OFFICIAL TRANSCRIPT PROCEEDINGS

PROTECTING CONSUMER INTERESTS IN CLASS ACTIONS

A WORKSHOP PRESENTED BY:

THE FEDERAL TRADE COMMISSION AND

THE GEORGETOWN JOURNAL OF LEGAL ETHICS

September 14, 2004

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The above-entitled workshop resumed on Tuesday, September 14, 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.

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P R O C E E D I N G S

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MS. OHLHAUSEN: Good morning, everyone. My name is Maureen Ohlhausen. I'm the Acting Director of the Office of Policy Planning at the Federal Trade Commission. I would like to welcome you all to our second day of our workshop on Protecting Consumer Interests in Class Actions.

Some of you are old hands at this, if you've been here yesterday, but for the people who are new to us today, I just wanted to go over some housekeeping details. First of all, the workshop will end at 12:15. There will be one break. And I want to give you a few reminders about security. If you leave the building, you need to reenter through the guard's desk and be rescreened, and for security reasons, please wear your name tag at all times. And if you notice anything suspicious, please report it to the guards.

Just a few details, please turn off your cell phones or set them to vibrate. The bathrooms are located across the lobby, kind of past the guard's desk there. Fire exits are through the main doors, or you can go out -- you notice a little pantry here and there's a lobby -- I mean, a corridor that leads out to the G Street entrance, and in the event of an emergency or if there's

a drill, proceed across the street to the Union Labor Life Building, it's like diagonally across from Massachusetts Avenue.

First, we'll have some opening remarks from Commissioner Harbour and then we'll have two panels this morning. There will be 10 minutes at the end of each panel for questions, and here are the question cards, they're in your folders. If you have a question, write it on the card and wave it and an FTC staffer will pick it up and your question will be read from the podium.

Also, there are evaluation forms in your packets, please fill them out. We thank you very much for doing this. It helps us to know what we're doing right, what we're doing wrong and to improve in the future.

Also, again, as you know, the workshop is co-sponsored by the Georgetown Journal of Legal Ethics and, again, I wanted to thank the Journal and the Editor Jaimie Kent, for helping us and for publishing -- they'll publish a transcript of today's and yesterday's proceedings.

Also, the Journal is accepting articles for publication. So, if you have any interest in writing something, please contact the Journal and see if they would be willing to publish it for you. Also, they have

a table in the foyer and they have materials on it and, also, please visit the tables -- there are several tables out there. There's some FTC materials and some other materials and I think you'd find it very interesting.

Finally, I wanted to thank everyone who was there last night, Hogan and Hartson; Paul, Weiss, Rifkin, Wharton and Garrison; Mayer, Brown, Rowe and Maw; O'Melveny and Myers; and Gibson, Dunn and Crutcher for their incredible generosity in providing coffee for today's attendees and for last night's lovely cocktail reception.

And now, without further delay, I want to introduce Commissioner Pamela Jones Harbour of the FTC.

COMMISSIONER HARBOUR: Thank you, Maureen. Good morning, everyone. I'd like to welcome you to the second day of the Federal Trade Commission and the Georgetown Journal of Legal Ethics workshop. I want to thank our distinguished panelists for sharing their insights and their expertise in this very important area.

I hope that you found yesterday's session as interesting and as stimulating as I did. We've learned a great deal about what can be done to help ensure that coupon and other non-pecuniary settlements provide real instead of illusory benefits to consumers and to other class members. And it is obvious, however, that we need

more meaningful data on actual redemption rates in coupon settlements so that we can better understand whether class members are truly obtaining value in individual cases.

We also listened to a very interesting discussion on the potential impact of class action settlement objectors and amicus filers, each of whom help to ensure that settlements provide fair and adequate relief for class members.

I am encouraged that real progress has been achieved in drafting plain language notices, and at the same time, I am, perhaps, more mindful now of the work that remains before we can feel truly confident that a substantial portion of the class members actually receive and understand these class notices, whether they are sent directly to them or whether they are published.

The goal here is to achieve meaningful notice to and active participation by class members. And in the modern day era of mass communications where most consumers face overflowing email or snail mail, we need the advice of communications and advertising experts who can show us how to craft and how to distribute class notices that won't inadvertently be thrown out by consumers or deleted as junk mail.

And I would like to flag another area of

particular interest to me and that is the need for workable procedures that enable class counsel to receive reasonable compensation for their work. I believe that the plaintiffs, the defendants and the class counsel alike would benefit from very well-crafted empirical studies on fee awards.

And, finally, our co-sponsorship with the Georgetown Journal of Legal Ethics reminds us that everything we do in this area must be infused with the highest regard for ethical consideration, especially where the interests of absent class members are at stake.

It has long been recognized that courts stand as fiduciary to the class; that class counsel have an obligation to provide adequate representation for all members of the class; and that the class must be free of conflict. Ordinary ethic rules that protect against conflicts of interest are largely dependent upon a client's consent. These kinds of rules may not always work properly in the class action setting where express, informed consent is often very difficult to obtain.

Courts typically strive for balance and that is protecting the class without unduly burdening the litigation process. But clearly articulated ethics standards, including explicit recognition that class counsel owes at least a quasi-fiduciary duty to absent

class members would help ensure that the interests of these absent class members are adequately protected.

As you can see, we've covered a great deal of ground already if you were here with us yesterday. But there is still much more to address today and we do have an equally impressive group of panelists who are going to discuss with us what the empirical data in class actions show. They will tell us what we still need to know and how we can best fill the knowledge gaps going forward.

Increased understanding of class action litigation, settlements and fee experiences is critical to bolstering the effectiveness of Rule 23 by addressing the strengths and the weaknesses of the Rule. And I am particularly looking forward, in addition to this panel, to our last panel, which is Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits. Given my career background prior to joining the Commission, I am intimately familiar with the unique challenges posed by follow-on or side-by-side private and government enforcement actions.

I litigated on behalf of antitrust defendants while I was a partner at Kaye Scholer and for many years before that, I represented the State of New York and its consumers as Deputy Attorney General and Chief of the

Public Advocacy Division in a variety of consumer recovery cases, most notably Reebok, Keds and Mitsubishi, and let me just digress for a second and talk about the Reebok case.

That is an example where the Federal District Court approved an $8 million 50-state parens patriae antitrust settlement for illegal retail price maintenance. The settlement was appealed to the Second Circuit, and after the state settlement was noticed, two Florida lawyers filed private litigation in Florida and these lawyers later sought to upset the states' settlement. Their appeal was dismissed on two alternate grounds. First, for lack of standing because they had failed to intervene in the underlying action; and second, because their objections to the settlement and the proposed plan for distribution, the Court found, were without merit.

In its opinion, the Second Circuit suggested that the appeal by those Florida lawyers was motivated largely by their request for attorney's fees in connection with their appeal.

In many instances, concurrent or follow-on private class litigation enables the private bar to seek resolution of problems that the government consumer protection agencies may not have the resources to pursue.

But as my Reebok example demonstrates, in other cases, private litigation can disrupt government enforcement.

In all cases, though, careful coordination between government and private litigators should be strongly encouraged so that the interests of consumers are protected in a cost-effective manner.

And with that, I am eager, as I know you are, to hear from our esteemed panelists and they will tell us how we can best manage the interplay between government enforcement actions, parens patriae cases and private class action damage suits. Therefore, with so very much to cover, I'd like to welcome you once again and we will begin day two of our workshop.

(Applause.)

PROFESSOR ZYWICKI: Thank you, Commissioner Harbour for those terrific opening remarks to summarize yesterday and look forward to today. I'm Todd Zywicki. I'll be the moderator of this upcoming panel and I feel uniquely invested in this project because I was at the FTC until about a month ago and now I'm over at Georgetown Law School. So, I'd like to thank everybody at the FTC who put this terrific program together, the Bureau of Consumer Protection, Office of Policy Planning, Bureau of Economics and, of course, over at Georgetown, the Georgetown Journal of Legal Ethics.

Basically, as Commissioner Harbour noted, what we're going to look at this morning is empirical questions in protecting consumer interests in class actions, and basically, as I see it, we have two models, both of which, as a theoretical matter, seem like they could be true. You've got the model, on one hand, that says that class actions are the best way of representing consumer interests, of generating compensation to consumers and deterrence to corporations or firms that do bad.

On the other hand, you've got an alternative model that says class actions are prone to a lack of monitoring by the class members, substantial agency costs between class members and their lawyers, and so what you have is the possibility of a collusive class action process where defendants get off easy or even sometimes better than easy, as in the Ameritech case that the FTC objected to, which was a situation where the Court deemed a settlement, but it smacked of a court-sponsored promotional gimmick that would actually perhaps benefit the defendant, and you get a situation where lawyers potentially walk away with big baskets full of money while consumers get very little.

As an a priori matter, both of these models seem plausible, and I think that that quickly generates

an empirical question and that's what we're going to look at today, is the empirical question of how these class actions actually work in practice and what can be done to improve that.

So, we're going to just work right down the line here and I'll introduce each person in order. We've only got an hour for this panel, so we're going to move along relatively quickly and we want to make sure we leave some time at the end.

So, I will start off by introducing Judge Lee Rosenthal, who's a United States District Court Judge for the Southern District of Texas. In addition to dealing extensively with class actions from the Bench, she is Chair of the Federal Judicial Conference Advisory Committee for the Federal Rules of Civil Procedure and previously served as Chair of the Subcommittee on Class Action. Judge Rosenthal?

JUDGE ROSENTHAL: Thank you. You may, quite properly, wonder what a federal district judge is doing on this panel because we are not known for our great empirical knowledge or our skills as social science researchers, but I am here, as you have guessed, because I do have this experience with class action, particularly from a rulemaking perspective. And let me first give the standard, but very sincere, disclaimer that I am not

speaking on behalf of the Committee.

The role of empirical data in rule making has changed dramatically and it's nowhere as clear as in class action. When Rule 23, as it presently exists, was drafted over a Halloween weekend in the early 1960s, Ben Kaplan and Charles Alan Wright and Arthur Miller did not rely heavily on empirical data when they made the changes that bring us all here today. But when you think about whether we could today amend Rule 23 without drawing on and making the case for change based on empirical data, the answer is obvious. We would be run out of town.

Today's rule making standards, quite properly, demand that there be an empirical basis for identifying particular problems created by or inadequately handled by existing rules, and an empirical case made for a particular way of addressing those problems by changing the rules. And that is now, indeed, the model for changing the Federal Rules of Civil Procedure. We followed that model in making recent changes to the discovery rules, for example, and to Rule 23, the changes that led first to the interlocutory appeal from certification decisions provision that became effective, and then most recently, the changes to standards for settlement class reviews, standards for attorney fee awards, standards for allowing greater opt-out rights

that became effective just last December.

So, where does that take us in terms of where we are now? We need empirical research, we need empirical data. How do you get it? I know you heard a great deal yesterday about some of the frustrations and difficulties in obtaining reliable and meaningful empirical data that bears on class actions. It is particularly frustrating because it is vital to understand one of the critical areas in class actions, that is how they are being handled in state courts. It is particularly vital to get state court data and it is particularly difficult to get state court data.

So, where does that take us? When we were investigating the case for each of the amendments that became effective -- the amendments to Rule 23 that became effective over the last two cycles of rulemaking, we came up with this term that seemed uniquely suited to describing the kind of information that asking questions about class action seemed to produce. The term is "anecdata".

What is "anecdata"? "Anecdata" is a summary of the way of describing the combination of the experiences of people who are deeply immersed in class action practice and more systematic rigorous information that their experience can provide us. I don't really mean to

be facetious because "anecdata" plays a vital role in alerting people who are involved in proposing rule changes to the need for rule changes.

"Anecdata" is what lets you know what parade of horribles might be out there. "Anecdata" tells you that there might be a problem. "Anecdata" tells you that there are areas where the rules are not providing adequate tools to discipline the practice, to police the problems and to prevent them. "Anecdata", by itself, isn't enough to tell you that a particular solution is going to be appropriate and is not going to create more harm or unintended harm. But "anecdata" is a fabulous place to start.

I don't have time to go into some of the problems, but there is one additional source of research promise that I wanted to end with. We have recently, in the federal courts, begun moving all of the federal courts to electronic filing. Many of you know this. What electronic filing will do very quickly is to provide quickly and easily -- relatively easily -- data, data that it used to take lots of people lots of time to go out and physically gather by going through paper files of cases. If you have remotely accessible electronic data about what's been done in cases, you have a gold mine of information waiting, and you have a different kind of

information that will be available as well.

Amendments to Rule 23 now require that judges in particular cases make findings as to the value of what is being made available to class members in settlements and to make findings as to the relationship of that value to the award of attorneys' fees. Those kinds of findings, which will be scanned, which will be made available electronically, and the data on which they rest, which will also be scanned if they are filed in the Courts, are just the stuff of not "anecdata" but real, live data.

And this organization, this agency, the FTC, I would think, is uniquely situated to be able not only easily to gather that data, but also to analyze it and to use the results of that analysis to then come back to the Courts and to the rulemakers and give us information as to whether we have made the right rulemaking decisions and what additional changes to the rules might be in order.

Thank you.

PROFESSOR ZYWICKI: Thank you, Judge Rosenthal. Next up will be Professor Ted Eisenberg who is the Henry Allen Marsh Professor of Law, Cornell Law School. He has written and spoken extensively on class action issues and his empirical studies on the legal system have appeared

in many law reviews and books. Professor Eisenberg?

PROFESSOR EISENBERG: Thank you. I just want to echo and build on two things Judge Rosenthal said. One, the promise of empirical research with respect to Federal Courts has dramatically improved by -- already improved by PACER and online research. You can get the docket sheet on every case in the country basically -- almost every case and I spent this past summer supervising students gathering data on every kind of discrimination case terminated in the Southern District of New York for one year, and it's just wonderful what you can get about a case off a docket sheet. In different jurisdictions that are moving to having complaints put online, the complaint tells you a lot about what's bothering the plaintiff and you can code a whole lot about the case just from the complaint and the docket sheets.

So, I think the prospects for empirical research on the federal courts and class action research have never been brighter. On the state side, which Judge Rosenthal started, we don't have a lot, but I think what the federal government can do is, and one thing it has done through the Bureau of Justice Statistics, and that is to fund substantial research on what's going on in state courts through entities like the National Center

for State Courts and others, where we have the best available data on trial outcomes and compensatory and punitive awards for 45 large counties. It would be wonderful to expand the BJS project funding of NCSC to include things like class action.

For example, the last -- 2001 data from the National Center included almost every trial judge or jury terminated in 45 large districts and what they found was one class action that had been terminated by trial. So, to get into the true level of class action activity, you need to expand the BJS grants to include data on every filed case because that's the only way you're going to find out over time or in a particular point in time the level of class action activity. So, I think the government has a major role to play and has begun to play it through the Bureau of Justice Statistics. That's our best hope, I think, for getting really good data about the state court systems, including class action.

My study with Geoffrey Miller of yesterday and you will hear, I wasn't -- he's a tough act to follow. Geoff is one of the country's leading class action experts. He's read thousands of cases now to code them for studies we do and the study today is a little different and perhaps, I don't know, less controversial it seems, than the one we did in the past about

attorneys' fees, and this is about opt-out rates and objector rates in class actions.

I think we have in the room -- Mr. Willging next to me, Deborah Hensler and the RAND folks in the audience -- we have maybe three-quarters of the people who've ever studied opt-out rates and objection rates in class actions and so you can add Geoff Miller and me.

What we've done is read all the cases we can get our hands on which have reports of the size of the class and the number opting out or the number objecting and summarized that in a paper distributed to you. Were I more confident, you would have a wonderful PowerPoint show with the tables, but my secretary saved me at the last minute by sending 100 copies of the paper here, so I'll refer to that. I think there's nothing more boring than reading numbers to people who can't follow them, you know, just orally. I have to see them.

So, let me give you the brief overview conclusion since the panel has a lot of speakers and not much time. Opt-outs and objections are extremely rare on average. Less than 1 percent of class members engage in some form of dissent in a class action.

Dissent rates -- and I'm calling opt-out and objection dissent collectively. Dissent rates vary by case type, but they're all low. The highest rate of opt-

out we found was 4.6 percent in mass tort cases, but that's in a relatively small number. Mass tort cases are highly publicized, but there are not that many of them, and getting information about class size and opt-out rates on any one of them is not that common. 2.2 percent in employment discrimination cases, 0.2 percent in consumer cases. The opt-out rates are highest in employment discrimination and civil rights cases, though both have less than 5 percent rates. So, that, in general, we do not expect to see much opt-out.

We find a decline over time, and I can -- maybe I should turn to the tables a little bit just to put some flesh on the bones. If you turn to Table 1 on page 23, you can listen or read as you choose, we find the percent -- mean percent opt-outs is 0.6 percent, the median is 0.1 percent. The mean percent objectors is 1.1 percent and the median is zero. I think some of the information we gathered that may be valuable is information about the size of classes because it really is quite variable. You'll see we have a mean number in class of 603,000 about and a median number of 22,000. So, class actions have a very sort of spread out distribution on the number.

If you look at Table 2 -- and here I think there's some other useful information -- this breaks

it down by case category, but what I think this table adds -- as I said, the dissent rates are very low. But what we get here are the recovery per class member and I think that's a key concept in class action, because one thing one often hears is -- and I think that the topic was introduced today -- big basketfuls of money, individual class members get little. That's true, and that's exactly as it should be.

Why? Because if individual class members could get a lot, you shouldn't have a class action. I mean, if there really is enough money on the table to warrant individual action, tens of thousands or hundreds of thousands of dollars per class member, chances are interests diverge, usually the case will differ, and maybe people should be getting individual representation. When the potential recovery per class member is $30, you're never going to see a lawsuit and the lawyers, in comparison to any individual client, are going to get a big basketful of money. I think one thing the rhetoric should tone down is the notion that a large fee for the attorneys compared to an individual client's recovery is somehow an indictment of the case.

The mean recovery in a Federal Debt Collection Practices case per class member was $44, and I'm sure the lawyers' fee was much higher. I'm not sure there's

anything wrong with that because that's $44 more than the clients would have gotten, unless you think there's an alternative mechanism for enforcement.

So, I'm not at all saying there's no abuse of class action, therefore, or there's not a whole lot of other stuff, but it is the nature of the beast that the client gets a tiny amount compared to what the single group of lawyers get. Otherwise, we shouldn't have class action if that weren't necessary.

I think the other thing I would emphasize in our study is that I think it's interesting -- well, two things, one is the table on page 30 -- figure on page 30. I can hold it up because I think you can see the pattern. That's a graph of the lawyer's recovery as a function of the client's recovery, and what you see is that it's far from random. There's a very tight distribution. What the judges do, regardless of whether they use a lodestar or anything else, they wind up compensating lawyers based on the amount they project being recovered for the class. Nobody's pulling numbers out of the air. It's a very tight fit. And nobody's pulling 33 percent as a class action fee regularly out of the air.

In the big class action cases, the mean or median fee, I forget which, is now -- you know, one's where there's over $190 million recovered, the fee is 10

percent. In the smallest class action cases, less than about $1.4 million, the fee is about 30 percent. There is no systematic recovery of one-third fees by class action lawyers as far as we can tell. And in the big cases, it is never close to 30 percent -- well, I wouldn't say never. The central tendency is not close to 30 percent, it's less than half of that.

The one other thing I guess I'd like to emphasize is while it's -- it may not jump out because it's a regression model, but I would say this. When -- and it's Table 4 on page 33. One predictor of whether you'll have dissenting behavior is the recovery per class member. As the recovery per class member increases, the likelihood that you'll have an opt-out increases. And at first, that jarred me. I said, my God, why are they opting out when they're getting more money? They should be delighted. But I think the somewhat deeper answer, at least to my initial reaction, was they opt out when there's more money on the table because they have a chance of securing counsel, maybe counsel is really trying to line them up, and that, in some sense, it's economically rational that the larger stakes for individual class members lead to increased dissent, because they'll have differing views.

But, again, that plugs back into, a basketful

of money for the lawyers, small amount of the clients. When there's a basketful of money for the clients, they opt out. So, the residual cases left are going to be small average recoveries to the clients. That's the way, probably, it should be.

I guess while I have the opportunity, since we have a federal judge and perhaps others who are more knowledgeable, one of the repeated themes is class actions coerce settlements. My time's up, so I'll do it in a minute. But I think we should understand class actions have sort of -- not class actions, but a lot of things have become what one might call the new litigation. As you'll see from the Vanishing Trials Project sponsored by the ABA and coming out in our own Journal of Empirical Legal Studies, trials are disappearing.

Why? Well, in part, I think the merits are being adjudicated or hints of the merits are being adjudicated at preliminary stages. In class actions, you'll often see an early motion for summary judgment denied before class certification. In class actions, you might see -- or other litigation, you might see a Daubert motion denied. Those give huge hints to both sides about how this case is going to come out. So, I'm not sure it's the fact of the class action necessarily that, per

se, coerces a settlement. It may be the fact of the class action plus in major class action litigation, you'll often have more information about the projected outcome than you do in sort of typical get to trial and find out what's going on cases.

So, if you have a serious motion for summary judgment denied and perhaps a Daubert motion denied, you may well be telling the defendant a lot about the merits of the case and that may have a huge role to play in the decision to settle, over and above the fact of the large risk that a class action poses for you. Thank you.

PROFESSOR ZYWICKI: Thank you, Professor Eisenberg. Our next speaker will be Tom Willging, who is an attorney and senior researcher with the Federal Judicial Center. During his time at the Center, he has concentrated on empirical studies and the civil litigation process with a special focus on class action.

Mr. Willging?

MR. WILLGING: Thank you and thank you for inviting me. I'm going to jump around a little bit. There's six issues identified for this panel and I'm going to try to say something about four of them in the five minutes that we're allocated. That's not a lot of time to talk about whether enough attention is paid to empirical research. We'll just go from here. The first

thing, I want to talk somewhat about attorneys' fees, following along with Professor Miller's report yesterday on attorneys' fees because we have a little more up-to-date data. We have a report that we put online in the spring of this year, a report to the Advisory Committee on Civil Rules, that reported attorneys' fees in response to a survey of lawyers and we had returns from 700 and some lawyers in roughly 620 cases in a representative sample of cases that were filed as class action in federal court or removed to the federal courts from state courts. And some of those cases were remanded back.

That study showed that the typical attorney fees and expenses amounted to 29 percent of the monetary recovery in most cases. That dovetails with the earlier research that we had done in 1996 and that Professor Miller cited showing fees in four District Courts in a large number of class actions in separate District Courts, fees ranging from 27 to 30 percent of the monetary recovery.

It also dovetails with the numerous findings that he cited both from the NERA data and his own data with Ted Eisenberg.

The second thing I want to cite from those studies, one of the questions is, how do we evaluate settlements? Now, the crude measure of evaluation that

we use is survey research, and we found that in those cases the typical monetary settlement, that is the 50 percent, the median line, was $800,000. The highest 25 percent of the cases had recoveries of $5.2 million or more. The lowest 25 percent had recoveries of $50,000 or less. It was suggested yesterday we were talking mostly about the upper 50 percentile and very little about those cases that have recoveries of $800,000 or less. But they are half of the cases in the federal system which we studied, so, in a way, this is an illustration of where the empirical study can guide policy -- at least help frame policy questions. I don't think we're going to provide the answers, but I think we do help frame the discussion and the questions.

The second thing we found in that study was in terms of non-monetary relief. We found that 20 percent of the cases had some form of non-monetary relief. Again, a lot of discussion was spent yesterday on this 20 percent, but you should recognize that they are simply 20 percent of the cases. Ten percent of those were cases that involved some kind of coupon. One percent of the cases involved a non-transferrable coupon as the only form of relief in the litigation. The other -- another 10 percent involved injunctive relief.

These are crude measures. You know, we asked

attorneys what was involved and what the recovery was. We're asking for a pretty off-the-cuff opinion and I wouldn't say that we have pinned this down. I think this is an area and this segues into the question of what kinds of needs are there for future research, and more particularly, what can the FTC contribute to the future of research picture.

I think Judge Wood yesterday indicated that when they see amicus briefs at the Court of Appeals, they ask the question, what does this add to the litigation? Does this brief contribute anything new or is it simply a restatement, a rehashing of what the parties have already briefed.

And I'd ask that same question in terms of empirical research. I think the FTC's strength, or a promising candidate for the FTC to consider, is to conduct careful economic analyses of the value of a sample of cases, of class actions. I think this is going on, to some extent, right now in the amicus programs -- but perhaps some more systematic and random way of documenting the value of both the monetary and non-monetary aspects of the settlement, coupons, injunctive relief, cy pres remedies, all these the benefits to the class.

And then I would pose an even stronger

challenge and that is to try to, in some way, quantify or approximate or get some measure of the value of these remedies to society as a whole, you know, to really get into the questions of general deterrence and so forth.

I understand my time is up. I think when we come to the discussion of further research topics that I can add a few more particular issues as we go along.

So, thank you.

PROFESSOR ZYWICKI: Thank you, Mr. Willging. Our next speaker is Nick Pace who is an attorney and a long-time staff member with the RAND Institute for Civil Justice. He has contributed to numerous Institute for Civil Justice research projects, including studies of the dynamics of class action litigation, and an in-depth evaluation of the Civil Justice Reform Act.

Mr. Pace?

MR. PACE: Thank you. Well, the topic today is empirical analysis of class actions which is all about data. It's a little embarrassing because I can't tell you much about class actions. I can tell you what we don't know about it. As part of the RAND Institute for Civil Justice research agenda, we've been very interested in the nature of class action litigation and mass litigation ever since the Institute was founded 25 years ago, I guess this month, and like other researchers in

this field, we've been experiencing the same sorts of frustrations involved in trying to understand what drives these cases and what sorts of outcomes result in the end.

It's nothing less than shocking to realize that we really don't know a heck of a lot about this sort of critical event in the justice system that can have a staggering impact on consumers and businesses and the courts themselves.

Our researchers run into two major problems in trying to understand what's going on with class actions. First, there is a lack of public data about these cases, despite the fact that they can consume incredible amounts of judicial attention and court resources. Quite understandably, in fact, we get calls a couple times a week, people wanting to know how many cases are there, have those numbers been growing over time, and if so, how fast, where are these cases being filed, who's bringing them, what are they about, yada, yada, yada. But because there's no single point source for tallying these cases up, nobody really knows for sure. You simply can't go to the vast majority of the court systems in this country and ask the clerk for a laundry list of all the certified class actions they've had in recent years. It just isn't possible.

To be fair, the federal courts do the best job

around for tracking these kinds of cases within their jurisdiction, but their numbers only reflect the experiences of a specialized, albeit extremely important, segment of our civil justice system. For a variety of reasons, the federal courts are probably not the filing forum of choice for most attorneys bringing money damage class action consumer issues and probably, to some extent, personal injuries as well.

Unfortunately --

PROFESSOR ZYWICKI: Could you please speak directly into the microphone?

MR. PACE: I sure can. Unfortunately, the state courts do, actually, a far worse job when it comes to keeping tabs on class actions. While individual state's individual court branches could tell you about recent cases in the class action pipeline, getting statewide counts is almost impossible. More importantly, court administrators have to make a very difficult decision to allocate the considerable resources needed to review each case on their docket and to flag in their transactional case management systems whenever this particular event happens, this event being motion for certification. If that isn't done, the information is never recorded and the data never goes public.

With the tight budgets and staff shortages that

are common in our nation's civil courts of law, the end result is that most court systems generally lump class actions in with the fender benders and the debt collection cases. In terms of record-keeping, a million-member class action is often simply just another docket number.

The second major problem that researchers face is a lack of private data. Despite the fact that the judges must review these proposed settlements in open court, what happens after the order of approval is signed sometimes falls into a black hole. Unless the judge requires ongoing disclosure, class counsel and the defendants are under no continuing obligation whatsoever to publicly report how a settlement fund is being distributed. Even if only one class member out of a thousand or even one class member out of 100,000 is able to successfully complete the claiming process, the judge, and the public at large, will never know how poorly this particular resolution is serving the certified class, in particular, and our society as a whole.

It gets worse. One would think that public interest groups, government agencies and private research organizations such as RAND could simply pick up the phone and contact the principals in these cases for a full and complete accounting of what happened, even if the judge

failed to require periodic or final reports.

But during our past research into class action outcomes, we ran into attorneys for both sides telling us that they're very sorry, they could not discuss any aspect of the case, including the distribution, because as part of the settlement approval process, they had executed a non-disclosure or a confidentiality agreement with opposing counsel. In other words, don't ask and don't tell.

The lack of public and private data is most acute for putative class actions, those ghosts and shadows of the system where class treatment is actually or is likely to be sought but, in fact, are dismissed or resolved on a non-class basis prior to certification. Putative cases don't get a lot of attention in the overall debate. I don't think I've heard anybody talk about them over the last 24 hours here, but they can sometimes have an enormous impact on similar litigation that gets certified in other courts. They can drive up defense costs and they can result in inflated settlements on an individualized basis. Unfortunately, nobody tracks them and nobody talks about them.

What is the answer? What are the answers? Well, in a perfect world, every court system in this country would be required to immediately report to some

centralized authority every time a motion for certification is filed, what the result of that motion might be, what were the details of any settlement agreement or other case outcome, and a complete description of the process for notification and claiming.

In that same perfect world, every judge in this country would, without fail, require regular reports of how any fund is being distributed and administered, including information about denied claims, and make those reports available to the public so outsiders could monitor the progress of the distribution as well.

In a perfect world, that same judge would always require, as far as any settlement approval, that class counsel and the defendants publicly disclose any payments being made to attorneys in competing cases, to intervenors and to objectors.

And in a perfect world, all of this information would be easily accessible and available to everyone so judges could use prior cases as benchmarks for judging the settlement agreements before them, so researchers could do their job with hard numbers instead of conjecture and anecdote, and ultimately, so policymakers could make quality decisions for ways to improve the outcomes of class action litigation, and hopefully, conferences like this will lead to that perfect world.

PROFESSOR ZYWICKI: Thank you, Nick.

Our next speaker will be Joseph Mulholland, who is an economist with the Federal Trade Commission's Bureau of Economics. He has been actively involved in the Commission's Class Action Fairness Project and is currently working on empirical investigations of the outcomes of Commission redress settlements.

Joe?

MR. MULHOLLAND: I'd like to continue just for one minute on adding another thing to Nick's perfect world scenario, and in my perfect world, you would eliminate reverter clauses because I think that's a key part of the problem here.

It seems to me that -- and by a reverter clause, I'm talking about a provision that any of the unspent money in the settlement goes back to the defendant. That creates loads of perverse incentives there. Certainly, the defendant now has no incentive, say, to come up with reliable consumer lists or what have you and neither does the class counsel, because, you know, the way that fees are ultimately determined, it has to be based on some ex ante projection by the defendant of how much money he's going to pay to the class and then the rest goes to the lawyers.

So, you know, it seems to me that, you know,

that would just help a lot. Obviously, it wouldn't be full. You'd still need, I think, more information on the outcomes, or what Nick calls the private data. But at least if there was some provision there that -- you know, it would seem to me that it would give a definite number, when we talk about what a settlement is, you know, and how much money is the settlement worth, it would seem to me that you would have a, more or less, reliable number there.

Now, how much money goes to the class? Well, that would depend on what sort of provision would be used to or is used in cases to exhaust all the money. Do you do pro rata? Do you do cy pres or what? So, anyway, just a diversion there to talk about that.

Now, to get back to, you know, what I'm doing. In your packet should be a table that was generated that shows the allocation of redress funds in this study that we're doing of our own redress process, which, in many ways, is similar to the process that goes on with class actions. The point of this was trying to get some idea -- since there is such a lack of outcome data out there and we go into these -- in looking at these cases, these settlements, and it's very hard figuring out what is the right valuation.

Ted mentioned there -- he talked about

projected, you know, valuation, value of the settlement, and clearly, that's what goes on a lot. There's lots of numbers thrown around out there about response rates, redemption rates and what have you.

So, anyway, so we thought that, at least as a start, we might be able to get some sort of insight if we looked at our cases, and in particular, what I did was I selected consumer cases. So, these are all consumer redress cases. They were finalized, and that means by the administrator, closed out in Fiscal '01, '02 and '03, and they were for amounts of $500,000 or more. So, what we ended up with is a list here of 22 cases.

Let me just say one thing more about what we can get out of this. One is, as I said, numbers like, say, response rates. Is it possible, say, to get response rates on certain kinds of cases that we have that turns out to be less than -- you know, similar to cases in, say, an upcoming class action? Unfortunately, I see I'm running out of time, so maybe we could talk a little bit about this later on. But I also think it can be useful in looking at the kinds of information that would go into a database, let's say. Again, in a perfect world, where we could look at the -- where we would have good outcome data.

And then the question is, well, how do you

arrange it, what are the features? And believe me, what struck me was you can't -- you talk about a response rate, but it can be quite complicated depending on how the redress process is set up, and certainly, what kind of customer list you have, if you have good customer lists, if you have to use public notices or what have you.

So, there's loads and loads of complications there, but certainly they can be all worked out and I certainly strongly support this idea of just making the basic outcome data available. In other words, if you just have -- I gather a judge could just enforce this or stipulate this in the settlement, which would simply say that the report of the administrator -- and I presume in most of these cases, an administrator is the one who processes funds, certainly in our case, and then writes a final report, just some provision saying that that final report is made public. I think that would help quite a bit.

So, at this point, I'll stop.

PROFESSOR ZYWICKI: Thanks, Joe. Our final speak is Jim Wootton, who is a partner with Mayer, Brown, Rowe and Maw. Prior to joining Mayer, Brown, he was President of the U.S. Chamber Institute for Legal Reform where he spent a substantial amount of his time

advocating reforms in the class action mechanism at both the state and federal level.

Jim?

MR. WOOTTON: Thanks, Todd. Thanks for having me. I'm going to ask a sort of bigger picture question, although all these other questions may have helped answer it, and that is, are we going in the right direction by leaning more and more on litigation in order to regulate? The compensation piece, in my opinion, is kind of almost a separate question. The paper I've circulated really is sort of a history of how we've changed our view of litigation over the last 30 or 40 years.

Litigation used to be, you know, a sometimes necessary evil that ought to be avoided. Some very influential thought leaders from Prosser to Calabresi to Posner have moved us in the direction that the tort law, and law generally and litigation generally, ought to play a more active role in regulation and deterrence, and ultimately, that led to a period of time with a few other changes, particularly the changes in Rule 23, when a combination of contingency fees at whatever level and the new rules for opt-out settlements, as opposed to opt-in settlements, which I can tell you there's a very contentious debate in corporate America today because opt-out settlements are actually a very effective way to

engage in what I'll pejoratively call collusive settlements.

But at any rate, the changes in Rule 23 that are trying to empower litigation as a regulatory tool led to very aggressive form shopping. You know, Dickie Scruggs' description of magic jurisdictions, no matter what happens at trials, plaintiffs win and that judges are elected with verdict money, so that there's this aspect of what's going on, and we had a session on litigation where Professor Calabresi came and said he's not so sure he agrees anymore that the court system is a rational regulator.

You know, asking ourselves the questions, how is the system doing in addressing a lot of these toughest questions and I think the debate that is really just beginning, and I think it's going to intensify is, to what extent should there be more difficult but ultimately more preemptive regulatory activity probably at the federal level in which society engages in balancing kinds of activities which I would say generally are not very well done in litigation.

There's a little bit of a debate going on right now around the FDA's rule, the Third Circuit issued an opinion in the Thoratec case where a medical device was implanted and the patient subsequently died and the

question was, could the widow sue, and the Third Circuit agreed with the FDA that the FDA's regulation was a floor and a ceiling and there are sort of other kinds of questions around that. And I was struck today by the account of the FDA panel dealing with this anti-depressants with adolescents situation right now, and it's a very thoughtful report on a discussion of what the research means, what that should lead to in the way of warnings and the use of these anti-depressants. It's hard to picture that kind of thoughtful discussion going on in Jefferson County, you know, in front of a jury down in Mississippi.

So, I think, you know, there are costs associated with regulating through litigation and it would be very interesting to try to find a way to capture that and weigh it against what are undoubtedly benefits of the class system in allowing the aggregation of claims.

PROFESSOR ZYWICKI: Thanks, Jim. We're going to go ahead and turn to questions and I'm sure each of you, if you want to make responses or replies to anything anybody else has said, we'll somehow work it into your response to the questions. I've got nine cards here. Five of them basically contain the same question. So, I'm going to start off with that question in a more

general way.

I think that what a lot of people are asking is essentially not the question of collecting the data, but interpreting the data. What do you make of the data that you have? Sort of what is the null hypothesis and how do you actually test hypotheses with the data? I'm going to give a couple of examples of things that people have suggested, and so, ideally, some of you would respond to some of these in more specifics as these are questions that have been asked. And when I mean some of you, reading the cards, that basically means Professor Eisenberg.

But, basically, the three areas in which I see the data interpretation questions being the real question as much as the actual -- what the data is, first, essentially is the question of nominal versus real recovery in cases, especially in consumer class actions as opposed to, I think, distinct from, say, employment discrimination or something else, which is, in particular, this question on this correlation between attorneys' fees and nominal recovery and whether or not the nominal recovery actually reflects what people really get, and in particular, in coupon settlement cases, do we adjust -- or in the research, do you adjust for coupon redemption rates in consumer class actions? And a

corollary question for Judge Rosenthal is, how do courts or do courts, as a practical matter, do you try to adjust the coupon redemption rates in setting the attorneys' fees?

A second question is opt-out frequency, which is, are people not opting out because they're basically happy with the settlement, or is it because they don't know because of the way the class action settlements are structured and noticed and that sort of thing?

A third question that I think relates to both of these more generally is, Professor Eisenberg suggests, I think, very strongly and to some extent, persuasively, which is that low recoveries are the raison d'etre of why we have class action, precisely because recoveries are small that we bundle them up in class actions and process it this way. The counter-hypothesis is that low recoveries for the class members are essentially evidence of nuisance suits and high agency cost with lawyers and that precisely because the recoveries are so small, those are the kind of cases where consumers lack the incentives to monitor what their lawyers are doing.

So, in each of these three questions, nominal versus real recovery, the opt-out frequency and sort of the raison d'etre of class actions, it would be interesting to hear the panel's reflection on how do we

interpret the data that we see there and is there some way to kind of engage in hypothesis testing.

I'll start with Judge Rosenthal and we'll just work down.

JUDGE ROSENTHAL: Well, those are a few interesting questions. How much time do we have?

Briefly, to start with the assumption that so-called negative value suits are the paradigm of class actions, I think the United States Supreme Court believes that. If you look at the AmChem decision, that's what Justice Ginsberg says that's what we're all here about. But that requires us to step back, and in answer to how do we interpret the data, how do we measure the value that those suits bring to the public good and how do we weigh that answer against the costs that those suits impose, which requires us, as well, to measure those costs.

We have assumed -- we, collectively, assumed for a very long time that negative value suits that provide access to courts that would otherwise not be practically available was inherently good. I think that we are now beginning to question whether we have created litigation that simply would not otherwise exist and whether that is, on balance, a good thing. That's really the subject of the next panel. But certainly it is a

fair question that we have not begun to answer in a meaningful sense.

The second issue is -- the second question that's really raised by that question is whether that accurately describes class action litigation today, because even though mass torts may be relatively few in numbers of cases, something that we really don't know because of the lack of some available data in the state courts, they clearly raised grave institutional issues. Mass torts were not what the framers of present rule opt-out B3 class action had in mind. They said it wasn't appropriate, but those words have been famously ignored. Mass torts are an important feature of class action litigation.

And if you believe that part of what class actions are supposed to do is provide a mechanism for the efficient and fair handling of mass harms that would otherwise -- it's not an issue of creating litigation that otherwise would not be created as much as it is fairly handling and justly handling litigation that would otherwise swamp the courts because it would be present in such numbers. A different set of issues than the negative value cases. But there, the problem that I don't think we have really begun to grapple with is whether by being so inviting to potential litigants, we

have so swamped the system with people who are not hurt, that we are gravely diluting the meaningful access to courts for people who are hurt by mass harms and who need recovery and an access to recovery.

There, how do you measure the numbers in which people who are not hurt are present in mass or in class actions? What is the effect of the presence of so many of those people, however many they are, on the ability of people who are hurt to get access to recovery fast enough to do them some good? I think those are issues that are, again, meaningful subjects of empirical research and they're different sets of issues.

With respect to the question on what judges do to account for coupon redemption rates, judges have been educated, I think, to become increasingly sensitive to the problem of coupons providing illusory value and unredeemed coupons providing no value. If you look at the Manual for Complex Litigation, the new edition, judges are counseled to consider a variety of techniques to avoid paying out attorneys' fees until judges fully understand what is being received by class members, so that if you have a coupon redemption program, a judge might well consider not paying the attorneys' fees, or at least holding back a significant amount of the attorneys' fees, until those coupons have been redeemed, the program

done. The judge knows exactly what amount has been paid out and the attorneys' fees could be based on what has been distributed as opposed to some number that has been promised. But that promise may never have to be made.

PROFESSOR EISENBERG: I saw three topics, the first of which is dealing with coupons, which the last just commented was on. I think just from Tom Willging's report today, if you look at the data Miller and I reported on 300 published opinions, we coded beneficial soft relief in 12 percent of the cases and questionable soft relief in 7 percent of the cases. Tom just reported 20 percent have some form of non-monetary relief, and of course, not all that's bad; 10 percent had coupons; and 1 percent had non-transferrable coupons as the only form of relief.

So, I think putting aside what the null hypothesis of anything else is, a simple description can shed light on a lot of things, and the scope of the questionable coupon relief seems to be well under 10 percent of the cases and perhaps we should keep that in perspective until we have further evidence that it's more of a problem. But I think it's a problem and I think judges deal with it -- you know, are learning to deal with it, but I think it's probably less than one case in ten that has that as an issue.

PROFESSOR ZYWICKI: Ted, can you clarify the pool? That's all cases or just consumer class actions?

PROFESSOR EISENBERG: Miller and I -- I'm just reading our Table 3 from our published article. That's all cases.

PROFESSOR ZYWICKI: Okay.

PROFESSOR EISENBERG: I don't know if, Tom, you surveyed across the board. Again, the data just on the opt-out stuff line up pretty consistently across studies, not that anyone's done a truly definitive study.

Opt-out frequency, I think -- I didn't get to maybe the policy punchline. I'm not sure there is on the low frequency. When you ask why it's not happening, I think consumers are rational. I get this class action thing in the mail and I decide is it worth opening and sometimes I do it and sometimes I don't and sometimes I open it up and put it aside and then lose it and maybe every fifth or tenth one I actually return.

I think the implication is, perhaps, at least in small recoveries per customer -- per consumer cases, we may be overdoing -- spending too much on notice and not -- just assume they're not going to opt out, right? Maybe we just should -- you know, there's the class, give them notice to participate, but don't rely on opt-outs as, one, evidence that it's a great settlement because

you don't get it very often that it's not, and two, don't rely on opt-outs and objections as sort of, gee, we've really done our due process, because we've really gotten notice to everyone.

I think the opt-out rate sort of coats both ways. To me it says, maybe we're trying to spend too much on notice, though I'm not quite sure where that leads, and the other is, don't count on notice as sort of to give due process blessing to the transactions because it may not really be serving that function.

I think the third topic with nuisance suits, I think Judge Rosenthal raised an enormous issue much larger than class action. Do we really want a society in which everyone enforces their legal rights? Because we would just fall apart in a minute if everyone asserted every legal right they have. But I guess the other side of that is particularly the low recovery per client, per customer, per class member in cases, do we want a society in which it's absolutely easy to cheat everyone a little? Because that's what you're giving up.

If I go over the so-called contracts in my cellular phone bills or in my credit card agreements and the way they're complied with or not complied with or read the cases, I'm sure I'm being cheated every month, but I'm not sure exactly by how much and I don't have the

time to figure it out. Apparently, there's a group of lawyers out there who spends the time to find out these things. I don't know if it's good or bad, but if we don't have it, I think the incentive to cheat everyone a little goes up and I don't think the government's going to spend a whole lot of time doing -- the government may have more important things to do and individual consumers may have more important things to do. Maybe we need someone monitoring those who would cheat a lot of people a little.

PROFESSOR ZYWICKI: Tom?

MR. WILLGING: As to the first question, I think part of the first question was, do we include coupon recoveries when we're figuring out the percentage of attorneys' fees, and the answer to that as a researcher is no. We had -- in both our studies, when we see a case that has both monetary and non-monetary aspects, we only count the monetary recoveries in determining what percentage is devoted to attorneys' fees. So, those figures -- that 29 percent figure I gave you is 29 percent of monetary recoveries, not including coupons.

The second question on the opt-out, I don't think we have a clear answer of why people opt out. I mean, I don't think people have gone -- researchers

haven't gone to the opt-out class members and said, why did you do this. I think we can infer from, at least our '96 study, that the amounts of recovery suggested clearly to us that people were not opting out to bring their own individual litigation. There's a suggestion, and certainly there are anecdotal reports, that people do opt out to bring their own class litigation. There are opt-outs that are included and you heard some of those stories yesterday.

The third question is, again, on the value of litigation in nuisance cases and so forth. I'd just echo what Ted has to say, but I think there are these cases where millions of people lose a few dollars and I think that is important from -- it's important to have the deterrent possibility of a class action that would disgorge some of those profits and send them back into society.

PROFESSOR ZYWICKI: Nick, and I'll remind everybody else on the panel, make sure you speak into the microphone so that the transcriber can hear you.

MR. PACE: Well, I'm just going to speak on the first question because I kind of didn't write down the other two.

(Laughter.)

MR. PACE: But as to the question of attorneys'

fees and actual recovery, you know, judges have a couple of options. One way, I suppose, if the courts could build on the considerable experience of the claims administrators and defendants who know about these things, they could guess-estimate what the likely redemption rates would be, the likely disbursement of a common fund. They would be able to say that given this particular type of coupon -- I'm sorry, this particular type of claim form published in this particular type of paper or per class member value of this much, you could probably -- if you knew all the data, you could probably guess-estimate what the likely redemption rate would be and then calculate attorneys' fees accordingly.

The better approach, I think, and what Judge Rosenthal suggested, which would be to link the attorneys' fees to actual disbursements and pay expenses upfront, perhaps, pay a chunk of the provisional attorneys' fees and then award them over time. It's a tough decision.

PROFESSOR ZYWICKI: Joe?

MR. MULHOLLAND: I think we're running out of time, so I'll be quick. Two points. One is about the small number of non-monetary settlements. I think one problem here -- again, this goes back to the reverter clause. It seems to me that you can get exactly the same

result if your lawyer that's trying to, you know, put out an imaginary valuation -- you can get the same result from just having low response rates than you get from a coupon. So, I'm not sure I see that that's as important a difference as others might think.

The other thing was, going back to the information and how important information is on outcomes because I think one other -- besides us fooling with the data and what have you, the other important thing, I think, is on reputation that, you know, the way it is now, that people make all sorts of predictions in class actions. You have the lawyers making predictions, you have the economic consultants and we never know -- and this is about response rates, we never know how good they are. And it seems to me if we had a database of data there on what the outcomes are, that then that would factor in -- that would almost be a self-disciplining device.

Because all of a sudden now, a lawyer coming up in another case, all of a sudden, he's got a record here, he's got a reputation. So, he's going to -- there's going to be some tendency on his part now to try and be a little more realistic, the same way with the consultants. You know, a consultant that has a very poor track record in other cases all of a sudden isn't going to be looked

at as well as another one. So -- but anyway, I'll just stop with that.

PROFESSOR ZYWICKI: Jim, we're almost out of time, but you get the last word now.

MR. WOOTTON: Okay. Well, the last word is people are going to behave according to the incentives that you give them. I think the policymakers have to look hard at whether the incentives are properly aligned with the best interests of society. I do think the Phil Howard point that judges could probably exercise more authority in managing the class actions, throwing out things that aren't worth a candle and that sort of thing, obviously, it's to their likes what that is. And I'll end with what I think is going to become a refrain in a lot of preemption debates is that we may be better off in this country with more cops and fewer vigilantes.

PROFESSOR ZYWICKI: Thanks, Jim. We'll get about 15 minutes now and then we'll resume at 10:30. Thanks to the panel for their insightful remarks.

(Applause.)

(Whereupon, a brief recess was taken.)

MS. MORRIS: My name is Lucy Morris and I'm a Senior Attorney in the Bureau of Consumer Protection here at the FTC. Several of my recent cases have involved class actions, so I am very pleased to be moderating this

panel on the unique challenges presented by multiple enforcers and follow-on lawsuits.

The title of this workshop is Protecting Consumer Interests in Class Actions and at the FTC, that sometimes means coordinating with related class actions to achieve a global settlement that benefits consumers; for example, in our recent cases with the associates from CitiGroup, Fairbanks and Rexall.

In other cases, though, where we believe consumers' interests are not being protected in a related class action settlement, we intervene and object or file amicus briefs, for example, as we did in our recent case against AmeriDebt.

Part of what we hope to gain from this panel is feedback on how the FTC is doing in this area.

We have an impressive panel today to discuss the challenges presented by multiple actions. Each panelist will give a presentation of not more than 10 minutes, and when everyone is done, we should have about a half-hour for questions. And as I think everyone knows by now, if you do have a question, please write it on a question card and give it to an FTC staffer who will then give it to me and I will ask the questions from here.

Let me first just go through and introduce the panelists and then we will begin.

In order starting on my left, we will hear first from Michael Greve, who is the John G. Searle Scholar at the American Enterprise Institute.

Beside him is Kenneth Gallo, a partner at Paul, Weiss, Rifkind, Wharton and Garrison.

We will then hear from Kevin Roddy, a partner at the law firm of Hagens Berman.

We will then hear from Linda Willett who is Deputy General Counsel with Bristol-Myers Squibb.

We were scheduled to hear from Trish Conners, an Assistant Attorney General with the State of Florida, but for hurricane-related reasons, she could not be with us. Thankfully, she was able to get Emily Myers, who's with the National Association of Attorneys General, to take her place.

And, finally, we'll hear from Bruce Hoffman, a Deputy Director with the Bureau of Competition at the Federal Trade Commission.

We will now turn to Michael Greve.

MR. GREVE: Thank you very much. My assigned task here or self-imposed task, once I figure this out, is to talk about consumer class actions without harms, that is class actions on behalf of people who haven't suffered $3.50 in harms or anything like that but have suffered no harm in any conventional sense.

We now have these kinds of class actions. Once upon a time, the common law had a notion of harms but no injuries. We now have a common law doctrinal or a transaction doctrine of injuries without harm.

The simple point I want to make was nicely captured in a Seventh Circuit decision in the second Firestone case, and I quote from that case, "If tort law fully compensates those who are physically injured then any recoveries by those whose products function properly means excess compensation," And to that I say, Amen, Brother Eastbrook. Double recoveries mean double deterrents. That can't possibly be in anyone's interest.

The only questions to my mind are, A, how widespread are these actions? And I don't have any systematic data, but I'll say this, I was astounded to learn that for statistical purposes $5 million settlements or something like that counts as high end, $5 million is what Lieff Cabrasar spends on coffee on a good afternoon. The actions I'm going to talk about rank in $500, $600 million, $1 billion, $2 billion, $4 billion, $10 billion.

And the second question is, what can be done about these kinds of actions? And the answer is, to my mind, probably nothing, at least nothing that matters.

These cases without harms, sometimes also

called benefit-of-the-bargain cases come in two versions. The first is, you have a very heterogenous class, a handful of members who are actually harmed in some sense, but the vast majority are not, and the question is, what do you do with those kinds of classes.

An example of these cases is the Toshiba case which eventually settled for $2.1 billion. There -- while the company promises that the computer will function flawlessly, then turns out if you had a ton of complicated programs running simultaneously in a particular configuration, that leads to data loss. But for the vast majority of consumers, the product functions as promised and the question is, what do you do with respect to the assignment of rights?

The traditional solution was, of course, separate the marginal consumers; that is to say, who would have bought a different product had they known the true characteristics of this one, would have purchased a different product. You separate those kinds of marginal consumers from the infer-marginal consumers for all of whom the product worked as promised and you do that either at the class cert phase or at the damage phase, it doesn't really matter.

The solution now is to say, let's certify the entire class of purchasers, and in this particular case,

even people who hadn't purchased the product and, again, flatten the demand curve and treat everyone as the marginal consumer in these cases and that's how we arrived at the $2.1 billion settlement.

Now, we may say, well, that's just a settlement, that's not anything wrong with the courts, it's just Toshiba decided to settle it for that amount of money, but this also happens in non-settled cases. Avery v. State Farm, which comes out of Illinois, is an example. This famous case deals with the company's habit of using -- or making people use aftermarket parts, that is, parts produced by somebody who is not the original manufacturer, in automobile repairs, the policies required by many states, though not, of course, Illinois. The plaintiffs in that case mobilized an expert who estimated the "damages" here at $1.2 billion. On cross examination, he was asked, well, what's the range of error. He said, oh, $1 billion.

Nonetheless, the Court and the Appeals Court credited that estimate and what happened in that case again is that they confused the marginal customer with the infer-marginal consumer. So, for example, if somebody has a vintage Corvette and has it repaired, that had better be the original part because both that customer and his potential buyers can tell the real part

from a fake whereas somebody with a scratched fender or a fender that was originally scratched and then gets banged up and then has it repaired with something other than the original part is, in fact, better off under State Farm's policy, especially if the replacement part or if the car was a Chrysler.

There's no effort in this expert estimate or in the Court's assessment to separate one from the other. So, in effect, again, the demand curve here gets completely flattened. Everyone is a marginal customer, everyone gets treated alike and, hallelujah, we arrive at $1.1 billion. That case is still in litigation.

The second kind of case in these benefit-of-the-bargain cases are cases where a company pumps out a product that harms some consumers. These injured consumers can sue, but the class actions for these particular cases are brought explicitly on behalf of classes that weren't sued and, in fact, the harmed consumers are explicitly excluded from the class.

One example is the famous Price case, also from Illinois come to think of it, involving Marlboro Lights and the consumers alleged, believe it or not, that they thought they were buying a safe cigarette when they were buying light cigarettes and, again, the plaintiffs mobilized an expert who estimated the difference between

the value of the product -- between a safe cigarette, which doesn't exist, and the product that they actually purchased, multiplied that by the packs and the price, and arrived at $7.1 billion and $3 billion in punitive damages and you have this $10 billion award.

Another example of these cases is about a dozen cases involving OxyContin, which is an opioid. The consumers in these cases, involving 50,000 consumers at a time, alleged that the product was addictive for others even though they, the consumers, benefitted greatly from this product, they didn't get the benefit of the bargain, they're horrified to learn that some other addicts actually got addicted to it.

What can one do about these cases of double deterrence and double compensation? To my mind, nothing much can be done that would be useful and some things that would be useful can't be done politically.

In all of these cases, almost all of these cases, there's a common law, a cause of action and then there's a consumer statute, consumer fraud statutory claim, and it's a conjunction of those kinds of claims with a class action mechanism that creates, in my mind, the problems.

What I think you want to do is to say, look, let's litigate on behalf of injured consumers under

traditional common law. Tort rule -- and that means you enforce the class action requirements vigorously as, in fact, they are enforced in the Seventh Circuit, though not anywhere else, and you insist on the traditional common law elements of the claim and that means, in particular, detrimental reliance, which is the element that's really missing in these benefit-of-the-bargain cases.

What do you do with respect to the cases where the proof problems are insurmountable and the aggregation problems are insurmountable? Well, you give those to public enforcement agencies. And, in fact, that is the model that we, once up on a time, had. The FTC Act, itself, is modeled like that. The little FTC Acts were originally modeled like that. Even the craziest statute in the country, which is California 17200, was still originally modeled like that. What then happened was that the Court sua sponte said, well, when private plaintiffs come forward to litigate under these statutes, they're not using the statutes, they're just assisting these resource-strapped public agencies.

But the difference between the private enforcers and the public enforcers to whom these tasks were originally entrusted is that you don't have any control over the private enforcers, whereas with respect

to the FTC, with respect to consumer agencies in the states, you have budgetary and political means of controlling these agencies and preventing the risk of or guarding against the risk of over-enforcement.

Will we ever sort of arrive at that sharper separation between public tasks, which is to create optimal deterrence, and private tasks and lawsuits on behalf of injured consumers? Not in a million years, at least not in my lifetime. Thank you.

MS. MORRIS: Thank you. Now, we'll hear from Kenneth Gallo.

MR. GALLO: Thank you. Thank you for inviting me. I'm going to speak briefly on the issue of duplicative recovery, specifically in antitrust cases and specifically even more so with the FTC's relatively recent focus on seeking disgorgement of profits in antitrust cases, as opposed to its more traditional approach of simply seeking injunctive relief.

And I should say at the outset, I don't think it's a very good idea for the FTC to seek disgorgement in antitrust cases. I think it complicates an already very complicated system and doesn't, in my view, give very much marginal benefit, so while I'm invited here by the FTC and I turn around and criticize the conduct of the FTC in the disgorgement cases, it's a little like being

invited to dinner and criticizing the host. I don't mean it in that spirit, but it is my view that it's been a -- it's a mistake and doesn't provide much marginal benefit to consumers.

I start from the proposition that it can hardly be debated. I think there's at least the potential for serious duplicative recovery in antitrust cases, with treble damages at the federal level, obviously, and then at the state level, indirect purchaser statutes, which again often allow for treble damages, sometimes allow for treble damages not calculated on the excess so-called monopoly overcharge, but on the entire purchase amount of a product, which -- so, it even increases the risk to the defendant that they get hit for direct damages and then indirect treble damages and then -- I think Kevin is going to be talking about not traditional antitrust statutes at the state level, but statutes like 17200 in California, which provide liability in a much less structured environment, a much less defined environment, and there is opportunity for damages there.

Of course, the State Attorney Generals can get into the fray in criminal cases. It's obviously a different policy consideration. It's not only compensation but some sense of punishment. So, I'm not suggesting that it's inappropriate, but in criminal

antitrust cases now, the fines are much higher than they used to be traditionally and there seems a huge escalation in fines in criminal cases, and then the advent of the FTC deciding, in relatively recent years, that it will go one step further and not just seek injunctive relief, but seek, in some limited cases, and it's only been, to my knowledge, three cases -- maybe there's something I'm not aware of, but only three cases I'm aware of and seek disgorgement of lost profits.

And so, the question then becomes under what circumstance is that appropriate and what policies is that decision to seek disgorgement of lost profits really very helpful?

The FTC policy statements on this, one which was last year, and I believe Rich Parker back in 1998 or so had a policy statement on it, have made it clear that it's the Commission's view that the Commission is going to be very mindful of avoiding duplicative damages, and that's absolutely stated right there up front and that disgorgement should only be used in a way and in a fashion to avoid duplicative damages, and the policy statement, I think, says words to the effect, where there's some reason to believe that private redress will not right the wrong. So, it's appropriate for the FTC to seek disgorgement of lost profits as opposed to simply

seeking injunctive relief.

My problem with that is I don't think it's actually worked out that way. Two of the cases, the Mylan case, which was the first one in 1998, disgorgement was sought where Mylan had allegedly monopolized a market by controlling the sources of supply and jacking prices up very, very quickly, and the Commission sought disgorgement and my recollection is that $100 million in disgorgement, which was put into a fund -- an escrow fund of some kind, but there were, at the same time, private actions at the federal level brought and private state indirect purchaser actions brought and State Attorney General actions brought and the money flowed into the escrow fund and then back out to the members of those classes.

So, I say the question I have is, okay, we go through all that disgorgement effort and what's the marginal benefit? If the private action is there anyway, unless one assumes that the Commission is better equipped than the private attorneys to reach the right monetary result or the judicial system can reach the right monetary result, if all we're going to get is it going in and back out where there are private actions filed, it seems to me that we don't get a marginal benefit there.

The Hoechst case, which I'll provide the

disclaimer on, I was personally involved in and counseled for Hoechst and so I speak for myself on this and not for the client, but to me there was a dissolution of a merger there, there was a $19 million disgorgement settlement reached with the Federal Trade Commission. At the same time and before that settlement was finally reached, there were private federal actions, there were private state actions, and ultimately, there were State AG actions, and once again, the money went into an escrow fund and back out.

And I say for all the time and effort that I know I spent, and I assume the FTC spent on those disgorgement issues, I suspect a huge commitment of resources at the Commission, I say, where did we end up better off for all that effort, because the private actions were there anyway and Hoechst settled with the private plaintiffs for $25 million, I think. $6 million more than the disgorgement number, and the $19 million went as essentially a credit toward that $25 million. So, a lot of resources committed, a lot of complication and I don't frankly see a heck of a lot of marginal benefit.

So, I guess my -- sort of in summary, the four or five points I would have is that it's not clear that there's a marginal benefit over allowing private actions,

and I'll flip it around the other way. Let's imagine the case -- and I don't know if this has come up, I'm not aware of it coming up -- where the FTC sought disgorgement, there was not a concurrently or a very quickly filed private action, so the money goes into some kind of fund and it is then disbursed.

Now, what happens if we end up in that case where the private action is filed a year or two later and now the money's out? That's, I guess, the prototypical case we're worried about is where there's not a private action. So, there's disgorgement and then there's a subsequent private action. Now, to me, it creates enormous logistical problems to be sure that the same consumers aren't getting redress twice and that the defendant isn't paying twice.

So, on the one hand I say where the private action is there, what's the benefit? Where the private action isn't there, I'm not sure I understand how you can get to a resolution that avoids the real prospect of duplicative recovery if it ever comes down the road.

I also think that you balance the FTC's allocation of resources to seek disgorgement and to quantify the injury and say, is the FTC really -- does it have a special expertise at quantifying that injury that makes it a useful exercise in allocation of resources?

Is there any reason to think that the Commission is better able to quantify that kind of injury to consumers than the private plaintiff's bar? My guess is probably not. My guess is that the private plaintiff's bar, which thinks about these problems every single day, may have a comparative advantage there. So, I wonder why we think there's an advantage there.

The last point I'll make is the anomaly that at least in the Hoechst case, some of the money that was in the disgorgement fund that was distributed when the private actions were filed went to indirect purchaser cases. So, you have the Supreme Court of the United States in Illinois Brick saying, on balance, we don't want indirect purchasers to have a claim because the prospect of duplicative recovery and the complications of allocation of resources is essentially a policy decision. The Supreme Court said, as a matter of judicial policy, that's a mistake.

The states have made a legislative judgment, many of them, to take a different tact. It's a legislative judgment, but to me, it's odd that the Federal Trade Commission, a federal enforcement agency, is seeking disgorgement, some of which ends up in the hand of indirect purchasers in light of the Illinois Brick decision. It's one thing, it seems to me, for a

state legislature to make that decision, it seems different to me for a federal enforcement agency to make that decision.

Thank you.

MS. MORRIS: Okay, thank you very much. We'll now hear form Kevin Roddy, who will do a PowerPoint presentation, and I think he'll have a different take on the issues. He's mostly a plaintiff's attorney, I believe.

MR. RODDY: Thanks. You know, I actually try to come at these problems from several different angles. I am a plaintiff's lawyer, I am a trial lawyer. My firm also represents defendants in class action litigation and I am the president-elect of a trade group of plaintiffs' lawyers that tries to formulate policy.

What I'm going to talk about here today is not philosophy. I'm going to talk about a real case that we litigated in conjunction with the FTC successfully. I'm going to talk about how we did that together in a cooperative fashion, and I'm going to talk about some of the problems that exist, what I call you can't give money away.

You know, our system is based upon a dual prosecution model. There should be healthy coexistence between private litigants, which I represent, regulators

and federal and state prosecutors when it's necessary for them to become involved. I think history has shown that the regulators cannot police every wrong, and what I hope to show you here today is that there are advantages to parallel litigation because sometimes private litigants bring things to the table that others cannot.

Rexall many of us remember as a drugstore chain. It had that orange and blue sign. At some point in the recent past, the name was purchased out of bankruptcy by a vitamin company which sells dietary supplements. A few years ago, 1999, Rexall began selling a dietary supplement called Cellasene that was sold in supermarkets and variety stores and drugstores, and it promised that it would eliminate cellulite. All women had to do was buy this over-the-counter product at approximately $30 a box, take it for eight weeks, and their cellulite would be eliminated. It truly was a miracle.

We filed a state court class action in Los Angeles Superior Court suing under our California Unfair Competition Law which is often called Section 17200. One of the commentators yesterday referred to it as litigation run amuck, so watch me carefully and see if I run amuck here.

That was in June of 2000. About one month

later, maybe three weeks later, colleagues of ours filed a state court class action in Palm Beach County, Florida, which is where the company happens to be based, and literally the same day, the FTC filed an enforcement action in the Federal District Court in Miami.

Now, what I show here on the PowerPoint was that we deliberately structured the state court litigation as follows: We pled the California case as a California-only class because of the powerful remedies that our democratically-elected legislature has provided to my state citizens, and we pled the Florida state court class action as a 49-state class, reasoning that because the company was based in Boca Raton, which is in Palm Beach County, a state court in Florida could apply Florida law to the residents of the other 49 states.

Prior to suing Rexall, the FTC had served a civil investigative demand and had collected certain responsive documents, and once the litigation started, those documents were also produced to us. Prior to that, Rexall had tried to halt the state court litigation arguing that under one doctrine or another -- I've lost track there were so many, primary jurisdiction, exclusive jurisdiction, preemption, unfairness -- the state court litigation should not go forward. Needless to say, the state court judges were not impressed with that argument.

It was eventually agreed by all parties that discovery would be coordinated and that the depositions that were taken in the federal case by the FTC lawyers could be used by the private litigants.

We moved forward. We got a California class certified in Los Angeles. We got a 49-state class certified in Palm Beach County. Rexall did not seek appellate review from either ruling. And then a very interesting thing happened. The FTC enforcement action was pending before a federal judge in Miami who is -- it is an understatement to say that that judge is elderly. And although the FTC was getting favorable rulings from the Magistrate Judge, the District Judge was not acting on the Magistrate Judge's recommendations.

Rexall had withheld a number of documents on purported privilege grounds, and we went before the state judge in Los Angeles, Judge Anthony Moore. He conducted an in camera review. He ordered Rexall to produce dozens of privileged documents to us, the word "privileged" is in quotes. We then provided them to the FTC and the FTC got permission to re-depose certain of the witnesses that it had previously deposed without the privileged documents.

Eventually, after a couple of years of butting heads in litigation, it was agreed that we would conduct

a three-way global mediation before retired Justice John Trotter of the California Court of Appeals who works for JAMS. Three-way, we would be present, Rexall would be present, Federal Trade Commission would be present.

During those -- prior to the negotiations, we coordinated our strategy with the FTC lawyers and it was tacitly agreed that during the settlement negotiations, we private litigants would watch the money and the FTC lawyers would watch the injunction and the consent decree because they wanted a consent decree to prevent this dietary supplement manufacturer from marketing this product or any other products when there was no scientific support whatsoever.

We reached a coordinated settlement. We agreed that we would follow the FTC rules and regs on giving notice to the consumers. We agreed that we would use an FTC-approved settlement and claims administration, Gilardi and Company from Northern California, which I've used many times in the past, and that we would use an FTC-type consumer redress procedure.

My program materials are posted on the website. Exhibit A I reproduced, you can find it on the website, is the long form class notice, which went out -- which was published in newspapers and went out to class members.

Exhibit B is the consumer claim and release form, which looks like this. It was specifically designed so that it would take the average consumer about as long to fill this out as one of those magazine subscription renewals and the deal was that the recommended course had been eight boxes at $30 a box. Any woman could fill out this claim form and with no proof of purchase receive $240 in cash, no questions asked. They had to provide their name, their mailing address, their phone number, the number of boxes they claimed to have purchase, the amount that they paid per box to the best of their recollection and the names of the stores where they had bought Cellasene, again, to the best of their recollection, and then they had to sign it under penalty of perjury and mail it in.

Exhibit C to my materials, which you can look at, is the consent decree and injunction which the FTC negotiated with Rexall, a very powerful injunction that they were able to secure. We signed onto it. Settlement approval was granted by the state courts in California and Florida and also by the federal judge. There were no opt-outs, there were no objections whatsoever to the settlement.

Now, here was the deal, as best as anyone could tell -- and no one could tell with any certainty -- the

retail sales of this product had been about $40 million. The problem is the product was sold through distributors and wholesalers and nobody really knew, but $40 million was as close as we could come. To settle the litigation, Rexall agreed to pay $8 to $12 million, plus fees and expenses. We conducted a nationwide class notice campaign, which cost about $750,000. We saved some money there because we permitted Rexall's media department to place the media buys.

One thing you may not have noticed yesterday about notice is that when you use a notice and claims administrator, there are certain costs built in. But anyway, we did effective nationwide notice of $750,000. But here's the problem, Gilardi, after discarding all of the phony claims that came in from male prisoners, and we got about 1,000 of those.

(Laughter.)

MR. RODDY: I don't know how these people get access to the Internet, but we got 1,000 claims. Gilardi paid out 1,862 consumer claims totaling, as you see there, $362,000 and change. The average claim was $195 which indicates that the average woman claimed six to seven boxes, which I think is a good sign of our society, if you could claim eight boxes with no proof of purchase to only claim between six and seven. The residue, which

was about $7 million, we agreed would be divided between the U.S. Treasury, which got about $3-and-a-half million, and we agreed to, as you say, cy pres, the rest of it, which means it will be distributed to charitable organizations and particularly medical research benefitting women age 18 to 54 who are the target audience -- I will tell you to finish up my presentation that we have just submitted recommendations to the trial courts that $3-and-a-half million will be divided between about 29 charitable organizations, advocacy groups and medical research projects that will benefit women.

Do I have time for one more comment? I want to make one more comment which is this dual -- what I call a dual prosecution mode, was successfully used in the tobacco litigation, in which my firm was involved, and it's currently being employed in the pharmaceutical litigation and I will give you one example.

Out in the corridor, you will find a newsletter from the Prescription Access Litigation Group, which my firm is involved in, and one case we have, we call EstraTest. There is a pharmaceutical manufacturer which sells a drug called EstraTest, which is a hormone replacement therapy for hot flashes for menopausal women. This drug has never been approved by the FDA for that purpose. This company has been selling this drug for 40

years. Lyndon Johnson was in the White House when they began selling it for that purpose. Their sales last year were over $150 million.

So, my -- I realize the FDA is busy, but seriously, folks, 40 years? Anyway, thank you all very much. Thank you.

MS. MORRIS: Okay. I just wanted to make sure we have the technical things in hand. That was very interesting. Thank you.

We will now hear from Linda Willett with Bristol-Myers.

MS. WILLETT: Lucy, thank you. I would like to thank the Federal Trade Commission and all of the speakers for, first, having me invited me here and for the very interesting presentations over the last day-and-a-half.

For those of you who may not have had a chance to read my comments on the FTC's website, I will tell you that my central theme is follow-on litigation, which I will define later, and/or government investigations are shifting the paradigm of effective regulation.

I'd like to begin by bringing my comments down to a very practical level and talking about the company -- the pharmaceutical industry and my company and the very practical impact of that shift.

First, let me describe my company. There are 45,000 people who work for Bristol-Myers Squibb and 25,000 of them are here in the United States. They, too, are consumers and many of them come to work every day with the intention and the goal of discovering new drugs to enhance and extend human life and, in fact, that is our stated mission.

We are heavily regulated. The pharmaceutical industry is a very heavily regulated industry regulated by, among other agencies, the Food and Drug Administration, the FDA, and the corollary of our enhancing human -- extending human life for the FDA is patient safety. And I have chosen to use as the focus of my remarks direct-to-consumer advertising as a platform for the remarks. But this could apply to a number of other areas, for example, product liability, and I will talk a little bit about that at the end of these prepared comments.

As I said, the FDA heavily regulates our industry and direct-to-consumer advertising is heavily regulated. I like to describe it as a dialogue. Years ago when I was a young person first watching television, you would not have seen direct-to-consumer advertising. We would have learned about pharmaceutical drugs only through the learned intermediary, our physician. Over

time, more recently, direct-to-consumer advertising has been a mode of communicating with consumers. At least I think at the beginning, some fairly interesting communications in that one would hear about a purple pill but wasn't quite sure of what that purple pill did and there would be pictures behind the purple pill, and if you were a very creative and innovative person, you could imagine what the purpose of the purple pill was. Perhaps it was a blue pill.

Over time, more and more information has come out to consumers. That information is regulated by the Food and Drug Administration and the information is often the product of a dialogue between the producer of the information and the Food and Drug Administration. The dialogue is held between corporations, companies, pharmaceutical companies that have scientists, physicians who are the people considering the information and scientists and physicians in the FDA who are considering the information. So, the point that I'm trying to make is that there are people with the requisite scientific and medical backgrounds considering this information.

From time to time, the Food and Drug Administration does take an action that says this particular direct-to-consumer ad must be withdrawn or it must be replaced. Now, a preface that I probably should

have made is that advertising, at all times, must be accurate. It must not be misleading. It must not be false. It must be correct. But direct-to-consumer advertising is complex because we're talking about complex information here, not simple information. And from time to time, the FDA makes a ruling and says, this particular advertising must be withdrawn or must be replaced after careful consideration.

What we have found in recent days is such rulings, which become available through the pink sheets and other publications, frequently are followed on by investigation by States' Attorneys General that will, representing the consumers, the people of a particular state, conduct an investigation or initiate an investigation into whether or not that direct-to-consumer advertising is harmful.

Our experience with the States' Attorneys General has been to be fully cooperative and I would use the word educative, to talk to the Attorneys General about the consumer advertising, what it means, what the dialogue was with the FDA, and I think we've had some modicum of success with that. In fact, we have been invited to address a whole group of Attorneys General in the next few weeks, along with a lot of other companies to talk about some of these issues and why these follow-

on investigations occur.

After the follow-on investigations, and frequently concurrent with them, are the filing of the private class actions, and they, in many ways, are more problematic because, as we know, they are litigations, they are adversarial proceedings. They are not always informed by the scientists, by the physicians, and the resolution has a very different goal than the FDA's goal of looking at direct-to-consumer advertising or even the States' Attorneys' General goal of looking at direct-to-consumer advertising.

There are very real costs that are associated with this duplicative effort and they're the ones that we've been talking about for the past day-and-a-half, the costs for a company of defending, educating first an agency, then another agency or an enforcement body and then perhaps a judge and a jury. Those are very real tangible costs.

But the more -- perhaps more worrisome costs are what is this follow-on litigation, investigation, class action shift doing to the regulatory paradigm? What is the end result for the company, for the consumers when you are ultimately faced with consent decrees or actions that require you to meet disparate regulatory requirements?

And I think that's what we really have to focus on in being concerned about these follow-on actions. The time that it takes from a company to be able to defend and respond, the time it takes from the employees that are now facing depositions and document discovery and spending maybe as much time on that as the day job of discovering drugs is very problematic to industry. I think that Judge Rosenthal had a good point, are we creating litigation that would not otherwise exist?

Now, my original practice in law representing my company was as a litigator, a defense litigator, and I spent a large amount of my time in the company looking at litigation. I am an advocate of litigation. Ten years ago, we saw litigation in our company where an individual would sue, alleging harm by a drug. We have very few individual lawsuits now. We have many mass tort litigations. And so, the litigation has moved from individual to mass tort to follow-on investigation to follow-on class action, and many times the consumers, when they recover, recover pennies on the dollar, and the attorneys' fees, as we have seen in some of the presentations, are outrageous.

I think that the past has moved into a very troublesome present, and I'd like to end my comments by using another paradigm or another example, and that is in

the area of product liability.

The very same thing that is happening in the direct-to-consumer advertising world is happening with respect to product liability. So that if the FDA appropriately questions, let's say, a post-marketing clinical trial and a potential change in a label and a label change is made, what we quickly then see is not so much the Attorney General action looking at whether or not there was a problem with the drug before that label was placed on, but the class actions basically questioning is there an issue with this product, was it ever efficacious in the first place.

I think this confluence of events, this shift from regulation, true regulation by those who understand the model, to regulation by litigation will only serve to create more confusion and will not serve consumers at the end of the day if our true concern is patient safety.

Thank you very much.

MS. MORRIS: Thank you, Linda. We'll now hear from the perspective of the State Attorney General, Emily Myers of NAG.

MS. MYERS: Hi, as Lucy said, I'm here today for Trish Conners who's awaiting the hurricane in Tallahassee, and I'll be reading Trish's remarks, so I'm going to be doing more reading than I normally would do.

But I do have to make the usual disclaimer that I am not speaking for the Attorney General of Florida or any other Attorney General or NAG.

The overall focus of the workshop has, obviously, been on the good and the bad brought by class actions and what changes we can make. My own view is -- let me say this is Trish's and my view -- is that class actions are a necessary and important part of our concurrent system of antitrust enforcement. There are too many diverse competitive and consumer interests involved in any one antitrust violation to leave the resolution and remedy of the matter to a single government enforcer. And without class actions, significant commercial and consumer interests would clearly go unrecompensed.

Of course, States' Attorneys General do occasionally appear, intervene or join in class actions to ensure that their state's individual consumer interests are adequately protected. The Attorneys General share concerns of the adequacy of some class notices, pure coupon settlements or settlements where much of the settlement fund ends up with class counsel as fees and costs. But we can also attest to many instances in which we have joined with class counsel in state and federal antitrust cases and achieved the best results

possible for our consumers and public entities with minimal duplication of effort or expense.

Today, I want to discuss the specific role State Attorneys General play in protecting consumer interests in the antitrust context and how Attorneys General interact with the class action bar. In discussing antitrust enforcement in the United States, I prefer the term "concurrent enforcement" to multiple enforcers because it more accurately describes how our system has evolved. State Attorneys General and the class action bar do not merely fill gaps in antitrust enforcement left by federal enforcers, rather it is more accurate to view our system as one in which four distinct and different sets of enforcers are represented.

These four enforcement groups are, of course, the Federal Trade Commission, the U.S. Department of Justice Antitrust Division, the private class action bar, and the State Attorneys General.

While the interests of these four groups may occasionally overlap, in practice, each of the four parts of our system approaches enforcement of the antitrust laws from different but complimentary jurisdictional and remedial premises. This means that all perspectives regarding a potential violation of the law are independently and appropriately considered and acted upon

for the benefit of consumers and competition. The Department of Justice Antitrust Division has exclusive authority at the federal level to bring criminal antitrust prosecution, as well as civil enforcement jurisdiction.

The FTC's primary jurisdiction under Section 5 of the FTC Act generally allows it to pursue antitrust matters civilly to obtain what is usually non-monetary equitable relief.

Class actions, the third part of our system, are routinely filed as follow-on or parallel cases to federal or state antitrust cases, but the private bar also has, for a number of years, regularly initiated many of their own actions that would otherwise never have been brought.

State Attorneys General are the fourth part of our concurrent system of enforcement. The Attorneys General have always focused their efforts on seeking monetary as well as injunctive relief on behalf of their consumers or public entities under state and federal antitrust laws and state consumer protection laws. In so doing, the State Attorneys General have also had their unique impact on antitrust juris prudence in this country. California v. Hartford Insurance and California v. ARC America are just two examples of that.

Section 4C of the Hart-Scott-Rodino Act provides State Attorneys General with express statutory parens patriae authority to recover treble damages on behalf of natural persons for violations of the federal antitrust laws. This grant of authority was premised on the recognition by Congress that neither of the federal enforcement agencies had the jurisdiction to represent natural persons, to recover money damages and, more importantly, that neither was the best representative of consumers seeking such remedies. Instead, Congress believed that State Attorneys General were the enforcement agencies most capable of representing natural persons parens patriae in federal antitrust matters.

In this capacity, State Attorneys General have actively pursued federal antitrust violations for two decades. The cases originated by State Attorneys General on behalf of natural persons parens patriae include New York's Mitsubishi, Keds and Reebok retail price maintenance cases, as mentioned by Commissioner Harbour; Florida and New York's Nine West and Compact Disk vertical restraint cases; the recent Taxol litigation; and the Disposable Contact Lens litigation, a boycott case.

In addition to cases that Attorneys General originate, there are also many that they undertake as

parallel or follow-on cases to the federal enforcement agencies' efforts so that consumers and public entities who may have been harmed may be recompensed. An example of a matter undertaken by state and federal enforcers in parallel fashion is the Mylan case, which was litigated and settled jointly, with the FTC taking the lead in discovery and the states taking the lead in settlement negotiations.

These cases demonstrate the effective government enforcement scheme created by Congress with the parens patriae provisions of the Hart-Scott-Rodino Act. No matter whether the states or the federal enforcement agencies have been the first to bring an antitrust matter, the result has generally been the same. The DOJ has obtained its criminal fines and sentences or civil injunctions, the FTC has achieved effective injunctive or other equitable relief, and the states have, where appropriate, recovered damages on behalf of natural persons and public entities.

Nonetheless, our system of enforcement would not be as effective or comprehensive if the role of private attorneys general in the class action bar did not exist. Besides initiating cases that would not otherwise be brought, the class action bar is the only one of the four parts of our system that regularly represents the

interests of commercial entities in antitrust cases. These entities are typically not represented in any direct fashion by the State Attorneys General or the federal enforcement agencies.

The class action bar is important from the perspective of natural person consumers as well. The size and extent of the resources available to the class action bar to initiate antitrust actions means that more consumers nationally are likely to obtain redress for damages incurred as the result of an antitrust law violation.

Overlapping representation can and does occur when both the class action bar and the State Attorneys General seek to recover damages on behalf of natural persons. This can arise in at least four ways. One, State Attorneys General have an ongoing investigation and class actions are filed; two, State Attorneys General file an action and class actions are filed as follow-on cases; three, State Attorneys General may intervene in or join ongoing class actions; and four, State Attorneys General may be invited by the parties to participate in a class action.

In the first type of case, the State Attorneys General can have an ongoing confidential investigation under way, unbeknownst to class plaintiffs, who then file

their own class action lawsuits against the same entities for antitrust damages. In order to salvage the time and expense put into the investigation and ensure that consumer interests are protected, State Attorneys General will often file their own parens patriae or governmental purchaser lawsuits and join in the class actions.

This occurred, for example, in the CDs case, where the states had initiated their investigation into the defendants' minimum advertised pricing policies well before any private class actions were filed, but, once the FTC announced it had obtained consent judgments against the five major CDs distributors, private class actions were filed all over the country. The Attorneys General of 42 states and territories ultimately filed their own multi-state action and were joined with the private class actions in multi-district proceedings in Maine. The presence of the Attorneys General resulted in a quicker settlement than would otherwise have been the case because their ability to represent consumers in 42 states and territories largely removed class certification as an obstacle to resolving the case. The matter settled within two years of the initial filing of the state complaints.

The second way in which overlapping representation can occur is when a state or states file

litigation in federal court representing consumers and, upon learning of the filing, the class action bar, as well as other State Attorneys General, file their own actions. A recent example of this is the Disposable Contact Lens Antitrust Litigation.

There, following an investigation that lasted more than two years, the State of Florida filed an antitrust case on behalf of Florida consumers in Federal District Court in Jacksonville. Florida's case was followed by several private class actions, filed on behalf of consumers in other states, and then, eventually, after their own extensive investigations, by 32 State Attorneys General, on behalf of the same consumer classes as those represented by class counsel.

Although, from Florida's perspective as the first filer, there was significant delay in the litigation caused by the private class action certification process, class counsel and the State Attorneys General worked very well together throughout the discovery process and through the five weeks of trial prior to the successful settlement.

A third way overlapping representation between the states and class counsel can occur is when class counsel have already initiated a lawsuit on behalf of consumers whose interests the State Attorneys General

also wish to protect and the states intervene or join in the ongoing litigation. This has occurred most recently in pharmaceutical cases, like Cardizem, where, as a matter of policy, State Attorneys General have entered on-going private class action litigation to ensure the best settlement possible on behalf of their consumers and public health agencies.

A fourth and final way overlapping representation can occur is when the class action bar or defense counsel actually invites the State Attorneys General into an existing class action in an effort to achieve a comprehensive, global settlement. The best example of a situation where both defendants and the private plaintiffs' counsel did the inviting is in the Vitamins case. There, desiring global peace, the defense counsel asked the private plaintiffs' counsel in the indirect purchaser cases to invite the State Attorneys General to the settlement table.

The states then participated equally with the private plaintiffs' counsel in the settlement negotiations even though the states had not yet formally entered the litigation. The result was an enhanced national settlement on behalf of indirect purchasers and a separate settlement fund for state government entities.

Defense counsel can also directly invite the

State Attorneys General to the settlement table, which is what happened in Nine West after a class action was filed in the midst of a confidential multi-state investigation. In that case, both the FTC and the State Attorneys General were separately investigating potential resale price maintenance allegations against Nine West. Neither investigation was public, when a New York Times article spawned the filing of private class actions. Defense counsel acted quickly to avoid the unnecessary expense of protracted litigation. Nine West counsel first negotiated a consent judgment with the FTC that called for non-monetary injunctive relief, but declined to sign the consent until it had negotiated consumer monetary relief with the states.

MS. MORRIS: Excuse me, Emily. If you could wrap up here. You're running over. I'm sorry.

MS. MYERS: Okay, yep. Nine West executed the FTC consent and got approval of the court of its settlement with the Attorneys General.

These are just a few examples of the ways in which State Attorneys General have effectively worked through issues raised by overlap with class actions and have enhanced or shortened the litigation or ensured better, more effective settlements on behalf of consumers. These examples also illustrate how the class

action bar and the State Attorneys General have used their individual strengths in situations of overlapping representation and have worked together to better coordinate and more effectively litigate complex multi-district matters in which they are both involved.

MS. MORRIS: Thank you very much, Emily. We will now hear from the FTC's Bruce Hoffman.

MR. HOFFMAN: It's a pleasure to be here. Let me start, before I forget, by giving my disclaimer, which is that the views I express are mine alone and don't necessarily represent the views of the Commission or any Commissioner, or for that matter, the Bureau of Competition.

Having listened to all these interesting and, in many respects, diametrically opposed presentations, I sort of feel like it's my job to be solemn and engraft the answer that will satisfy everybody in 10 minutes or less. I don't think I can do that, but I will try to satisfy a somewhat lower expectation. I'm going to try to propose a solution to the problem that Michael Greve thought would not be solved in his lifetime, or a partial solution in any event, specifically dealing with the not-so-optimistic view he took of the sharper separation between public and private enforcement in the class action arena.

And to some extent, this could be a bit of a counter to Ken Gallo's views about disgorgement. I'm otherwise not going to address the disgorgement question about which the FTC has said quite a lot. But some of what I say may address the issue of who ought to be seeking relief and of what kind, and more particularly, in what form.

The issue that I want to address is an issue that arises very early in class actions. It's gotten a little bit of attention, I think, over the course of this workshop, but not so much attention in the courts or in the literature about the problems in overlapping enforcement efforts, which is the effective government action on class certification as opposed to on settlements or on the ultimate relief or on, for that matter, attorneys' fees.

Those issues, the type of settlement, who gets what under the settlement and so forth and the attorneys' fees are very important issues, but they've been discussed exhaustively. We have filed quite a few amicus briefs addressing some of those points and I think that it's worthwhile to spend some time thinking about things that happened a lot earlier in the litigation process, the class certification itself.

Certification, as I'm sure most of you all

know, is a critical moment in class actions. It really often is the decisive point in a class action. Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action, particularly some of the very large kinds of class actions and the antitrust role that we've seen in recent years, and to some extent in consumer fraud or in, what I've taken to calling kind of loosely, competition law, which you could view kind of in a negative light, I guess, as antitrust claims dressed up in RICO or state little FTC Acts or things like that, or you could view that as a positive thing and say that those kinds of claims fill gaps that currently exist in antitrust enforcement. Whichever way you do it, it doesn't matter. Those cases are out there and they have to be thought about.

The point that I would suggest -- and I called this in the paper that I think has been handed out -- I failed to get it on the website in time, but it's also available outside -- is a modest proposal for addressing overlapping enforcement in class actions. You can decide for yourselves whether the modest proposal reference is a good or bad thing. But the proposal I've made is that it ought to be part of the certification decision. The

presence of government enforcement, let me put it that way, ought to be part of the certification decision.

Now, I don't prejudge the outcome of that or what effect it might have on whether the class should be certified, but I think it's an important point, which is rarely taken into account of by courts when they're considering whether to certify a class as opposed to whether the settlement is adequate or what the attorneys' fees should be.

Before I talk about exactly how this might play out, let me just spend a moment or so on the legal framework for considering the effect of government enforcement on whether to certify a class, and I'm going to talk about Rule 23. In my experience and in my prior life before coming to the Commission, I did, in the interest of full disclosure, a fair amount of class action work. Mostly -- I think not on the class action side, exclusively on the defense side. So, that's a little bit of where my priors come from here.

But the state class action rules typically mirror the federal rules. There are some exceptions and I'm not going to purport to address those today. But to the extent that the state class action rules mirror the federal rules, this discussion should apply.

I'm going to start with Rule 23(b)(3) which is,

I believe, the most widely used class certification rule. It's the -- sort of the default, money, damages kind of case and it's often referred to in shorthand as the predominance rule where you have to show that common issues predominate over individual issues.

A much less well-known part of that particular rule is that in addition to finding that common issues predominate over individual issues, the court is also supposed to determine that a class action is superior to other methods for adjudicating the controversy, for resolving the controversy. That language varies a little bit in the states.

It seems to me that determining whether the class device is a superior method for adjudicating the controversy almost necessarily calls for an inquiry into whether or not there is government law enforcement activity directed at the same underlying conduct and what the form of that government law enforcement activity is and what relief is being sought in it. If you don't consider those things, how can you tell if the class action device is the superior way to solve the problem?

However, there are very few cases where that's done. Certainly, in reported decisions, there's very few reported decisions that consider the presence of government action in determining whether the class device

is superior.

Now, obviously, there's lot of issues that can arise in this kind of calculus. What's the nature of the harm? What's the cost to the system? What kind of relief is being sought? The one obvious area, which is a likely differentiated point between many forms of government enforcement and private antitrust or other class claims is the damages issues, since, as has been pointed out earlier, certainly at the federal level there is, at best, a very loose and rare overlap between the kinds of monetary damages that private plaintiffs might seek and the kinds of relief that federal agencies might obtain.

On the state side, that can be different. States often seek monetary remedies, as Emily pointed out, and to some extent, those may overlap completely or to a large extent with the private remedies sought in the class action cases.

But in any event, I think it's not necessarily the case that you could say with confidence that simply because there might be a monetary claim in a proposed class case and there wasn't a monetary claim or not the same monetary claim in the federal antitrust consent decree, for example, that that necessarily means the class device is always going to be superior. I think a

lot might have to do with the nature of the monetary claim and the cost of administering it.

Some of the points, I think, that Michael made earlier, you know, there is really a question in some of these cases where there's monetary claims of whether or not at the end of the day individuals who actually suffered monetary harm are going to recover anything, and if so, how much.

The second rule that I want to talk about -- and I'm going to skip 23(b)(1) because it's very complicated and also pretty infrequently used. But 23(b)(2) is sort of the second -- well, it is the second most frequently used class certification rule and it's a rule that I think has risen in prominence in recent years. I refer to it in shorthand as the injunction rule. It's the rule where the class should be certified if the dominant theme of the case, the heart of the case as described in various ways, is a request for injunctive or declaratory relief and monetary damages, to the extent they're sought, are purely incidental and easy to calculate.

I say that this has been increasing in prominence in recent years because I believe that what's happened is the perception -- and maybe this is reality -- has kind of permeated the bar, that it's a

little bit easier to get a class certified under Rule 23(b)(2) than it is under Rule 23(b)(3), in part because (b)(2) does not require you to show that common issues predominate over individual issues.

In addition to that, 23(b)(2) does not permit opt-outs, unlike 23(b)(3). That sort of follows from the idea that what you're primarily seeking is injunctive relief.

Now, it's also the case that there's no superiority requirement in 23(b)(2). But I think it's -- I would certainly argue that given that the primary focus of a (b)(2) case is supposed to be injunctive relief, it's a perfectly legitimate consideration for any court facing a (b)(2) claim to determine whether or not the injunctive relief sought in the case has already been obtained or is likely to be obtained by government law enforcement.

If so, it may not be the case that the class shouldn't be certified, but that if it is to be certified, it should be certified under what I think some commentators would call the more exacting requirements of 23(b)(3) with its more rigorous opt-out protections.

Along that line, I think it's worth noting that in this context, the question of who's the follow-on is pretty unimportant. My view is that the question the

court ought to be answering when deciding whether to certify a class, as opposed to perhaps the level of attorneys' fees and things like that, is not who came first, but what's the best way to solve the problem from the consumer's perspective, and that's an answer that can vary widely by every -- you know, by case, by rule under which it's being sought, but the nature of the relief and a lot of other factors.

I'm just about out of time, so I'm not going to spend a lot -- I'm not going to spend any time really talking about how this analysis might be done. Let me just say that I think it's certainly not the case that this sort of analysis will routinely result in denying class certification. I think there may be many cases where a court will look at the companion litigation, whether it's federal or state or class action and say, there's a legitimate and important role here for private class actions and they are, in fact, the superior means of addressing some part of this controversy.

But it may also be the case that a court would say, no, in this situation, the class action is not superior, the government, at some level or another, has solved the problem or that the government has solved part of the problem and so in order for the class to proceed, it's going to have to proceed under Rule 23(b)(3).

Thanks very much.

MS. MORRIS: Thank you, Bruce. Well, we've heard a number of different perspectives and it's hard to know where to begin. But just to pick up on something that Bruce was talking about and something that has given me much thought the last couple of days is the question of how effective -- how worthwhile is injunctive relief or similar perspective relief obtained in class actions? And related to that is, are those injunctive provisions really enforced, are they monitored when you just have a class action involved?

I'd be happy to hear from anyone who wants to address that question.

MR. RODDY: I'll start. And I'd like to give a particular example which will focus -- hopefully, will focus back on some of the things that were said over the last day about coupon settlements. We became involved in litigation involving the money transfer industry, which is where to transfer money from the United States to a foreign country or from a foreign country to the United States, you pay certain fees, some of which are disclosed, some of which are not. And we entered into a worldwide settlement with the largest company in this field involving about 18 million consumers.

And the problem is, if you consider 18 million

people who did 55 million transactions between the United States and 80 countries over a seven-year period, some of whom were defrauded out of pennies, some of whom were defrauded out of a dollar or two, and then try to imagine distributing cash in 80 different currencies to 18 million people, the system breaks. You simply can't do it.

The settlement that we devised -- and this is a point I'd like to make about coupon settlements -- was that we are distributing coupons to all 18 million people in their local currency that they can use on future money transfer transactions. The value of the coupon is a high multiple of the individual damages that each of them suffered. We spent $22 million to give worldwide notice to these 18 million people. In addition, the defendant company has agreed to rewrite all of its disclosures and disclosure forms in 48 different languages in these 80 countries and distribute the new forms to more than 200,000 retail agents.

The face value of the coupons is about $65 million. What we did was based on the company's records, we calculated an estimated redemption rate of 10 percent, which is what the typical coupon usage is, and because the case was filed in a federal district where this particular judge used the lodestar plus multiplier

method, our fees and expenses that we hoped to be awarded by the court are about $2-and-a-quarter million which is our lodestar times one-and-a-half.

The point I'd like to make is twofold. First, one of the advantages, the reason why coupon settlements sometimes get negotiated, is that there is no way to distribute the cash. You physically can't do it, the computers aren't sophisticated enough.

Secondly, if you combine it with meaningful injunctive relief, and I think, based on the presentation of the settlement I just made, you would agree that getting a defendant to completely change its business practices for a period of 10 years is meaningful. I think that injunctive relief can be very valuable and should be looked at in deciding whether or not a settlement is fair, adequate or reasonable.

The problem I present is, as my colleague, Mr. Constantine, alluded to yesterday, how do you value it? I don't know how to value that injunctive relief which will affect 18 plus million people except to look at how much it's going to cost the defendant out of pocket to impose it.

MS. MORRIS: Any other thoughts on that particular issue?

(No response.)

MS. MORRIS: One of the top sub-topics for this panel is something that we haven't discussed at all, I don't think, and I'm interested in hearing more about, which is how should attorneys' fees be calculated in class action settlements that follow on or even just benefit from government enforcement actions. Anybody have thoughts on that particular question? Kenneth?

MR. GALLO: Well, in my experience, they often -- I mean, in the real world, my experience is that often, the fact that there was a preceding government action doesn't come into play very much. For example, where there has been a -- well, except in an indirect way, where there was, for example, a price-fixing conviction and then the follow-on litigation is brought by private plaintiffs to recover treble damages and the case is settled. In my experience, it hasn't been explicitly stated that because there's a government action, the fees have been reduced, except insofar as federal judges take account of the difficulty and risk of the plaintiff's lawyer taking a case and it doesn't take a genius to figure out that it's a much easier case where there's been a criminal conviction preceding it.

So, it gets rolled into it in that formula and I'm not sure that I know of any better way to consider it other than the question of what is the risk and what is

the difficultly of the case that gets folded into the attorney fee calculation.

I don't mean to be sort of a one-man -- a one-trick pony here, but the issue of attorneys' fees, I think, has influenced the Federal Trade Commission's decision to seek disgorgement in some cases, and I think that the Commission has been influenced by the notion that if it seeks disgorgement and gets, for example, $20 million and then a plaintiff's firm sues and the total class settlement is $25 million, the FTC has taken the position, which I think was largely accepted by Judge Jackson, that the attorney fee for the plaintiff's firm should only be calculated on that additional $5 million.

Let me just make one point and I'll be done. That may be right insofar as it goes. I don't have a big problem with that either. The only observation I would make is I don't think people ought to jump to the conclusion that, therefore, more money went to consumers because the attorney fee was only calculated on the $5 million. These are very complex negotiations with a whole bunch of moving parts and I don't think there's any way to know that had there not been a disgorgement remedy of $20 million, the plaintiff's firm might have gotten $30 or $35, and so even though the plaintiffs got more money -- got more attorneys' fees, consumers, also, might

have gotten more money.

And I think it's superficial to jump to the conclusion that the total amount of money going to consumers is bigger because the attorneys' fees are lower. One does not necessarily follow from the other. It could be you would have a very different dynamic in the negotiation and you could reach a bigger number total for consumers or you could reach a smaller number.

MR. HOFFMAN: Let me just really quickly comment on that. What Ken's referring to is the First Data Bank antitrust litigation amicus brief that the FTC filed, which is, I believe, linked to the website for today, and was follow-on -- or involved follow-on litigation from the First Trust case.

And the brief actually is worth looking at on this point because it provides some fairly detailed analysis about not just the issue on what basis or what part of the dollar the awarded attorney's fees ought to be calculated, but then also on whether and to what extent the lodestar amount or the damage multipliers ought to be adjusted to reflect the amounts of risk assumed by the plaintiff's firm and some other factors like that, and it discusses a few other cases, going back actually quite a few years -- they're relatively infrequent but they exist -- dealing with these kinds of

issues where you have multiple enforcement litigation and the effect it has on attorneys' fees.

MR. GREVE: My wife likes to say that contentiousness is not my preferred mode of discourse, it's my only mode of discourse.

(Laughter.)

MR. GREVE: But to my mind, this question about attorneys' fees and should there be any discount if there's follow-on actions highlights the general problem in the system, which is that there's a lot of follow-on and it doesn't really matter who moves first. Sometimes it's the AGs move first and then the private class action bar comes later, sometimes it's an individual attorney and then the AG decides that, oh, wait a minute, I mean, that's -- if I don't do something, that suggests I wasn't on top of it. Sometimes it's the FTC's and somebody follows them.

There is -- in the entire system, there's only opportunity points, there's only pile-on points, there is never a stopping point. There is nobody with the authority to say, enough is enough, once is enough, and that drives me, quite frankly, to certain distraction.

Kevin's talk was obviously meant to reassure people, and like everything his firm does, very, very competently done. But it still leaves me nervous, and

I'll give you three points.

The first thing is, as Kevin pointed out, this was self-coordinated enforcement. That is to say the FTC and the plaintiffs' bar created an action by acting together that none of them on their own could have done. I get extremely nervous, I have to admit -- look, call me old-fashioned, there are reasons why the FTC, itself, possesses only certain powers, but not others. There are reasons why there are limitations on the discovery process albeit very few. There are reasons why there are privileges. If people gang up and say, hey, all acting in concert, we created the lawsuit from hell and deprive you, the defendant, of the defenses you would have in any single jurisdiction against any single enforcer, that makes me very nervous.

Second, what makes me nervous, Kevin was very good at outlining the claim -- the average claim at the end of the day was, I forget, $199.07 --

MR. RODDY: Cash.

MR. GREVE: Cash, cold hard cash. Now -- and it wasn't an awful lot of claims. I wonder if, gee, that's an awful lot of commotion for, you know, a few hundred thousand bucks. What did it cost to get the FTC to bring this action? More importantly, how much did Hagens Berman and its fellows in Florida clear on this

transaction? Is this really at the end of the day -- as Lee Rosenthal said, is this worth the candle at the end of the day?

And then the third and biggest worry that I have with respect to this presentation -- and this had to happen and I'm glad Kevin said it himself, the model for this is the tobacco litigation, okay? Now, there, the coordination was so fabulous that one of the chief coordinators, Attorney General Morales, is now spending his days in jail. That was a fabulous model and somebody ought to look at the outcome of that litigation, which was the result of coordination.

What, in a nutshell, that action did was to create $450 billion in monopoly profits, which the states and the AGs and the trial lawyers and the tobacco monopolists themselves then proceeded to split among themselves. To prevent that as a gargantuan victory for consumers is, to my mind, misleading.

And having said one word about the AGs, I'll say one additional word, it may seem unfair, but I think you have to bring an awful lot of actions over shoe companies to create something of the value that was destroyed from this monopolization in the tobacco litigation. If you don't want to take my word for it, take Ralph Winter's word for it and Freedom Holdings

which just came down a few months ago. And if you don't want to take Ralph Winter's word for it, take Judge Sotomayor's word for it who concurred or voted with Judge Winter in that case.

It is a little strange, quite frankly, for Attorneys General to parade around the country as enforcers of antitrust laws when they, themselves, created the biggest monopoly and the biggest bank oligopoly that we have in the country.

And the final remark on that is, it is I think strange -- as it happened, I just looked at state enforcement activities in the antitrust area. The results will be in the upcoming University of Chicago Law Review. I'll just give you one brief nutshell. It is -- one of the things you could say is that if the coordination among several enforcers would be a little better such that AGs really act when other enforcers won't act, that would actually makes sense. But the observed pattern is not that.

One of the things State AGs could very usefully do is to curtail state-sponsored cartels. State action. The FTC has enormous problems proceeding against these things and private enforcers don't like it either. So, that the State AG could really spring into action there.

I look over the entire reported universe of

cases and there are precisely two cases in which State AGs proceeded against a state-sponsored cartel in their own state or in a sister state. The bottom line of the enforcement pattern, at least in the antitrust area, which we observe, is that State AGs, for the most part pile on to fill any enforcement gaps, not that one can see.

MR. RODDY: Let me respond briefly on two points, and I do appreciate what Michael has to say.

One of the ironies of the litigation that I didn't get to tell you because of the time limit was after we had negotiated a three-way global settlement and were papering the deal, along on the scene came one of the California County District Attorneys, the county will not be disclosed to protect the guilty, filed an enforcement action and then basically showed up and put its hand out and said, give us a million dollars.

I negotiated with this particular District Attorney and we agreed that as part of the settlement, to make the case go away, we would reimburse the District Attorney's Office for up to $50,000 in out-of-pocket expenses. I sit here today. I still have not seen one scrap of paper from this DA's office justifying expenses and they will not be getting that $50,000.

My point about the claims process -- and with

all due respect to my friends at the FTC, and I do consider them friends -- the system doesn't work. One of the negotiation points that went on was our desire to allow interactive claims where consumers can go online, can fill out their claim form online and submit it. Under the FTC rules and regs, as they were explained to me, a consumer can retrieve a claim form online, but they still have to print it, they have to fill it out in pen and ink, they have to sign it under penalty of perjury and submit it. That's not much of an advance over the 1950s and 1960s or calling an 800 number to get a claim form.

Honestly, I'm not being critical. I'm frustrated by where the system is and, as I said before, you can't give money away. I was very frustrated by the fact that we, despite every noticed effort you can imagine, we could not get consumers to submit claims and collect this money that they were owed. And I don't know what to do about that. That's a flaw in the system that, in our generation or the next generation, needs to be fixed. The Internet is a partial fix. We need to come up with better ways of distributing this money so that consumers can get what they're owed.

And, unfortunately, for any of you class members that are in the room, the claims process has

expired. However, you can access our firm's website and look at the pending cases that have claims and, you know, maybe you may already be a winner.

MS. MORRIS: What about those male prisoners, maybe they could use it?

(Laughter)

MR. RODDY: You know, I still have one male prisoner -- I think we're on the tenth exchange of letters. You see, the problem is, men don't get cellulite, okay? So, I've finally --

UNIDENTIFIED FEMALE: That is a problem.

(Laughter)

MR. RODDY: Exactly. So, I finally wrote a -- remember how we all learned as young associates to write lawyer letters? I finally wrote him a polite letter and said, you know, you better send us a photograph of your backside because I just don't think you've got cellulite. I'm still waiting to hear that response.

(Laughter)

MS. MORRIS: Okay. Does anyone want to make any final comments?

MS. MYERS: Can I just address two quick points on what Michael said? I'm not going to address tobacco because that's a long question and, frankly, I wasn't involved in it. But I would say that I don't -- I think

it's unfair to characterize the Attorneys General as piling on when what they are actually getting is different relief than the federal agencies.

And secondly, you know, it's easy to characterize the Attorneys General as saying, well, I should have gotten -- you know, I need to get involved in that. But the fact is they have a public responsibility to review things that are happening to their citizens in their state and they take that responsibility seriously and -- the pharmaceutical cases are an example, I'm sorry to say, Linda. But, I mean, the fact is pharmaceuticals are important and you could certainly make the claim that, you know, maybe shoes are not as important. But the fact is pharmaceuticals are important, and I think that Attorneys General are going to continue to be involved in that for that reason.

MS. MORRIS: Michael?

MR. GREVE: Sorry, just very -- I swear to God this will be brief. Look, on certain occasions, in certain circumstances, I totally agree. The different forms of relief actually make sense to me. So, for example, state-demanded divestiture remedies make a great deal of sense to me, at least in the abstract, putting aside any individual case because what you're saying there is that deals that have global benefits may still

go forward, you just have divestiture in individual states. So, those kinds of things make a certain amount of sense to me.

But, at the same time, I mean, that same power also entails the power to sustain the kinds of antitrust remedies that as a federal policy we don't want anymore and have decided are, by and large, inefficient. I mean, I -- frankly, I don't know whether any of the Section 2 remedies are on balance, worth the candle, because they're bound to make so many -- I mean, the enforcers are bound to make so many errors and you'll have to take bitter here with the sweet and the danger here is -- and the judgment you have to make, are the benefits greater than the risks, all things considered.

MS. MORRIS: Okay, that was a terrific panel. Thank you, everyone.

(Applause)

MS. MORRIS: I will now turn it over to Maureen.

MS. OHLHAUSEN: Thank you, Lucy. On behalf of the FTC and the Georgetown Journal of Legal Ethics, I'd like to thank you all for attending and our panelists all for participating in this very interesting and lively debate on the issues raised by consumer class action litigation. I'd like to remind you all that the

panelists' materials and the related FTC materials are on our website and will continue to be on our website and that we will be posting a transcript of this proceeding on the FTC website, which is ftc.gov.

Before you leave, I'd like to stress again, please take a moment to fill out these workshop evaluation forms. They are extremely critical for us in creating these workshops and making them better in the future.

And then before you go, don't leave yet because now I'd like to welcome Commissioner Thomas Leary who will offer some closing remarks for this workshop.

Commissioner Leary?

(Applause)

COMMISSIONER LEARY: Well, you know my principal job here today is to thank you for participating all in various ways and to bid you farewell. But, you know, you give a lawyer a microphone and he's going to bloviate a little bit. So, I'm going to take the opportunity to bloviate a little bit.

You know, one of the things, when we look at any aspect of our system, we may think to ourselves, well, what would a visitor from Mars think if they could come and see the way we deal with these problems? And I've never had the opportunity to consult with a visitor

from Mars, but I came very close about two months ago because I was in China with a delegation, Hew Pate and I and a bunch of other people, talking to some officials in the Chinese government -- these are Chinese Communists who want to promote free market institutions in China and want to learn about competition law and competition -- and consumer protection law from visitors from the United States.

So, Hew and I and a bunch of other people were over there to talk to them about this. We're sitting across the table, speaking through interpreters, of course, and it fell upon Hew at one point to describe the multi-faceted enforcement system that we have in the United States, where we have the Federal Trade Commission and we have the Department of Justice and we have the 50 sovereign states and on top of that we have private consumers and consumer class actions. And, you know, every five minutes or so, why, Hew stopped and then the interpreter goes. And I can see these people on the other side of the table looking more and more confused and perplexed. These are the men from Mars.

And so, Hew was feeling a little bit apologetic and diffident about this and he said, I will concede to you that our system is a bit messy, and then speaking through an interpreter, it was either a very tactful

Communist party official or a very tactful interpreter and he said, I -- it's not for me to say that your system is messy, but I do observe it's somewhat complex.

(Laughter)

COMMISSIONER LEARY: So, we are here dealing with a complex system which we have inherited, and we, in the Federal Trade Commission, are part of that system. And we have, ourselves, limited powers; we have, ourselves, limited ability to monitor the world. I've said before we're a very small agency with a very big mission because we cover virtually the entire economy. We have certain areas we don't deal with, but virtually the entire economy, and we do it with very small resources. And we are dependent on other government entities and on the private sector to supplement our remedies. So, we have a very keen interest in what the other entities are doing.

Class actions are just part of the other remedies, private remedies and other government remedies. I'm probably the only person in the room who was actively litigating at the time the Class Action Rule was amended in 1966 -- that's almost 40 years ago -- to sanction opt-in classes -- opt-out classes, I'm sorry. And there were two tremendous advantages, theoretical advantages for opt-in classes. Number one was the ability to avoid the

problem of having people who have suffered injuries but don't know it or don't know what to do about it and how do you compensate those people. And the opt-in mechanism doesn't work very well.

And the second major advantage -- and this was an advantage that was touted by members of the defense bar is that you can get all of your legal problems resolved at once and you can get res judicata against absent class members, against people who have never even heard of the litigation. They can be bound by the outcome and that will prevent people from gaming the system and bringing sequential actions and, finally, joining in when it looks like one is a winner.

So, everybody thought this was great and there were a number of unintended consequences that people, I have to tell you, 40 years ago did not realize. One of them is this fundamental problem of the difficultly of communicating with and getting people to respond, people who have claims, was not eliminated by opt-out classes, it was simply postponed because we've seen this as a result -- you know, the discussion of the one case that we had here today where you had, I guess, a response of maybe 1 percent.

At some point, if people are going to get money, they're going to have to raise their hands and

say, I'm here and I've got a claim and here is my claim. So, you postpone it, you don't solve it.

The fact that that -- raising the hand is postponed means that before that time, you don't really have clients in control of the action. And I'm not one of these people who believes that lawyers are unethical or corrupt or bad people. But you have lawyer-driven actions, and even those of us who are good people -- I think we're all good people in this room, I certainly think of myself as a good person, but I can tell you I have an uncanny ability to conflate my personal interest with the public interest. I can't tell you how less concerned I am about high marginal tax rates now that I am working for the Federal Trade Commission.

(Laughter)

COMMISSIONER LEARY: I see it in my own self and that's just -- that's just the way of the world. That's the way people are. It's a matter of incentives. It's not a matter of ethics or morality.

Defendant's counsel have the same problems, obviously. Their objective is not to serve the public interest, it's their company's long term to serve the public interest, I'm sure, or they wouldn't be successful. But in a particular piece of litigation, their job, obviously, is to get out of this as cheaply as

they can.

Now, theoretically, you have judges who are supposed to be controlling these things, but that dynamic doesn't work quite as well as we would like it to either because as I guess it was Bruce said a little bit earlier, the big battle is over certification. That's the big battle. In the real world, that's the real -- that's outcome determinative because if the class is not certified, the action really goes away at minimal cost.

If the class is certified, there are immense pressures on defendants to settle. The cases do settle. And the judges, who are fully aware of the manageability problem and the difficulties of communicating with vast numbers of people, have a very powerful incentive to settle cases themselves. And that doesn't mean they're immoral or bad people either, but they have an incentive to get rid of these cases.

And once everybody agrees that the best thing to do is to get rid of the cases, then you really don't have an adversarial process anymore. You have a whole bunch of people with a common interest in settling the cases in ways that will make their lives easier. And, again, I'm not being -- I'm not being pejorative at all. That's just the incentives that people have.

And so, you get this settlement dynamic and you

get cases that are settled and some of the settlements are not all that good.

Now, where does the Federal Trade Commission come in? What's our role in this? We're not decision makers in the process of changing federal rules or anything else like that. We don't have the power to change the federal rules. We don't have the power to change that dynamic. What can we do about it?

Well, the principal thing that we can do about it is use our bully pulpit and we can, every once in a while, when we see a really bad settlement -- and I'm not saying that all coupon settlements are bad, by the way, and I'm not saying that that settlement that was described, that settlement having to do with the cellulite -- and by the way, I never thought cellulite as all that bad anyway. I don't know what the fuss is about.

(Laughter)

COMMISSIONER LEARY: I thought it was part of being an attractive woman, but that's another matter. Maybe that's generational.

Anyway, look, I'm not saying that's a bad settlement at all. I'm not saying that's a bad settlement at all because you did have people selling $40 million worth of a totally worthless product and I think

that the bottom line settlement where you have that settlement may have tremendous deterrent effect, may have tremendous deterrent effect. I'm not criticizing the settlement. As a matter of fact, I think I voted for it.

(Laughter)

COMMISSIONER LEARY: I'm not sure, I don't remember. Did I vote for that one?

UNIDENTIFIED FEMALE: Yes, you did.

COMMISSIONER LEARY: I did. Okay. So, obviously, that was a good settlement.

(Laughter)

COMMISSIONER LEARY: Anyway, I'm not saying it's a bad settlement. All I'm saying is that the consumer redress part of it, the class action part of it, you know, the notice and so on, you wonder whether that was all worth the candle. What did that add to the mix?

Well, okay, but we do have some settlements out there that are really bad -- that appear to be really bad. And so, we file amicus briefs, we make statements and so on.

In addition -- in addition, it seems to me we have a longer term objective -- a longer term objective and that is somehow or other to gather a bunch of knowledgeable people together and talk about some of the more fundamental problems, and that's what the last day-

and-a-half here has been all about.

We try to some -- by airing these problems -- and as you know, we have these hearings and workshops and little seminars on a variety of issues and it's a long term project. We don't expect immediate results from these things. So, don't be dismayed, those of you either inside or outside this agency. You might sit there and you say to yourself, okay, what's the big -- what's the big answer, what's the solution to this? I don't think we're in a position to have one. There may never be one.

I don't think -- one of the papers that expressed -- I can't even remember whose it was. I read the papers that were available before I came down here and there was one paper by one of the commentators who said, you know, we really don't know what's going on. We have various examples and everybody's got their horrible examples or their favorite good examples, but we really don't have any systematic data on what's happening throughout the federal system much less what's happening in the state system. We really do not know.

So, we do not know the magnitude of the problem, if there indeed is a serious one, and we most certainly do not know what the costs may be of making some fundamental changes.

So, I hope you leave here and that you're not disappointed because we don't have final answers today and we may never have final answers for these things. We may simply be able to nibble away at these various problems with incremental suggestions which maybe hopefully some judge or some legislator will listen to and will get something done.

My life experience, quite frankly, is that most issues and most questions do not lend themselves to simplistic answers. We got here, where we are now, right now in a way that kind of shocks those men from Mars. We got here through a long process of accretion, of remedy, knowledge and wrongs that go un-redressed that people wanted to do something about, and we got here gradually and I think we will move on and extricate ourselves from some of these things gradually.

So, have modest expectations. I hope you walk out of here feeling that you know a little bit more about the good side and the bad side of class actions here. And now, finally, after that, I wish you well. Good-bye.

(Applause)

(Whereupon, the workshop was concluded at 12:13 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 14, 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 30, 2004

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KAREN GUY

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.

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DIANE QUADE