension and then to look at the standard deviations. And here is a graphic determination of that.

So as long as you're in some of those solid lines you'll be okay. I just have one minute but I'm going to spend that minute referring to some other results of the study. The study found when we looked at the regression analysis, which I haven't given you, that risk does affect fee. The higher risk the case, the higher the fee; the lower the risk, the lower the fee.

We talked about non-pecuniary and coupon settlements. That's in our study. We found that non-pecuniary settlements had no effect whatsoever on the fee, either if the value of the settlement is included in the stated value of the recovery or not, no effect either way on the fee.

We looked at securities cases, pre and post the Private Securities Litigation Reform Act. That statute was widely touted as tending to rein in the class action attorney. One would have thought that it would reduce the fees awarded to class action attorneys. In fact, our study provides some evidence that there is a significant positive effect of PSLRA, that is, plaintiffs' attorneys earning more in these cases than they did before.

We looked at objectors. One of the factors we're going to talk about is the role of objectors. Objectors had no measurable impact, no statistically significant impact on fees. We looked at settlement classes. These have been challenged. Settlement classes had no statistically measurable impact on fees.

Finally, we looked at federal versus state. I know there's been a lot of effort in Washington to federalize class actions on the theory that federal courts might do a better job at reining in class counsel than state courts. In fact, our study showed that attorneys' fees in federal courts were statistically significant and larger than attorneys' fees in state court.

So if you want to put more class actions in the federal courts I'm sure the plaintiffs' bar might be very happy about that fact. Thank you very much.

MS. BAK: Deborah, you've examined this issue but from a slightly different approach. Why don't you explain?

PROF. HENSLER: Well, like Geoff I want to begin by making the -- if it weren't obvious to you when you walked into the room at the end of a long day of talks the now obvious point that attorney fees are at the core of the controversy over class actions.

But I want to underline that point despite the mundaneness of it because we spent so much of today talking about coupon settlements that I think that might leave you all with the sense that coupon settlements are where it's at with trying to evaluate the costs and benefits societally of class actions and if we could only get rid of these bad coupon settlements that some people spoke about this morning that we could all stop worrying about class actions.

I think that's not really true. I think the issue really is what is it that attorneys are achieving for class members and for society in relation to the fees that they're obtaining. And it's clear to all of us from the press coverage of this issue as well as from cocktail party conversation that fees are perceived by many as outsized compared to the benefits that are provided to classes from class actions.

But the evidence has until very recently been mainly anecdotal and even in these very rich data sets that Geoff has just summarized for us very cogently, much of the statistical data pertain mainly to securities class actions which have long been the subject of very sound and extensive academic research.

And those cases, of course, don't represent the full landscape of class actions and certainly don't represent fully the kinds of small-value claim to consider class actions that I take it has driven the Federal Trade Commission's interest in this subject.

It's also true that much of the data that's available including the data we just saw are data that are derived from careful weeding of the characteristics of class action settlements, that is, the settlement as approved by the judge which, of course, as we have heard in the discussion today, may not be the settlement as it is finally experienced by class members.

To find out what happens to class members one needs to get deeper into cases. And this is very difficult and unfortunately very expensive because it's time-consuming to do and in the study that I led at Rand along with my colleague Nick Pace who's here and will be speaking tomorrow we chose a case study method a very fine-grained,

qualitative method to try and understand what had happened to specific cases.

And we selected ten cases for close analysis because that's all we could afford to do. We focused specifically on small damages, consumer class actions and also on mass tort class actions because they've been central to the policy controversy over class actions.

This was research that was done in the mid to late 1990s so we were looking at cases that had been resolved at the point of our research. Many of them, of course, were cases that had been filed some years earlier.

One of the things that distinguishes our data from some of the data that you've heard quoted already today is that we tried to avoid high-profile cases. These are not the cases generally that were emblazoned in newspaper headlines bewailing the abuses of class actions. And in most instances, we actually did not know what the outcomes of these cases were when we selected them for research.

There is obviously a question when anybody uses a small set of cases as I am about to do. We can't claim that they're statically representative. And many people who have read our book worried about whether we selected them with a plaintiffs' bias or whether we selected them

with a defense bias.

All I can tell you about that is that people who read our book have claimed we either chose the cases to demonstrate how bad class actions or on the other side critics have accused us of having chosen the cases to demonstrate how good class actions are. So you have to make up your minds for yourselves.

And in the book we describe the cases in great detail as objectively as we can to leave people with the ability to make their own decision about that.

Briefly, I am going to describe these cases. I'm not going tell you in detail but you can see that they are a range of pricing cases, sales practices, variations on alleged violations of business practices. I'm not going to speak about all the mass tort class actions because I don't think they're all opposite but I thought I would include in the data I'm about to show you two property damage cases because at some level they could be understood not only as product defect cases, which is the way they were litigated, but as cases where claims were made about the products that were not substantiated.

Now, attorney fees, as we all know, are popularly compared to what individual class members receive. We heard some commentary about that this morning and so I've

showed you what would be that comparison. If you looked at these cases you can see right away that in one of the cases, the case against Bausch & Lomb, with regard to contact lenses, that no one actually knows what the class members got because that information was not required to be reported to the court and it's been sealed.

You can also see in the other cases that we're not, even in this class of consumer class actions we're not talking only about cases that are worth $5 or less than $10, that there are cases here where the value to the individual was in the thousands of dollars or the hundreds of dollars. But you can see in the case that I've highlighted, the case against Allstate and Farmers Insurance Company alleging violations of business practices and the technique that was used to round charges, the kind of emblematic case.

Here we have the class counsel fees getting for total of fees and expenses over $11 million and the individual policyholder then takes away $5.75. But the appropriate comparison, of course, is looking at the total of attorney fees relative to the total class member benefits because as we've been reminded this is aggregate litigation that would not survive in a court system unless the cases could be collected.

So the comparison we ought to be looking at is of class counsel fees and expenses to the total compensation fund. And again, you see that in some of these cases we don't actually know what that amount is, again because a judge did not require that information.

But the key question, it seems to me, thinking about the public policy purpose of class actions when we're looking at the attorney fee question is how do the attorney fees compare to what the settlement actually achieves. And settlement funds as this chart shows do not always equal the actual benefits to the class.

So here what I'm showing you in the blue bar which you will notice is often quite large is the amount of money on which the judge based the fee award decision and in the green bar I'm showing you the amount of money that was actually paid to the class.

And I just change the chart slightly. If you were looking quickly so that as you look at the first bar, the Robert's bar, let me go back a minute, that green bar includes about half the value that was alleged for coupons and half the cash value. And here I'm showing you the comparison looking at the cash value.

Now, these cases as you can see have quite dramatically different benefits, so let me show you just

some different versions of this chart so you can see what's going on in some of the cases where you can't read the data.

So the Selnick case was a case alleging improper late fees and the Inman case is a case having to do with insurance rates. And again, that's the case where we don't know what the settlement fund was supposed to be because the judge didn't seem to know what it was supposed to be at the time he approved the settlement.

And I've also now added onto the chart two huge cases. These are property damage cases. One is the other wood siding case that was going on in the courts at the same time the Masonite case was being prosecuted and the other is a case that may be familiar to you. It's a case involving polybutylene pipes.

You can see the settlements were very large and you can also see at the time we did the study we had to do some projections but our projections were that those dollar amounts would be fully paid out.

So now we can look at what class counsel fees and expenses look like as a share of both the negotiated and the actual settlement value. And you can see that on this chart that story might look very different depending on whether you're talking about the negotiated settlement or

the actual settlement.

Now, I want to point out that there are administrative costs to run these settlements, the costs of getting those notices out. These are all settlement classes. The notice costs are paid by the defendant. That's on top of the expenses that I showed you on the other chart so I just wanted to give you some sense of what those costs are and what they are as a percent of the total that the defendant paid out.

And the important note in parentheses at the bottom of the chart is in the Rand study we were not able to collect data on defense fees. And so I should remind everybody since we're focusing so much on plaintiff attorney fees that to the best that we could tell if I had to make a guess based on the fragmentary data we collected I would say defense fees were at least equal to plaintiff attorney fees in these cases.

But as we've also already been reminded some benefits of class actions are not included in the settlement fund value and there is the issue of what's the value of the injunctive relief that may be achieved by the class actions.

In all six of these consumer cases that were represented on the chart there were changes in practice

that we could document in all of the corporations that were associated with the class actions.

Now, in four of those cases we thought, and we described this in detail in the book, that you could make a pretty compelling case that the changes were either the direct effect of the suit or frequently they had been made before the settlement was approved, perhaps in an effort to put the defendant in a better position.

Nonetheless, the threat of a class action suit one can argue is often as important as the actual suit and settlement. So our bottom line was that in four of those cases there were changes that seemed to be the effect of the suits.

In two of the cases it is quite clear that the cases are follow-on cases. They are one of a family of cases, sometimes dozens of cases that were brought across the country alleging the same violation of business practice codes by the same defendant. This is the Nth case that the defendant is paying off. That defendant long made those changes. They may well have made those changes in response to the first suit but they didn’t make it in response to this suit.

We also saw one case where there was legislation although I note that I think reasonable folks might think

that the legislation was passed to protect the corporations that were sued not to protect the consumers, and the product defect cases that we studied were always going on in the context of some kind of product change, removal from the market or often a state AG investigation.

As Geoff's data indicated, fee regime didn't seem to matter very much. In every case it seemed to be percentage of fund, whatever was the actual rule in the Circuit. Fees and hours and expenses were often not reported but where they were our calculation showed a wide variation in hourly rates and notice in disbursement procedures clearly matter.

I think this point was made fairly clearly by the previous panel. Clearly when you directly distribute benefits to class members, more class members get paid. All of the current policyholders who were due compensation in the insurance double rounding case received the money that they were due under the settlement. Less than 1 percent, far less than 1 percent of the former policyholders who had to go through a claims process actually collected the money.

And we did also find cases in which the rule was whoever claimed would collect all of the fund rather than having it revert to the defendant and claimants simply got

second, if necessary, pro rata pay-outs until the fund was exhausted.

So I'll close on the point that I do think, as Judge Hornby accused me of thinking this morning, that judicial attention is necessary and can produce a better benefit/cost ratio. More attention to settlement details, closer scrutiny of noncash components.

I do believe the fees ought to be awarded directly between the real benefits that are actually achieved, which can be achieved in some instances by periodic payments that have been ordered by some courts and finally, I want to close on the note that I think that for those of us who are concerned that the class action mechanism, which I believe is extremely important in the United States as a tool of regulation, can best be preserved by making it work right.

Probably the single best thing we could do to improve class actions is put all of the features of settlements and fees as they are actually taking place instead of as they appear on paper on the record. Sunshine is a wonderful tool for improving everybody's behavior. Thank you.

MS. BAK: Thank you. I thought now we'd just turn to our panel members for a few minutes of questions

that they might have for Professor Hensler and Professor Miller. Judge Walker?

JUDGE WALKER: Patricia, can I lead off and ask Geoff Miller, it appears to me that the number of cases in your study is fairly small, if you consider the number of class actions generally. You've got the NERA data. Those tend to be securities cases; maybe they all are. The class action report data are selected cases. Can you really draw definitive conclusions from a fairly limited data set of this kind?

PROF. MILLER: Well, the numbers are more than adequate to get statistical significance to the study. The NERA data set is 1100 plus cases. Our sample of that was something like 670 during the time frame. We looked at every single decided case in the state or the federal courts that was published, including some of yours, Judge. And that came to 370 cases.

JUDGE WALKER: I won't ask what you made of those.

PROF. MILLER: You're quite right that there's a huge dark mass of sort of dark matter of cases that we did not study and that have not been studied and our results are only good for the other cases if the other cases, if the ones we studied is a fair sample of the total universe.

And we don't know that -- although I'm inferring -- that that would be the case.

MR. DENGER: I guess I have two questions for you, Geoff. One is when we look at the class action percentage awards in various types of cases antitrust, for example, is at 21 and 23 percent and mass torts is lower at 18 percent, how much of the subject matter is really masking the size of the case? In other words, did you run regression analyses by size of case within and correlate that with the subject matter to determine if that may be the driving factor?

PROF. MILLER: Yes. I mean, I'm not the econometrician here. Ted Eisenberg is. But we did control for that. However, when we did do the regression analysis, Mike, as I mentioned we couldn't reject the hypothesis that the case types had no impact, that the observed differences that are in that table may actually just be a function of chance.

MR. DENGER: Let me ask one other question. You mentioned that risk affected the fee award. And I confess that I haven't read your article in depth but it's my understanding you tried to assess risk based upon the judge's comments in the fee award decision. Is that correct?

PROF. MILLER: If the judge made a comment we did that. If it was a case where risk was obviously low, for example, it was a follow-on case to a government prosecution we would code that as a low risk case. So we did both. But mostly we looked at what the judge said about risk.

MR. LANGER: I just wanted to understand from Prof. Hensler's data, in most of the cases that you just showed us when you did the comparison between the actual recovery and the recovery that was presented it seemed to me but I'm not sure that certainly in the largest of the cases in your study and in most of the cases in the study if you aggregated them actually a very large percent, there was actually a high correlation between the actual amount presented to the court and that which was distributed to class members.

PROF. HENSLER: I would actually describe again underlining that this is a very small set of cases so that we can't infer what proportion this is in the population that what we see is variation. We see both sides of the continuum. We see the cases in which all of the money was delivered, I believe, because of the processes that were used for delivering the funds and the requirements for reporting that judges imposed.

And we see several cases where a much smaller percentage of the settlement was delivered and in the cases where we see those small percents it's clear that the lawyer is getting a much larger proportion than the 25 to 30 percent that we see in these larger statistical data. In our sample we did see cases where the lawyers were getting 50 percent of the dollars that were delivered.

MR. LANGER: Professor Miller, if I understand your study, it showed that basically in the aggregate that risk was appropriately rewarded but was really a measure of what the lawyers ultimately received was the risk --

UNIDENTIFIED SPEAKER: Can’t hear you.

MR. LANGER: I take it from your study that the lawyers recovery reflected the risk they assumed at the outset to some degree and second that things were working at least they’re supposed to work in the sense that the larger the recovery the smaller the percentage but the larger the reward to the lawyers.

PROF. MILLER: On the latter point that’s exactly right. The award did go up as the award to the lawyers does go up consistently as the recovery goes up although at a decreasing rate and the percentage award to the attorneys once you’re over a certain threshold goes down as the amount of the recovery goes up.

On your first question, yes, we coded cases for normal risk, high risk and low risk, and we got highly statistically significant results. High risk cases generated higher percentage fees and low risk cases generated lower percentage fees as compared to the average case.

MR. LANGER: Can I ask you -- I'm sorry to monopolize the time here but can I ask you one quick question about how you handled the class action study?

PROF. MILLER: Sure.

MR. LANGER: I noticed that basically having just had a very diligent judge who told me that I better study the class action reports and address them when I did my fee petition I also had a chance to study these in detail, but did you find that -- I notice that the first four settlements that are discussed in the class action reports are so vastly larger than any of the others, even in the highest grouping, that is, the first one is for $10 billion, the second one for $3 billion and the third and fourth one both over a billion and the next closest is just about $700 million, if you remove those four largest ones would it have affected the data?

PROF. MILLER: I'm sure it would because the class action reports uses a weighted average whereas we

didn't use a weighted average. So you're going to get disproportionate impact of the very, very large cases.

But we didn't do that but it would affect the data and would probably result in even in the very large cases the average percentage would be higher if you took out those mega, mega, mega-cases.

MS. BAK: Anybody else?

PROF. MILLER: So, Deborah, would you agree that in addition to, you talked about the recovery that the class members got in terms of money, let's say. You also talked about the recovery they got in terms of the value of an injunction and non-pecuniary recovery.

Would you agree that another element that ought to be taken into account is the sort of general deterrence that can be affected by class action, that is the defendant has to pay and because the defendant has to pay that person or others are less likely to do the bad thing in the future? And if general deterrence is an important feature of class action recoveries is that something that should be calculated in when we look at the value?

PROF. HENSLER: I agree, in principle, that a value of a well functioning liability system including class action system is general deterrence as well as specific deterrence. But I think if a system comes to be

perceived as producing outcomes that bear little or no relationship with the behavior of those who are being sued, then I think that substantially erodes the deterrence ability of the system.

So as it currently stands I would be rather uncomfortable with the notion of judges valuing general deterrence from a case, particularly given the evidence I think that they are not doing a terrific job of valuing the more specific aspects of the case.

But if we could look ahead to a world in which the system is functioning more effectively then I think that that's an entirely reasonable goal and something we might think of implementing.

MS. BAK: I think we've got time for just one. Judge Walker.

JUDGE WALKER: Well, I just wanted to ask Geoff and Deborah, given that the data you have used, particularly you, Geoff, have not been reported on a consistent basis but you're attempting to mine from judges' opinions what the numbers really are, what the relationships really are, do you not have some misgivings about some of the conclusions that you might draw from these data?

And secondly, what you are measuring in any

event, it appears to me, is what judges do, what amounts judges award and circumstances and conditions under which they make these awards. Is the length of the judge's conscience on these matters really what should determine fee awards and expenses in these cases?

PROF. MILLER: I agree with you that there are definitely obvious problems of methodology looking at judges' opinions. I'm not sure that they skew the results one way or the other. It could be that you just get a lot more noise but that the means and medians that we observed are pretty accurate.

Your second question, that is, what's the best methodology raises a very thorny question of how we decide what ought to be the criteria we would use to determine the appropriate fee. And I don't even think anybody really has come to a satisfactory answer to that.

I would like to know what the private market would do, if there were a private market. Unfortunately, more judges aren't doing what you've done, Judge, and hold an auction for cases that would give us information about what the private market would actually demand for this type of representation.

If we had more auctions, which I would be very much in favor of, we get information on that which would be

extremely valuable. But at the moment we only have the results of three or four auctions to go by and that's not yet enough of a database to look to. But certainly the auction results would be very valuable information as well.

MS. BAK: That's a great segue to turning to our next topic which is innovative approaches to appointing, managing and compensating class counsel. And I thought we would start with Judge Walker since you've been on the forefront, Your Honor, in the use of class counsel auctioning to more closely approximate market rates for class representation and to avoid some of the associated difficulties with ex poste evaluation of fees. Perhaps you could briefly explain the kinds of devices you've used in some of your cases and what the results have been.

JUDGE WALKER: Thank you, Patricia. Well, I'll talk about two. And the first is what has been called judicial auctions and the second is the empowered plaintiff or lead plaintiff model that was ultimately enacted in the private securities litigation format.

And I suppose the moral from the story is that judges shouldn't read law review articles, including those of Geoff Miller because that really was what gave birth to the auction idea.

It was a contest between lawyers fighting for the

lead counsel position in a class action, a securities class action. It was not a beauty contest; it was an ugly contest as they were throwing all sorts of charges and countercharges against one another and I'd been on the bench for three months at this time and after watching this go on for awhile threw up my hands and said well, why doesn't somebody make a proposal based upon the fees that are going to be charged?

Needless to say, silence fell on the courtroom and the parties quickly made up and submitted a joint proposal, which needless to say, got my dander up and that's how we got into auctions in that case.

Actually, Geoff, there have been a few more cases than three. There have been either 14 or 16 and Tom Willging of the FJC has done a review of those. And those of course have been compiled in the Third Circuit task force report.

The so-called auctions that I have run and that I think most judges have run have been an auction in which the lawyers have bid on the amount of the recovery that they're going to charge in fees. Judge Kaplan, Judge Lou Kaplan in the Southern District of New York hit upon what I think is a very imaginative idea in the auction house cases in which he essentially asked the lawyers to bid on the

amount of the recovery.

And the scheme he developed was one in which there would be no fees paid on the X amount of recovery and then 25 percent on every dollar recovered thereafter.

When you get into designing a sensible fee regime there are all kinds of problems that come out of the woodwork. Do you have increasing percentages to incentivize the lawyers as Jack Coffee at Columbia recommends? Do you have declining percentages to represent economies of scale, which I rather favor?

Do you have some regime along the lines of Judge Kaplan's? I don't know the answers, the correct answer at any rate and I don't think anybody else does in part because we haven't had enough experience. I do know this: that these bidding or competitive selecting class counsel is feasible only in a limited number of cases.

And basically what you need are two things. You need cases in which obviously more than one firm is competing to represent the class and that requires that the class be fairly well-defined. You can't have lawyers competing to represent two disparate classes.

But if you have a situation in which you've got a fairly well-defined class, such as usually the case in a securities case, or in follow-on cases that follow a

government investigation or prosecution, then there's a possibility for competition among the lawyers.

Problems? There are the problems that I mentioned of designing an appropriate regime. There's a problem because there's great resistance in the bar to competitive selection.

There's uncertainty on the part of judges as to how to conduct auctions and there's a certain awkwardness of judges in this position. Indeed, there's an awkwardness that Judge Hornby mentioned this morning and judges involved in any fee determination at all.

It's an irregular part of the judicial process. It's not the usual adversarial process with established processes that we are accustomed to following. And that makes it problematic but so far no one else has come forward to take on the task. And as Professor Hensler just mentioned, she calls for even greater judicial scrutiny. So she wants us to put us further into the fire.

Then the second approach is the empowered plaintiff or lead plaintiff model. That, too, is something that was born out of a law review article by Elliott Weiss and John Beckerman.

And I tried it in another securities case even before the enactment of the PSLRA. It was one of these

cases in which the lawyers, and very good lawyers both on the plaintiff side and the defense side, came in shortly after the complaint was filed with a settlement.

And it appeared to me that that was too soon to have fully evaluated the case and urged the parties to get a real member of the class. And ultimately the Colorado Public Employees Retirement Association came forward and improved the settlement amount in that case by about a hundred percent and had hired Hogan & Hartson here in Washington along with the plaintiffs' firm that I alluded to to represent the class and they did an outstanding job.

Obviously, as you know, that model was enacted in the 1995 amendments to the 33 and 34 acts. It does relieve the courts of the responsibility of acting as a fiduciary or purporting to act as a fiduciary. And it also allows and encourages ex ante fee setting, which I think is very constructive and useful.

If you're going to award lawyers for the risk that they undertake in litigation the best time to measure that risk and in fact the only time that you can do so effectively is at the outset of the case. It's really impossible to assess risk looking backwards.

So the empowered plaintiff model of the PSLRA does that. The problem with this approach is that

relatively few investors come forward. Very few real investors, institutional investors come forward, and I think with respect to some there is a concern about whether there is truly an arms-length relationship that exists between counsel and the lead plaintiff and are we not just back in the same situation we were prior to the enactment of the reform act.

So those are the two so-called innovative approaches that I have had personal experience with. I think they bear pursuing further, even though it's obviously very hard to do that with the auction model.

But one point I would like to make in commending the Commission for undertaking a survey of class actions and attorney fees in class actions, I hope the Commission doesn’t set its sights only on studying attorney fees in class actions because this is a problem which confronts the judiciary in a whole range of cases.

There are about 200 or so federal statutes in which we are as judges are called upon to award attorney fees. And we have very, very, very little hard, good information that is compiled on a consistent basis to allow us to make those kinds of decisions.

And whatever you say about lawyers, they simply don’t have an interest generally in bringing forward, in

the usual adversarial way, information that we can use to test fee applications. And so I certainly hope that the Commission continues its interest in this subject but does so on an even wider scale than the class action scale.

MS. BAK: Before we go on I just want to remind all the speakers to speak very directly because our court reporter unfortunately is having trouble hearing everybody. So grab your mike and just speak right into it.

Mike Denger, you believe that some of these auction ideas would be well suited for antitrust cases as well. Do you want to share some of your thoughts about that and your plans for this agency?

MR. DENGER: I have no plans.

MS. BAK: No plans. Recommendations then.

MR. DENGER: Recommendations, perhaps. I think like Judge Walker I would commend the Commission for the Class Action Fairness Project where it went in and filed amicus briefs where it believed these were excessive either given the relief provided to the class or given the underlying, significant, contributory role of government enforcement actions.

And I would, particularly given the Commission's antitrust mandate, as well as its consumer protection mandate, and given what I think is an imbalance of

information that Judge Walker and the other judges sometimes have to face if they are to award attorneys' fees after the fact, the Commission ought to consider a broader advocacy role particularly in follow-on cases of the type that Judge Walker was talking about where I think that the Commission could play a role given its consumer protection and competition heritage.

Now, I would draw distinctions between two types of antitrust cases. One is the follow-on cases which I suggest present very minimal risk to the plaintiffs. Why? Because a criminal conviction or civil judgment in a government case is admissible as prima facie evidence of liability.

The government often develops almost all of the underlying facts which can be obtained during discovery. The direct purchaser classes are easy to certify in follow-on cases. There’s joint and several liability and no right of contribution. You can recover damages, even if the defendants or even if the plaintiffs were to pass them on with a markup to the indirect purchasers. And you have statutory treble damages or statutory punitive damages.

So on these cases, particularly when attorneys' fee awards are based on the size of the recovery, which means if you get a plaintiff in a big one, you’re in great

shape.

I think that there is room for the auction type of procedure at the beginning of the case. I say it for a second reason. I've sat in on an awful lot of class actions when there are 40, 50, 60 plaintiffs' law firms purporting or seeking to represent the class. Some are designated as lead counsel, some liaison counsel, some as members of the steering committee and some on all sorts of other committees but none seem to ever disappear.

And I am concerned that this approach is inconsistent with the Commission's antitrust mission. Remember the antitrust laws apply to lawyers. If this were bidding on a government contracts case you might hear someone say it was inconsistent with the spirit of the antitrust laws.

If we have joint ventures, the Commission's and the government's historical enforcement policy has been that you want to have multiple competing ventures seeking to bid so you can have competition. If you have the situation where you have a large number of firms, no matter how you divvy it up, you're going to have waste and inefficiency.

And I think the Commission could get better representation for the class, fairer representation at a

lower fee in cases where the risk is minimal by coming in and encouraging at the beginning the type of auction procedure that Judge Walker pioneered and Judge Kaplan used in the auction house cases.

I contrast these cases, and Lloyd and I are usually on the opposite sides of everything, so I'm going to break some ground today and be on Lloyd's side. Lloyd in a case committed 50 percent of the resources of his firm -- if I have the facts wrong he'll tell me. He usually does -- for a seven-year period.

It wasn't a lay-down, slam-dunk case following a government investigation. He litigated it out through summary judgment, through expert reports, spent an enormous amount of time and got a heck of a recovery for the class, both in terms of money and in terms of the value of the relief he got on a going-forward basis. I would have given him a hell of a lot more had I been the judge. But I wasn't.

But that type of case where you have a significant risk incurred by a plaintiff law firm, they develop a tremendous result for the class is a far different set when you follow along behind a government investigation. You have liability determined. You have everybody trying to play one off against the other, and

it’s not hard to develop evidence.

And I shouldn’t probably say this but having been through a lot of litigation, you can have economists to take positions, on almost any amount, on the side of what the damages were to the class. And I probably couldn’t tell you which one I think is right. But there’s plenty of them out there.

So what I suggest in this type of situation, particularly when almost all of them settle, the defendants settle out and say they won’t object above a certain level of fees. The objectors who opt out of the class aren’t in a position -- I mean, the opt-outs aren’t in a position to have standing to object. The named plaintiffs in this case -- I haven’t seen too many of them ever complaining about attorneys' fees.

This is a case where we need to go in and get some relief at the beginning. And I really think it benefits to the class because there’s only so much money to go around and it benefits to all of us because if there are excess costs they’re eventually going to get passed on to you and me as consumers.

So in this particular circumstance, and I lay that out in more detail in the written materials, I think it would be appropriate for the Commission, who is uniquely

positioned, to come in and advocate some sort of ex ante type procedure in getting counsel to compete among themselves to represent the classes in these types of litigation.

MS. BAK: Mike, before I turn ultimately over to Lloyd at the end to talk about his case a bit, I want to let Howard take five minutes and then follow up with Lloyd.

Howard, ultimately the Third Circuit concluded that traditional methods of selecting class counsel with significant reliance on private ordering and a great deal of oversight was probably the way to go in most cases. You've just come out of the liner-board litigation where you were very innovative in adopting some of those management tools. Why don't you talk to us a little bit about that?

MR. LANGER: I did want to just say one thing though --

MS. BAK: Talk really directly into --

MR. LANGER: While Mike was talking about antitrust cases I was just glancing down the list in the class action reports to try and see like how many cases fit this model of an auction where there would be a follow-on case.

And what struck me immediately was that all of

the largest settlements in antitrust cases as you go down the line were in cases that couldn't in any way be characterized as follow-on type cases.

The NASDAQ market makers case, the largest here prior to Lloyd's case, Lloyd's case was a case that preceded the government action. The brand-name prescription drugs case, which is the next largest, had no government action. The corrugated container case, the original one not my case, followed a criminal trial where the jury was out for three hours and acquitted all of the defendants. So it's very, very hard to know what is a follow-on case.

My own case that I just settled for $202 million, the FTC brought a very unique, individual invitation-to-collude action against one defendant and we expanded it to many others. Was it a follow-on case? I don't know but we do know that the district judge found in our case that nobody wanted to bring the case. We couldn't find lawyers to work with us.

MR. DENGER: Then I would applaud you.

MR. LANGER: I know. But what I'm saying --

MR. DENGER: And I would applaud the effort.

MR. LANGER: But what I'm saying is that it's very, very hard to know what is a follow-on case and one

would have said that the first corrugated case was a follow-on case but then after the criminal trial did it cease to be a follow-on case when the jury had acquitted? It's a very, very difficult concept to know exactly what the area is.

Just this morning I was teaching the auctions case. Well, in my textbook they quote the testimony of the people admitting in the criminal case their liability, they met and colluded. But there are very few cases that are really that simple.

In any event, my own view is that more proactive judges and the Third Circuit model, to the extent there was a problem, which I take it from Professor Miller's study, I'm not sure that there is a problem, be resolved.

The courts to date in the Third Circuit recognize that there's jurisprudence on how to measure an attorney's fee award, whether you're in the Third Circuit where they have seven or eight criteria or you're in the Eleventh Circuit where they have 11 or 12 criteria but they have criteria that already exist that courts are to apply.

And it's one of the reasons that the Third Circuit felt that they couldn't permit auctions within the circuit because they already had a body of laws as to how attorneys' fees would be decided.

But to the extent that I would recommend or think that there were things that courts could do to assist themselves, particularly in terms of the types of settlements that Professor Hensler was showing it would seem to me that there's nothing to preclude a court, as part of the settlement process, have the parties to the settlement fund such experts as a court would require to analyze a settlement and determine whether the money was actually going to get to the class members or not.

I mean, I thought when I was listening to the prior panel talk about all of the different businesses that had arisen that were ancillary to class actions in order to get class members to file claims that this was really the courts and counsel not doing an appropriate job at that stage.

There shouldn't be a requirement to have some company out there make sure that people file claims. It should be part of the process in the fee that goes to counsel and in the court's overseeing of the case that there's an adequate notice that assures that people file claims. And I think that it's really a more proactive judiciary in terms of the criteria that they're applying now that would ameliorate such concerns as have been articulated.

MS. BAK: Lloyd, I thought we'd sort of switch gears as we come to you and talk a little bit about the special challenges of determining reasonable fees in non-pecuniary cases. Yours, of course, had a huge recovery but also significant injunctive relief. And when, Howard, you mentioned there should be greater attention by the judiciary to various standards there what standards do we look to? How do courts evaluate significant injunctive relief?

MR. CONSTANTINE: Well, I can tell you what happened in our case. In our case, Judge Gleeson made a specific finding that the injunction in our case was worth between $25 and $87 billion and he also found that the injunctive relief was much more significant, far more significant, of much greater value to the merchants and consumers of the United States than the record compensatory relief, which was $3.383 billion, which itself was a record and the highest antitrust settlement in history.

He then said, it should affect my decision. It has. I'm not telling you how. I'm not telling you what but it has. And then he went on to make the award that he did.

I'd like to sort of cycle back because I think you can prove everything from our case and you can also

disprove everything from our case because it went on for so long and it's still going on. I'll be working on it for the next four or five years.

But to get to the bottom line of what I think about all of this, I think that the best approach is probably for cases where there is competition to represent the class because they are follow-on cases because they follow on a DOJ or state AG or an FTC prosecution of some sort that I think the auction process, the kind that Judge Walker and Judge Kaplan have utilized, is probably the best way to go.

In a situation like our case, which Howard has said his case was similar to that, where there is no competition, where you just get hired to do a case. I don't consider myself a class action lawyer. I don't consider myself a plaintiff's lawyer or defense lawyer. I consider myself an antitrust lawyer.

And five companies came to me and they hired me and they said would you bring a case for us? It was Wal-Mart, Sears, Circuit City, Safeway and The Limited. And they just hired a lawyer to do that case.

In that type of case, I think, when a dozen years later -- and that's what it was, 12 years later -- a court has to make a decision on attorneys' fees the best way of

doing that is to go back and try, as best as possible, to answer two questions. What would a buyer pay for this case? And what would a rational seller agree to sell his or her services at?

And I think the closest that I've seen to that kind of analysis comes out of Judge Easterbrook in his Synthroid decisions, in the two decisions that he wrote in the Synthroid case.

So let me cycle back to sort of what happened here and where I think the court -- and I'm not trying to engender any sympathy. Having been awarded a $220 million attorneys' fee it's not a good idea to go before a group of people and say, hold out your hand and say, look how I was shortchanged here. That's not my purpose.

I think the important issue here is what these cases mean and what they mean about the future and do we really want to encourage a certain type of important, big picture forward-looking case. And that's to me the real issue. Coming out of a government background, that's sort of the way I got into this particular case.

So we recovered $3.4 billion. We got an injunction which the court valued at somewhere between $25 and $87 billion and had it's most confident prediction that it was $70 billion. It was a case that did not follow on a

government prosecution but instead actually spawned a raft of government activity. An FTC investigation followed on us. A DOJ prosecution followed on us and several state AG initiatives followed after our action. And we seeded those things.

In the Second Circuit, Judge Gleeson sat down and said, what am I going to do with this thing? What fee am I going to award you? We put together a fee application. Unfortunately, I didn't ask for it to be posted on the web site. I will now after the fact.

I'll ask for three things to be posted. One will be our fee application. One will be Judge Gleeson's decision, which you can find at 297 F. Supp. 503. And one would be our appellate brief, which I argued in the Second Circuit a couple of weeks ago.

In the meantime, you can get the fee petition and the appellate brief at CPNY.com. They're on our web site. But in any event, we went to Judge Gleeson. We said okay, you know all about this case. You closely supervised the settlement negotiations in this case. We don't want to file a specific request for any particular fee. We tried that.

We said we will just set out all of the law, all of the factors, everything we possibly can. We'll come

forward with a recommendation of John Coffee, of Arthur Miller who was the reporter for the Third Circuit task force, of the chief counsel for the National Consumer Law Center and for Frank Fisher and for Harry First of NYU and you do whatever you want.

The judge come back to us and said, oh, no. You're not going to lay that on me. You have to ask for a specific amount. We then did our very, very best and we didn't hold back any cases. There was not a single case that was cited in Judge Gleeson's decision which we had not given him. We cited everything possible. We came forward with the experts who are considered to be the preeminent experts in the area and we applied for a fee of 18 percent.

We made our fee petition along the Goldberger factors, which are the factors in the Second Circuit. In most circuits you have something like Goldberger, and they're all pretty much the same. The fact is that the Second Circuit cites our time and labor and magnitude and complexity.

Judge Gleeson made a finding that our case was of enormous complexity, unprecedented complexity and magnitude, 400 depositions, 54 expert reports, over 500 motions, a pretrial record with 230,000 pages of exhibits, 17,000 deposition designations, 730 trial witnesses and I

could go on for a while but those were all Judge Gleeson's findings. He said the magnitude, complexity, time and labor were beyond recognition.

He said that the case was unprecedented in terms of risk, citing the fact again that this did not follow on but instead seeded government investigations. He said that the result achieved was the highest antitrust settlement in history and the highest settlement ever approved by a federal court on compensatory grounds alone. He made specific findings with respect to the injunctive relief and he said it was very important to encourage future cases like this.

Having done all that, he then awarded a fee of 6.511 percent, which was slightly above one quarter of the average fee that is awarded in the most relevant category here, which was antitrust megafunds settlements, settlements of $100 million. The average fee awarded in those cases was 24.56 percent.

It was interesting that after Judge Gleeson's decision the liner-board decision came out and I read that and I was, like everybody else, I was impressed by what Howard and his co-counsel had done. And I saw the judge lauding Howard and his firm for being so efficient about doing the case. Only 18 attorneys had done 75 depositions.

Six people in my firm, include myself, did 281 depositions in our case in terms of efficiency.

Why did this happen? And frankly, it doesn't matter that much to me because the fact of the matter is at a fee of $220 million or a fee at $600 million, it really doesn't matter too much to my personal life. What this matters is to the future but how did this happen?

I think it happened because the standards in all of these circuits -- it's called Goldberger in the Second Circuit. It's called something else in other circuits are nothing but sort of a hodgepodge.

They're what Judge Easterbrook called a chopped salad. It's anything you want to thrown in, anything you think about it and then there's this investment of broad discretion to the District Court judge to do at the end of the day whatever he or she wants to do.

And I think Judge Gleeson, who was a great guy, said, you know what? $220 million is enough for anybody. Well, that's absolutely the case. That's true. It's enough for anybody looking backward.

But what about going forward? Would a rational group of lawyers agree to do a case at 6.5 percent looking forward, a case like this, a case which everybody recognized was a very, very low proposition case against

two well-heeled defendants that had never lost an antitrust case backed by 6000 banks and all of their additional counsel? The answer is I don't think too many groups of lawyers would agree to do that going forward if they knew that at the end of the day there would be 6.5 percent awarded.

And I think the real problem in this decision, if it becomes persuasive to anybody else, is its effect on the future. It's defined its own category of settlements above a billion or $2 billion. And I think there's a real problem there.

So what I take away from this whole experience other than a lot of money is a belief in just what I said before. In terms of cases where there's competition to represent the class something like what Judge Walker and Judge Kaplan have utilized.

In the kind of case that we were involved in, very, very difficult, very, very long, very complex, very risky case, I think the best way for a court to proceed is to simply try to ask that question that Judge Easterbrook asked in Synthroid is what would a rational seller sell his or her services at and what would a rational buyer sell (sic)?

The last thing I'll tell you is that we actually

had fee agreements in our cases with all of our clients. And those fee agreements would have yielded a fee of over $1 billion, because we just didn't want to do it, and actually the truth of the matter is because I just didn't want to do it. It was my decision.

I did not want to take these fee agreements and take them to Judge Gleeson and say okay, five very sophisticated buyers in arm's-length negotiation with equal information agreed to pay us what would yield a fee of over $1 billion. Please enforce that.

I just did not -- I knew this case would be my sort of legacy. This is going to be in my obit. And I did not want in my obit -- I didn't. I mean, you're getting -- this is some rare candor here -- I didn't want that to be the final story here.

So we told Judge Gleeson they existed. We told him that they were way beyond what we were asking for. He understood that. And then we simply didn't offer them.

MS. BAK: I think we're going to have to close this. And I apologize for not taking your wonderful questions. I hope you will buttonhole each and every one of these panelists to get some more. But I hope you've enjoyed some very personal and interesting information from their experiences. Thank you very much. (Applause.)

(Whereupon, a short recess was taken.)

MR. FRISCH: We have been called to order. Good afternoon. I know it's been a long afternoon but I believe that this last presentation of the day is going to be an interesting and challenging hour on the special ethical concerns in class action litigation.

We have a variety of viewpoints and disciplines represented here, lawyers and economist, plaintiff and defendant, and a lot of interesting and difficult issues to cover in a fairly short period of time.

My name is Michael Frisch. I'm the ethics counsel at the Georgetown University Law Center. I also teach a course in professional responsibility at Georgetown.

My panelists, to my immediate left, you've already been introduced to Geoffrey Miller from the last panel, NYU Law School. To his left, Brian Wolfman, of Public Citizen. Then farther to the left, Lewis Goldfarb, a partner in the New York office of Hogan & Hartson. To his left, Roberta Liebenberg of the Philadelphia firm, Fine, Kaplan & Black. And to her left, John Johnson, IV, our token economist.

The more extensive biographies of each panelist

are in your materials. We're going to start today's discussion with Roberta talking about the particular problems of communicating with absent members in class action litigation. I'm going to turn it over to Roberta.

MS. LIEBENBERG: Thank you. Courts have long recognized the potential for abuse that may occur when there are unsupervised communications with class members. Courts have broad authority to govern contacts with class members by either plaintiffs' counsel or defense counsel under Rule 23 the Code of Professional Responsibility or the court's inherent authority.

Some federal courts have adopted local rules to govern communications with class members. I want to focus my remarks this afternoon on several recurring situations in which ethical issues are raised by communications with putative class members before class certification.

I'm going to focus on these communications because it is well settled that once the class is certified and the time period for opt-outs has expired, class members are considered to be the clients of class counsel for purposes of the ethical rules.

Model Rule 4.2 and its code equivalent, 7-104, prohibits an attorney from discussing the subject matter of a case with an adverse party that's represented by counsel

unless the attorney obtains the permission of the opposing counsel. One of the most common situations in which there are pre-certification communications is when a defendant attempts to settle a claim of an individual absent class member.

The cases in the manual on complex litigation make it clear that the ethics rules do not prohibit such settlements so long as the defendant doesn't utilize any misleading information in the settlement negotiation.

The cases diverge, however, as to whether or not the defendant has an affirmative duty to disclose the existence of the class action at the time the settlement offer is made.

Courts have found that such disclosure may be warranted in situations where the defendant has the potential ability to coerce an individual settlement, such as in employment or franchise cases. For example, in the Bublitz v. DuPont case the court found that although there was no evidence that DuPont's settlement offers to absent class members were misleading there was an inherent risk of coercion because the class was combined of DuPont's at-will employees.

The court required DuPont to make its settlement offer in writing. The written settlement offer had to be

disclosed not only to class counsel and to the court but as well the court required DuPont to serve class counsel with the names and addresses of all the employees to whom the settlement offer was made. Class counsel could then communicate with the class members to advise them of the case and to answer an inquiries.

I also want to talk about ethical issues that may arise when plaintiffs' counsel communicate with class members. Class counsel can communicate with putative class members before the class to talk about the case so long as their communications are not misleading.

Courts have stepped in, however, when class counsel and in many instances competing class counsel have sent out mass advertisements or mass mailings which contain deceptive information. For example, in the McKesson securities case, a competing class counsel has solicited -- they had lost the bid for lead counsel and they sent out a mass mailing attempting to recruit shareholders to file individual claims and to retain that law firm.

The court found that the solicitation was misleading. One, the solicitation was labeled a notice and it had failed to disclose some of the information in terms of the advantages of participating in a class action.

The court required corrective notice and also

required a notice that allowed class members to rescind any of the retention agreements that had been entered into as a result of this solicitation campaign.

I'm now going to just shift focus for a minute to talk about communications after the class has been certified and efforts may be taken by defense counsel, competing class counsel, or even objectors to solicit opt-outs from the class.

Courts have routinely condemned opt-out campaigns. For example, in the Impervious Paint antitrust litigation, the class action which I was one of class counsel, one of the defendants solicited a high percentage of opt-outs from the class by advising them that their continued participation in the class would subject them to onerous legal discovery as well as other legal proceedings. The court invalidated the opt-outs, required corrective notice and also extended the time period for opt-outs.

I think what's interesting about Impervious Paint is that although the communications were made by the defendant, not defense counsel, the court found that defense counsel had violated 7-104 because they knew about the solicitation campaign in advance and had failed to advise against it.

So in summary, there have been suggestions that

the ethical rules should be revised to specifically address class actions. In my view the ethical rules are working well and the situations in which there are improper communications with class members are really the rare exception not the norm.

Courts have demonstrated an ability and a willingness under Rule 23 and under the current ethical rules to fashion appropriate relief when there has been misleading communications to class members. Thank you.

MR. FRISCH: Thank you, Roberta. The reference to 7-104 and to Rule 4.2, 7-104 is the former code predecessor to the same provision which now is in the model Rules of Professional Conduct as Rule 4.2.

We're next going to hear from Brian Wolfman who's going to expand on the discussion about ethical issues that plaintiffs' counsel faces in class action suits.

MR. WOLFMAN: What I'd like to do is I want to address this globally because my view as I'll get to is that the rules, the ethical rules don't work very well in a class action context. So that, to me, when I get a question that is termed ethical I try to think of it outside of the box of the ethical rules and think of it more in terms of what you're trying to achieve in a class action.

And so what I want to do really is to address specifically the questions posed by the FTC in organizing this panel. One, do the ethics rules properly apply to issues of class action governance? And two, should we attempt to construct new ethics rules or simply use the principles embodied in Rule 23 in evaluating lawyer conduct in class actions?

And simply put, my answers are as I said, no, the ethics rules don't generally sensibly apply to matters of class action governance because they weren't written with the particular problems of class actions in mind. And second, generally speaking, we should use principles developed and to be developed in the future under Rule 23 because it's that rule by which the class is protected.

And however imperfect it's not the model rules but Rule 23 that understand or attempts to understand the fundamental differences between representative litigation and individual litigation.

I think others here are going to get into conflicts issues but I want to look at some of the other rules and just explain why they don't really fit the class action context and why I think when you come on one of these problems you ought to think in terms of class actions.

You know, the fee rule, for instance, the rule on fees is a very basic rule and it says a lawyer's fee shall be reasonable, but if you look at the cases under that rule, rules are almost never found unreasonable under Rule 1.5 in bipolar individual situations. And the reason is is that it's assumed that contract between a lawyer and a client generally takes care of the problem.

But, of course, in a class action there's no meaningful contract at all. The contract with the named plaintiff ought to be ignored, for instance in the typical consumer class and courts sensibly generally ignore it.

Fee setting needs to take into account economies of scale, which of course an ordinary contract 101 contract doesn't do. So generally you wouldn't say, for instance, because an individual contingency fee lawyer's fee of one-third is reasonable, you wouldn't say that that is reasonable in a class action automatically because that would, in essence, say that the lawyer doesn't have to share the economies of scale with his clients in the class action. So that's but one example.

Let's take a look at another one and say something perhaps that others don't agree with but there's a Rule 7.3A. It's about in-person solicitation. It says among other things it says a lawyer shall not by in-person

or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no previous relationships when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

Well, whatever you think of that rule, it seems to me to have no application to the class action because we're not worried about -- if we're assuming this class is going to go forward as a class action, we're not worried about, or at least I'm not worried about the class lawyer overreaching with respect to that particular person.

In fact, if it was up to me you could get rid of the typicality requirement altogether and treat the class as a legal entity and ask whether the lawyer's relationship with that class is sensible and not worry at all about the typicality of the individual representatives' circumstance.

Another example to my mind is the one that Bobbie mentioned, Rule 4.2 dealing with unrepresented persons. And I'll use her example, the opt-out campaign. And the basic rule, as we know, is that you ought not to contact someone who's represented about that matter, that a person you know is already represented.

Now, the reason we might be concerned about a defendant doing that in a class action is because we're worried the defendant will drag off members of the class

and destroy the class action. So there's good reasons for applying the concept and the rule but not for the reason stated in the rule, for other reasons.

In the plaintiffs' situation -- let me go back to the objectors. If there are objectors that a lawyer solicits to opt out it seems to me that there's, in many circumstances, nothing wrong with that contact with those objectors. After all, the objectors are going to be bringing forth information concerning the validity of this settlement. And it's up to the court to determine whether the settlement should stand or fall or the certification should stand or fall or whatever.

So in other words, what we have here is the court interposing most of the types of protections we seek from the rules, not anything about the individual client-lawyer relationship, which is what the ethical rules are based on.

But we rely on the court to interpose rules dealing with conflict of interest, dealing with fees, dealing with solicitation because there is no real lawyer-client relationship in a class action, what the academics call an agency problem that there is this entity out there, the class, that has no relationship with a lawyer.

And we call upon the court to act as that fiduciary. We call upon the court to interpose a series of

rules based on the particular circumstances of the case and the particular circumstances of class action.

So my view would be as I've said that the rules are not particularly helpful and that any time you get a situation that presents itself as being ethical take a look at them and ask yourself what are the differences in class action? What are the differences between class action and individual representation and does application fo the rule make much sense in that circumstance.

MR. FRISCH: Thank you Brian. We'll next hear from Lew Goldfarb whose experience is in defending class actions and he's going to talk to us about concerns about ethical violations from the point of view of counsel defending class actions.

MR. GOLDFARB: Thank you, Michael. And let me just make a disclaimer. I started my career actually at the FTC. I'm delighted to be back here and to see the Commission show such an interest in trying to make sure that class actions are truly for the benefit of consumers.

But the disclaimer that I want to make is that I think class actions are a good thing and that the public benefits from class actions and they do deter bad behavior. And so I don't want anyone to construe from my comments that I believe otherwise.

However, a lot of our points of view depend on the area of class action litigation that we're involved in. And my area of litigation has been products liability, consumer financial services, pharmaceuticals. And I'm a little jaded from that experience because I will say to you that one of the first questions that comes to mind in handling over 200 class actions over the past 15 years is the fundamental question, when is it truly in a consumer's interest to serve as named plaintiff in a class action?

I mean, if someone has been injured, if someone has a product that hasn't worked, isn't it more in their interest to try to get it resolved through the seller or the manufacturer rather than wait three to five years as a named plaintiff?

And so it leads me to really focus on one of the ethical provisions that I think hasn't been discussed very often but I think it goes to the core of what class action litigation or at least the areas that I've been involved in focus on and that is Rule 1.8G of the conflict of interest rules which state as follows: a lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client.

And I would suggest for consideration that in an

enormous number of class actions -- I won't say the majority but a significant number of class actions it's the lawyer who has the only interest in the class action. In fact, it's the lawyer who has really created the class action and has gone out and pulled in or found clients to assist in this so-called business venture.

I had an opportunity a few years ago in representing a client to really have access to the underbelly, I will say, of the class action industry. My client was sued along with several other auto manufacturers by a group of lawyers claiming that the seat backs in all the vehicles manufactured over the previous five years were unsafe. They had actually obtained this factual basis for this from a Federal Register article that was actually debating whether certain kinds of seat backs were safe or not.

They went out and filed five class actions within a period of about two weeks against three or four major manufacturers and held a press conference and claimed that their clients were entitled to $5 billion and all the things that often accompany cases like this, hoping, I think, to coerce settlements.

And we conducted an investigation and found that none of the named plaintiffs in these cases ever owned a

vehicle manufactured or sold by our client. And we did what you would expect we would do which was to file dispositive motions early on.

We got these cases dismissed but my client was willing to go beyond that and asked us to research whether there was anything that could be done to deal with lawyers who they believed were abusing the class action process and, lo and behold, found a statute in Pennsylvania called the Dragonetti Act which codifies abusive process and gives it private cause of action to defendants.

And so my client had us bring a lawsuit against the law firm that was behind these class actions. And as the members of the bench who are here today will attest, no judges want to be presiding over a lawsuit between lawyers. I mean, you generally don’t get very far.

And this litigation went on for about a year and a half at tremendous expense to the client but there was real value in it because discovery enabled the client and others on the defendant side to get a bird’s eye view of what really goes on. And we believe, and based on other experience, is indicative of -- I’ll just refer to it as a segment of the bar -- that constitutes the class action industry.

What was discovered, and this is all public

information, was that a number of lawyers in a few different law firms got together and signed a joint venture agreement. And we got a copy of that document. That document assigns various roles to the various lawyers and some of them were to go out and hire an expert.

One of the lawyers was to go out and hire a plaintiff. That's the term that was used, hire a plaintiff, which was done. And unfortunately for some of the plaintiffs, these are people that had actually, one of them had actually gone to the law firm with a problem with his seat, thought he was getting representation and found out later on in deposition that he was a member, that he was the named plaintiff in a class action.

There were also documents which showed the strategy of holding a press conference, holding out some of the documents in the Federal Register where a government agency had made certain findings about seat backs and essentially trying to coerce a settlement as early as possible.

That was the experience of this group of defendants. It does demonstrate that there is a segment of the class action activity which is not in the interests of consumers, which is really designed to basically constitute business ventures on the part of the plaintiffs' lawyers

and I think it's a pretty clear violation of this section of the code.

So when the FTC staff asks should there be changes to the code, well maybe there should but there should also be greater enforcement of the Code of Professional Responsibility which is something that you don't get in the courtroom.

And more importantly I will say, and this client also had a bar grievance filed against some of the lawyers who've been involved in situations like this, even bar associations, again, we have found are often more protective of lawyers except for those who steal money and engage in criminal acts than they are willing to really apply certain provisions of the code to discipline lawyers. I see the one minute sign up so I'll stop there. Thank you.

MR. FRISCH: Thank you. I spent 18 years of my life prosecuting lawyers for the state bar and I have to echo the view just expressed there that the rules of professional conduct are woefully underenforced and often enforced in a manner that is self-protective of the profession rather than the public. With that sermon, let's turn to Geoffrey Miller, NYU Law School, to talk about the conflicts of interest rules and how they intersect with

class actions. Geoff?

PROF. MILLER: Thank you. Given time constraints I'm only going to talk about conflicts among class members as they relate to the ethical obligations of class counsel. So suppose that you have a class where some class members have old claims that are potentially barred by a statute of limitations subject to a discovery rule and others have younger claims that are not even arguably time barred. Can a single attorney represent both segments of the class?

You might think this is an easy question but it's really not because the segments of the class are differently situated with respect to the strength of their legal claims, the possible legal arguments, the possible factual arguments that might be made on behalf of those legal claims and the allocation of any settlement that might result from settlement bargaining.

Courts have agonized over these problems but have yet to come up with an acceptable methodology for dealing with them. The problem is that the class setting makes application of the ordinary rules on conflicts of interest impossible.

When you have a conflict or potential conflict among clients outside the class setting the usual solution is to seek client consent to the representation. If

informed consent is forthcoming there is usually no problem with going forward but it is impossible to obtain the consent of the class.

The entire structure of the conflicts of interest rules is built around the linchpin of consent and consent is not possible in a class action setting. The ordinary rule of legal ethics is strict. If you don't have consent in the case of an otherwise disabling conflict you can't go forward with the representation. If that rule is applied strictly in class cases it would disqualify far too many attorneys.

Now, as Brian said, the solution, ordinary solution, is that in the class cases the court acting on behalf of class members makes the judgment about whether the representation can go forward.

But what standards should the court use to guide its analysis? There aren't very many articulated standards that are available to courts to help this question. So what I want to do is suggest a standard that the courts might think about, which I call the hypothetical consent approach.

Under this approach, the court should ask in a case of a class conflict whether a reasonable class member would consent to the attorney representing the subparts of

the class. And to exclude the possibility of consent being withheld for strategic considerations or for reasons of self-interest that adversely affect the interest of the class as a whole, we add in the constraint that the reasonable plaintiff not know which segment of the class he or she is in.

So the question the court's going to ask is would a reasonable plaintiff, who is unaware of the segment of the class in which the reasonable plaintiff happens to find himself or herself in reality, consent to the representation.

What do we mean by reasonable plaintiff? We mean someone who is self-interested with respect to the litigation and not motivated by idiosyncratic considerations such as a wish to have his or her day in court, but not necessarily someone who's purely financially self-interested. It could be that many class actions also involve important nonfinancial considerations and those would be taken account of.

So to revert to the statute of limitations example the question a judge should ask is this: would a reasonable plaintiff, not knowing whether he or she has a new claim or an old claim, consent to the attorney representing both parts of the class. The considerations

that would be relevant would go the costs and benefits of plural representation as well as the risk-aversion of average class members.

Now, if you apply this hypothetical consent approach, I think the problems really sort of bifurcate into two types. Some problems are ones of allocation among segments of the class. These are not very problematic. As long as the attorney has no self-interest in favoring one segment of the class over another the hypothetical consent approach would allow the representation to proceed in most cases.

After all, the attorney wants to maximize the recovery for the class as a whole and that’s also what the hypothetical plaintiff wants if he or she doesn’t know what role he or she has in the class.

In other cases the attorney does have a self-interest. For example, in asbestos cases attorneys might have an inventory of individual cases that get swept into the overall settlement. Such attorneys might have an incentive to structure the class recovery so as to benefit the inventory plaintiffs.

In such cases the hypothetical consent approach would suggest that the reasonable plaintiff would refuse consent to plural representation because they don’t believe

the attorney has an incentive either to maximize the recovery for the class as a whole or to make a fair allocation of the settlement proceeds.

What are the advantages of the hypothetical consent approach? Well, it really does a better job, it emulates the consent, the actual consent you have in ordinary representation by creating a hypothetical condition rather than a real condition. It maximizes the benefits to the class as a whole. It provides guidance to the judge and it tends to reduce the transactions cost that would otherwise make class action litigation potentially unworkable.

So this is just what I wanted to spend my five minutes suggesting, that this is a possible valuable thought experiment that courts could use to deal with the many and multiple situations where there are fissures in the class in order to assist the courts in assessing whether a single representation can occur with respect to multiple parts of the class.

MR. FRISCH: Thank you, Geoff. Our last panelist today is John H. Johnson, IV, our economist. John, do you want to use the podium and the PowerPoint?

DR. JOHNSON: I'd like to just do it from here. So well, as you heard several times, I'm the token

economist on the class action ethics panel today and that puts me in a unique situation. It's not the case that economists are frequently used to testify in class action cases, particularly about the Rule 23 and whether or not the class, there's common impact, formulaic approaches to damages.

I think sort of the unique positioning is my place on the ethics panel today. And what I want to spend my time on is a discussion of how economists have frequently spoken to the issue of interclass conflict and specifically focus on a few examples.

From an ethical perspective, the existence and assessment of whether conflicts exist amongst class members clearly can pose ethical dilemmas for attorneys. Where economists have begun to play in is actually using economic theory to sort of delineate are there actual conflicts.

I think a nice summary of where this fits in comes from the liner-board antitrust litigation. The adequacy of the class representative is dependant on satisfying two factors.

First, that the plaintiffs' attorney is competent to conduct the class action and second that the class representatives do not have interests antagonistic to the class.

I want to be clear as an economist I have nothing to say about the competence of attorneys. That's not my role. But where I do think economics has been very useful is at least delineating whether the interests are antagonistic to the class.

Now, how might this play out in terms of economics? Well, first, economics is in part the study of the allocation of scarce resources and so markets, in fact, are mechanisms for allocating goods between consumers services. So oftentimes we study and use economic theory to delineate competing incentives.

Second, we often find that economic factors such as economic market definition can provide structure and guidance as to the potential impact of a defendant's actions in class litigation. It's also the case that the basis of many damage estimates are different types of economic analysis and an understanding of the assumptions and how those estimates are come about will also sort of identify conflict.

And finally, economics provides quite a bit of guidance on valuation. How do we capture considerations such as current versus future claims, expected value, those types of issues.

I've selected sort of two cases to illustrate the

potential conflict issues and how economics actually can be illustrative. I purposely chose two cases that I had no direct involvement in but some of our panelists have so I'm sure they'll chime in when the time is appropriate. One example is a settlement class in a product liability case and the second is a class in a monopolization/antitrust matter.

So the first case is the General Motors Corporation pickup truck fuel tank products litigation. And basically, in this case class members were purchasers of certain mid- and full-size General Motors pickup trucks which because of the location of the fuel tanks were vulnerable to fires in collisions. There were a number of issues raised in this litigation. I just want to focus only on the interclass conflict issue.

So basically, to summarize the settlement terms very crudely the settlement agreement provided for members of the settlement class to receive thousand-dollar coupons redeemable to the purchase of any new GMC truck or Chevrolet light-duty truck. The coupons could be transferred to other family members and there were some other aspects to the settlement as well, but that's the crux of the issue for highlighting the conflicts.

Where the interclass conflict came about was that

there were two sort of distinct types of truck owners. The first were individual owners and the second, what were called fleet owners, groups that owned a number of trucks, for example, the court cited government agencies as an example of fleet owners.

So ultimately the question the court raised was, given the structure of the settlement could the class representatives, who were all individual owners, have been acting in the best interest of the members?

Specifically, it's another quote, the fleet owners will never enjoy the benefits of the settlement terms such as the interhousehold transfer option intended specifically for the benefit of the individual owner.

Now, from an economic standpoint several factors stand out that might illustrate this type of conflict. First, economics would point to the likely differences in purchase decisions by these two groups of customers. Second, it would talk to the differences in the intended uses of the vehicles.

Third, it would talk to the differences in the methods for potential recovery by these two groups and fourth, it would talk to differences in the value of the settlement to each group.

Now, I'll loop around at the end to discuss sort

of solutions to interclass conflict but let me give the second example. The second example is a more recent case 3M v. Bradburn. 3M is a case where the product at issue is transparent tape.

In the precursor to the class action, 3M was found guilty of unlawful maintenance of a monopoly, basically as a result of bundled rebate programs. And so in the class action a class was proposed to persons directly purchasing from the defendant invisible and transparent tape.

So the class representative, in this case Bradburn, had purchased transparent tape exclusively from 3M. Plaintiffs proposed damage theory was that of an overcharge, basically because of monopolization the prices had been elevated and therefore there would be a simple overcharge theory.

Where the court took issue was the fact that within the class was a second group of large retailers who had also purchased what was called private label tape. And these would be customers like if I had bought tape then I resold it as Johnson Tape that would be private label tape if I was reselling the tape.

And this group of class members could be viewed as in direct competition with 3M. As a result, how would

that group of class members approach the damage issue? Well, there would actually be a claim that the monopolization actually could have depressed market shares. In other words, they were in direct competition and so as a result there would be a lost profits claim.

So the conflict there was that the class representative would be arguing about overcharge theory but in fact the other group of class representatives actually would have a different theory entirely based on the market shares.

So how would economics be useful in this context? Well, first, the relative positioning of the class members in the market would be clear. Second, the economic impact and harm potentially caused by the defendant's actions and third, the alternate theories underlying damage recovery for the class members.

I think I should be clear about two points. First, existence of interclass conflict is very fact-specific and depends on the economic circumstances. This is not any kind of one-size-fits-all issue. Always have to deal with the economics very carefully. And second, the courts have provided some remedies for overcoming interclass conflict and so I think should definitely talk about those.

I think the best summary is in the VISA/MasterMoney antitrust litigation where when issues of interclass conflict were raised the court proposed the following remedies. First, you could bifurcate the liability and damages phases of the trial. Second, you could decertify the class after the liability phase or third, you could create subclasses.

In terms of what had happened in the two cases I described in the pickup trucks case, basically, there was a refiling in Louisiana after and the terms of the settlement were broadened in several ways that seemed to resolve the antagonism between the class members.

In the second, in the Bradburn case actually, just two weeks ago, the court ruled again based on a new class and the new class was limited only to those people who had purchased private -- I'm sorry, excluded all those who purchased private label type, which left the class only members that would pursue an overcharge theory and not a monopolization or a market share theory. Thank you.

MR. FRISCH: Thank you, John. I would ask if any of the panelists have additional comments they would like to make in light of the other comments that have been made? Brian first then Lew.

MR. WOLFMAN: I think Lew's presentation is very

interesting because it presents a situation that on its face appears extremely unsavory, the conduct of the lawyers appears highly improper. And I don't want to speak to that particular situation because I don't know it but let's assume -- I'm sorry. I'll speak up.

Let's assume, for instance, that there was this type of aggressive solicitation of individuals to bring a consumer antitrust class action and the purpose was to meet this requirement in the law that we have a named plaintiff.

But the difficulty I have with automatically condemning that is that the court is going to sit there ultimately to protect the thousands of other people in the case, not the particular named plaintiff.

Now, as I say if it were up to me I think there are rational arguments to eliminating the named plaintiff requirement. I understand there may be standing problems in the current law, serious problems of typicality and so forth in the current law but it seems to me that Lew's problem is, the question really is do we want to be enforcing those kinds of rights aggressively?

And again, I'm not speaking to the situation. There may have been no rights to enforce there. But it seems to me that ethical rules about solicitation just don't say anything about whether we want that conduct to

occur.

MR. FRISCH: Lew?

MR. GOLDFARB: I just had a quick question for Bobbie, actually, with regard to communications to putative class members. They're not class members obviously until the class is certified but very often a defendant upon being served with a class action sometimes plaintiffs' lawyers actually do find problems with products and services and it's often in a defendant's interest to take some action before the case even goes very far, maybe even turn it into a catalyst case.

Under your interpretation of the rules for communicating with putative class members before a class is certified obviously what's your view on whether a company can simply go out and do something for class members, I mean, just affirmatively make contact with class members and take some action that may actually moot out the underlying class action?

MS. LIEBENBERG: Well, I think the case law is clear that the defendant can go ahead and initiate these types of settlement proposals with putative class members. I think where there is some dispute in terms of is it an employee/employer relationship. Could it be seen as a potential for coercion like the DuPont case.

But it is clear under the ethics rules that because the class, the putative class members, are considered unrepresented that defense counsel can have contacts with those putative class members so long as there's no misleading or false information.

I mean, it seems to me that where you see these abuses in the case law is where there's been some type of misleading information, failing to tell somebody that if they sign this release that they're going to be giving away all of their rights in a class action in certain circumstances where you almost have a duty to disclose.

MR. FRISCH: And there are separate ethics rules that deal with misleading, dishonest conduct, things of that nature, totally separate and apart from the question of communication with a class member.

MS. LIEBENBERG: I would just add that it's a tricky situation I think for defense counsel just for that very reason because under 4.1 you have to be careful that you're not giving legal advice. And that is a fine line to draw.

MR. FRISCH: Right. The ethical rule there says that one cannot give a nonclient legal advice except the advice to secure counsel, I think, is how that rule reads.

One of the questions that we have really touched

upon throughout the presentations and I would ask if anybody wants to expand upon their views with respect to it, is whether there ought to be special ethics rules with respect to class actions or should we, as Brian has indicated, just depend upon the non-enforcement of the rules we already have? (Laughter.)

Let's start with the question of solicitation which -- now, first, the solicitation rules among the states vary greatly. The District of Columbia is the most solicitation-friendly jurisdiction in the country and Iowa is the solicitation gulag. Can we craft a special rule for that particular area that would vindicate the interests that the ethics rules are designed to vindicate and yet still allow class action lawyers to operate in a sensible way to achieve the ends a class action should achieve? Lew, you want to start with that one?

MR. GOLDFARB: Yeah. Let me just speak to that because whether it's crafting a special new rule or interpreting the existing rules that provide some restrictions on solicitation I think what has happened, and just as an example, the rules allow you to send a communication out or make contact with an individual with whom you've had a prior professional relationship.

And on its face that looks to be pretty innocuous

but what has happened in the class action context is that you have lawyers who are one of a couple dozen plaintiffs' lawyers in a massive class action where there are hundreds of thousands or maybe even a million class members. And each one of those lawyers construes every one of those class members as their clients, people with whom they have a professional relationship.

And so what then follows from that is they will send a communication out having nothing to do with the original underlying litigation. This happens in the asbestos area where they will send a communication out and ask whether you own a particular motor vehicle or whether you've used a particular pharmaceutical and if you have would you like to be a member of the class. I don't think the professional rules were intended to allow for that kind of communication and yet that is happening all over and it is really a problem, I think.

MS. LIEBENBERG: I'd like to respond, too.

MR. FRISCH: Brian then Roberta.

MR. WOLFMAN: Let me just ask though, I mean, why isn't the question -- and let me just say to Mike, I don't represent plaintiffs. I generally represent objectives and we try to argue the ethical rules because they're the current, I'm big on ethical enforcement but I'm saying just

sort of ideally why isn't the question in that circumstance the degree of enforcement society wants of the rules? Why are we focused on the named plaintiff in a class action?

It doesn't seem to me to be what class action is about. After all, in the ethical rules we're worried about overreaching between the lawyer and that particular person but in the class action we're asking whether the class as a whole ought to be represented in enforcing this public right. I just don't understand why the question is should we try to enforce every wrong out there or not. And that seems to me the question for society, not whether the ethical rules.

MR. GOLDFARB: Brian, the underlying premise of your question is that the class action has legitimacy and that what we should really be focusing on is that class members should maybe get some relief regardless of how the named plaintiff is approached.

MR. WOLFMAN: No, Lew. I'm not saying that. Maybe the class action is not legitimate but that's the question not whether we should do it through the ethical rule. The question is how much public enforcement do we want through private attorneys general. Maybe we'll decide that we want none and we want to do it through regulators but it doesn't seem to me that looking to the rule answers

that question one way or the other.

MS. LIEBENBERG: Well, it seems there has been commentary that, for example, in the antitrust cases where you're really acting as a private attorney general that really that is the model. And answering your question, Brian, that you do away with the named plaintiff because in essence you are acting as the private attorney general supplementing government enforcement.

It seems to me however that you have to distinguish between the types of cases. If you just look at Lloyd Constantine's case where the named plaintiffs were Wal-Mart, Sears, I forgot who else were the other named plaintiffs.

MR. FRISCH: Entities in need of great protection.

MS. LIEBENBERG: Yes, yes. It seems to me that they are, in fact, controlling the litigation. They are having an impact in terms of the types of information that is given to a lawyer. And so I think you can't make these broad-brush types of analyses because the types of class actions vary so much.

And I just want to respond one minute to Lew's comments about maybe a class member doesn't want to wait three to five years and they'd rather go through the

process of dealing with the defendant.

In my experience, most of the consumer cases that we have represented are aggrieved individuals who have come into our office because they have not been able to get satisfaction from the defendant. And if the defendant had done a better job, they probably wouldn't have come in to see me.

MR. GOLDFARB: Can I just make one comment about this notion of private attorney general? Maybe this will sound like heresy here but do we really need 100,000 lawyers running around the country serving as private attorneys general? I mean, we've seen this run amok in California where everyone in the state can be a private attorney general and sue on behalf of people that haven't even used products or have no harm whatsoever.

I mean, I think it's gotten totally out of hand and what has happened in a major segment of these cases is that what just happened in the case that I described which is the lawyers set up these ventures to create class actions. They really don't care that much how much the public is really being protected. They want to come up with some theory that may be viable, that maybe a court will buy into and maybe find some product is defective even though it has not caused any harm up to that point in time.

And so it really has, from my experience, gotten abused and that's why maybe the ethical rules are the vehicle through which we should rein some of this activity in.

MS. LIEBENBERG: I would mention that the cases are very clear that where there is abuses the courts have been ready and willing to sanction lawyers. In the Cobell v. Norton case, for example, the judge referred the attorneys the defense counsel, actually it was government counsel, to the D.C. Disciplinary Board. And I think that was also true in the Kleiner case. So you do see courts when there are abuses taking remedial action.

MR. WOLFMAN: I think that both the points Bobbie and Lew make are well taken and I think they're consistent with my point. For instance, concerns of the type Bobbie raised caused, for whatever you think of it, Congress to decide that the named plaintiff in many or most securities actions had to be the person with the largest stake, or ought, presumptively, would be the person with the largest stake whereas, Lew, the point you raise may get into the California Supreme Court to start interpreting the private attorney general law there more stringently, which they have, or the legislature could repeal it.

But my point is that in both instances I think

it’s a very indirect way to go about it to go through the ethical rules instead of asking what should our public policy be as a substantive matter. It seems to me it doesn’t have to do with the relationship between one lawyer and one particular client when you have classes of 100,000 people.

MR. WOLFMAN: But who enforces public policy? I mean, you asked the question --

MR. GOLDFARB: Maybe it should just be regulators. But --

MR. WOLFMAN: The FTC -- should the FTC be doing more in the area of class action oversight?

MR. GOLDFARB: The market.

MR. FRISCH: Geoff?

PROF. MILLER: I was just going to say -- no. I forgot there’s a market out there.

MR. FRISCH: One of the recurrent claims of abuse in the class action area is that it's really the financial interests of the lawyers that predominate and often the clients don’t get much if anything at all. Is there anything that can be done in the ethics rules that could alleviate that problem or is it really an imaginary problem? Does anyone have any comment on that?

MS. LIEBENBERG: Well, it seems to me that the

way the Rule 23 has been set up has been set up so that the court has supervision over what type of fee an attorney gets and it seems to me that the ethical rules are ill-equipped to really handle that kind of issue.

Another area in which there seems to be this tension in the ethical rules is where you have a conflict between the named class representative and perhaps other members of the class over a settlement.

And I think one of the -- as Judge Adams said in a concurring opinion in corn derivatives, you just can't mechanically apply the ethics rules to Rule 23. And I really think I would commend it because I think it is really an appropriate analysis of how the interplay between the ethics rules and Rule 23. And where we've seen that there needs to change the Federal Rules Advisory Committee has come up with ways to change the class action rules where there needed to be perceived change.

MR. FRISCH: Well, that's exactly right. The traditional ethics formulation is that the client absolutely controls the settlement and what do you do with multiple clients and varied interests? Is it sufficient to simply depend upon a court to, in effect, substitute for the client under those circumstances?

Well, I've raised a lot of interesting questions.

I'm sure there are no definitive answers an I'm sure each and every one of you join me in thinking our panelists for a very provocative and thoughtful presentation.

(Applause.)

(Whereupon, the workshop recessed at 5:30 p.m.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P024210

CASE TITLE: PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

DATE: SEPTEMBER 13, 2004

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: SEPTEMBER 27, 2004

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DEBORAH TURNER

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for

accuracy in spelling, hyphenation, punctuation and format.

SARA J. VANCE