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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 13, 2004

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The above-entitled workshop was held on Monday,

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P R O C E E D I N G S

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

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

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For security reasons we also ask that you wear your name tags at all times and if you notice anything

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~~suspicious please call the FBI at (508) 552-1000 or the local police department~~

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

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

7 Process issues. There are going to be ten
8 minutes at the end of each panel for questions and you'll
9 find question cards in your packets and if you need more

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

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

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

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

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

7 The Honorable Diane Wood, Circuit Court of
8 Appeals judge for the Seventh Circuit; the Honorable Brock
Hornby, U.S. District Court judge for the District of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Second, we would like to solicit feedback on the
2 amicus component of our project. To date, the FTC
 settlement obra8s8 the

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

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

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

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

22 And now I will turn this over to John Delacourt
23 to begin our first panel. Thank you again for being here.
24 (Applause.)

MR. DELACOURT: Thank you, Chairman Majoras. I

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

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

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

 Though the use of many of these coupons was

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

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

10 In order to resolve the variety of antitrust
11 charges, the defendant music distributors in that case
12 agreed to a hybrid settlement that included both a cash and
13 a noncash component. Defendants agreed to pay \$67 million
14 in cash directly to consumers. They also pledged to
15 distribute 5.6 million CDs to governmental and nonprofit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Third, the class member could use her coupon for
18 a purchase that she was planning to make anyway. This
19 noninduced purchase outcome shows that settlement coupons
20 are not inherently worthless. The class member who uses
the coupon for a planned purchase receives, in essence, a

1 level of both compensation and disgorgement.

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

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

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

24 All of these transfer restrictions reduce the

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

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

7 This is particularly a problem with durable goods

1 member who actually used the coupon would be foregoing a
2 \$400 net discount available to everybody who was not a
3 member of the class.

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

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

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

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

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

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

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

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

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

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

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

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

6 Many judges appear unreceptive to class member
7 objections as well. Furthermore, given the low stakes for
each individual class member it is perfectly rational ow stakes for

1 a judge to reject a coupon settlement.

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

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

12 In this forum I would like to consider two new
13 potential solutions. First, collecting greater data so

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

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

20 Yet, over the last 25 years we have become case
21 managers and we've learned to manage litigation and settle

15

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

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

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

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

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

11 It may not actually tell us where to come out on
a question but it gives some comfort that we're engaging in

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

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

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

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

1 action.

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

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

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

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

24 The FTC role would be somewhat like the role of

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

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

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

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

24 MR. DELACOURT: Thank you, Judge Hornby. Our

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 There is going to be some discussion, I'm sure,
7 today about what can be done. A couple of solutions that
8 have come up in the materials or in our past reading have
9 been creating a secondary market for the coupons, which we

1 the suit said that this could cause engine wear.

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

7 Another way to resolve these problems is to have
8 defendants fight, not settle, frivolous lawsuits. There
9 was a case in Illinois involving a Jeep Cherokee where

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

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

10 UNIDENTIFIED SPEAKER: Yay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Criticisms are lodged and the system works.

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

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

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

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

1 changing because the courts and the objectors are requiring
2 this.

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

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

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

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

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

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

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

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

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

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

11 So why are we surprised now that individual class

1 true.

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

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

16 And one of the other problems with this is a
17 fundamental premise -- well, look, class actions are
18 neutral in the sense of what they do. The problem is with
19 the case itself. If it's a meritorious case and a
meritorious case where the individual harm is so smts50 TD(19)Tjekt
meritorious individual clims.

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

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

12 What noncash permits the parties to do, and if we
13 view settling these cases as having a societal value, what
14 noncash does is often allow them to bridge those
15 differences so that the plaintiffs feel that they are
50a2. getting more value for the class. The defendants, frankly, they are

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

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

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

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

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

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

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

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

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

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

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

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

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

17 I'd like to discuss briefly two cases to
18 illustrate this phenomenon. One is the CD case you've
19 already talked about and another one is one that we're in
litigation right now. Actu5085nF the6you'veWte t7 TDmsrb It.

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

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

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

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

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

8 However, if that product was reduced to an actual
9 cash value, let's say the \$175 million worth of cosmetics
10 is really only worth \$25 million in cold cash to the
11 company, let's discount the cosmetics some 80 percent,
12 well, the attorneys are asking for about \$25 million.
13 Obviously, their fee would look too high if they took cash
14 in that case, even though the consumer might want that \$25
15 million. If you have two million filed claims they'll get
16 \$12 checks. That may be preferable.

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

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

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

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

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

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

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

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

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

21 I'd like to start off with a first question that
22 ties back to Chairman Majoras' introductory remarks. She
23 mentioned that one of the big purposes of this workshop, we

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

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

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

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

~~PROF. B. HENNING~~
Tj should we be looking 8 to start off?

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

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

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

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

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

1 properly analyze what the problem is.

2 With all due respect to those who want to look at
3 redemption rates, transferability, counsel taking it, they

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

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

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

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

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

1 the coupons were used.

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

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

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

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

17 On Saturday I got in the mail, some of you may
18 have a notice, in a case dealing with life insurance and
19 typically it's in this microprint of 40 pages and so forth
20 right here. The point size is about 7-point or 8-point.

But the point I'm trying to make is ij-4.A79trying to make is ija TT

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

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

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

16 MR. DELACOURT: Judge Hornby.

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

1 settlement.

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

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

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

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

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

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

7 A principled approach, frankly, would have cost
8 more than a settlement. A principled approach would have

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUDGE HORNBY: It is important to distinguish
14 between distaste for attorneys' fees and distaste for the

1 important not to collapse these in our discussion.

2 MR. DELACOURT: Paul?

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

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

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

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

1 relief that was minor.

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

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

1 defendant's lawyers.

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

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

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

20 So all of a judge's instincts are to the

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. DELACOURT: Phil?

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

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

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

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

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

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

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

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

1 that aren't worth much but to get there you have incredibly
2 huge transaction costs, large defense costs, large
3 imposition on the court's time. You're slowing claims of

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

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

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

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

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

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

6 **(Whereupon, a short recess was**
7 **taken.)**

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

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

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

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

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

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

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

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

The first is that when you settle a class action, I will sa

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

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

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

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

1 dollar amounts are involved.

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

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

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

24 Now, the amici and the objectors can play that

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

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

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

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

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

1 the case goes back to litigation.

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

10 In terms of objectors, however, well, we not only
11 can delay the resolution but because we can act in some

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

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

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

10 And yes, we have already in that case, for
11 example, cost the defendants an increase in payout from
12 \$108,000 to \$12.5 million minimum. So if we are successful
13 we end up costing them money not so much for our fees
14 because we rarely seek fees but much more for paying the
15 class.

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

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

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

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

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

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

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

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

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

10 And the settlement provided that each class
11 member get, let's say, \$500 or \$1,000 per person and that
12 it was no opt-out as to punitive damages. You could not
13 opt out and seek punitive damages separately. You got
14 \$1,000; that was the end of it.

15 And so we went down to object and we appear
16 before Judge Pickering. We have three clients, class
17 members who had mobile homes and were treated like this.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 I think having third-party objectors come in does
18 impose considerable costs on the litigants and as a
19 consequence class members see their recovery pushed down

1 costs on the process.

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

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

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

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

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

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

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

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

21 When a client wants me to negotiate and obtain

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

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

7 Into that arena comes the objector. And I agree

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

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

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

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

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

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

MR. GORSUCH: Sure Tca,l 0.001 d hsiot1

1 claims.

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

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

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

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

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

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

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

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

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

3 Nonetheless, the statistics are telling. In the
4 Devlin v. Scadelletti case where we represented the Council
5 of Institutional Investors we looked at 30 years worth of
6 history of nonparty objector appeals and we found that
7 fully 32 percent of the cases in which nonparty objectors
8 had participated were reversed. This compares with about a
9 12 percent reversal rate of average civil litigation. So
10 the participation of objectors proves itself by the
11 statistics.

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

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

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

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

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

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

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

1 seek a payment to go away.

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

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

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

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

1 settlement is structured.

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

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

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

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

24 That is a very complicated question. That's a

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

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

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

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

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

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

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

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

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

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

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

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

1 published opinions that we have.

2 In terms of objectors, I see it as quite
3 differently, as a somewhat different problem anyway. Let
4 me preface this remark by sharing with you an experience I

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

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

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

20 I know it's a costly matter but the fact is
21 people have the right to point out different things to the
22 courts and we don't want to approve settlements if, in

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

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

9 But before going into that I thought we could
10 spend just a few minutes on some recent amendments to Rule
11 23 starting with the older amendment providing for the
12 appeal of orders granting or denying class certification.
13 And Brian, would you mind starting off on that with a
14 little introduction?

15 MR. ANDERSON: Sure. Rule 23F had its fifth
16 birthday last December. Before December of 1998 there were
17 18 published decisions by Federal Courts of Appeal on an
18 interlocutory basis reviewing orders that either granted or
19 denied class certification over a ten-year period. So that
20 was about two decisions per year.

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

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

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

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

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

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

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

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

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

19 Defendants who are challenging class
20 certification orders have filed roughly twice as many
21 requests for interlocutory review as have plaintiffs who

1 they grant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 So we're not going to be as taken with the
7 question whether there is some underlying merits issue.
8 Maybe you think that the plaintiffs' theory is frivolous
9 anyway or maybe you think something about the merits. The

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

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

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

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

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

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

1 the parties in terms of how they craft their settlement.

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

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

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

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

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

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

6 But the second reason is more of a practical one
7 which is that, as Neil just said, the overwhelming number

1 rates in the court, from as best we can tell on

1 bearing.

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

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

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

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

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

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

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

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

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

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

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

1 told me to raise it so I will.

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

4 MR. BRYANT: Sure. Be happy to.

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

9 What happens when there's a case that may not be
very strong but the parties want to settle it? What are

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

5 Unfortunately, we don't live in a perfect world.
6 Companies that are faced with these kind of class action
7 lawsuits have to recognize that even if they think they're
8 frivolous the plaintiffs' bar has the ability to impose
9 great cost and great disruption on the company's processes

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

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

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

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

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

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

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

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

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

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

14 To take just an example, since the passage of the
15 PSLRA in the securities context in 1995 over 2000

1 make settlements fairer.

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

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

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

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

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

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

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

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

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

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

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

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

10 (Whereupon, a lunch recess was
11 taken.)

12

13

14

15

AFTERNOON SESSION

16

(1:48 p.m.)

17

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

24

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

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

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

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

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

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

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

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

24 So there was within the Advisory Committee on

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

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

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

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

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

of your hits or anything like that when you go to the site-3.00 0 Th

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1 able to come up with these notices.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 don't think the judge will require us to do more than X.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 We put a claim form right in the notice,
12 published it, mailed it and all the nine yards. We got
13 680,000 claims in this case and there's -- just to see if I
14 can go backwards here -- compare that to this which is a
15 similar type of case when what's different? I mean,
16 there's nothing to stand out. It arguably has a claim
17 form. It has a headline that I have trouble reading here
18 but it's somewhat similar and this makes all the
19 difference.

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

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

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

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

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

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

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

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

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

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

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

1 questions I want to show that Masonite spot.

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

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

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

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

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

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

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

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

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

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

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

24 MR. FINE: So in part a business client would

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

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

16 In other cases, certainly the Microsoft cases are
 17 good examples, all securities cases where you have to
 18 analyze substantial trading data, I know that we may see
 19 Todd's Masonite ad although we were not involved in

lsj-4.a Masonite cases, 7 files related to the Masonite case

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

9 MR. FINE: Okay. I think that's a good segue now

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

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

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

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

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

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

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

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

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

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

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

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

8 There are a couple of other points though. Many
9 cases are claims-made cases. Claims-made cases' redemption
10 rates are very, very low. That's all there is to it.
11 Little more needs to be said. So if you can avoid a
12 claims-made, and I probably should be careful because I'm
going to be giving some denttms-(and kenttms-(and kenv(1spTI/)Tj13-e

and dramaes y injo if we . oki I -3.9/

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

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

9 Secondly, with transferability -- transferability
10 alone is illusory and a lot of people try to make
11 transferability, they try to lean on transferability.
Well, transferability does not always mean freely

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

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

The other thing we look at is marke p.8(memb0winc.)o infae

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

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

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

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

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

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

6 Yesterday I received a check for more than
7 \$3,000. What a wonderful surprise. I plan to share the
8 money with my grown kids but they have to promise to be
9 part of AARP in 20 years or so when they qualify. Thank
10 you again and keep up the good work.

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

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

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1 claim, opt out, object, whatever they feel is important for
2 them.

3 But it's important to keep in mind that again
4 every group has a publication schedule and sometimes it's
5 months in advance of when it actually is going to hit
6 people's mailboxes.

7 MR. FINE: Todd, do you have something you want
8 to interject?

9 MR. HILSEE: Yeah. I wanted to say that that's a
10 very common component of class action notice programs, the
11 formal notice programs approved by courts is finding those
12 demographic groups. And we work with the AARP in that
13 regard in putting notices into their publications and
14 putting it into the notice plans asking courts to approve
15 that as part of a notice program but also press releases,
16 press efforts, prepared news articles, outreach to lots of
17 third party groups.

18 Or a lot of times you may not see it in the types
19 of notice programs that you might perceive to be the normal
20 course of notice programs but these are part of good notice
21 programs all the time. And I think that's a really
22 important aspect of good notice is the type of outreach to
23 groups like the AARP and, for example, our Synthroid notice
24 program reaching a somewhat older demographic took

1 advantage of that.

2 MR. FINE: Great. Well, we have three excellent
3 questions. Unfortunately, we'll only be able to get to
4 one. I encourage the drafters of the other two to speak
5 with our panelists at some point during a break but I do
6 want to ask this one question.

7 The question is: Please comment on the role of
8 minimum payments in creating adequate incentive for
9 consumers to bother making a claim. Is anyone aware of any
10 research done showing what constitutes adequate payment to
11 be a tipping point for claims rates? Howard?

12 MR. YELLIN: Well, not research but we've today
13 referred repeatedly to the CD cases and their payment was
14 \$13, \$13.86 or whatever it was and was received well. So I
15 think that at least as far as cash payment goes on broad-
16 based consumer class actions the threshold is surprisingly
low. You wouldn't

HILSE FINISHED PARTICIPATING ON PLEA CD TODAY

1 live with daily?

2 I mean, in a case like Microsoft one of the
3 things that enters into your mind is this an issue that
4 people are concerned about the price they paid for their
5 software? And I'm not certain that they are.

6 But look, I mean, the response rates come and I
7 want to just take the opportunity to touch on the fact that
8 in the context of court notice programs, the attorneys, and
9 I think there are many situations where attorneys are doing
10 the right thing and trying to do outreach on their own to
11 get claims rates up. And that's something that doesn't
12 come out quite often. I wanted to play a spot that --

13 MR. FINE: Sure. Deborah's going to say one
14 final note and then we're going to play your spot.
15 Deborah.

16 MS. ZUCKERMAN: Just quickly, one point I would
17 like to make and this was something that I think was
18 brought out in the objections that I included in our
19 materials is while I agree that to some degree
20 participation rates have to do with how important this is
21 to you, I think a really big issue that hasn't been
22 addressed enough, although briefly, is what, if any, claims
23 process there is.

24 And when I got an e-mail from a friend of mine

1 exactly how much they spent. There is really no good
2 reason to have a claims process other than, frankly, to
3 reduce the claims rate.

4 MR. FINE: Well, why don't we finish this off.
5 Todd, why don't you show us your final video?

6 MR. HILSEE: Well, just to end on a positive
7 note, I think to say, to show one thing let me show you
8 first one thing that defendants do in terms of are we
9 really willing to try to reach people, defendants in this -
10 - I'm not sure if you can see this -- in the Blockbuster
11 case the defendants wanted to put the notice and agreed
12 with us we could put the notice right on the store receipt
13 and they gave automatic credits of certificates.

14 Of course, it was on appeal for so long that
15 we're just getting started. But we gave out 25 million
16 notices this way. And I think that shows a willingness to
17 really try to desire to reach people. From a plaintiffs'
18 attorneys' side after final approval, \$580 million has been
19 paid so far in this Masonite siding case and after final
20 approval, plaintiffs' attorneys are still willing to put,
21 invest money in reaching more class members because they
22 think that there's more people out there. So you can do
23 this kind of thing within the context of formal notice.
24 (Whereupon a videotape was played.)

1 what the data actually shows.

2 Are class action attorney fees rising
3 exponentially as the press would have us believe or is it
4 myth? So we will first turn to them and following their
5 presentation have an open discussion among all our panel
6 members about their findings.

7 Thereafter, all the panel members are going to
8 engage in examining a number of particularly challenging
9 problems in the area of attorneys fees. First, we're going
10 to turn to exploring some innovative approaches to
11 appointing, managing and compensating class counsel and
12 certain means by which to ensure that counsel are
13 adequately and reasonably compensated for their work and
14 that the results they obtain are reflected appropriately in
15 their fees and that those fees reflect a market rate of
16 some sort.

17 Next we're going to discuss some of the special
18 challenges posed in determining reasonable attorneys' fees
19 in the context of non-pecuniary settlements or settlements
20 where total payment to the class depends on the number of
21 class members who file a claim.

22 After that we're going to hear our panelists'
23 views as to whether they believe the amendments to Rule 23
24 are going to make any substantial difference.

1 And finally, we're going to touch just briefly,
2 because we've spent a lot of time on it in other panels, on
3 the value and function of objectors, that is fee objectors
4 in this case, how that process might be better managed to
5 inform a court with an adversarial voice as to the
6 appropriateness of fees.

7 And then finally, best of all, we're going to
8 leave some time to actually answer your questions. So
9 please if you see somebody walking up and down the aisles
10 holding up a card, jot down your questions so we're sure
11 that we're able to ask it.

12 So without further ado, I think I'm going to do a
13 little bit of introducing even though I hope you'll turn to
14 your packets because there's extensive information on the
15 bios of each of our esteemed panelists.

16 Professor Geoffrey Miller, who's going to be
17 presenting his work that he co-authored with a future
18 panelist who will be appearing tomorrow, Ted Eisenberg, is
19 the Stuyvesant and William T. Comfort Professor of Law at
20 NYU.

21 Prior to joining NYU Geoff was the Kirkland and
22 Ellis professor at the University of Chicago Law School
23 where he also was associate dean, editor of the Journal of
24 Legal Studies, the director of the university's Law and

1 Just immediately to his left is Mike Denger.
2 Mike is the antitrust partner at Gibson, Dunn & Crutcher
3 where he co-chairs the firm's antitrust and trade
4 regulation practice.

5 Mike has been litigating and handling all manner
6 of antitrust and trade regulation matters for over 30
7 years. He currently serves on the ABA's Antitrust
8 Section's antitrust remedies task force and has previously
9 served on section task forces which have presented reports
10 and recommendations to both the Clinton and Bush
11 administrations.

12 Howard Langer, immediately to his left, is a
13 partner with the firm of Langer & Grogan in Philadelphia.
14 Howard has litigated large complex commercial and class
15 action cases on behalf of plaintiffs for over 25 years.

16 He is an adjunct professor at the University of
17 Pennsylvania Law School. He teaches antitrust. He most
18 recently won an approximately \$203 million, I believe it
19 was, recovery on behalf of the plaintiff class in the liner
20 board antitrust litigation. He obtained a \$60 million fee
21 for plaintiffs' counsel and high praise from the court for
22 his management of that case.

23 And last but not least at the very far end, I can
24 barely see him myself, is Lloyd Constantine. He's the

1 managing partner of Constantine and Partners. Lloyd was
2 lead counsel in the VISA check MasterMoney antitrust
3 litigation which resulted in a \$3.4 billion settlement and
4 historic injunctive relief that benefitted U.S. businesses.

5 Lloyd has been involved in numerous class action
and multistate antitrust litigations over his entire

1 interest between class counsel and the class fees must be
2 set by the court. But how is the court to go about this
3 task of setting fees?

4 So the ultimate objective a court looks to in
5 deciding on an attorney's fee is whether the fee is
6 reasonable. That sounds like that's pretty easy but how do
7 you know what a reasonable fee is? You need some more
8 information than that because reasonableness, in itself, is
9 a pretty amorphous concept.

10 So the courts have come up with, as many people
11 know, several methodologies for calculating a reasonable
12 fee. One is the percentage approach which emulates the
13 standard contingency fee in a personal injury case, just a
14 percent of the class recovery. Lodestar approach, which
15 emulates the hourly fee, that is reasonable hours put in on
16 the case times a reasonable hourly rate.

17 More jurisdictions actually use a mixed approach
18 which either permit the trial court to use in his or her
19 discretion, the percentage approach or the lodestar
20 approach, or require that the trial judge compare one to
21 the other, let's say, award a percentage fee but check it
22 against the lodestar.

23 And then some jurisdictions just use an
24 unvarnished form of judicial discretion. The judge just

1 looks at the case and decides what a reasonable fee would
2 be.

1 the brief time we have.

2 This slide is from a study by the National
3 Economic Research Associates, an economic think tank, and
4 it's a study of fee awards in settled securities class
5 actions from 1991 to 1996, 434 settlements. And it divides
6 these according to size as you can see.

7 What is interesting about this is the far right-
8 hand column where you'll see that -- or the next to far
9 right-hand column if you want the average -- where the fee
10 awards are extremely tightly bunched between about 30 and
11 32 percent. They really have a very strong result here
12 that fee awards in settled securities class actions are
13 quite tightly bunched together.

14 This includes fees and expenses as a percent of
15 the settlement. I'll skip that because of time. Next,
16 what can you tell about fee awards across jurisdictions?
17 Well, this same National Economic Research Associates study
18 looked at fee awards in all of the federal circuits, that
19 is district courts in all of the federal circuits, and
20 divided up the awards across circuits.

21 And again, you can see from the far right-hand
22 column that there's a really extraordinarily tight bunching
23 of the awards, that is, they run from about again 30 to
24 about 32, 33 percent across the jurisdictions. So it's

1 kind of a remarkable result that in each of these different
2 circuits the fee awards are just about the same when
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1 outcomes of cases in the four federal courts.

2 And again, you can see that even in this area
3 where the cases are not solely securities cases but they're
4 cases of a variety of different types, you get a tight
5 bunching. Although the percentages in this study are a
6 little bit lower than in the securities study they range
7 between about 26 and 31 percent. But still, quite close to
8 that 30 percent category.

9 Now, so far the information that I've presented
10 has been based on fairly narrow data sets, either
11 securities cases only or a relatively small number of cases
12 in these federal courts.

13 As you can see on this slide the numbers are
14 quite small: about 45 cases, something like that. So this
15 isn't going to give you a statistically valid picture but
16 there have been two more recent studies that looked at
17 quite broad databases so these studies are going to give a
18 much more comprehensive picture of how fees are actually
19 awarded in class action cases.

20 One is the class action reports data. This is a
21 study of something around 1120 cases, I think exactly 1120
22 cases that have been reported in that journal. Not a
23 systematic or comprehensive selection of cases, these are
24 cases that were selected for being reported in the journal.

1 But you can see here that we again get fees and
2 costs as a percent of the recovery. And here we do get
3 that bunching between 30 and 32 that we observed in the
4 prior slides until you get to a certain size, that is about
5 \$10 million of class recovery.

6 And once you reach \$10 million the percentage
7 fees begin to fall off. So it looks like there's something
8 of a scale effect playing a role here that didn't show up
9 in the other studies. It looks like as the size of the
10 recovery goes up the percentage fees that are awarded, at
11 least over certain threshold, begins to go down.

12 Now, another study was done by myself and
13 Professor Theodore Eisenberg of Cornell University. This
14 study is a comprehensive review of all of the reported
15 decisions in any public reporting media over a ten year
16 period, 1993 to 2002. So any decision that was reported in
17 any of the official or unofficial reporters where we could
18 determine the size of the fee and the size of the class
19 recovery went into this database.

20 There are two lines here. The dotted line is for
21 common fund cases and you can see it reaches a peak, again,
22 at that area of 30 to 32 percent, around there. So that's
23 the probability distribution of the fee awards in common
24 fund cases.

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1 tended to observe a scale effect, that is, the fees seemed
2 to go down as a percentage of the recovery as the amount of
3 recovery goes up.

4 This is all of the different large-scale
5 databases with the results plotted and regression lines
6 drawn through them. Now, this is really a remarkable
7 outcome, I think, a remarkable finding. And what's
8 remarkable about this finding is that these cases are
9 bunched just extraordinarily tightly around a straight
10 line.

11 There's very little deviation here which suggests
12 that what's really going on, no matter how the courts claim
13 to be assessing the fee, no matter what factors seem to be
14 playing a role, what really goes on in determining a fee is
15 the size of the recovery for the class. That is the single
16 overwhelmingly most important factor that determines the
17 attorney fee.

18 The size of the recovery explains between 89 and
19 94 percent of the entire variance of these data sets. So
20 no one expected that. We didn't expect that. There's no
21 reason intrinsically to expect that fee-shifting
22 methodology should be the same as common fund cases but
23 they are. This is really to my mind a remarkable outcome.
24 Almost the only thing that ultimately decides the fee is

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1 whether the fee is reasonable.

2 And this simply does this, dividing up the class
3 action reports data into ten deciles where you get the
4 average recovery, the mean fee percent and we've also
5 calculated here the standard deviation, which is the simple
6 measure of variance from a mean for each of these deciles.

7 The suggestion is that a court might wish to, in
8 a given case, to check the reasonableness of a fee request
9 to look at what the average recovery is for cases of this
10 dimension and then to look at the standard deviations. And
11 here is a graphic determination of that.

12 So as long as you're in some of those solid
13 lines you'll be okay. I just have one minute but I'm going
14 to spend that minute referring to some other results of the
15 study. The study found when we looked at the regression
16 analysis, which I haven't given you, that risk does affect
17 fee. The higher risk the case, the higher the fee; the
18 lower the risk, the lower the fee.

19 We talked about non-pecuniary and coupon
20 settlements. That's in our study. We found that non-
21 pecuniary settlements had no effect whatsoever on the fee,
22 either if the value of the settlement is included in the
23 stated value of the recovery or not, no effect either way
24 on the fee.

1 MS. BAK: Deborah, you've examined this issue but
2 from a slightly different approach. Why don't you explain?

3 PROF. HENSLER: Well, like Geoff I want to begin
4 by making the -- if it weren't obvious to you when you
5 walked into the room at the end of a long day of talks the
6 now obvious point that attorney fees are at the core of the
7 controversy over class actions.

8 But I want to underline that point despite the
9 mundaneness of it because we spent so much of today talking
10 about coupon settlements that I think that might leave you
11 all with the sense that coupon settlements are where it's
12 at with trying to evaluate the costs and benefits
13 societally of class actions and if we could only get rid of
14 these bad coupon settlements that some people spoke about
15 this morning that we could all stop worrying about class
16 actions.

17 I think that's not really true. I think the
18 issue really is what is it that attorneys are achieving for
19 class members and for society in relation to the fees that
20 they're obtaining. And it's clear to all of us from the
21 press coverage of this issue as well as from cocktail party
22 conversation that fees are perceived by many as outsized
23 compared to the benefits that are provided to classes from
24 class actions.

1 But the evidence has until very recently been
2 mainly anecdotal and even in these very rich data sets that
3 Geoff has just summarized for us very cogently, much of the
4 statistical data pertain mainly to securities class actions
5 which have long been the subject of very sound and
6 extensive academic research.

7 And those cases, of course, don't represent the
8 full landscape of class actions and certainly don't
9 represent fully the kinds of small-value claim to consider
10 class actions that I take it has driven the Federal Trade
11 Commission's interest in this subject.

12 It's also true that much of the data that's
13 available including the data we just saw are data that are
14 derived from careful weeding of the characteristics of
15 class action settlements, that is, the settlement as
16 approved by the judge which, of course, as we have heard in
17 the discussion today, may not be the settlement as it is
18 finally experienced by class members.

19 To find out what happens to class members one
20 needs to get deeper into cases. And this is very difficult
21 and unfortunately very expensive because it's time-
22 consuming to do and in the study that I led at Rand along
23 with my colleague Nick Pace who's here and will be speaking
24 tomorrow we chose a case study method a very fine-grained,

1 qualitative method to try and understand what had happened
2 to specific cases.

3 And we selected ten cases for close analysis
4 because that's all we could afford to do. We focused
5 specifically on small damages, consumer class actions and
6 also on mass tort class actions because they've been
7 central to the policy controversy over class actions.

8 This was research that was done in the mid to
9 late 1990s so we were looking at cases that had been
10 resolved at the point of our research. Many of them, of
11 course, were cases that had been filed some years earlier.

12 One of the things that distinguishes our data
13 from some of the data that you've heard quoted already
14 today is that we tried to avoid high-profile cases. These
15 are not the cases generally that were emblazoned in
16 newspaper headlines bemoaning the abuses of class actions.
17 And in most instances, we actually did not know what the
18 outcomes of these cases were when we selected them for
19 research.

20 There is obviously a question when anybody uses a
21 small set of cases as I am about to do. We can't claim
22 that they're statically representative. And many people
23 who have read our book worried about whether we selected
24 them with a plaintiffs' bias or whether we selected them

1 with a defense bias.

2 All I can tell you about that is that people who
3 read our book have claimed we either chose the cases to
4 demonstrate how bad class actions or on the other side
5 critics have accused us of having chosen the cases to
6 demonstrate how good class actions are. So you have to
7 make up your minds for yourselves.

8 And in the book we describe the cases in great
9 detail as objectively as we can to leave people with the
10 ability to make their own decision about that.

11 Briefly, I am going to describe these cases. I'm
12 not going tell you in detail but you can see that they are
13 a range of pricing cases, sales practices, variations on
14 alleged violations of business practices. I'm not going to
15 speak about all the mass tort class actions because I don't
16 think they're all opposite but I thought I would include in
17 the data I'm about to show you two property damage cases
18 because at some level they could be understood not only as
19 product defect cases, which is the way they were litigated,
20 but as cases where claims were made about the products that
21 were not substantiated.

22 Now, attorney fees, as we all know, are popularly
23 compared to what individual class members receive. We
24 heard some commentary about that this morning and so I've

1 showed you what would be that comparison. If you looked at
2 these cases you can see right away that in one of the
3 cases, the case against Bausch & Lomb, with regard to
4 contact lenses, that no one actually knows what the class
5 members got because that information was not required to be
6 reported to the court and it's been sealed.

7 You can also see in the other cases that we're
8 not, even in this class of consumer class actions we're not
9 talking only about cases that are worth \$5 or less than
10 \$10, that there are cases here where the value to the
11 individual was in the thousands of dollars or the hundreds
12 of dollars. But you can see in the case that I've
13 highlighted, the case against Allstate and Farmers
14 Insurance Company alleging violations of business practices
15 and the technique that was used to round charges, the kind
16 of emblematic case.

17 Here we have the class counsel fees getting for
18 total of fees and expenses over \$11 million and the
19 individual policyholder then takes away \$5.75. But the
20 appropriate comparison, of course, is looking at the total
21 of attorney fees relative to the total class member
22 benefits because as we've been reminded this is aggregate
23 litigation that would not survive in a court system unless
24 the cases could be collected.

1 So the comparison we ought to be looking at is of
2 class counsel fees and expenses to the total compensation
3 fund. And again, you see that in some of these cases we
4 don't actually know what that amount is, again because a
5 judge did not require that information.

6 But the key question, it seems to me, thinking
7 about the public policy purpose of class actions when we're
8 looking at the attorney fee question is how do the attorney
9 fees compare to what the settlement actually achieves. And
10 settlement funds as this chart shows do not always equal
11 the actual benefits to the class.

12 So here what I'm showing you in the blue bar
13 which you will notice is often quite large is the amount of
14 money on which the judge based the fee award decision and
15 in the green bar I'm showing you the amount of money that
16 was actually paid to the class.

17 And I just change the chart slightly. If you
18 were looking quickly so that as you look at the first bar,
19 the Robert's bar, let me go back a minute, that green bar
20 includes about half the value that was alleged for coupons
21 and half the cash value. And here I'm showing you the
22 comparison looking at the cash value.

23 Now, these cases as you can see have quite
24 dramatically different benefits, so let me show you just

1 some different versions of this chart so you can see what's
2 going on in some of the cases where you can't read the
3 data.

4 So the Selnick case was a case alleging improper
5 late fees and the Inman case is a case having to do with
6 insurance rates. And again, that's the case where we don't
7 know what the settlement fund was supposed to be because
8 the judge didn't seem to know what it was supposed to be at
9 the time he approved the settlement.

10 And I've also now added onto the chart two huge
11 cases. These are property damage cases. One is the other
12 wood siding case that was going on in the courts at the
13 same time the Masonite case was being prosecuted and the
14 other is a case that may be familiar to you. It's a case
15 involving polybutylene pipes.

16 You can see the settlements were very large and
17 you can also see at the time we did the study we had to do
18 some projections but our projections were that those dollar
19 amounts would be fully paid out.

20 So now we can look at what class counsel fees and
21 expenses look like as a share of both the negotiated and
22 the actual settlement value. And you can see that on this
23 chart that story might look very different depending on
24 whether you're talking about the negotiated settlement or

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1 second, if necessary, pro rata pay-outs until the fund was
2 exhausted.

3 So I'll close on the point that I do think, as
4 Judge Hornby accused me of thinking this morning, that
5 judicial attention is necessary and can produce a better
6 benefit/cost ratio. More attention to settlement details,
7 closer scrutiny of noncash components.

8 I do believe the fees ought to be awarded
9 directly between the real benefits that are actually
10 achieved, which can be achieved in some instances by
11 periodic payments that have been ordered by some courts and
12 finally, I want to close on the note that I think that for
13 those of us who are concerned that the class action
14 mechanism, which I believe is extremely important in the
15 United States as a tool of regulation, can best be
16 preserved by making it work right.

17 Probably the single best thing we could do to
18 improve class actions is put all of the features of
19 settlements and fees as they are actually taking place
20 instead of as they appear on paper on the record. Sunshine
21 is a wonderful tool for improving everybody's behavior.
22 Thank you.

23 MS. BAK: Thank you. I thought now we'd just
24 turn to our panel members for a few minutes of questions

1 that they might have for Professor Hensler and Professor
2 Miller. Judge Walker?

3 JUDGE WALKER: Patricia, can I lead off and ask
4 Geoff Miller, it appears to me that the number of cases in
5 your study is fairly small, if you consider the number of
6 class actions generally. You've got the NERA data. Those
7 tend to be securities cases; maybe they all are. The class
8 action report data are selected cases. Can you really draw
9 definitive conclusions from a fairly limited data set of
10 this kind?

11 PROF. MILLER: Well, the numbers are more than
12 adequate to get statistical significance to the study. The
13 NERA data set is 1100 plus cases. Our sample of that was
14 something like 670 during the time frame. We looked at
15 every single decided case in the state or the federal
16 courts that was published, including some of yours, Judge.
17 And that came to 370 cases.

18 JUDGE WALKER: I won't ask what you made of
19 those.

20 PROF. MILLER: You're quite right that there's a
21 huge dark mass of sort of dark matter of cases that we did
22 not study and that have not been studied and our results
23 are only good for the other cases if the other cases, if
24 the ones we studied is a fair sample of the total universe.

1 And we don't know that -- although I'm inferring -- that
2 that would be the case.

3 MR. DENGER: I guess I have two questions for
4 you, Geoff. One is when we look at the class action
5 percentage awards in various types of cases antitrust, for
6 example, is at 21 and 23 percent and mass torts is lower at
7 18 percent, how much of the subject matter is really
8 masking the size of the case? In other words, did you run

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1 On your first question, yes, we coded cases for
2 normal risk, high risk and low risk, and we got highly
3 statistically significant results. High risk cases
4 generated higher percentage fees and low risk cases
5 generated lower percentage fees as compared to the average
6 case.

7 MR. LANGER: Can I ask you -- I'm sorry to
8 monopolize the time here but can I ask you one quick
9 question about how you handled the class action study?

10 PROF. MILLER: Sure.

11 MR. LANGER: I noticed that basically having just
12 had a very diligent judge who told me that I better study
13 the class action reports and address them when I did my fee
14 petition I also had a chance to study these in detail, but
15 did you find that -- I notice that the first four
16 settlements that are discussed in the class action reports
17 are so vastly larger than any of the others, even in the
18 highest grouping, that is, the first one is for \$10
19 billion, the second one for \$3 billion and the third and
20 fourth one both over a billion and the next closest is just
21 about \$700 million, if you remove those four largest ones
22 would it have affected the data?

23 PROF. MILLER: I'm sure it would because the
24 class action reports uses a weighted average whereas we

1 didn't use a weighted average. So you're going to get
2 disproportionate impact of the very, very large cases.

3 But we didn't do that but it would affect the
4 data and would probably result in even in the very large
5 cases the average percentage would be higher if you took
6 out those mega, mega, mega-cases.

7 MS. BAK: Anybody else?

8 PROF. MILLER: So, Deborah, would you agree that

1 perceived as producing outcomes that bear little or no
2 relationship with the behavior of those who are being sued,
3 then I think that substantially erodes the deterrence
4 ability of the system.

5 So as it currently stands I would be rather
6 uncomfortable with the notion of judges valuing general
7 deterrence from a case, particularly given the evidence I
8 think that they are not doing a terrific job of valuing the
9 more specific aspects of the case.

10 But if we could look ahead to a world in which
11 the system is functioning more effectively then I think
12 that that's an entirely reasonable goal and something we
13 might think of implementing.

14 MS. BAK: I think we've got time for just one.
15 Judge Walker.

16 JUDGE WALKER: Well, I just wanted to ask Geoff
17 and Deborah, given that the data you have used,
18 particularly you, Geoff, have not been reported on a
19 consistent basis but you're attempting to mine from judges'
20 opinions what the numbers really are, what the
21 relationships really are, do you not have some misgivings
22 about some of the conclusions that you might draw from
23 these data?

24 And secondly, what you are measuring in any

1 event, it appears to me, is what judges do, what amounts
2 judges award and circumstances and conditions under which
3 they make these awards. Is the length of the judge's
4 conscience on these matters really what should determine
5 fee awards and expenses in these cases?

6 PROF. MILLER: I agree with you that there are
7 definitely obvious problems of methodology looking at
8 judges' opinions. I'm not sure that they skew the results
9 one way or the other. It could be that you just get a lot
10 more noise but that the means and medians that we observed
11 are pretty accurate.

12 Your second question, that is, what's the best
13 methodology raises a very thorny question of how we decide
14 what ought to be the criteria we would use to determine the
15 appropriate fee. And I don't even think anybody really has
16 come to a satisfactory answer to that.

17 I would like to know what the private market
18 would do, if there were a private market. Unfortunately,
19 more judges aren't doing what you've done, Judge, and hold
20 an auction for cases that would give us information about
21 what the private market would actually demand for this type
22 of representation.

23 If we had more auctions, which I would be very
24 much in favor of, we get information on that which would be

1 extremely valuable. But at the moment we only have the
2 results of three or four auctions to go by and that's not
3 yet enough of a database to look to. But certainly the
4 auction results would be very valuable information as well.

5 MS. BAK: That's a great segue to turning to our
6 next topic which is innovative approaches to appointing,
7 managing and compensating class counsel. And I thought we
8 would start with Judge Walker since you've been on the
9 forefront, Your Honor, in the use of class counsel
10 auctioning to more closely approximate market rates for
11 class representation and to avoid some of the associated
12 difficulties with ex poste evaluation of fees. Perhaps you
13 could briefly explain the kinds of devices you've used in
14 some of your cases and what the results have been.

15 JUDGE WALKER: Thank you, Patricia. Well, I'll
16 talk about two. And the first is what has been called
17 judicial auctions and the second is the empowered plaintiff
18 or lead plaintiff model that was ultimately enacted in the
19 private securities litigation format.

20 And I suppose the moral from the story is that
21 judges shouldn't read law review articles, including those
22 of Geoff Miller because that really was what gave birth to
23 the auction idea.

24 It was a contest between lawyers fighting for the

1 amount of the recovery.

2 And the scheme he developed was one in which
3 there would be no fees paid on the X amount of recovery and
4 then 25 percent on every dollar recovered thereafter.

5 When you get into designing a sensible fee regime
6 there are all kinds of problems that come out of the
7 woodwork. Do you have increasing percentages to
incentivize the lawyers as Jack D3/3hatColumbiao

the favor?o

Do you have some regime aoin the ineds ofJudghe

1 government investigation or prosecution, then there's a
2 possibility for competition among the lawyers.

3 Problems? There are the problems that I
4 mentioned of designing an appropriate regime. There's a
5 problem because there's great resistance in the bar to
6 competitive selection.

7 There's uncertainty on the part of judges as to
8 how to conduct auctions and there's a certain awkwardness
9 of judges in this position. Indeed, there's an awkwardness
10 that Judge Hornby mentioned this morning and judges
11 involved in any fee determination at all.

12 It's an irregular part of the judicial process.
13 It's not the usual adversarial process with established
14 processes that we are accustomed to following. And that
15 makes it problematic but so far no one else has come
16 forward to take on the task. And as Professor Hensler just
17 mentioned, she calls for even greater judicial scrutiny.
18 So she wants us to put us further into the fire.

19 Then the second approach is the empowered
20 plaintiff or lead plaintiff model. That, too, is something
21 that was born out of a law review article by Elliott Weiss
22 and John Beckerman.

23 And I tried it in another securities case even
24 before the enactment of the PSLRA. It was one of these

1 the usual adversarial way, information that we can use to
2 test fee applications. And so I certainly hope that the
3 Commission continues its interest in this subject but does
4 so on an even wider scale than the class action scale.

5 MS. BAK: Before we go on I just want to remind
6 all the speakers to speak very directly because our court
7 reporter unfortunately is having trouble hearing everybody.
8 So grab your mike and just speak right into it.

9 Mike Denger, you believe that some of these
10 auction ideas would be well suited for antitrust cases as
11 well. Do you want to share some of your thoughts about
12 that and your plans for this agency?

13 MR. DENGER: I have no plans.

14 MS. BAK: No plans. Recommendations then.

15 MR. DENGER: Recommendations, perhaps. I think
16 like Judge Walker I would commend the Commission for the
17 Class Action Fairness Project where it went in and filed
18 amicus briefs where it believed these were excessive either
19 given the relief provided to the class or given the
20 underlying, significant, contributory role of government
21 enforcement actions.

22 And I would, particularly given the Commission's
23 antitrust mandate, as well as its consumer protection
24 mandate, and given what I think is an imbalance of

1 information that Judge Walker and the other judges
2 sometimes have to face if they are to award attorneys' fees
3 after the fact, the Commission ought to consider a broader
4 advocacy role particularly in follow-on cases of the type
5 that Judge Walker was talking about where I think that the
6 Commission could play a role given its consumer protection
7 and competition heritage.

8 Now, I would draw distinctions between two types
9 of antitrust cases. One is the follow-on cases which I
10 suggest present very minimal risk to the plaintiffs. Why?
11 Because a criminal conviction or civil judgment in a
12 government case is admissible as prima facie evidence of
13 liability.

14 The government often develops almost all of the
15 underlying facts which can be obtained during discovery.
16 The direct purchaser classes are easy to certify in follow-
17 on cases. There's joint and several liability and no right
18 of contribution. You can recover damages, even if the
19 defendants or even if the plaintiffs were to pass them on
20 with a markup to the indirect purchasers. And you have
21 statutory treble damages or statutory punitive damages.

22 So on these cases, particularly when attorneys'
23 fee awards are based on the size of the recovery, which
24 means if you get a plaintiff in a big one, you're in great

1 shape.

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1 lower fee in cases where the risk is minimal by coming in
2 and encouraging at the beginning the type of auction
3 procedure that Judge Walker pioneered and Judge Kaplan used
4 in the auction house cases.

5 I contrast these cases, and Lloyd and I are
6 usually on the opposite sides of everything, so I'm going
7 to break some ground today and be on Lloyd's side. Lloyd
8 in a case committed 50 percent of the resources of his firm
9 -- if I have the facts wrong he'll tell me. He usually
10 does -- for a seven-year period.

11 It wasn't a lay-down, slam-dunk case following a
12 government investigation. He litigated it out through
13 summary judgment, through expert reports, spent an enormous
14 amount of time and got a heck of a recovery for the class,
15 both in terms of money and in terms of the value of the
16 relief he got on a going-forward basis. I would have given
17 him a hell of a lot more had I been the judge. But I
18 wasn't.

19 But that type of case where you have a
20 significant risk incurred by a plaintiff law firm, they
21 develop a tremendous result for the class is a far
22 different set when you follow along behind a government
23 investigation. You have liability determined. You have
24 everybody trying to play one off against the other, and

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1 positioned, to come in and advocate some sort of ex ante
2 type procedure in getting counsel to compete among
3 themselves to represent the classes in these types of
4 litigation.

5 MS. BAK: Mike, before I turn ultimately over to
6 Lloyd at the end to talk about his case a bit, I want to
7 let Howard take five minutes and then follow up with Lloyd.

8 Howard, ultimately the Third Circuit concluded
9 that traditional methods of selecting class counsel with
10 significant reliance on private ordering and a great deal
11 of oversight was probably the way to go in most cases.
12 You've just come out of the liner-board litigation where
13 you were very innovative in adopting some of those
14 management tools. Why don't you talk to us a little bit
15 about that?

16 MR. LANGER: I did want to just say one thing
17 though --

18 MS. BAK: Talk really directly into --

19 MR. LANGER: While Mike was talking about
20 antitrust cases I was just glancing down the list in the
21 class action reports to try and see like how many cases fit
22 this model of an auction where there would be a follow-on
23 case.

24 And what struck me immediately was that all of

1 the largest settlements in antitrust cases as you go down
2 the line were in cases that couldn't in any way be
3 characterized as follow-on type cases.

4 The NASDAQ market makers case, the largest here
5 prior to Lloyd's case, Lloyd's case was a case that
6 preceded the government action. The brand-name
7 prescription drugs case, which is the next largest, had no
8 government action. The corrugated container case, the
9 original one not my case, followed a criminal trial where
10 the jury was out for three hours and acquitted all of the
11 defendants. So it's very, very hard to know what is a
12 follow-on case.

13 My own case that I just settled for \$202 million,
14 the FTC brought a very unique, individual invitation-to-
15 collude action against one defendant and we expanded it to
16 many others. Was it a follow-on case? I don't know but we
17 do know that the district judge found in our case that
18 nobody wanted to bring the case. We couldn't find lawyers
19 to work with us.

20 MR. DENGGER: Then I would applaud you.

21 MR. LANGER: I know. But what I'm saying --

22 MR. DENGGER: And I would applaud the effort.

23 MR. LANGER: But what I'm saying is that it's
24 very, very hard to know what is a follow-on case and one

1 would have said that the first corrugated case was a
2 follow-on case but then after the criminal trial did it
3 cease to be a follow-on case when the jury had acquitted?
4 It's a very, very difficult concept to know exactly what
5 the area is.

6 Just this morning I was teaching the auctions
7 case. Well, in my textbook they quote the testimony of the
8 people admitting in the criminal case their liability, they
9 met and colluded. But there are very few cases that are
10 really that simple.

11 In any event, my own view is that more proactive

1 MS. BAK: Lloyd, I thought we'd sort of switch
2 gears as we come to you and talk a little bit about the
3 special challenges of determining reasonable fees in non-
4 pecuniary cases. Yours, of course, had a huge recovery but
5 also significant injunctive relief. And when, Howard, you
6 mentioned there should be greater attention by the
7 judiciary to various standards there what standards do we
8 look to? How do courts evaluate significant injunctive
9 relief?

10 MR. CONSTANTINE: Well, I can tell you what
11 happened in our case. In our case, Judge Gleeson made a
12 specific finding that the injunction in our case was worth
13 between \$25 and \$87 billion and he also found that the
14 injunctive relief was much more significant, far more
15 significant, of much greater value to the merchants and
16 consumers of the United States than the record compensatory
17 relief, which was \$3.383 billion, which itself was a record
18 and the highest antitrust settlement in history.

19 He then said, it should affect my decision. It
20 has. I'm not telling you how. I'm not telling you what
21 but it has. And then he went on to make the award that he
22 did.

23 I'd like to sort of cycle back because I think
24 you can prove everything from our case and you can also

1 disprove everything from our case because it went on for so
2 long and it's still going on. I'll be working on it for
3 the next four or five years.

4 But to get to the bottom line of what I think
5 about all of this, I think that the best approach is
6 probably for cases where there is competition to represent
7 the class because they are follow-on cases because they
8 follow on a DOJ or state AG or an FTC prosecution of some
9 sort that I think the auction process, the kind that Judge
10 Walker and Judge Kaplan have utilized, is probably the best
11 way to go.

12 In a situation like our case, which Howard has
13 said his case was similar to that, where there is no
14 competition, where you just get hired to do a case. I
15 don't consider myself a class action lawyer. I don't
16 consider myself a plaintiff's lawyer or defense lawyer. I
17 consider myself an antitrust lawyer.

18 And five companies came to me and they hired me
19 and they said would you bring a case for us? It was Wal-
20 Mart, Sears, Circuit City, Safeway and The Limited. And
21 they just hired a lawyer to do that case.

22 In that type of case, I think, when a dozen years
23 later -- and that's what it was, 12 years later -- a court
24 has to make a decision on attorneys' fees the best way of

1 doing that is to go back and try, as best as possible, to
2 answer two questions. What would a buyer pay for this
3 case? And what would a rational seller agree to sell his
4 or her services at?

5 And I think the closest that I've seen to that
6 kind of analysis comes out of Judge Easterbrook in his
7 Synthroid decisions, in the two decisions that he wrote in
8 the Synthroid case.

9 So let me cycle back to sort of what happened
10 here and where I think the court -- and I'm not trying to
11 engender any sympathy. Having been awarded a \$220 million
12 attorneys' fee it's not a good idea to go before a group of
13 people and say, hold out your hand and say, look how I was
14 shortchanged here. That's not my purpose.

15 I think the important issue here is what these
16 cases mean and what they mean about the future and do we
17 really want to encourage a certain type of important, big
18 picture forward-looking case. And that's to me the real
19 issue. Coming out of a government background, that's sort
20 of the way I got into this particular case.

21 So we recovered \$3.4 billion. We got an
22 injunction which the court valued at somewhere between \$25
23 and \$87 billion and had it's most confident prediction that
24 it was \$70 billion. It was a case that did not follow on a

1 government prosecution but instead actually spawned a raft
2 of government activity. An FTC investigation followed on
3 us. A DOJ prosecution followed on us and several state AG
4 initiatives followed after our action. And we seeded those
5 things.

6 In the Second Circuit, Judge Gleeson sat down and
7 said, what am I going to do with this thing? What fee am I
8 going to award you? We put together a fee application.
9 Unfortunately, I didn't ask for it to be posted on the web
10 site. I will now after the fact.

11 I'll ask for three things to be posted. One will
12 be our fee application. One will be Judge Gleeson's
13 decision, which you can find at 297 F. Supp. 503. And one
14 would be our appellate brief, which I argued in the Second
15 Circuit a couple of weeks ago.

16 In the meantime, you can get the fee petition and
17 the appellate brief at CPNY.com. They're on our web site.
18 But in any event, we went to Judge Gleeson. We said okay,
19 you know all about this case. You closely supervised the
20 settlement negotiations in this case. We don't want to
21 file a specific request for any particular fee. We tried
22 that.

23 We said we will just set out all of the law, all
24 of the factors, everything we possibly can. We'll come

1 forward with a recommendation of John Coffee, of Arthur
2 Miller who was the reporter for the Third Circuit task
3 force, of the chief counsel for the National Consumer Law
4 Center and for Frank Fisher and for Harry First of NYU and
5 you do whatever you want.

6 The judge come back to us and said, oh, no.
7 You're not going to lay that on me. You have to ask for a
8 specific amount. We then did our very, very best and we
9 didn't hold back any cases. There was not a single case
10 that was cited in Judge Gleeson's decision which we had not
11 given him. We cited everything possible. We came forward
12 with the experts who are considered to be the preeminent
13 experts in the area and we applied for a fee of 18 percent.

14 We made our fee petition along the Goldberger
15 factors, which are the factors in the Second Circuit. In
16 most circuits you have something like Goldberger, and
17 they're all pretty much the same. The fact is that the
18 Second Circuit cites our time and labor and magnitude and
19 complexity.

20 Judge Gleeson made a finding that our case was of
21 enormous complexity, unprecedented complexity and
22 magnitude, 400 depositions, 54 expert reports, over 500
23 motions, a pretrial record with 230,000 pages of exhibits,
24 17,000 deposition designations, 730 trial witnesses and I

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1 Six people in my firm, include myself, did 281 depositions
2 in our case in terms of efficiency.

3 Why did this happen? And frankly, it doesn't
4 matter that much to me because the fact of the matter is at
5 a fee of \$220 million or a fee at \$600 million, it really
6 doesn't matter too much to my personal life. What this
7 matters is to the future but how did this happen?

8 I think it happened because the standards in all
9 of these circuits -- it's called Goldberger in the Second
10 Circuit. It's called something else in other circuits are
11 nothing but sort of a hodgepodge.

12 They're what Judge Easterbrook called a chopped
13 salad. It's anything you want to throw in, anything you
14 think about it and then there's this investment of broad
15 discretion to the District Court judge to do at the end of
16 the day whatever he or she wants to do.

17 And I think Judge Gleeson, who was a great guy,
18 said, you know what? \$220 million is enough for anybody.

Well, that's about it by the way (1871-10-51)

1 two well-heeled defendants that had never lost an antitrust
2 case backed by 6000 banks and all of their additional
3 counsel? The answer is I don't think too many groups of
4 lawyers would agree to do that going forward if they knew
5 that at the end of the day there would be 6.5 percent
6 awarded.

7 And I think the real problem in this decision, if
8 it becomes persuasive to anybody else, is its effect on the
9 future. It's defined its own category of settlements above
10 a billion or \$2 billion. And I think there's a real
11 problem there.

12 So what I take away from this whole experience
13 other than a lot of money is a belief in just what I said
14 before. In terms of cases where there's competition to
15 represent the class something like what Judge Walker and
16 Judge Kaplan have utilized.

17 In the kind of case that we were involved in,
18 very, very difficult, very, very long, very complex, very
19 risky case, I think the best way for a court to proceed is
20 to simply try to ask that question that Judge Easterbrook
21 asked in Synthroid is what would a rational seller sell his
22 or her services at and what would a rational buyer sell
23 (sic)?

24 The last thing I'll tell you is that we actually

1 had fee agreements in our cases with all of our clients.
2 And those fee agreements would have yielded a fee of over
3 \$1 billion, because we just didn't want to do it, and
4 actually the truth of the matter is because I just didn't
5 want to do it. It was my decision.

6 I did not want to take these fee agreements and
7 take them to Judge Gleeson and say okay, five very
8 sophisticated buyers in arm's-length negotiation with equal
9 information agreed to pay us what would yield a fee of over
10 \$1 billion. Please enforce that.

11 I just did not -- I knew this case would be my
12 sort of legacy. This is going to be in my obit. And I did
13 not want in my obit -- I didn't. I mean, you're getting --
14 this is some rare candor here -- I didn't want that to be
15 the final story here.

16 So we told Judge Gleeson they existed. We told
17 him that they were way beyond what we were asking for. He
18 understood that. And then we simply didn't offer them.

19 MS. BAK: I think we're going to have to close
20 this. And I apologize for not taking your wonderful
21 questions. I hope you will buttonhole each and every one
22 of these panelists to get some more. But I hope you've
23 enjoyed some very personal and interesting information from
24 their experiences. Thank you very much. (Applause.)

1 **(Whereupon, a short recess was**
2 **taken.)**

3 MR. FRISCH: We have been called to order. Good
4 afternoon. I know it's been a long afternoon but I believe
5 that this last presentation of the day is going to be an
6 interesting and challenging hour on the special ethical
7 concerns in class action litigation.

8 We have a variety of viewpoints and disciplines
9 represented here, lawyers and economist, plaintiff and
10 defendant, and a lot of interesting and difficult issues to
11 cover in a fairly short period of time.

12 My name is Michael Frisch. I'm the ethics
13 counsel at the Georgetown University Law Center. I also
14 teach a course in professional responsibility at
15 Georgetown.

16 My panelists, to my immediate left, you've
17 already been introduced to Geoffrey Miller from the last
18 panel, NYU Law School. To his left, Brian Wolfman, of
19 Public Citizen. Then farther to the left, Lewis Goldfarb,
20 a partner in the New York office of Hogan & Hartson. To
21 his left, Roberta Liebenberg of the Philadelphia firm,
22 Fine, Kaplan & Black. And to her left, John Johnson, IV,
23 our token economist.

 The more extensive biographies of each panelist

1 are in your materials. We're going to start today's
2 discussion with Roberta talking about the particular
3 problems of communicating with absent members in class
4 action litigation. I'm going to turn it over to Roberta.

5 MS. LIEBENBERG: Thank you. Courts have long
6 recognized the potential for abuse that may occur when
7 there are unsupervised communications with class members.
8 Courts have broad authority to govern contacts with class
9 members by either plaintiffs' counsel or defense counsel
10 under Rule 23 the Code of Professional Responsibility or
11 the court's inherent authority.

12 Some federal courts have adopted local rules to
13 govern communications with class members. I want to focus
14 my remarks this afternoon on several recurring situations
15 in which ethical issues are raised by communications with
16 putative class members before class certification.

17 I'm going to focus on these communications
18 because it is well settled that once the class is certified
19 and the time period for opt-outs has expired, class members
20 are considered to be the clients of class counsel for
21 purposes of the ethical rules.

22 Model Rule 4.2 and its code equivalent, 7-104,
23 prohibits an attorney from discussing the subject matter of
24 a case with an adverse party that's represented by counsel

1 unless the attorney obtains the permission of the opposing
2 counsel. One of the most common situations in which there
3 are pre-certification communications is when a defendant
4 attempts to settle a claim of an individual absent class
5 member.

6 The cases in the manual on complex litigation
7 make it clear that the ethics rules do not prohibit such
8 settlements so long as the defendant doesn't utilize any
9 misleading information in the settlement negotiation.

10 The cases diverge, however, as to whether or not
11 the defendant has an affirmative duty to disclose the
12 existence of the class action at the time the settlement
13 offer is made.

14 Courts have found that such disclosure may be
15 warranted in situations where the defendant has the
16 potential ability to coerce an individual settlement, such
17 as in employment or franchise cases. For example, in the
18 Bublitz v. DuPont case the court found that although there
19 was no evidence that DuPont's settlement offers to absent
20 class members were misleading there was an inherent risk of
21 coercion because the class was combined of DuPont's at-will
22 employees.

23 The court required DuPont to make its settlement
24 offer in writing. The written settlement offer had to be

1 disclosed not only to class counsel and to the court but as
2 well the court required DuPont to serve class counsel with

1 required a notice that allowed class members to rescind any
2 of the retention agreements that had been entered into as a
3 result of this solicitation campaign.

4 I'm now going to just shift focus for a minute to
5 talk about communications after the class has been
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1 the ethical rules should be revised to specifically address
2 class actions. In my view the ethical rules are working
3 well and the situations in which there are improper
4 communications with class members are really the rare
5 exception not the norm.

6 Courts have demonstrated an ability and a
7 willingness under Rule 23 and under the current ethical
8 rules to fashion appropriate relief when there has been
9 misleading communications to class members. Thank you.

10 MR. FRISCH: Thank you, Roberta. The reference
11 to 7-104 and to Rule 4.2, 7-104 is the former code
12 predecessor to the same provision which now is in the model
13 Rules of Professional Conduct as Rule 4.2.

14 We're next going to hear from Brian Wolfman who's
15 going to expand on the discussion about ethical issues that
16 plaintiffs' counsel faces in class action suits.

17 MR. WOLFMAN: What I'd like to do is I want to

1 And so what I want to do really is to address
2 specifically the questions posed by the FTC in organizing
3 this panel. One, do the ethics rules properly apply to
4 issues of class action governance? And two, should we
5 attempt to construct new ethics rules or simply use the
6 principles embodied in Rule 23 in evaluating lawyer conduct
7 in class actions?

8 And simply put, my answers are as I said, no, the
9 ethics rules don't generally sensibly apply to matters of
10 class action governance because they weren't written with
11 the particular problems of class actions in mind. And
12 second, generally speaking, we should use principles
13 developed and to be developed in the future under Rule 23
14 because it's that rule by which the class is protected.

15 And however imperfect it's not the model rules
16 but Rule 23 that understand or attempts to understand the
17 fundamental differences between representative litigation
18 and individual litigation.

19 I think others here are going to get into
20 conflicts issues but I want to look at some of the other
21 rules and just explain why they don't really fit the class
22 action context and why I think when you come on one of
23 these problems you ought to think in terms of class
24 actions.

1 You know, the fee rule, for instance, the rule on
2 fees is a very basic rule and it says a lawyer's fee shall
3 be reasonable, but if you look at the cases under that
4 rule, rules are almost never found unreasonable under Rule
5 1.5 in bipolar individual situations. And the reason is is
6 that it's assumed that contract between a lawyer and a
7 client generally takes care of the problem.

8 But, of course, in a class action there's no
9 meaningful contract at all. The contract with the named
10 plaintiff ought to be ignored, for instance in the typical
11 consumer class and courts sensibly generally ignore it.

12 Fee setting needs to take into account economies
13 of scale, which of course an ordinary contract 101 contract
14 doesn't do. So generally you wouldn't say, for instance,
15 because an individual contingency fee lawyer's fee of one-
16 third is reasonable, you wouldn't say that that is
17 reasonable in a class action automatically because that
18 would, in essence, say that the lawyer doesn't have to
19 share the economies of scale with his clients in the class
20 action. So that's but one example.

21 Let's take a look at another one and say
22 something perhaps that others don't agree with but there's
23 a Rule 7.3A. It's about in-person solicitation. It says
24 among other things it says a lawyer shall not by in-person

1 and destroy the class action. So there's good reasons for
2 applying the concept and the rule but not for the reason
3 stated in the rule, for other reasons.

4 In the plaintiffs' situation -- let me go back to
5 the objectors. If there are objectors that a lawyer
6 solicits to opt out it seems to me that there's, in many
7 circumstances, nothing wrong with that contact with those
8 objectors. After all, the objectors are going to be
9 bringing forth information concerning the validity of this
10 settlement. And it's up to the court to determine whether
11 the settlement should stand or fall or the certification
12 should stand or fall or whatever.

13 So in other words, what we have here is the court
14 interposing most of the types of protections we seek from
15 the rules, not anything about the individual client-lawyer
16 relationship, which is what the ethical rules are based on.

17 But we rely on the court to interpose rules
18 dealing with conflict of interest, dealing with fees,
19 dealing with solicitation because there is no real lawyer-
20 client relationship in a class action, what the academics
21 call an agency problem that there is this entity out there,
22 the class, that has no relationship with a lawyer.

23 And we call upon the court to act as that
24 fiduciary. We call upon the court to interpose a series of

1 rules based on the particular circumstances of the case and
2 the particular circumstances of class action.

3 So my view would be as I've said that the rules
4 are not particularly helpful and that any time you get a
5 situation that presents itself as being ethical take a look
at them.²⁷ Trthe parof the case c ethiwlarly TDRriyhelpful atfere.5a

1 However, a lot of our points of view depend on
2 the area of class action litigation that we're involved in.
3 And my area of litigation has been products liability,
4 consumer financial services, pharmaceuticals. And I'm a
5 little jaded from that experience because I will say to you
6 that one of the first questions that comes to mind in
7 handling over 200 class actions over the past 15 years is
8 the fundamental question, when is it truly in a consumer's
9 interest to serve as named plaintiff in a class action?

10 I mean, if someone has been injured, if someone
11 has a product that hasn't worked, isn't it more in their
12 interest to try to get it resolved through the seller or
13 the manufacturer rather than wait three to five years as a
14 named plaintiff?

15 And so it leads me to really focus on one of the
16 ethical provisions that I think hasn't been discussed very
17 often but I think it goes to the core of what class action
18 litigation or at least the areas that I've been involved in
19 focus on and that is Rule 1.8G of the conflict of interest
20 rules which state as follows: a lawyer shall not acquire a
21 proprietary interest in the cause of action or subject
22 matter of the litigation the lawyer is conducting for the
23 client.

24 And I would suggest for consideration that in an

1 enormous number of class actions -- I won't say the
2 majority but a significant number of class actions it's the
3 lawyer who has the only interest in the class action. In
4 fact, it's the lawyer who has really created the class
5 action and has gone out and pulled in or found clients to
6 assist in this so-called business venture.

7 I had an opportunity a few years ago in
8 representing a client to really have access to the
9 underbelly, I will say, of the class action industry. My
10 client was sued along with several other auto manufacturers
11 by a group of lawyers claiming that the seat backs in all
12 the vehicles manufactured over the previous five years were
13 unsafe. They had actually obtained this factual basis for
14 this from a Federal Register article that was actually
15 debating whether certain kinds of seat backs were safe or
16 not.

17 They went out and filed five class actions within
18 a period of about two weeks against three or four major
19 manufacturers and held a press conference and claimed that
20 their clients were entitled to \$5 billion and all the
21 things that often accompany cases like this, hoping, I
22 think, to coerce settlements.

23 And we conducted an investigation and found that
24 none of the named plaintiffs in these cases ever owned a

1 vehicle manufactured or sold by our client. And we did
2 what you would expect we would do which was to file
3 dispositive motions early on.

4 We got these cases dismissed but my client was
5 willing to go beyond that and asked us to research whether
6 there was anything that could be done to deal with lawyers
7 who they believed were abusing the class action process
8 and, lo and behold, found a statute in Pennsylvania called
9 the Dragonetti Act which codifies abusive process and gives
10 it private cause of action to defendants.

11 And so my client had us bring a lawsuit against
12 the law firm that was behind these class actions. And as
13 the members of the bench who are here today will attest, no
14 judges want to be presiding over a lawsuit between lawyers.
15 I mean, you generally don't get very far.

16 And this litigation went on for about a year and
17 a half at tremendous expense to the client but there was
18 real value in it because discovery enabled the client and
19 others on the defendant side to get a bird's eye view of
20 what really goes on. And we believe, and based on other
21 experience, is indicative of -- I'll just refer to it as a
22 segment of the bar -- that constitutes the class action
23 industry.

24 What was discovered, and this is all public

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1 and I think it's a pretty clear violation of this section
2 of the code.

3 So when the FTC staff asks should there be
4 changes to the code, well maybe there should but there
5 should also be greater enforcement of the Code of
6 Professional Responsibility which is something that you
7 don't get in the courtroom.

8 And more importantly I will say, and this client
9 also had a bar grievance filed against some of the lawyers
10 who've been involved in situations like this, even bar
11 associations, again, we have found are often more
12 protective of lawyers except for those who steal money and
13 engage in criminal acts than they are willing to really
14 apply certain provisions of the code to discipline lawyers.
15 I see the one minute sign up so I'll stop there. Thank
16 you.

17 MR. FRISCH: Thank you. I spent 18 years of my
18 life prosecuting lawyers for the state bar and I have to
19 echo the view just expressed there that the rules of
20 professional conduct are woefully underenforced and often
21 enforced in a manner that is self-protective of the
22 profession rather than the public. With that sermon, let's
23 turn to Geoffrey Miller, NYU Law School, to talk about the

1 class actions. Geoff?

2 PROF. MILLER: Thank you. Given time constraints
3 I'm only going to talk about conflicts among class members
4 as they relate to the ethical obligations of class counsel.
5 So suppose that you have a class where some class members
6 have old claims that are potentially barred by a statute of
7 limitations subject to a discovery rule and others have
8 younger claims that are not even arguably time barred. Can
9 a single attorney represent both segments of the class?

You might think this is an easy question em TD0 Tc(1)Tj9.9

1 informed consent is forthcoming there is usually no problem
2 with going forward but it is impossible to obtain the
3 consent of the class.

4 The entire structure of the conflicts of interest
5 rules is built around the linchpin of consent and consent
6 is not possible in a class action setting. The ordinary
7 rule of legal ethics is strict. If you don't have consent
8 in the case of an otherwise disabling conflict you can't go
9 forward with the representation. If that rule is applied
10 strictly in class cases it would disqualify far too many
11 attorneys.

12 Now, as Brian said, the solution, ordinary
13 solution, is that in the class cases the court acting on
14 behalf of class members makes the judgment about whether
15 the representation can go forward.

16 But what standards should the court use to guide
17 its analysis? There aren't very many articulated standards
18 that are available to courts to help this question. So
19 what I want to do is suggest a standard that the courts
20 might think about, which I call the hypothetical consent
21 approach.

22 Under this approach, the court should ask in a
23 case of a class conflict whether a reasonable class member
24 would consent to the attorney representing the subparts of

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1 that would be relevant would go the costs and benefits of
2 plural representation as well as the risk-aversion of
3 average class members.

4 Now, if you apply this hypothetical consent
5 approach, I think the problems really sort of bifurcate
6 into two types. Some problems are ones of allocation among
7 segments of the class. These are not very problematic. As
8 long as the attorney has no self-interest in favoring one
9 segment of the class over another the hypothetical consent
10 approach would allow the representation to proceed in most
11 cases.

12 After all, the attorney wants to maximize the
13 recovery for the class as a whole and that's also what the
14 hypothetical plaintiff wants if he or she doesn't know what
15 role he or she has in the class.

16 In other cases the attorney does have a self-
17 interest. For example, in asbestos cases attorneys might
18 have an inventory of individual cases that get swept into
19 the overall settlement. Such attorneys might have an
20 incentive to structure the class recovery so as to benefit
21 the inventory plaintiffs.

22 In such cases the hypothetical consent approach
23 would suggest that the reasonable plaintiff would refuse
24 consent to plural representation because they don't believe

1 economist on the class action ethics panel today and that
2 puts me in a unique situation. It's not the case that
3 economists are frequently used to testify in class action
4 cases, particularly about the Rule 23 and whether or not
5 the class, there's common impact, formulaic approaches to
6 damages.

7 I think sort of the unique positioning is my
8 place on the ethics panel today. And what I want to spend
9 my time on is a discussion of how economists have
10 frequently spoken to the issue of interclass conflict and
11 specifically focus on a few examples.

12 From an ethical perspective, the existence and
13 assessment of whether conflicts exist amongst class members
14 clearly can pose ethical dilemmas for attorneys. Where
15 economists have begun to play in is actually using economic
16 theory to sort of delineate are there actual conflicts.

17 I think a nice summary of where this fits in
18 comes from the liner-board antitrust litigation. The
19 adequacy of the class representative is dependant on
20 satisfying two factors.

21 First, that the plaintiffs' attorney is competent
22 to conduct the class action and second that the class
23 representatives do not have interests antagonistic to the
24 class.

1 potential conflict issues and how economics actually can be
2 illustrative. I purposely chose two cases that I had no
3 direct involvement in but some of our panelists have so I'm
4 sure they'll chime in when the time is appropriate. One
5 example is a settlement class in a product liability case
6 and the second is a class in a monopolization/antitrust
7 matter.

8 So the first case is the General Motors
9 Corporation pickup truck fuel tank products litigation.
10 And basically, in this case class members were purchasers
11 of certain mid- and full-size General Motors pickup trucks
12 which because of the location of the fuel tanks were
13 vulnerable to fires in collisions. There were a number of
14 issues raised in this litigation. I just want to focus
15 only on the interclass conflict issue.

16 So basically, to summarize the settlement terms
17 very crudely the settlement agreement provided for members
18 of the settlement class to receive thousand-dollar coupons
19 redeemable to the purchase of any new GMC truck or
20 Chevrolet light-duty truck. The coupons could be
21 transferred to other family members and there were some
22 other aspects to the settlement as well, but that's the
23 crux of the issue for highlighting the conflicts.

24 Where the interclass conflict came about was that

1 there were two sort of distinct types of truck owners. The
2 first were individual owners and the second, what were
3 called fleet owners, groups that owned a number of trucks,
4 for example, the court cited government agencies as an
5 example of fleet owners.

6 So ultimately the question the court raised was,
7 given the structure of the settlement could the class
8 representatives, who were all individual owners, have been
9 acting in the best interest of the members?

10 Specifically, it's another quote, the fleet
11 owners will never enjoy the benefits of the settlement
12 terms such as the interhousehold transfer option intended
13 specifically for the benefit of the individual owner.

14 Now, from an economic standpoint several factors
15 stand out that might illustrate this type of conflict.
16 First, economics would point to the likely differences in
17 purchase decisions by these two groups of customers.
18 Second, it would talk to the differences in the intended
19 uses of the vehicles.

20 Third, it would talk to the differences in the
21 methods for potential recovery by these two groups and
22 fourth, it would talk to differences in the value of the
23 settlement to each group.

24 Now, I'll loop around at the end to discuss sort

1 of solutions to interclass conflict but let me give the

1 that group of class members approach the damage issue?

2 Well, there would actually be a claim that the

3 monopolization actually could have depressed market shares.

4 In other words, they were in direct competition and so as a

5 result there would be a lost profits claim.

6 So the conflict there was that the class

7 representative would be arguing about overcharge theory but

8 in fact the other group of class representatives actually

9 would have a different theory entirely based on the market

10 shares.

11 So how would economics be useful in this context?

12 Well, first, the relative positioning of the class members

13 in the market would be clear. Second, the economic impact

14 and harm potentially caused by the defendant's actions and

15 third, the alternate theories underlying damage recovery

16 for the class members.

17 I think I should be clear about two points.

18 First, existence of interclass conflict is very fact-

19 specific and depends on the economic circumstances. This

20 is not any kind of one-size-fits-all issue. Always have to

21 deal with the economics very carefully. And second, the

22 courts have provided some remedies for overcoming

23 interclass conflict and so I think should definitely talk

24 about those.

1 I think the best summary is in the
2 VISA/MasterMoney antitrust litigation where when issues of
3 interclass conflict were raised the court proposed the
4 following remedies. First, you could bifurcate the
5 liability and damages phases of the trial. Second, you
6 could decertify the class after the liability phase or
7 third, you could create subclasses.

8 In terms of what had happened in the two cases I
9 described in the pickup trucks case, basically, there was a
10 refiling in Louisiana after and the terms of the settlement
11 were broadened in several ways that seemed to resolve the
12 antagonism between the class members.

13 In the second, in the Bradburn case actually,
14 just two weeks ago, the court ruled again based on a new
15 class and the new class was limited only to those people
16 who had purchased private -- I'm sorry, excluded all those
17 who purchased private label type, which left the class only
18 members that would pursue an overcharge theory and not a
19 monopolization or a market share theory. Thank you.

20 MR. FRISCH: Thank you, John. I would ask if any
21 of the panelists have additional comments they would like
22 to make in light of the other comments that have been made?
23 Brian first then Lew.

24 MR. WOLFMAN: I think Lew's presentation is very

1 interesting because it presents a situation that on its
2 face appears extremely unsavory, the conduct of the lawyers
3 appears highly improper. And I don't want to speak to that
4 particular situation because I don't know it but let's
5 assume -- I'm sorry. I'll speak up.

6 Let's assume, for instance, that there was this
7 type of aggressive solicitation of individuals to bring a
8 consumer antitrust class action and the purpose was to meet
9 this requirement in the law that we have a named plaintiff.

10 But the difficulty I have with automatically
11 condemning that is that the court is going to sit there
12 ultimately to protect the thousands of other people in the
13 case, not the particular named plaintiff.

14 Now, as I say if it were up to me I think there
15 are rational arguments to eliminating the named plaintiff
16 requirement. I understand there may be standing problems
17 in the current law, serious problems of typicality and so
18 forth in the current law but it seems to me that Lew's
19 problem is, the question really is do we want to be
20 enforcing those kinds of rights aggressively?

21 And again, I'm not speaking to the situation.
22 There may have been no rights to enforce there. But it
23 seems to me that ethical rules about solicitation just
24 don't say anything about whether we want that conduct to

1 occur.

2 MR. FRISCH: Lew?

3 MR. GOLDFARB: I just had a quick question for
4 Bobbie, actually, with regard to communications to putative
5 class members. They're not class members obviously until
6 the class is certified but very often a defendant upon
7 being served with a class action sometimes plaintiffs'
8 lawyers actually do find problems with products and
9 services and it's often in a defendant's interest to take
10 some action before the case even goes very far, maybe even
11 turn it into a catalyst case.

12 Under your interpretation of the rules for
13 communicating with putative class members before a class is
14 certified obviously what's your view on whether a company
15 can simply go out and do something for class members, I
16 mean, just affirmatively make contact with class members
17 and take some action that may actually moot out the
18 underlying class action?

19 MS. LIEBENBERG: Well, I think the case law is
20 clear that the defendant can go ahead and initiate these

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1 upon throughout the presentations and I would ask if
2 anybody wants to expand upon their views with respect to
3 it, is whether there ought to be special ethics rules with
4 respect to class actions or should we, as Brian has
5 indicated, just depend upon the non-enforcement of the
6 rules we already have? (Laughter.)

7 Let's start with the question of solicitation
8 which -- now, first, the solicitation rules among the
9 states vary greatly. The District of Columbia is the most
10 solicitation-friendly jurisdiction in the country and Iowa
11 is the solicitation gulag. Can we craft a special rule for
12 that particular area that would vindicate the interests
13 that the ethics rules are designed to vindicate and yet
14 still allow class action lawyers to operate in a sensible
15 way to achieve the ends a class action should achieve?
16 Lew, you want to start with that one?

17 MR. GOLDFARB: Yeah. Let me just speak to that
18 because whether it's crafting a special new rule or
19 interpreting the existing rules that provide some
20 restrictions on solicitation I think what has happened, and
21 just as an example, the rules allow you to send a
22 communication out or make contact with an individual with
23 whom you've had a prior professional relationship.

24 And on its face that looks to be pretty innocuous

1 but what has happened in the class action context is that
2 you have lawyers who are one of a couple dozen plaintiffs'
3 lawyers in a massive class action where there are hundreds
4 of thousands or maybe even a million class members. And
5 each one of those lawyers construes every one of those
6 class members as their clients, people with whom they have
7 a professional relationship.

8 And so what then follows from that is they will
9 send a communication out having nothing to do with the
10 original underlying litigation. This happens in the
11 asbestos area where they will send a communication out and
12 ask whether you own a particular motor vehicle or whether
13 you've used a particular pharmaceutical and if you have
14 would you like to be a member of the class. I don't think
15 the professional rules were intended to allow for that kind
16 of communication and yet that is happening all over and it
17 is really a problem, I think.

18 MS. LIEBENBERG: I'd like to respond, too.

19 MR. FRISCH: Brian then Roberta.

20 MR. WOLFMAN: Let me just ask though, I mean, why
21 isn't the question -- and let me just say to Mike, I don't
22 represent plaintiffs. I generally represent objectives and
23 we try to argue the ethical rules because they're the
24 current, I'm big on ethical enforcement but I'm saying just

1 sort of ideally why isn't the question in that circumstance
2 the degree of enforcement society wants of the rules? Why
3 are we focused on the named plaintiff in a class action?

4 It doesn't seem to me to be what class action is
5 about. After all, in the ethical rules we're worried about
6 overreaching between the lawyer and that particular person
7 but in the class action we're asking whether the class as a
8 whole ought to be represented in enforcing this public
9 right. I just don't understand why the question is should
10 we try to enforce every wrong out there or not. And that
11 seems to me the question for society, not whether the
12 ethical rules.

13 MR. GOLDFARB: Brian, the underlying premise of
14 your question is that the class action has legitimacy and
15 that what we should really be focusing on is that class
16 members should maybe get some relief regardless of how the
17 named plaintiff is approached.

18 MR. WOLFMAN: No, Lew. I'm not saying that.
19 Maybe the class action is not legitimate but that's the
20 question not whether we should do it through the ethical
21 rule. The question is how much public enforcement do we
22 want through private attorneys general. Maybe we'll decide
23 that we want none and we want to do it through regulators
24 but it doesn't seem to me that looking to the rule answers

1 that question one way or the other.

2 MS. LIEBENBERG: Well, it seems there has been
3 commentary that, for example, in the antitrust cases where
4 you're really acting as a private attorney general that
5 really that is the model. And answering your question,
6 Brian, that you do away with the named plaintiff because in
7 essence you are acting as the private attorney general
8 supplementing government enforcement.

9 It seems to me however that you have to
10 distinguish between the types of cases. If you just look
11 at Lloyd Constantine's case where the named plaintiffs were
12 Wal-Mart, Sears, I forgot who else were the other named
13 plaintiffs.

14 MR. FRISCH: Entities in need of great
15 protection.

16 MS. LIEBENBERG: Yes, yes. It seems to me that
17 they are, in fact, controlling the litigation. They are
18 having an impact in terms of the types of information that
19 is given to a lawyer. And so I think you can't make these
20 broad-brush types of analyses because the types of class
21 actions vary so much.

22 And I just want to respond one minute to Lew's
23 comments about maybe a class member doesn't want to wait
24 three to five years and they'd rather go through the

1 process of dealing with the defendant.

2 In my experience, most of the consumer cases that
3 we have represented are aggrieved individuals who have come
4 into our office because they have not been able to get
5 satisfaction from the defendant. And if the defendant had

1 And so it really has, from my experience, gotten
2 abused and that's why maybe the ethical rules are the
3 vehicle through which we should rein some of this activity
4 in.

1 it's a very indirect way to go about it to go through the
2 ethical rules instead of asking what should our public
3 policy be as a substantive matter. It seems to me it
4 doesn't have to do with the relationship between one lawyer
5 and one particular client when you have classes of 100,000
6 people.

7 MR. WOLFMAN: But who enforces public policy? I
8 mean, you asked the question --

9 MR. GOLDFARB: Maybe it should just be
10 regulators. But --

11 MR. WOLFMAN: The FTC -- should the FTC be doing
12 more in the area of class action oversight?

13 MR. GOLDFARB: The market.

14 MR. FRISCH: Geoff?

15 PROF. MILLER: I was just going to say -- no. I
16 forgot there's a market out there.

17 MR. FRISCH: One of the recurrent claims of abuse
18 in the class action area is that it's really the financial
19 interests of the lawyers that predominate and often the
20 clients don't get much if anything at all. Is there
21 anything that can be done in the ethics rules that could
22 alleviate that problem or is it really an imaginary
23 problem? Does anyone have any comment on that?

24 MS. LIEBENBERG: Well, it seems to me that the

1 way the Rule 23 has been set up has been set up so that the
2 court has supervision over what type of fee an attorney
3 gets and it seems to me that the ethical rules are ill-
4 equipped to really handle that kind of issue.

5 Another area in which there seems to be this
6 tension in the ethical rules is where you have a conflict
7 between the named class representative and perhaps other
8 members of the class over a settlement.

9 And I think one of the -- as Judge Adams said in
10 a concurring opinion in corn derivatives, you just can't
11 mechanically apply the ethics rules to Rule 23. And I
12 really think I would commend it because I think it is
13 really an appropriate analysis of how the interplay between
14 the ethics rules and Rule 23. And where we've seen that
15 there needs to change the Federal Rules Advisory Committee
16 has come up with ways to change the class action rules
17 where there needed to be perceived change.

18 MR. FRISCH: Well, that's exactly right. The
19 traditional ethics formulation is that the client
20 absolutely controls the settlement and what do you do with
21 multiple clients and varied interests? Is it sufficient to
22 simply depend upon a court to, in effect, substitute for
23 the client under those circumstances?

24 Well, I've raised a lot of interesting questions.

1 I'm sure there are no definitive answers an I'm sure each
2 and every one of you join me in thinking our panelists for
3 a very provocative and thoughtful presentation.

4 (Applause.)

5 (Whereupon, the workshop recessed
6 at 5:30 p.m.)

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