

P R O C E E D I N G S

For The Record, Inc.
Waldorf, Mar land
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1 a drill, proceed across the rear of the Union Labor
 2 Life Building, in a like diagonal across from
 3 Massachusetts Avenue.

4 First, we'll have some opening remarks from
 5 Commissioner Harbo and then we'll have a panel this
 6 morning. There will be 10 minutes at the end of each
 7 panel for questions, and here are the questions card,
 8 here in our folder. If you have a question, raise
 9 your hand on the card and raise your hand and an FTC staffer will pick
 10 up and your question will be read from the podium.

11 Also, here are evaluation forms in our
 12 package, please fill them out. We thank you very much
 13 for doing this. I hope you know how we're doing
 14 right, how we're doing wrong and how to improve in the
 15 future.

16 Also, again, as you know, the work hop is co-
 17 sponsored by the Georgetown Journal of Legal Ethics and,
 18 again, I appreciate your thank the Journal and the Editor
 19 Jaimie Kemp, for helping and for publishing -- we'll
 20 publish a transcript of today and elsewhere
 21 proceeding.

22 Also, the Journal is accepting articles for
 23 publication. So, if you have an interest in raising
 24 something, please contact the Journal and see if we
 25 could be willing to publish it for you. Also, we have

1 available in the folder and the habeas material on it and,
 2 also, please identify the available -- here are several available
 3 copies here. There is some FTC material and some other
 4 material and I think you'd find it interesting.

5 Finally, I appreciate everyone who has
 6 here last night, Hogan and Harmon; Paul, Wei, Rifkin,
 7 Wharton and Garrison; Maer, Brown, Rose and Ma;
 8 O'Melveny and Myers; and Gibson, Dinn and Cracher for
 9 their incredible generosity in providing coffee for
 10 today's attendees and for last night's lovely cocktail
 11 reception.

12 And now, in honor of her dedication, I appreciate
 13 introduce Commissioner Pamela Jones Harbour of the FTC.

14 COMMISSIONER HARBOUR: Thank you, Maureen.
 15 Good morning, everyone. I'd like to welcome you to the
 16 second day of the Federal Trade Commission and the
 17 Georgetown Journal of Legal Ethics workshop. I appreciate
 18 your thank you regarding invited panelists for having their
 19 insights and their expertise in this important area.

20 I hope you have found yesterday's session a
 21 interesting and a stimulating as I did. We've learned a
 22 great deal about what can be done to help enhance
 23 competition and other non-pecuniary elements provide real
 24 instead of ill or benefit to consumers and other
 25 class members. And in addition, however, we need

1 more meaningful data on actual redemption rate in compo-
 2 nents. Elements of the hearing can be better understood, and the hearing
 3 class members are still obtaining all the information in individual
 4 cases.

5 We also listened to a series of presentations
 6 discussing the potential impact of class action
 7 elements on objectors and amici filers, each of whom help
 8 to ensure that elements provide fair and adequate
 9 relief for class members.

10 I am encouraged that real progress has been
 11 achieved in drafting plain language notices, and as the
 12 same time, I am, perhaps, more mindful now of the work
 13 that remains before we can feel that all class members have a
 14 substantial portion of the class members actually receive
 15 and understand the notices, and the hearing are expediently
 16 directed to them or the hearing are published.

17 The goal here is to achieve meaningful notices
 18 to and active participation by class members. And in the
 19 modern data era of mass communication there must
 20 consider face-to-face or email or mail, we need
 21 the advice of communication and advertising people who
 22 can help us craft and distribute the class
 23 notices that are not inadvertently blocked by
 24 consumer or deleted as junk mail.

25 And I would like to flag another area of

1 cla member o ld help en re ha he in ere of
 2 he e ab en cla member are adeq a el pro e ed.

3 A o can ee, e e co ered a grea deal of
 4 gro nd alread if o ere here i h e erda . B
 5 here i ill m ch more o addre oda and e do ha e
 6 an eq all impre i e gro p of paneli ho are going o
 7 di c i h ha he empirical da a in cla a ion
 8 ho . The ill ell ha e ill need o kno and
 9 ho e can be fill he kno ledge gap going for ard.

10 Increa ed nder anding of cla a ion
 11 li ga ion, e lemen and fee e perience i cri cal
 12 o bol ering he effe i ene of R le 23 b addre ing
 13 he re ng h and he eakne e of he R le. And I am
 14 par ic larl looking for ard, in addi ion o hi panel,
 15 o o r la panel, hich i Cla A ion a an
 16 Alerna i e o Reg la ion: The Uniq e Challenge
 17 Pre en ed b M liple Enforcer and Follo -On La i .
 18 Gi en m career backgro nd prior o joining he
 19 Commi ion, I am in ima el familiar i h he niq e
 20 challenge po ed b follo -on or ide-b - ide pri e and
 21 go ernmen enforcemen a ion .

22 I li ga ed on behalf of ap i r defendan
 23 hile I a a par ner a Ka e Scholer and for man ear
 24 before ha , I repre en ed he S a e of Ne York and i
 25 con mer a Dep A orne General and Chief of he

1 Public Ad vocac Di i ion in a arie of con mer
 2 reco er ca e , mo , no abl Reebok, Ked and Mi bi hi,
 3 and le me j digre for a econd and alk abo he
 4 Reebok ca e.

5 Tha i an e ample here, he Federal Di ric
 6 Co r appro ed an \$8 million 50- a e paren pa riae
 7 an i r e lemen for illegal re ail price
 8 main enance. The e lemen a appealed o he Second
 9 Circ i , and af er he a e e lemen a no iced, o
 10 Florida la er filed pri a e li ga ion in Florida and
 11 he e la er la er o gh o p e he a e
 12 e lemen . Their appeal a di mi ed on o alerna e
 13 gro nd . Fir , for lack of anding beca e he had
 14 failed o ip er ene in he nderling ac ion; and econd,
 15 beca e heir objec ion o he e lemen and he
 16 propo ed plan for di rib ion, he Co r fo nd, ere
 17 i ho meri .

18 In i opinion, he Second Circ i gge ed
 19 ha he appeal b ho e Florida la er a mo i a ed
 20 largel b heir req e for a orne fee in
 21 connec ion i h heir appeal.

22 In man in ance , conc rrep or follo on
 23 pri a e cla li ga ion enable he pri a e bar o eek
 24 re ol ion of problem ha he go ernmen con mer
 25 pro ec ion agencie ma no ha e he re o rce o p r e.

1 Brea of Commerce ample demonstrate, in other cases,
2 private litigation can deter pro-competitor enforcement.

3 In all cases, though, careful coordination
4 between competitors and private litigant should be
5 strongly encouraged. Otherwise, the interests of consumers
6 are protected in a cost-effective manner.

7 And, I hope, I am eager, as I know you are,
8 to hear from our esteemed panelists and the excellent
9 how we can better manage the interplay between competitor
10 enforcement action, patent law cases and private
11 class action damage suits. Therefore, I hope to meet
12 you soon, I'd like to welcome you once again and we will
13 begin our work soon.

14 **(Applause.)**

15 PROFESSOR ZYWICKI: Thank you, Commissioner
16 Harbo for your terrific opening remarks to summarize
17 the agenda and look forward to your agenda. I'm Todd Zywicki.
18 I'll be the moderator of this upcoming panel and I feel
19 privileged to introduce his project because I am a former
20 FTC staff member a month ago and now I'm over at
21 George Mason Law School. So, I'd like to thank everybody

22

23 Brea of Commerce Protection, Office of Policy Planning,
24 Brea of Economic and, of course, over at George Mason,
25 the George Mason Journal of Legal Economics.

1 Ba icall , a Commi ioner Harbo r no ed, ha
 2 e re going to look at hi morning i empirical
 3 q e r i o n in pro e s i n g con mer i n e r e i n cla
 4 a s i o n , and ba icall , a I ee i , e ha e o model ,
 5 bo h of hich, a a heore ical ma er, eem like he
 6 co ld be r e . Yo e go he model, on one hand, ha
 7 a ha cla a s i o n are he be a of repre e n i n g
 8 con mer i n e r e , of genera i n g compen a i o n o
 9 con mer and de e r r e n c e o corpora i o n or firm ha do
 10 bad.

11 On the o her hand, o e go an al e r n a i e
 12 model ha a cla a s i o n are prone o a lack of
 13 moni o r i n g b he cla member , b a n i a l a g e n c co r
 14 be e e n cla member and heir la e r , and o ha o
 15 ha e i he po i b i l i t y of a coll i e cla a s i o n
 16 proce here defendan ge off ea or e e n o m e i m e
 17 be e r han ea , a i n the Ameri e c h ca e ha he FTC
 18 obje e d o , hich a a i a i o n here he Co r deemed
 19 a e r l e m e n , b i m a c k e d of a co r - p o n o r e d
 20 p r o m o t i o n a l g i m m i c k ha o l d a s a l l p e r h a p b e n e f i
 21 he defendan , and o ge a i a i o n here la e r
 22 p e e r i a l l a l k a a i h b i g b a k e f l l of m o n e
 23 h i l e c o n m e r g e e r l i l e .

24 A an a p r i o r i m a e r , bo h of he e model
 25 e e m p l a i b l e , and I h i n k ha ha q i c k l g e n e r a e

1 an empirical question and, however, we are going to look
 2 at the data, in the empirical question of how the classification
 3 action as all work in practice and how can be done, or
 4 improve, however.

5 So, we are going to just work right down the
 6 line here and I'll introduce each person in order. We are
 7 only going to have an hour for this panel, so we are going to move
 8 along relatively quickly and we are going to make sure we
 9 leave some time at the end.

10 So, I'll start off by introducing Judge Lee
 11 Rosenhal, who is a United States District Court Judge for
 12 the Southern District of Texas. In addition to dealing
 13 extensively with classification from the Bench, he is
 14 Chair of the Federal Judicial Conference Advisory
 15 Committee for the Federal Rules of Civil Procedure and
 16 previously served as Chair of the Subcommittee on Classification.
 17 Judge Rosenhal?

18 JUDGE ROSENTHAL: Thank you. You may, quite
 19 properly, wonder how a federal district judge is doing
 20 on this panel because we are not known for our great
 21 empirical knowledge or our killer social science
 22 researcher, but I am here, and I have agreed, because
 23 I do have this experience with classification, particularly
 24 from a rulemaking perspective. And let me first give the
 25 standard, but I am sincere, disclaimer, however, I am not

1 peaking on behalf of the Committee.

2 The role of empirical data in rule making has
 3 changed dramatically and indeed there is a clear
 4 classification. When Rule 23, as presently is, was
 5 drafted over a Halloween weekend in the early 1960s, Ben
 6 Kaplan and Charles Alan Wright and Arthur Miller did not
 7 relate to empirical data when they made the change
 8 to bring all here today. But when you think about
 9 the heretofore could amend Rule 23 in holding on
 10 and making the case for change based on empirical data,
 11 the entire objective would be a non-objection.

12 Today's rule making standard, quite properly,
 13 demands that there be an empirical basis for identifying
 14 particular problems created by or inadequately handled by
 15 existing rules, and an empirical case made for a
 16 particular area of addressing the problem by changing
 17 the rule. And that is, indeed, the model for
 18 changing the Federal Rules of Civil Procedure. We
 19 followed that model in making recent changes of the
 20 discovery rule, for example, and of Rule 23, the change
 21 that led first of the interlocutory appeal from
 22 certification decision provision, has become effective,
 23 and then more recently, the change of standard for
 24 the element clause, standard for a one fee
 25 standard, standard for allowing greater opportunity right

1 be face io beca e "anecd a" pla a i al role in
 2 aler ing people ho are in ol ed in propo ing r le
 3 change r, o r, he need for r le change .

4 "Anecd a" i ha le o kno ha parade of
 5 horrible migh be o r, r, here. "Anecd a" r, ell o r, ha
 6 r, here migh be a problem. "Anecd a" r, ell o r, ha
 7 r, here are area here, he r le are no pro iding
 8 adeq a e r, ool r, o di cipline, he prac ice, r, o police, he
 9 problem and, o pre ep r, hem. "Anecd a", b i elf,
 10 i n r, eno gh, o r, ell o r, ha a par ic lar ol r, ion i
 11 going, o be appropria e and i no going, o crea e more
 12 harm or nip ended harm. B r, "anecd a" i a fab lo
 13 place, o r, ar .

14 I don r, ha e r, ime, o go in o ome of r, he
 15 problem , b r, r, here i one addi tional o rce of re earch
 16 promi e r, ha I an ed, o end i h. We ha e recep l , in
 17 r, he federal co r , beg n mo ing all of r, he federal
 18 co r r, o eleg ronic filing. Man of o kno r, hi .
 19 Wha eleg ronic filing ill do er q ickl i r, o pro ide
 20 q ickl and ea il -- rela i el ea il -- da a, da a
 21 r, ha i ed, o r, ake lo of people lo of r, ime, o go
 22 o r, and ph icall ga her b going, hro gh paper file of
 23 ca e . If o ha e reme el acce ible eleg ronic da a
 24 abo r, ha been done in ca e , o ha e a gold mine of
 25 informa ion a i ng, and o ha e a differen kind of

1 information, has will be available as well.

2 Amendmen of Rule 23 no require, has judge
3 in particular case make finding as to the value of has
4 is being made available to class member in settlement
5 and to make finding as to the relationship of, has value
6 as to the award of attorney's fee. The kind of
7 finding, which will be canned, which will be made
8 available electronically, and the data on which the
9 rests, which will also be canned if they are filed in the
10 Court, are just the stuff of no "anecdotal" but real,
11 reliable data.

12 And this organization, this agency, the FTC, I
13 would think, is in a position to be able not only
14 establish to gather has data, but also to analyze it and
15 the results of has analysis when come back to the
16 Court and to the rlemaker and give information as
17 to whether she has made the right rlemaking decision
18 and has additional change as to the rule might be in
19 order.

20 Thank you.

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

1 for S a e Co r and o her , here e ha e r, he be r,
 2 a ailable da a on r, rial o r, come and compen a or and
 3 p ni i e a ard for 45 large co p i e . I o ld be
 4 onderf l r, o e pand r, he BJS projec f nding of NCSC r, o
 5 incl de r, hing like cla a ç ion.

6 For e ample, r, he la r, -- 2001 da a from r, he
 7 Na ional Cep er incl ded almo r, e er r, rial j dge or j r
 8 r, ermina ed in 45 large di r, ric and ha r, he fo nd a
 9 one cla a ç ion r, ha had been r, ermina ed b r, rial. So,
 10 r, o ge in o r, he r, e le el of cla a ç ion a ç i j , o
 11 need r, o e pand r, he BJS grap r, o incl de da a on e er
 12 filed ca e beca e r, ha \ r, he onl a o \ re going r, o
 13 find o r, o er r, ime or in a par ic lar poin in r, ime r, he
 14 le el of cla a ç ion a ç i j . So, I r, hink r, he
 15 go ernmen ha a major role r, o pla and ha beg n r, o pla
 16 j r, hro gh r, he B rea of J r, ice S a i r, ic . Tha \ o r
 17 be r, hope, I r, hink, for ge r, ing reall good da a abo r,
 18 r, he r, a e co r, r, em , incl ding cla a ç ion.

19 M r, d j h Geoffre Miller of e r, erda and
 20 o ill hear, I a n r, -- he a r, o gh a ç r, o follo .
 21 Geoff i one of r, he co p r, \ leading cla a ç ion
 22 e per r, . He read r, ho and of ca e no r, o code r, hem
 23 for r, die e do and r, he r, d r, oda i a li r, le
 24 differen and perhap , I don r, kno , le con ro er ial
 25 j eem , r, han r, he one e did in r, he pa r, abo r,

1 a~~r~~ orne \ fee , and~~r~~ hi i abo~~r~~ op -o~~r~~ ra~~e~~ and
2 obje~~c~~ or ra~~e~~ in cla~~s~~ a~~s~~ ion .

3 I~~r~~ hink e ha e in~~r~~ he room -- Mr. Willging
4 ne~~r~~ ~~r~~ o me, Deborah Hen ler and~~r~~ he RAND folk in~~r~~ he
5 a dience -- e ha e ma be~~r~~ hree-q ar~~r~~ er of~~r~~ he people
6 ho e e er ~~r~~ died op -o~~r~~ ra~~e~~ and obje~~c~~ ion ra~~e~~ in
7 cla~~s~~ a~~s~~ ion and o o can add Geoff Miller and me.

8 Wha~~r~~ e e done i read all~~r~~ he ca e e can
9 ge~~r~~ o r hand on hich ha e repor~~r~~ of~~r~~ he ize of~~r~~ he

1 o_r e fo nd a 4.6 perce_n in ma_r or_r ca e , b_r
 2 ha_r in a rela_r i el mall n mber. Ma_r or_r ca e are
 3 highl p blicized, b_r here are no_r ha_r man of_r hem,
 4 and ge_r ing informa_r ion abo_r cla_r i ze and op_r -o_r
 5 ra e on an one of_r hem i no_r ha_r common. 2.2 perce_n
 6 in emplo me_n di crimina_r ion ca e , 0.2 perce_n in
 7 con mer ca e . The op_r -o_r ra e are highe_r in
 8 emplo me_n di crimina_r ion and ci il righ_r ca e , ho gh
 9 bo h ha e le_r han 5 perce_n ra e . So, ha_r , in
 10 general, e do no_r e pe_r o ee mch op_r -o_r .

11 We find a decline o er_r ime, and I can -- ma be
 12 I ho ld_r rn_r o_r he_r able a li_r le bi j_r o p_r ome
 13 fle h on_r he bone . If o_r rn_r o Table 1 on page 23,
 14 o can li_r en or read a o choo e, e find_r he perce_n
 15 -- mean perce_n op_r -o_r i 0.6 perce_n , he median i
 16 0.1 perce_n . The mean perce_n obje_r or i 1.1 perce_n
 17 and he median i zero. I_r hink ome of_r he informa_r ion
 18 e ga hered_r ha ma be al able i informa_r ion abo_r he
 19 i ze of cla e beca e i reall i q_r e ariable.
 20 Yo ll ee e ha e a mean n mber in cla_r of 603,000
 21 abo_r and a median n mber of 22,000. So, cla_r a_r ion
 22 ha e a er_r or of pread o_r di_r rib_r ion on_r he
 23 n mber.

24 If o look a Table 2 -- and here I_r hink
 25 here ome o her ef l informa_r ion -- hi break

1 i do n b ca e ca egor , b ha I hink hi able
 2 add -- a I aid, he di en ra e are er lo . B
 3 ha e ge here are, he reco er per cla member and I
 4 hink ha a ke concep in cla ac ion, beca e one
 5 hing one of en hear i -- and I hink ha he opic
 6 a in rod ced, oda -- big ba ke f l of mone ,
 7 indi id al cla member ge li le. Tha r e, and
 8 ha e ac l a i ho ld be.

9 Wh ? Beca e if indi id al cla member co ld
 10 ge a lo , o ho ldn ha e a cla ac ion. I mean, if
 11 here reall i eno gh mone on he able, o arran
 12 indi id al ac ion, en of ho and or h ndred of
 13 ho and of dollar per cla member, chance are
 14 in ere di erge, all he ca e ill differ, and
 15 ma be people ho ld be ge ing indi id al repre en a ion.
 16 When, he po en ial reco er per cla member i \$30,
 17 o re ne er going, o ee a la i and, he la er , in
 18 compari on, o an indi id al clien , are going, o ge a
 19 big ba ke f l of mone . I hink one hing, he rhe oric
 20 ho ld, one do n i he no ion, ha a large fee for, he
 21 orne compared, o an indi id al clien, reco er i
 22 omeho an indic men of, he ca e.

23 The mean reco er in a Federal Deb Collec ion
 24 Pra ice ca e per cla member a \$44, and I m re, he
 25 la er fee a m ch higher. I m no re, here

an, hing rong i h, ha becanga -13 \$44 morga -1na -e5

1 percen . In the malle cla a ç ion ca e , le han
 2 abo \$1.4 million, he fee i abo 30 percen . There
 3 i no ema ic reco er of one hird fee b cla
 4 aç ion la er a far a e can ell. And in the big
 5 ca e , i i ne er clo e o 30 percen -- ell, I
 6 oldn a ne er. The cen ral endenc i no clo e o
 7 30 percen , i le han half of ha .

8 The one o her hing I ge I d like o
 9 empha ize i hile i -- i ma no jmp o beca e
 10 i a regre ion model, b I old a hi . When --
 11 and i Table 4 on page 33. One predic or of he her
 12 o ll ha e di ep ing beha ior i the reco er per cla
 13 member. A the reco er per cla member increa e , the
 14 likelihood ha o ll ha e an op -o increa e . And a
 15 fir , ha jarred me. I aid, m God, h are the
 16 op ing o hen the re ge ing more mone ? The hold
 17 be deligh ed. B I hink the ome ha deeper an er, a
 18 lea , o m ini ial reac ion, a the op o hen
 19 the re more mone on the able beca e he ha e a
 20 chance of ec ring con el, ma be con el i reall
 21 ring o line hem p, and ha , in ome en e, i
 22 economicall ra ional ha the larger take for
 23 indi id al cla member lead o increa ed di ep ,
 24 beca e the ll ha e differing ie .

25 B , again, ha pl g back in o, a ba ke f l

1 of mone for, he la er , mall amo p of, he clien .
 2 When, here a ba ke f l of mone for, he clien , he
 3 op o . So, he re id al ca e lef are going, o be
 4 mall a erage reco erie , o, he clien . Tha \ , he a ,
 5 probabl , i ho ld be.

6 I g e hile I ha e, he oppor ni , ince e
 7 ha e a federal j dge and perhap o her ho are more
 8 kno ledgeable, one of, he repea ed, heme i cla
 9 aq ion coerce e, lemen . M , ime p, o I ll do i
 in a min, e. B, I, hink e ho ld, lem97 0 coerce e, lemen 5.1
 had(aab be hile Ia min)9 j023rI e oga-Moj5.1Iho 5.10 mall a5.m a b

1 e e i r e r e a r c h , a n d e f o n d , h a i n , h o e
 2 c a e , h e , p i c a l m o n e a r e , l e m e n , , h a i , h e 5 0
 3 p e r c e n t , h e m e d i a n l i n e , a \$ 8 0 0 , 0 0 0 . T h e h i g h e r 2 5
 4 p e r c e n t o f , h e c a e h a d r e c o e r i e o f \$ 5 . 2 m i l l i o n o r
 5 m o r e . T h e l o e r 2 5 p e r c e n t h a d r e c o e r i e o f \$ 5 0 , 0 0 0 o r
 6 l e . I a g g e , e d e , e r d a e e r e , a l k i n g m o , l
 7 a b o , , h e p p e r 5 0 p e r c e n t i l e a n d e r l i , l e a b o , , h o e
 8 c a e , h a h a e r e c o e r i e o f \$ 8 0 0 , 0 0 0 o r l e . B , , h e
 9 a r e h a l f o f , h e c a e i n , h e f e d e r a l , e m h i c h e
 10 , d i e d , o , i n a a , , h i i a n i l l , r a i o n o f h e r e
 11 , h e e m p i r i c a l , d c a n g i d e p o l i c -- a l e a , h e l p
 12 f r a m e p o l i c q e , i o n . I d o n , , h i n k e r e g o i n g , o
 13 p r o i d e , h e a n e r , b , I , h i n k e d o h e l p f r a m e , h e
 14 d i c i o n a n d , h e q e , i o n .

15 T h e s e c o n d , h i n g e f o n d i n , h a , d a i n
 16 , e r m o f n o n - m o n e a r r e l i e f . W e f o n d , h a 2 0 p e r c e n t
 17 o f , h e c a e h a d o m e f o r m o f n o n - m o n e a r r e l i e f .
 18 A g a i n , a l o o f d i c i o n a p e r e , e r d a o n , h i 2 0
 19 p e r c e n t , b , o h o l d r e c o g n i z e , h a , h e a r e i m p l 2 0
 20 p e r c e n t o f , h e c a e . T e n p e r c e n t o f , h o e e r e c a e
 21 , h a i n o l e d o m e k i n d o f c o p o n . O n e p e r c e n t o f , h e
 22 c a e i n o l e d a n o n - r a n f e r r a b l e c o p o n a , h e o n l
 23 f o r m o f r e l i e f i n , h e l i g a i o n . T h e o t h e r -- a n o t h e r
 24 1 0 p e r c e n t i n o l e d i n j u r i e r e l i e f .

25 T h e e a r e c r e d e m e a r e . Y o k n o , e a k e d

1 challenge and, ha i o r o, in ome a , q an if or
 2 appro ima e or ge ome mea re of, he al e of, he e
 3 remedie o ocie a a hole, o kno , o reall ge
 4 ip o, he q e, ion of general de errence and o for h.

5 I nder, and m , ime i p. I, hink hen e
 6 come, o, he di c ion of f , her re earch, opic , ha I
 7 can add a fe more par ic lar i e a e go along.

8 So, , hank o .

9 PROFESSOR ZYWICKI: Thank o , Mr. Willging.
 10 O r ne, peaker i Nick Pace ho i an a , orne and a
 11 long, ime , aff member i h, he RAND In, i , e for Ci il
 12 J , ice. He ha con rib, ed, o n mero In, i , e for
 13 Ci il J , ice re earch projec , incl ding , die of, he

1 are common in or nation ci il co r of la , he end
 2 re l i ha mo co r em generall l mp cla
 3 aç ion in i h he fender bender and he deb
 4 collec ion ca e . In erm of record-keeping, a million-
 5 member cla aç ion i of en impl j an her docke
 6 n mber.

7 The econd major problem ha re earcher face
 8 i a lack of pri a e da a. De pi e he fac ha he
 9 j dge m re ie he e propo ed e lemen in open
 10 co r , ha happen af er he order of appro al i igned
 11 ome ime fall in o a black hole. Unle he j dge
 12 req ire ongoing di clo re, cla co nel and he
 13 defendan are nder no cop in ing obliga ion ha oe er
 14 o p blicl repor ho a e lemen f nd i being
 15 di rib ed. Een if onl one cla member o of a
 16 ho and ore en one cla member o of 100,000 i able
 17 o cce f ll comple e he claiming proce , he j dge,
 18 and he p blic a large, ill ne er kno ho poorl hi
 19 par ic lar re ol ion i er ing he cer ified cla , in
 20 par ic lar, and o r ocie a a hole.

21 I ge ore. One o ld hink ha p blic
 22 in ere gro p , go ernmen agencie and pri a e re earch
 23 organiza ion ch a RAND co ld impl pick p he phone
 24 and cop aç he principal in he e ca e for a f ll and
 25 comple e acco p ing of ha happened, een if he j dge

1 failed to require periodic or final reports.

2 During our previous research in connection
3 with the case, we ran into a problem for both identifying
4 the hearing error, he could not identify an
5 aspect of the case, including the distribution, because
6 a part of the elements approval process, he had
7 executed a non-disclosure or a confidentiality agreement
8 with opposing counsel. In other words, don't ask and
9 don't tell.

10 The lack of public and private data is more
11 accurate for private information, however, and
12 had of the elements here classification is all
13 or it is likely to be enough, in fact, are diminished or
14 reduced on a non-classification prior certification.
15 Private case don't get a lot of attention in the
16 overall debate. I don't think I've heard anybody talk
17 about them other than the last 24 hours here, but they can
18 sometimes have an enormous impact on similar litigation
19 that gets certified in other courts. The candidate's
20 defense counsel and he can rely on inflated elements
21 on an individualized basis. Unfortunately, nobody tracks
22 them and nobody talks about them.

23 What is the answer? What are the answers?

24 Well, in a perfect world, every court system in his
25 country would be required to immediately report to some

1 centralized authority, the time a motion for
 2 certification is filed, the relevance of the motion
 3 might be, the details of an element
 4 agreement or other case outcome, and a complete
 5 description of the procedure for notification and claiming.

6 In the same perfect world, the judge in his
 7 counterpart world, if he fails, require regular reports of
 8 how an individual is being distributed and administered,
 9 including information about denied claims, and make those
 10 reports available to the public so that
 11 monitoring the progress of the distribution is possible.

12 In a perfect world, the same judge would
 13 also require, as far as an element approval, the
 14 claimant and the defendant publicly disclose an
 15 opinion being made, so that in competing cases, no
 16 inferior and inferior.

17 And in a perfect world, all of this information
 18 would be easily accessible and available to everyone so
 19 the judge could use prior cases as a benchmark for judging
 20 the element agreement before them, so researchers
 21 could do their job with hard numbers instead of
 22 conjecture and anecdote, and limit the policymaker
 23 could make quality decisions for a more improved
 24 outcome of classification litigation, and hopefully,
 25 conferences like this will lead to a perfect world.

1 PROFESSOR ZYWICKI: Thank you, Nick.

2 Our next speaker will be Joseph Mulholland, who
3 is an economist with the Federal Trade Commission
4 Bureau of Economic Analysis. He has been assigned in
5 the Commission's Class Action Fairness Project and is
6 currently working on empirical investigation of the
7 economic consequences of the settlement.

8 Joe?

9 MR. MULHOLLAND: I'd like to continue just for
10 one minute on adding another thing to Nick's perfect
11 world scenario, and in my perfect world, the old
12 elimination of the class because I think has a key
13 part of the problem here.

14 I seem to me that -- and by the way, the
15 class, I'm talking about a provision that allows the
16 defendant to go back to the settlement of the
17 defendant. That creates a load of per se evidence
18 here. Certainly, the defendant has no incentive,
19 and, of course, a highly reliable consumer or has a
20 and neither does the class counsel, because, of
21 course, the attorney's fees are limited determined, and
22 to be based on some appropriate projection by the defendant
23 of how much money he's going to pay on the class and then
24 the rest goes to the lawyer.

25 So, of course, I seem to me that, of course,

1 projected, to know, allocation, all of the elements,
 2 and clearly, has, has gone on a lot. There, lot of
 3 number, through around of, here about, response rate,
 4 redemption rate and has, has been.

5 So, and, although, a, a, a, a, a
 6, we might be able, to get some of in, if we
 7 looked at, or case, and in particular, has, I did, a, I
 8 elected, commercial. So, these are all commercial
 9 redemptive cases. These were finalized, and, has, mean, by
 10 the administrative, closed, in Fiscal, 01, 02 and 03,
 11 and, these were for amount of \$500,000 or more. So, has,
 12 we ended, with, a, list, here of 22 cases.

13 Let me, just, say, one, thing, more, about, has, we
 14 can, get, out, of, this. One, is, a, I, said, number, like,
 15 a, response, rate. It, is, possible, a, to, get
 16 response, rate, on, certain, kind, of, case, has, we, have
 17, has, been, to, be, like, --, to, know, similar, to
 18 cases, in, a, an, upcoming, classification? Unfortunately,
 19 I, see, I, am, running, out, of, time, so, maybe, we, could, talk, a
 20 little, bit, about, this, later, on. But, I, do, think, it, can
 21 be, useful, in, looking, at, the, kind, of, information, has,
 22 we, could, go, into, a, database, let, us, see. Again, in, a, perfect
 23 world, these, we, could, look, at, the, --, here, we, could, have
 24 good, outcomes, data.

25 And, then, the, question, is, well, how, do, we

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1 ad oca ing reform in the cla as ion mechani m a bo h
2 the state and federal level.

3 Jim?

4 MR. WOOTTON: Thank , Todd. Thank for ha ing
5 me. I m going o a k a or of bigger pic re q e r i o n ,
6 al ho gh all the e o her q e r i o n ma ha e helped an er
7 i , and ha i , are e going in the righ direc ion b
8 leaning more and more on li ga ion in order o reg la e?
9 The compen a ion piece, in m opinion, i kind of almo
10 a epara e q e r i o n . The paper I e circ la ed reall i
11 or of a hi or of ho e e changed or ie of
12 li ga ion o er the la 30 or 40 ear .

13 Li ga ion ed o be, o kno , a ome ime
14 nece ar e il ha o gh o be a oided. Some er
15 infl ep ial ho gh leader from Pro er o Calabre i o
16 Po ner ha e mo ed in the direc ion ha he or la ,
17 and la generall and li ga ion generall , o gh o pla
18 a more ac i e role in reg la ion and de errence, and
19 l ima el , ha led o a period of ime i h a fe o her
20 change , par ic larl the change in R le 23, hen a
21 combina ion of con ingenc fee a ha e er level and the
22 ne r le for op -o r e r lemen , a oppo ed o op -in
23 e r lemen , hich I can ell o r here a er
24 con ep io deba e in corpora e America oda beca e
25 op -o r e r lemen are ac all a er effec i e a r o

1 engage in ha I ll pejora i el call coll i e
2 e. lemen .

3 B. a an ra e, he change in R le 23. ha
4 are. r ing. o empo er li iga ion a a reg la or .ool led
5 o er aggre i e form hopping. Yo kno , Dickie
6 Scr gg\ de cription of magic j ri dic ion , no ma. er
7 ha happen a r. rial , plain iff in and. ha j dge
8 are elec ed i h erdic mone , o. ha . here . hi
9 a peg of ha\ going on, and e had a e ion on
10 li iga ion here Profe or Calabre i came and aid he
11 no o re he agree an more. ha . he co r . em i a
12 ra ional reg la or.

13 Yo kno , a king o r el e . he q e. ion , ho
14 i . he . em doing in addre ing a lo of. he e. o ghe.
15 q e. ion and I. hink. he deba e. ha i reall j .
16 beginning, and I. hink i\ going. o in en if i , . o
17 ha e. en ho ld. here be more diffic l b. l ima el
18 more preemp i e reg la or a. i i probabl a . he
19 federal le el in hich ocie engage in balancing kind
20 of a. i i ie hich I o ld a generall are no er
21 ell done in li iga ion.

22 There a li. le bi of a deba e going on righ
23 no aro nd. he FDA r le, he Third Circ i i ed an
24 opinion in. he Thora ec ca e here a medical de ice a
25 implan ed and. he pa ien b eq en l died and. he

1 question a, could he do it, and the Third Circuit
 2 agreed with the FDA, that the FDA regulation is a floor
 3 and a ceiling and there are other kinds of
 4 questions around that. And I am not sure that the
 5 account of the FDA panel dealing with his anti-
 6 depression in the adolescent population is right, and
 7 I am a member of the high level report on a discussion of his
 8 research means, that he would lead to in the area of
 9 warning and the use of the antidepressant. I
 10 hardlyopic research, that kind of high level discussion going
 11 on in Jefferson County, to know, in front of a jury down
 12 in Mississippi.

13 So, I think, to know, there are certainly
 14 associated with the regulation, through litigation and it
 15 would be interesting to our to find a way to capture
 16 that and weigh it again, that are undoubtedly benefits
 17 of the claim to them in allowing the aggregation of
 18 claim.

19 PROFESSOR ZYWICKI: Thank you, Jim. We're going
 20 to go ahead and return to the question and I'm sure each of
 21 you, if you are to make a response or reply to anything
 22 anybody else has said, will come forward in your
 23 response to the question. I'll go on to the next card here.
 24 Five of them basically contain the same question. So,
 25 I'm going to start off with the question in a more

1 general a .

2 I think, ha ha a lot of people are a king i
 3 especially no the question of collecting the data, but
 4 interpreting the data. What do you make of the data, ha
 5 do you have? Some of the information is not here and how do
 6 you account for the information in the data? I'm going to
 7 give a couple of examples of things that people have
 8 suggested, and you, ideally, some of you would respond to
 9 some of the more specific areas that they are questioning
 10 that have been asked. And then I mean some of you,
 11 reading the card, that basically mean Professor
 12 Eisenberg.

13 But, basically, the three areas in which I see
 14 the data interpretation question being the real question
 15 is much a general -- that the data is, first,
 16 especially in the question of nominal versus real
 17 recorder income, especially in commercial action
 18 as opposed to, I think, deriving from, a, employment
 19 discrimination or something else, which is, in
 20 particular, the question on the correlation between
 21 turnover, fee and nominal recorder and whether or not
 22 the nominal recorder actually reflects that people really
 23 get, and in particular, in component elements case, do we
 24 adjust -- or in the research, do you adjust for component
 25 redemption rate in commercial action? And a

1 corollary question for Judge Rosenhal is, how do you
 2 or do you, as a practical matter, do your work on
 3 the composition rate in entering the average
 4 fee?

5 A second question is open-ended frequency, which
 6 is, are people not opening up because they're basically
 7 happy with the elements, or is it because they don't
 8 know because of the average classification elements are
 9 recognized and noticed and heard of?

10 A third question is, I think relate to both
 11 of the more generally, Professor Eisenberg says,
 12 I think, very strongly and some extent, per se,
 13 which is, the low royalties are the rationale of
 14 the average classification, precisely because royalties are
 15 small, the bundle of elements in classification and process
 16 is high. The counter-argument is that the low
 17 royalties for the classification are especially evidence
 18 of inaccuracy and high agency cost with the latter and
 19 the precise because the royalties are small, how
 20 are the kind of cases where consumers lack the incentive
 21 to monitor what the latter are doing.

22 So, in each of the three questions, nominal
 23 or real royalties, the open-ended frequency and heard of
 24 the rationale of classification, it would be
 25 interesting to hear the panel's reflection on how to

1 interpret the data, have been here and interpret here some
2 a kind of engagement in hope he is engaging.

3 All are in the Judge Rosenhal and all jobs
4 work done.

5 JUDGE ROSENTHAL: Well, how are a few
6 interpreting question. How much time do we have?

7 Briefly, are in the he a mission, have
8 called negative value are the paradigm of cla
9 sification, I think the United States Supreme Court believe
10 have. If you look at the AmChem decision, have have
11 Justice Ginsberg a have have are all here about.
12 But have require of report back, and in an effort to
13 do interpret the data, how do we measure the value
14 have how we bring of the public good and how do we
15 weigh have another again, the court have have we
16 impose, which require, a well, of measure how we
17 court.

18 We have a method -- the collection, a method
19 for a long time, have negative value we have
20 provide access to court have old other ideas be
21 practically available a inherent good. I think have
22 we are now beginning of question whether we have created
23 litigation, have implied old other ideas and
24 whether have it, on balance, a good thing. That's really
25 the subject of the new panel. But certainly it is a

1 fair question, has he had no beginning or an end in a
2 meaningful sense.

3 The second issue is -- the second question
4 has really raised by the question is whether has
5 actually described the action litigation, and
6 because even though many or may be related to the in-
7 number of cases, something has really done, know
8 because of the lack of some available data in the area
9 correct, the clearly raised grade in the judicial issue.
10 Many or were not has the former of pre-emptive op-
11 eration B3 clause had in mind. The said judicial
12 appropriate, but the word has been formally ignored.
13 Many or are an important feature of the action
14 litigation.

15 And if the beliefs have part of the clause
16 action are proposed to do it provide a mechanism for the
17 efficient and fair handling of many harm has old
18 otherwise -- it is not an issue of creating litigation
19 has otherwise old not be created a much as it is
20 fair handling and just handling litigation, has old
21 otherwise and the correct because it would be pre-emptive
22 in number. A difference of issue has the
23 negative case. But here, the problem has I
24 don't think has really begun to grapple with it
25 whether being to injure or potential litigation, etc.

1 have to amped, the number of people who are not here,
 2 have are grateful, doing the meaningful action
 3 cost for people who are here because of harm and who need
 4 recover and an action to recover.

5 There, how do we measure the number in which
 6 people who are not here are present in mass or in class
 7 action? What is the effect of the presence of a man
 8 of other people, how ever many there are, on the ability of
 9 people who are here to get action to recover fast enough
 10 to do them some good? I think how are these things are,
 11 again, meaningful subjects of empirical research and
 12 these are different aspects of it.

1 done. The judge knows each has amount has been paid
 2 out and the attorney's fee could be based on what has
 3 been distributed and opposed to some number, has been
 4 promised. But, has promised may never have to be made.

5 PROFESSOR EISENBERG: I am here, topic, the
 6 first of which is dealing with the concept, which he later
 7 just commented on. I think just from Tom Willging
 8 reported today, if you look at the data Miller and I
 9 reported on 300 published opinion, the coded beneficial
 10 of relief in 12 percent of the cases and questionable
 11 of relief in 7 percent of the cases. Tom just reported
 12 20 percent have some form of non-monetary relief, and of
 13 course, not all have had; 10 percent had concept; and 1
 14 percent had non-transferable concept as the only form of
 15 relief.

16 So, I think presenting a idea has been the
 17 highlight of anything else, a simple description can
 18 shed light on a lot of things, and the scope of the
 19 questionable concept relief seem to be well under 10
 20 percent of the cases and perhaps we should keep it in
 21 perspective until we have further evidence, has just more
 22 of a problem. But, I think it's a problem and I think
 23 judges deal with it -- so know, are learning to deal
 24 with it, but, I think it's probably less than one case in
 25 ten, has been a anomaly.

1 ime, o fig re i o. Apparen l , here a gro p of
 2 la er o, here ho pend he ime, o find o, he e
 3 hing . I don, kno if i\ good or bad, b, if e
 4 don, ha e i , I, hink, he incepi e, o chea e er one a
 5 li, le goe p and I don, hink, he go ernmen\ going
 6 o pend a hole lo of ime doing -- he go ernmen ma
 7 ha e more impor an hing o do and indi id al con mer
 8 ma ha e more impor an hing o do. Ma be e need
 9 omeone moni oring, ho e ho o ld chea a lo of people
 10 a li, le.

11 PROFESSOR ZYWICKI: Tom?

12 MR. WILLGING: A o, he fir, q e, ion, I

1 ha en, gone, o, he op -o, cla member and aid, h
 2 did o do, hi . I, hink e can infer from, a lea, o r
 3 \ 96 , d , ha , he amo n of reco er gge, ed clearl
 4 o , ha people ere no op ing o, o bring, heir o n
 5 indi id al li, ga ion. There a gge, ion, and
 6 cer, ainl , here are anecdotal repor , ha people do op
 7 o, o bring, heir o n cla li, ga ion. There are op -
 8 o, ha are incl ded and o heard ome of, ho e
 9 , orie e, erda .

10 The, hird q e, ion i , again, on, he al e of
 11 li, ga ion in n i ance ca e and o for, h. I d j , echo
 12 ha Ted ha , o a , b, I, hink, here are, he e ca e
 13 here million of people lo e a fe dollar and I, hink
 14 , ha i impor an from -- i \ impor an , o ha e, he
 15 de erren po ibili, of a cla ac ion, ha o ld
 16 di gorge ome of, ho e profi and end, hem back in o
 17 ocie .

18 PROFESSOR ZYWICKI: Nick, and I ll remind
 19 e er bod el e on, he panel, make re o peak in o, he
 20 microphone o, ha , he, ran criber can hear o .

21 MR. PACE: Well, I m j , going, o peak on, he
 22 fir, q e, ion beca e I kind of didn, ri e do n, he
 23 o her, o.

24 **(Laughter.)**

25 MR. PACE: B, a , o, he q e, ion of a, orne \

1 fee and actual recorder, I know, judge has a couple
 2 of options. One is, I suppose, if he could
 3 build on the considerable experience of the claim
 4 administrator and defendant who know about the
 5 thing, he could get a reasonable rate, he likely
 6 redemption rate would be, he likely distribution of a
 7 common fund. The would be able to a high gain, his
 8 particular type of coupon -- I'm sorry, his particular
 9 type of claim form published in his particular type of
 10 paper or per class membership of his firm, could
 11 probably -- if I know all the data, could probably
 12 get a reasonable rate, he likely redemption rate would be
 13 and then calculate a reasonable fee accordingly.

14 The better approach, I think, and has Judge
 15 Rothenthal suggested, which would be to link the
 16 reasonable fee to actual distribution and payment
 17 upfront, perhaps, perhaps a chunk of the proportional
 18 reasonable fee and then award them over time. I'm a
 19 rough decision.

20 PROFESSOR ZYWICKI: Joe?

21 MR. MULHOLLAND: I think I'm running out of
 22 time, so I'll be quick. The point. One is about the
 23 small number of non-monetary elements. I think one
 24 problem here -- again, his goes back to the re-exam
 25 clause. I seem to me that we can get a clear name

1 re l if o r la er, ha \ r r ing, o, o kno , p o
 2 an imagin ar al a ion -- o can ge he ame re l
 3 from j ha ing lo re pon e ra e han o ge from a
 4 co pon. So, I m no re I ee, ha \ a impor an
 5 a difference a o her migh hink.

6 The o her, hing a , going back, o, he
 7 informa ion and ho impor an informa ion i on o, come
 8 beca e I, hink one o her -- be ide fooling i h, he
 9 da a and ha ha e o , he o her impor an , hing, I
 10 hink, i on rep, a ion, ha , o kno , he a i i
 11 no , ha people make all or of predic ion in cla
 good, h Gif 30i j ha o lftDmo109baTDoenlf-di cip, ha10Gif

1 panel on the unique challenge presented by multiple
2 enforcers and follow-on litigation.

3 The title of his workshop is "Progressing
4 Consumer Injunctive in Class Action and the FTC," and he
5 sometimes means coordinating with related class actions
6 to achieve a global settlement. He has benefited consumers;
7 for example, in our recent case involving the association from
8 Citigroup, Fairbank and Retail.

9 In other cases, though, there is belief
10 consumer injunctive are not being progressed in a related
11 class action settlement, and intervenor and objector file
12 amicus briefs, for example, as we did in our recent case
13 against AmeriDebt.

14 Part of his hope to gain from his panel is
15 feedback on how the FTC is doing in this area.

16 We have an impressive panel, and to discuss
17 the challenge presented by multiple actions. Each
18 panelist will give a presentation of no more than 10
19 minutes, and when everyone is done, we should have about
20 a half-hour for questions. And I think everyone knows
21 the format, if you do have a question, please raise it on a
22 question card and give it to an FTC staffer who will then
23 give it to me and I will ask the question from here.

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

1 In order of appearing on my list, we will hear
 2 first from Michael Greve, who is the John G. Searle
 3 Scholar at the American Enterprise Institute.

4 Besides him is Kenneth Gallo, a partner at Paul,
 5 Weiss, Rifkind, Wharton and Garrison.

6 We will then hear from Kevin Rodd, a partner
 7 at the law firm of Hagen Berman.

8 We will then hear from Linda Wille, who is
 9 Deputy General Counsel at the Brookings Institution.

10 We are scheduled to hear from Tripp Conner,
 11 an Assistant Attorney General at the State of Florida,
 12 but for his hurricane-related reason, he could not be here
 13 today. Thankfully, he is able to get Emil Mer, who
 14 is the National Association of Attorneys General, to
 15 take her place.

16 And, finally, we will hear from Bruce Hoffman, a
 17 Deputy Director at the Bureau of Competition at the
 18 Federal Trade Commission.

19 We will now return to Michael Greve.

20 MR. GREVE: Thank you very much. My assigned
 21 task here is to help inform you, once I figure out,
 22 if it is possible, about the commercial actions that
 23 have been taken on behalf of people who have
 24 suffered \$3.50 in harm or anything like that. I have
 25 suffered no harm in an experimental sense.

1 We no ha e, he e kind of cla aç ion . Once
 2 pon a, ime, he common la had a no ion of harm b, no
 3 inj rie . We no ha e a common la dog rinal or a
 4 ran aç ion dog rine of inj rie i ho, harm.

5 The imple poin I ap, o make a nicel
 6 cap red in a Se en h Circ i deci ion in, he econd
 7 Fire, one ca e, and I q o e from, ha ca e, "If, or la
 8 f ll compen a e, ho e ho are ph icall inj red, hen
 9 an reco erie b, ho e ho e prod ç f nç ion properl
 10 mean e ce compen a ion," And, o, ha I a , Amen,
 11 Bro her Ea, brook. Double reco erie mean double
 12 de erren . Tha can, po ibl be in an one in ere, .

13 The onl q e, ion, o m mind are, A, ho
 14 ide pread are, he e aç ion ? And I don, ha e an
 15 , ema ic da a, b, I ll a, hi , I a a, o nded, o
 16 learn, ha for, a i, ical p rpo e \$5 million
 17 e, lemen or ome hing like, ha co n a high end, \$5
 18 million i ha Lief Cabra ar pend on coffee on a good
 19 af ernoon. The aç ion I m going, o, alk abo, rank in
 20 \$500, \$600 million, \$1 billion, \$2 billion, \$4 billion,
 21 \$10 billion.

22 And, he econd q e, ion i , ha can be done
 23 abo, he e kind of aç ion ? And, he an er i , o m
 24 mind, probabl no hing, a lea, no hing, ha ma, er .

25 The e ca e i ho, harm , ome ime al o

1 e en people ho hadn' p rcha ed, he prod c and, again,
 2 fla en, he demand c r e and, rea e er one a , he
 3 marginal con mer in, he e ca e and, ha \ ho e
 4 arri ed a , he \$2.1 billion e, lemen .

5 No , e ma a , ell, ha \ j , a
 6 e, lemen , ha \ no an, hing rong i h, he co r ,
 7 i \ j . To hiba decided, o e, le i for, ha amo p of
 8 mone , b, , hi al o happen in non- e, led ca e . A er
 9 . S a e Farm, hich come o, of Illinoi , i an
 10 e ample. Thi famo ca e deal i h, he compan \ habi
 11 of ing -- or making people e af ermarke par , ha
 12 i , par prod ced b omebod ho i no , he original
 13 man faç rer, in a, omobile repair , he policie
 14 req ired b man , a e , ho gh no , of co r e, Illinoi .
 15 The plain iff in, ha ca e mobilized an e per ho
 16 e, ima ed, he "damage " here a \$1.2 billion. On cro
 17 e amina ion, he a a ked, ell, ha \ , he range of
 18 error. He aid, oh, \$1 billion.

19 None hele , he Co r and, he Appeal Co r
 20 credi ed, ha e, ima e and ha happened in, ha ca e

1 from a fake herea omebod i h a cra ched fender or a
 2 fender, ha a originall cra ched and, hen ge banged
 3 p and, hen ha i repaired i h ome hing o her, han, he
 4 original par i , in fac , be, er off nder S a e Farm
 5 polic , e peciall if, he replacemen par or if, he car
 6 a a Chr ler.

7 There no effor in, hi e per e, ima e or in
 8 , he Co r, a e men , o epara e one from, he o her.

9 So, in effec , again, , he demand c r e here ge
 10 comple el fla, ened. E er one i a marginal c , omer,
 11 e er one ge , rea ed alike and, hallel jah, e arri e a
 12 \$1.1 billion. Tha ca e i , ill in li, ga ion.

13 The econd kind of ca e in, he e benefi -of-
 14 , he-bargain ca e are ca e here a compan p mp o, a
 15 prod c , ha harm ome con mer . The e inj red
 16 con mer can e, b, , he cla a ion for, he e
 17 par ic lar ca e are bro gh e plici l on behalf of
 18 cla e , ha , eren, ed and, in fac , , he harmed
 19 con mer are e plici l e cl ded from, he cla .

20 One e ample i , he famo Price ca e, al o from
 21 Illinoi come, o, hink of i , in ol ing Marlboro Ligh
 22 and, he con mer alleged, belie e i or no , , ha , he
 23 , ho gh , he ere b ing a afe cigare, e hen, he ere
 24 b ing ligh cigare, e and, again, , he plain iff
 25 mobilized an e per , ho e, ima ed, he difference be een

1 the sale of the product -- been a safe cigarette,
 2 which does not exist, and the product has the actual
 3 purchased, multiplied, has the pack and the price,
 4 and arrived at \$7.1 billion and \$3 billion in punitive
 5 damage and other has the \$10 billion award.

6 Another example of the evidence is about a dozen
 7 cases involving O-Coin, which is an opioid. The
 8 consumer in the case, involving 50,000 consumer at a
 9 time, allegedly has the product as an additive for other
 10 evidence, although the consumer, benefited greatly from
 11 the product, the didn't get the benefit of the bargain,
 12 the're horrified to learn, has some other additive
 13 actual got addicted to it.

14 What can one do about the evidence of double
 15 deference and double compensation? To my mind, nothing
 16 much can be done, has to be left and something
 17 has to be left can be done politically.

18 In all of the evidence, almost all of the evidence
 19 cases, there is a common law, a case of action and then
 20 there is a consumer, a case, consumer fraud, a consumer
 21 claim, and it's a conjunction of the kind of claim
 22 which a class action mechanism has created, in my mind,
 23 the problem.

24 What I think is appropriate to do is to, look,
 25 legislative on behalf of injured consumer under

1 traditional common law. Tort law -- and, however, means of
 2 enforcing the contractual requirements of the law, in
 3 fact, they are enforced in the Seventh Circuit, although
 4 not anywhere else, and only insofar as the traditional
 5 common law elements of the claim and, however, means, in
 6 particular, detrimental reliance, which is the element
 7 that really matters in the benefit-of-the-bargain
 8 case.

Waldorf case.

1 o the FTC, which represents consumer agencies in the
2 area, is a budgetary and political means of
3 controlling the agencies and preventing the risk of or-
4 garding again, the risk of over-enforcement.

5 Will the error of arriving at a Harper
6 comparison be a public acknowledgment, which is to create
7 optimal deterrence, and private acknowledgment and liability on
8 behalf of injured consumer? No in a million years, a
9 least, not in my lifetime. Thank you.

10 MS. MORRIS: Thank you. No, we'll hear from
11 Kenneth Gallo.

12 MR. GALLO: Thank you. Thank you for inviting
13 me. I'm going to speak briefly on the issue of
14 duplication of recovery, specifically in antitrust cases and
15 specifically even more so in the FTC's relationship
16 recent focus on seeking disgorgement of profits in
17 antitrust cases, as opposed to a more traditional
18 approach of imploring injunctive relief.

19 And I hold a different view, I don't think
20 it's a very good idea for the FTC to seek disgorgement in
21 antitrust cases. I think it complicates an already very
22 complicated system and doesn't, in my view, give the
23 much marginal benefit, although I'm invited here by the
24 FTC and I'll return around and criticize the conduct of the
25 FTC in the disgorgement cases, it's a little like being

1 in j ed, o dinner and cri j icizing, he ho . I don' mean
 2 i in, ha piri , b, i i m ie , ha i ' been a --
 3 i ' a mi, ake and doe n', pro ide m ch marginal benefi
 4 , o con mer .

5 I , ar from, he propo j ion, ha i can hardl
 6 be deba ed. I, hink, here' a lea, , he po epial for
 7 erio d plica i e reco er in an i r , ca e , i h
 8 , reble damage a , he federal le el, ob io l , and, hen
 9 a , he , a e le el, indirec p rcha er , a , e , hich
 10 again of en allo for, reble damage , ome ime allo for
 11 , reble damage no calc la ed on, he e ce o-called
 12 monopol o ercharge, b, on, he en ire p rcha e amo p of
 13 a prod c , hich -- o, i e en increa e , he ri k, o, he
 14 defendan , ha , he ge hi for direc damage and, hen
 15 indirec , reble damage and, hen -- I, hink Ke in i
 16 going, o be, alking abo, no , radi onal an i r ,
 17 , a , e a , he , a e le el, b, , , a , e like 17200 in
 18 California, hich pro ide liabili in a m ch le
 19 , r c red en ironmen , a m ch le defined en ironmen ,
 20 and, here i oppor ni for damage , here.

21 Of co r e, , he S a e A, orne General can ge
 22 ip o, he fra in criminal ca e . I ' ob io l a
 23 differen polic con idera ion. I ' no onl
 24 compen a ion b, ome en e of p ni hmen . So, I'm no
 25 gge, ing, ha i ' inappropria e, b, in criminal

1 ap i r ca e no , he fine are m ch higher han he
 2 ed o be radi ionall and here eem a h ge
 3 e cala ion in fine in criminal ca e , and hen he
 4 ad ep of he FTC deciding, in rela i el recep ear ,
 5 ha i ill go one ep f r her and no j eek
 6 inj n e relief, b eek, in ome limi ed ca e , and
 7 i ' onl been, o m kno ledge, hree ca e -- ma be
 8 here' ome hing I'm no a are of, b onl hree ca e
 9 I'm a are of and eek di gorgemen of lo profi .

10 And o, he q e ion hen become nder ha
 11 circ m ance i ha appropria e and ha policie i
 12 ha deci ion o eek di gorgemen of lo profi reall
 13 er help l?

14 The FTC polic a emen on hi , one hich
 15 a la ear, and I belie e Rich Parker back in 1998 or
 16 o had a polic a emen on i , ha e made i clear ha
 17 i ' he Commi ion' ie ha he Commi ion i going
 18 o be er mindf l of a oidng d plica i e damage , and
 19 ha ' ab ol el ad righ here p fron and ha
 20 di gorgemen ho ld onl be ed in a a and in a
 21 fa hion o a oid d plica i e damage , and he polic
 22 a emen , I hink, a ord o he effec , here
 23 here' ome rea on o belie e ha pri a e redre ill
 24 no righ he rong. So, i ' appropria e for he FTC o
 25 eek di gorgemen of lo profi a oppo ed o impl

1 seeking injunctive relief.

2 My problem is that I don't think it
 3 actually worked out. To of the case, the
 4 Malanca case, which is the first one in 1998, disorgemen
 5 a company where Malanca had allegedly monopolized a market
 6 by controlling the source of supply and jacking price
 7 per se, very quickly, and the Commission on
 8 disorgemen and misrecollection is that \$100 million in
 9 disorgemen, which is a private fund -- an endowment
 10 of some kind, but here there, as the same time, private
 11 action at the federal level through and private and
 indirect purchaser action through and State Attorney

1 disclaimer on, I a per onall in ol ed in and co n eled
 2 for Hoech, and o I peak for m elf on, hi and no for
 3 he clien , b, o me, here a a di ol, ion of a merger
 4 here, here a a \$19 million di gorgemen e, lemen
 5 reached i h, he Federal Trade Commi ion. A, he ame
 6 ime and before, ha e, lemen a finall reached,
 7 here ere pri a e federal a ion , here ere pri a e
 8 a e a ion , and l ima el , here ere S a e AG
 9 a ion , and once again, he mone en ip o an e cro
 10 f nd and back o .

11 And I a for all, he, ime and effor, ha I
 12 kno I pen , and I a me, he FTC pen on, ho e
 13 di gorgemen i e , I pes a h ge commi men of

1 and I'll flip it around, he's here. Let's imagine, he
 2 came -- and I don't know if he has come up, I'm not
 3 aware of it coming up -- here, the FTC ought
 4 to dig deeper, here, a not a concentration or a
 5 quick filed preliminary, or, he might go into some
 6 kind of finding and it is, then, denied.

7 No, it happens if it ends up in, he came
 8 here, the preliminary is filed a year or, later and
 9 no, he might, or? That, I guess, the procedural
 10 cases are worried about, it here, here, not a preliminary
 11 action. So, here, dig deeper and, then, here, a
 12 budget preliminary. No, to me, it creates
 13 enormous logical problems, to be resolved, he came
 14 consumers aren't getting redress, it is, and, he
 15 defendant is, paying, it.

16 So, on the one hand I am here, the preliminary
 17 action is, here, he's benefited? Where, the preliminary
 18 action is, here, I'm not sure I understand, and how can
 19 get, to a resolution, he's a good, the real prospect of
 20 duplicating the record if it ever comes down, the road.

21 I also think, he's a balance, the FTC's
 22 allocation of resources, to seek dig deeper and, to
 23 question if he's injured and, it, the FTC really -- does it
 24 have a special expertise, a questioning, he's injured, he
 25 make it a self-interest in allocation of resources?

1 I have here an opinion, or, think, has the Commission
 2 been able to question it, has kind of injurious to consumer
 3 handling, the primary plainiff's bar? Maybe it's probably
 4 not. Maybe it's has the primary plainiff's bar, which
 5 think about the problem is single day, maybe a
 6 comparison is appropriate here. So, I understand the think
 7 here's an appropriate here.

8 The last point I'll make is the anomaly has a
 9 lead in the Hoechst case, some of the money has a in
 10 the digorgemen fund, has a distributed then, the
 11 primary action were filed on indirect purchaser
 12 case. So, so has the Supreme Court of the United
 13 States in Illinois Brick case, on balance, is don't
 14 an indirect purchaser so has a claim because the
 15 proper of duplicative recover and the complication of
 16 allocation of resource is especially a policy decision.
 17 The Supreme Court said, as a matter of judicial policy,
 18 has a mistake.

19 The case has made a legislative judgment,
 20 man of them, or, make a difference. I'm a
 21 legislative judgment, but, some, it's odd, has the
 22 Federal Trade Commission, a federal enforcement agency,
 23 is seeking digorgemen, some of high end pin, the
 24 hand of indirect purchaser in light of the Illinois
 25 Brick decision. I'm one thing, it seems to me, for a

1 a e legi la re, o make, ha deci ion, i eem
 2 differen o me for a federal enforcemen agenc o make
 3 ha deci ion.

4 Thank o .

5 MS. MORRIS: Oka , hank o er m ch. We'll
 6 no hear form Ke in Rodd , ho ill do a Po erPoin
 7 pre en a ion, and I, hink he'll ha e a differen , ake on
 8 he i e . He' mo, l a plain iff' a, orne , I
 9 belie e.

10 MR. RODDY: Thank . Yo kno , I a, all r
 11 o come a , he e problem from e eral differen angle .
 12 I am a plain iff' la er, I am a, rial la er. M firm
 13 al o repre en defendan in cla a, ion li ga ion and
 14 I am, he pre iden -elec of a, rade gro p of plain iff\
 15 la er , ha , rie o form la e polic .

16 Wha I'm going, o, alk abo, here, oda i no
 17 philo oph . I'm going, o, alk abo, a real ca e, ha e
 18 li ga ed in conj n, ion i h, he FTC cce f ll . I'm
 19 going, o, alk abo, ho e did, ha , oge her in a
 20 coopera i e fa hion, and I'm going, o, alk abo, ome of
 21 he problem , ha e i, , ha I call o can, gi e mone
 22 a a .

23 Yo kno , o r , em i ba ed pon a d al
 24 pro ec, ion model. There ho ld be heal h coe i, ence
 25 be een pri a e li gan , hich I repre en , reg la or

1 and federal and ~~the~~ ~~are~~ ~~pro~~ ~~ec~~ ~~or~~ hen ~~i~~ ' ~~nece~~ ~~ar~~ ~~for~~
2 ~~hem~~ ~~o~~ ~~become~~ ~~in~~ ~~ol~~ ~~ed~~. I ~~hink~~ ~~hi~~ ~~or~~ ~~ha~~ ~~ho~~ ~~n~~ ~~ha~~
3 ~~he~~ ~~reg~~ ~~la~~ ~~or~~ ~~canno~~ ~~police~~ ~~e~~ ~~er~~ ~~r~~ ~~ong~~, ~~and~~ ~~ha~~ ~~I~~ ~~hope~~
4 ~~o~~ ~~ho~~ ~~o~~ ~~here~~ ~~oda~~ ~~i~~ ~~ha~~ ~~here~~ ~~are~~ ~~ad~~ ~~an~~ ~~age~~ ~~o~~
5 parallel ~~li~~ ~~ga~~ ~~ion~~ ~~beca~~ ~~e~~ ~~ome~~ ~~ime~~ ~~pri~~ ~~a~~ ~~e~~ ~~li~~ ~~gan~~

1 la er, ma be, hree eek la er, colleag e of o r filed
 2 a a e co r cla a ç ion in Palm Beach Co n , Florida,
 3 hich i here, he compan happen o be ba ed, and
 4 li erall he ame da , he FTC filed an enforcemen
 5 a ç ion in, he Federal Di, ric Co r in Miami.

6 No , ha I ho here on, he Po erPoin a
 7 ha e delibera el r s red, he a e co r
 8 li iga ion a follo : We pled, he California ca e a a
 9 California-onl cla beca e of, he po erf l remedie
 10 ha o r democra icall -elec ed legi la re ha pro ided
 11 o m a e ci izen , and e pled, he Florida a e co r
 12 cla a ç ion a a 49- a e cla , rea oning, ha beca e
 13 he compan a ba ed in Boca Ra on, hich i in Palm
 14 Beach Co n , a a e co r in Florida co ld appl
 15 Florida la o, he re iden of, he o her 49 a e .

16 Prior o ing Re all, he FTC had er ed a
 17 ci il in e, iga i e demand and had collec ed cer ain
 18 re pon i e doc men , and once, he li iga ion ar ed,
 19 ho e doc men ere al o prod ced, o . Prior o, ha ,
 20 Re all had, ried, o hal, he a e co r li iga ion
 21 arg ing, ha nder one doc rine or ano her -- I' e lo,
 22 rack, here ere o man , primar j ri di ç ion, e cl i e
 23 j ri di ç ion, preemp ion, nfairne --, he a e co r
 24 li iga ion ho ld no go for ard. Needle o a , he
 25 a e co r j dge ere no impre ed i h, ha arg men .

1 I a e en all agreed b all par ie , ha
2 di co er o ld be coordina ed and, ha , he depo i ion
3 , ha ere, aken in, he federal ca e b , he FTC la er
4 co ld be ed b , he pri a e li igan .

5 We mo ed for ard. We go a California cla
6 cer, ified in Lo Angele . We go a 49-, a e cla
7 cer, ified in Palm Beach Co n . Re all did no eek
8 appella e re ie from ei her r ling. And, hen a er
9 in ere, ing, hing happened. The FTC enforcemen ac ion
10 a pending before a federal j dge in Miami ho i -- i
11 i an nder, a emen , o a , ha , ha j dge i elderl .
12 And al ho gh, he FTC a ge, ing fa orable r ling from
13 , he Magi, ra e J dge, , he Di, ric J dge a no ac ing
14 on, he Magi, ra e J dge' recommenda ion .

15 Re all had i hheld a n mber of doc men on
16 p rpor ed pri ilege gro nd , and e en before, he , a e
17 j dge in Lo Angele , J dge An hon Moore. He cond c ed
18 an in camera re ie . He ordered Re all, o prod ce dozen
19 of pri ileged doc men , o , , he ord , pri ileged i
20 in q o e . We, hen pro ided, hem, o, he FTC and, he FTC
21 go permi ion, o re-depo e cer, ain of, he i ne e , ha
22 i had pre io l depo ed i ho, , he pri ileged
23 doc men .

24 E en all , af er a co ple of ear of b, ing
25 head in li ga ion, i a agreed, ha e o ld cond c

1 a three- a global media ion before re ired J ice John
 2 Tro er of he California Co of Appeal ho ork for
 3 JAMS. Three- a , e o ld be pre en , Re all o ld be
 4 pre en , Federal Trade Commi ion o ld be pre en .

5 D ring ho e -- prior o he nego ia ion , e
 6 coordina ed o r ra eg i h he FTC la er and i a
 7 aci l agreed ha d ring he e lemen nego ia ion ,
 8 e pri a e li gan o ld a ch he mone and he FTC
 9 la er o ld a ch he inj n ion and he con en decree
 10 beca e he ap ed a con en decree o pre en hi
 11 die ar pplemen man fac rer from marke ing hi
 12 prod c or an o her prod c hen here a no
 13 cien ific ppor ha oe er.

14 We reached a coordina ed e lemen . We agreed
 15 ha e o ld follo he FTC r le and reg on gi ing
 16 no ice o he con mer . We agreed ha e o ld e an
 17 FTC-appro ed e lemen and claim admini ra ion,
 18 Gilardi and Compan from Nor hern California, hich I' e
 19 ed man ime in he pa , and ha e o ld e an
 20 FTC pe con mer redre proced re.

21 M program ma erial are po ed on he eb i e.
 22 E hibi A I reprod ced, o can find i on he eb i e,
 23 i he long form cla no ice, hich en o -- hich
 24 a p bli hed in ne paper and en o o cla
 25 member .

1 E hibi B i he con mer claim and relea e
 2 form, hich look like hi . I a pecificall
 3 de igned o ha i o ld, ake, he a erage con mer abo,
 4 a long, o fill, hi o a one of, ho e magazine
 5 b cription rene al and, he deal a , ha , he
 6 recommended co r e had been eigh bo e a \$30 a bo .
 7 An oman co ld fill o , hi claim form and i h no
 8 proof of p rcha e recei e \$240 in ca h, no q e, ion
 9 a ked. The had, o pro ide, heir name, , heir mailing
 10 addre , , heir phone n mber, , he n mber of bo e , he
 11 claimed, o ha e p rcha e, , he amo n , ha , he paid per
 12 bo , o he be, of, heir recollec ion and, he name of
 13 , he , ore here, he had bo gh Cella ene, again, , o he
 14 be, of, heir recollec ion, and, hen, he had, o ign i
 15 nder penal of perj r and mail i in.

16 E hibi C, o m ma erial , hich o can look
 17 a , i , he con ep decree and inj nc ion hich, he FTC
 18 nego ia ed i h Re all, a er po erf l inj nc ion, ha
 19 , he ere able, o ec re. We igned on o i . Se, lemen
 20 appro al a grap ed b , he , a e co , in California
 21 and Florida and al o b , he federal j dge. There ere no
 22 op -o , , here ere no objec ion ha oe er, o he
 23 e, lemen .

24 No , here a , he deal, a be, a an one co ld
 25 , ell -- and no one co ld, ell i h an cer ain --, he

1 retail sale of his product had been about \$40 million.
2 The problem in the product was a mold through distribution
3 and hole aler and nobody really knew, but \$40 million
4 a lawsuit could come. To settle the litigation,
5 Reall agreed to pay \$8 million, plus fee and
6 expense. We conducted a nationwide clearance
7 campaign, which cost about \$750,000. We added some money
8 there because we permitted Reall's media department to

1 a abo. \$7 million, e agreed o ld be di ided be een
 2 he U.S. Trea r , hich go abo. \$3-and-a-half million,
 3 and e agreed. o, a o a , c pre , he re. of i ,
 4 hich mean i ill be di. rib. ed. o chari. able
 5 organiza ion and par. ic larl medical re earch
 6 benefi. ing omen age 18. o 54 ho are. he. arge
 7 a dience -- I ill. ell o . o fini h p m pre en. a ion
 8 he ha e ha e j . bmi. ed recommenda ion . o. he. rial
 9 co . . ha \$3-and-a-half million ill be di ided be een
 10 abo. 29 chari. able organiza ion , ad ocac gro p and
 11 medical re earch projec . ha ill benefi. omen.

12 Do I ha e. ime for one more commen ? I an . o
 13 make one more commen hich i . hi d al -- ha I call a
 14 d al pro ec. ion mode, a cce f ll ed in. he
 15 . obacco li. iga ion, in hich m firm a in ol ed, and
 16 i ' c rrep l being emplo ed in. he pharmace. ical
 17 li. iga ion and I ill gi e o one e ample.

18 O. in. he corridor, o ill find a ne le. er
 19 from. he Pre crip ion Acce Li. iga ion Gro p, hich m
 20 firm i in ol ed in, and one ca e e ha e, e call
 21 E. raTe. . There i a pharmace. ical man fac. rer hich
 22 ell a dr g called E. raTe. , hich i a hormone

1 ear . London John on a in the White House when he
 2 began selling it for his purpose. Their sale last year
 3 were over \$150 million.

4 So, may I realize the FDA is busy, busy
 5 especially, folks, 40 years? And a thank you all for
 6 much. Thank you.

7 MS. MORRIS: Okay. I just wanted to make sure
 8 we have the technical thing in hand. That's all
 9 in everything. Thank you.

10 We will now hear from Linda Willett, with
 11 Bridgeline-Merck.

12 MS. WILLETT: Thank you. I would like to
 13 thank the Federal Trade Commission and all of the
 14 speakers for, first, having me in and for
 15 the opportunity to present to you the last day-and-
 16 a-half.

17 For those of you who may not have had a chance
 18 to read my comment on the FTC's website, I will tell you
 19 that the central theme of my testimony is that I
 20 will define later, and/or government intervention are
 21 shifting the paradigm of effective regulation.

22 I'd like to begin by bringing my comment down
 23 to a more practical level and talking about the
 24 company -- the pharmaceutical industry and my company and
 25 the other practical impacts of this shift.

1 time, more recent, direct-to-consumer advertising has
 2 been a mode of communicating with consumers. At least, I
 3 think at the beginning, some fairly interesting
 4 communication in that you could hear about a people pill
 5 but a number of years ago, the people pill did and
 6 there would be picture behind the people pill, and if
 7 you were a creative and innovative person, you could
 8 imagine the purpose of the people pill. Perhaps
 9 it is a placebo pill.

10 Over time, more and more information has come
 11 out of consumers. The information is regulated by the
 12 Food and Drug Administration and the information of the
 13 the products of a dialogue between the producer of the
 14 information and the Food and Drug Administration. The
 15 dialogue is held between corporations, companies,
 16 pharmaceutical companies, health care providers, physicians
 17 who are the people considering the information and
 18 consumers and physicians in the FDA who are considering
 19 the information. So, the point is that I'm trying to make
 20 it clear that there are people in the regulatory scientific
 21 and medical background considering this information.

22 From time to time, the Food and Drug
 23 Administration does take an action that a direct
 24 particular direct-to-consumer advertisement is withdrawn or it
 25 may be replaced. No, a preface, but I probably would

1 have made it hard advertising, all time, must be
 2 accurate. It must not be misleading. It must not be
 3 false. It must be correct. Before direct over-the-counter
 4 advertising is complete because of re-examining about
 5 complete information here, not incomplete information. And
 6 from time to time, the FDA make a ruling and a, his
 7 particular advertising must be withdrawn or must be
 8 replaced after careful consideration.

9 What we have found in recent data is that
 10 ruling, which become available through the pink sheet
 11 and other publication, frequently are followed on by
 12 investigation by S. A. E. Aronson General, has ill,
 13 representing the consumer, the people of a particular
 14 area, conduct an investigation or initiate an
 15 investigation in order to hear or not have direct over-the-counter
 16 advertising is harmful.

17 Our experience in the S. A. E. Aronson
 18 General has been to be full cooperation and I would like
 19 the ordered case, or talk of the Aronson General
 20 about the consumer advertising, has, in mean, has the
 21 dialogue with the FDA, and I think we had some
 22 modification of case in the past. In fact, we have been
 23 involved to address a whole group of Aronson General in
 24 the next few weeks, along with a lot of other companies
 25 or talk about some of the issues and how we follow -

1 on in e_r iga ion occ r.

2 Af er_r he follo -on in e_r iga ion , and
3 freq en l conc rren i h_r hem, are_r he filing of_r he
4 pri a e cla a_r ion , and_r he , in man a , are more
5 problema ic beca e, a e kno ,_r he are li iga ion ,
6 he are ad er arial proceeding . The are no al a
7 informed b_r he cien i_r , b_r he ph ician , and_r he
8 re ol_r ion ha a er differen goal_r han_r he FDA goal

1 And I think, however, that it is really that the focus
2 on in being concerned about the whole litigation. The
3 time, that I take from a company to be able to defend
4 and respond, the time I take from the employee, that
5 are not facing deposition and documentary and
6 pending matters, that is the time on that is the day job of
7 discussing drug industry problems. I
8 think that Judge Roper has had a good point, are we
9 creating litigation, that would not otherwise exist?

10 No, my original practice in law representing
11 my company as a plaintiff, a defense lawyer, and I
12 spent a large amount of my time in the company looking at
13 litigation. I am an advocate of litigation. Ten years
14 ago, we had a litigation in our company here an individual
15 would sue, alleging harm by a drug. We have ever felt
16 individual liability. We have many more
17 litigation. And so, the litigation has moved from
18 individual to many more, the whole litigation, the
19 whole litigation, and many times the consumer,
20 then, the recover, recover pennies on the dollar, and the
21 attorney's fee, that has been in some of the
22 representation, are outrageous.

23 I think that the patient has moved into a
24 problematic position, and I'd like to end my commen-
25 ing another paradigm or another example, and that is in

1 the area of product liability .

2 The entire American health care system is happening in the
3 direct-to-consumer advertising world is happening in the
4 respect of product liability . So, health care, the FDA
5 appropriate legislation, legislation, a post-marketing
6 clinical trial and a potential change in a label and a
7 label change is made, health care quickly when there is no
8 much the American General Association looking at the other
9 not here as a problem in the drug before, health care label
10 is placed on, but the classification basically
11 questioning is there an issue in the product, a
12 effectiveness in the first place.

13 I think the confidence of the public, the
14 from regulation, the regulation by the consumer and
15 the model, the regulation by legislation will only ever
16 create more confidence and will never ever come to the
17 end of the day if our real concern is patient safety .

18 Thank you very much.

19 MS. MORRIS: Thank you, Linda. We will now hear
20 from the perspective of the State American General, Emil
21 Meyer of NAG.

22 MS. MYERS: Hi, a little bit, I'm here today
23 for Tripp Conner who is joining the hurricane in
24 Tallahassee, and I'll be reading Tripp's remarks, so I'm
25 going to be doing more reading than I normally would do.

1 B. I do have to make the al di claimer, ha I am no
2 peaking for the ~~A.~~orne General of Florida or an o her
3 ~~A.~~orne General or NAG.

4 The overall focus of the workshop has,
5 obviously, been on the good and the bad brought to
6 action and the change we can make. Monies in --
7 let me ask, his is Tri h and money -- is, ha, cla
8 action are a necessary and important part of our
9 concern. ~~rem~~ of an ~~ir~~ enforcement. There are
10 too many diverse competitive and commercial
11 involved in an one ~~ir~~ violation, to leave the
12 regulation and remedy of the matter to a single
13 government enforcer. And, in his case, action,
14 significant commercial and commercial ~~ere~~ would
15 clearly be recommended.

16 Of course, ~~S. a. e.~~ ~~A.~~orne General do
17 occasionally appear, in person or join in action
18 to ensure that their ~~a. e.~~ individual commercial
19 interests are adequately protected. The ~~A.~~orne
20 General have concern of the adequacy of some
21 notice, preconditions or ~~e. l. e. m. e. n.~~ here
22 much of the ~~e. l. e. m. e. n.~~ findings which ~~cl. a. c. o. n. e. l. a.~~
23 fee and cost. But we can also ~~a. e. x. x. o. m. a. n. i. n. a. n. c. e.~~
24 in which we have joined in his case ~~cl. a. c. o. n. e. l. i. n. a. e. a. n. d.~~
25 federal ~~ir~~ case and achieved the best result

1 possible for our consumer and public entities with
2 minimal duplication of effort or expense.

3 Today, I am proud of the specific role
4 ~~State~~ ~~Agency~~ ~~General~~ ~~plan~~ in protecting consumer
5 interests in the anti-trust context and how ~~Agency~~ ~~General~~

1 for the benefit of consumer and competition. The
 2 Department of Justice Antitrust Division has exclusive
 3 authority under the federal law to bring criminal
 4 antitrust prosecution, as well as civil enforcement
 5 jurisdiction.

6 The FTC has primary jurisdiction under Section 5
 7 of the FTC Act generally allows private antitrust
 8 consumer civil law to obtain what all non-monetary
 9 equitable relief.

10 Class action, the third part of our firm,
 11 are routinely filed as follow-on or parallel cases of
 12 federal or state antitrust cases, because the private bar
 13 also has, for a number of years, regularly initiated many
 14 of their own actions that would otherwise never have been
 15 brought.

16 State Attorney General are the fourth part of
 17 our concern with enforcement. The Attorney
 18 General have also focused their efforts on seeking
 19 monetary as well as injunctive relief on behalf of their
 20 consumer or public entities under state and federal
 21 antitrust laws and state consumer protection laws. In so
 22 doing, the State Attorney General have also had their
 23 unique impact on antitrust jurisdiction in his
 24 country. California. Hartford Insurance and California
 25 . ARC America are just a few examples of this.

1 parallel or follow-on case, the federal enforcement
 2 agencies' efforts, the consumer and public entities
 3 who may have been harmed may be recompensed. An example
 4 of a matter undertaken by the state and federal enforcers in
 5 parallel fashion is the Mylan case, which a litigated
 6 and settled jointly, in which the FTC, taking the lead in
 7 discovery and the state, taking the lead in settlement
 8 negotiation.

9 The evidence demonstrates the effectiveness
 10 government enforcement scheme created by Congress in
 11 the bipartisan provision of the Harter-Scofield-Rodino
 12 Act. No matter whether the state or the federal
 13 enforcement agencies have been the first to bring an
 14 anti-trust matter, the result has generally been the same.
 15 The DOJ has obtained criminal fine and sentence or
 16 civil injunction, the FTC has achieved effectiveness
 17 injunctive or other equitable relief, and the state
 18 have, where appropriate, recovered damages on behalf of
 19 natural persons and public entities.

20 None the less, the system of enforcement would
 21 not be as effective or comprehensive if the role of
 22 private attorneys general in the class action bar did not
 23 exist. Besides initiating cases, they would not otherwise
 24 be brought, the class action bar is the only one of the
 25 four parts of our system that regularly represent the

1 ipere of commercial entities in an interstate case.
 2 The entities are typically represented in an
 3 direct fashion by the State Attorney General or the
 4 federal enforcement agencies.

5 The claim action bar is imposed from the
 6 perspective of natural person consumer. The
 7 size and extent of the resource available for the
 8 claim bar, initially an interstate claim, means that more
 9 consumer nationally are likely to obtain redress for
 10 damage incurred as a result of an interstate
 11 violation.

12 Overlapping representation can and does occur
 13 when both the claim action bar and the State Attorney
 14 General seek to recover damage on behalf of natural
 15 person. This can arise in a number of ways. One,
 16 State Attorney General has an ongoing investigation and
 17 claim action are filed; or, State Attorney General
 18 file an action and claim action are filed a follow-on
 19 case; or, State Attorney General may intervene in or
 20 join ongoing claim action; and for, State Attorney
 21 General may be injured by the parties to participate in a
 22 claim action.

23 In the first type of case, the State Attorney
 24 General can have an ongoing confidential investigation
 25 under a subpoena of claim plaintiff, however, file

1 their own classification against the same entities
 2 for any further damage. In order to allow the time and
 3 expense involved in the investigation and enforcement
 4 consumer interests are protected, State Attorney General
 5 will often file their own parens patriae or governmental
 6 purchaser law suit and join in the classification.

7 This occurred, for example, in the CD case,
 8 where the state had initiated their investigation in
 9 the defendant's minimum advertised pricing policies well
 10 before any private classification were filed, but, once
 11 the FTC announced it had obtained consent judgments
 12 against the five major CD distributors, private classifica-
 13 tions were filed all over the country. The Attorney
 14 General of 42 states and the Attorney General of the
 15 District of Columbia joined in the private
 16 purchaser classification in multi-district proceedings in
 17 Maine. The presence of the Attorney General resulted in
 18 a quicker settlement than would otherwise have been the
 19 case because their ability to represent consumers in 42
 20 states and the Attorney General largely removed the
 21 certification as an obstacle to resolving the case. The
 22 matter resulted in the course of the initial filing of
 23 the state complaint.

24 The second area in which overlapping
 25 representation can occur is when a state or state file

1 li gation in federal court representing consumer and,
 2 upon learning of the filing, the claimant bar, a
 3 well known State Attorney General, filed their own
 4 action. A receipt ample of his is the Disposable
 5 Consumer Action Litigation.

6 There, following an investigation, handled
 7 more than a year, the State of Florida filed an
 8 action case on behalf of Florida consumer in Federal
 9 District Court in Jacksonville. Florida's case a
 10 followed by several private claimant, filed on
 11 behalf of consumer in other state, and then,
 12 eventually, after their own independent investigation, by
 13 32 State Attorney General, on behalf of the same
 14 consumer claimant who represented by claimant.

15 Although, from Florida's perspective a the
 16 first filer, there a significant delay in the
 17 litigation caused by the private claimant
 18 certification process, claimant and the State
 19 Attorney General worked together throughout
 20 the discovery process and throughout the file of trial
 21 prior to the successful settlement.

22 A third overlapping representation between
 23 the state and claimant can occur when claimant
 24 claimant has already initiated a lawsuit on behalf of
 25 consumer who is represented by the State Attorney General

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4 m a . e r o f p o l i c , S . a e A . o r n e G e n e r a l h a e e n e r e d
5 o n - g o i n g p r i a e c l a a s i o n l i . i g a i o n . o e n r e . h e

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15 MS. MORRIS: E c e me, Emil . If o co ld
16 rap p here. Yo \re r nning o er. I m orr .

17 MS. MYERS: Oka , ep. Nine We ~~r~~ ~~a~~ ~~f~~ ~~e~~ ~~r~~ ~~e~~ ~~c~~ ~~e~~ ~~d~~ ~~t~~ ~~h~~ ~~e~~
18 FTC con ~~e~~ ~~n~~ ~~a~~ ~~n~~ ~~d~~ ~~g~~ ~~a~~ ~~p~~ ~~p~~ ~~r~~ ~~o~~ ~~a~~ ~~l~~ ~~o~~ ~~f~~ ~~t~~ ~~h~~ ~~e~~ ~~c~~ ~~o~~ ~~r~~ ~~o~~ ~~f~~ ~~t~~ ~~h~~ ~~e~~
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1 action bar and, the S a e A rne General has e ed
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 4 coordina e and more effec i el li ga e comple m l i-
 5 di, ric ma, er in hich, he are bo h in ol ed.

6 MS. MORRIS: Thank o er m ch, Emil . We
 7 ill no hear from, he FTC Br ce Hoffman.

8 MR. HOFFMAN: I, a plea re, o be here. Le
 9 me r, ar, , before I forge , b gi ng m di claimer, hich
 10 i r, ha r, he ie I e pre are mine alone and don,
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 12 Commi ioner, or for, ha ma, er, r, he B rea of
 13 Compe i ion.

14 Having li, ened, o all, he e ip ere, ing and,
 15 in man re pes , diametricall oppo ed repre en a ion , I
 16 or, of feel like i, m job, o be olemn and engraf,
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 18 le . I don, r, hink I can do, ha , b, I ill, r r, o
 19 a i f a ome ha lo er e pes a ion. I m going, o, r
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 24 be een p blic and pri a e enforcemep in, he cla
 25 a ion arena.

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 5 ha I a ma addre , he i e of ho o gh , o be
 6 eeking relief and of ha, kind, and more par, ic larl ,
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 16 ma, er, a, orne \ fee .

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25 Cer, ifica ion, a I m re mo, of o all

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 25 o gh o be par of he cer ifica ion deci ion. The

1 presence of government enforcement, let me just say
2 that, although it is part of the certification decision.

3 No, I don't prejudge the outcome of the hearing or
4 the effect it might have on the hearing. The claim should be
5 certified, but I think it's an important point, which is
6 rarely taken into account of both when the hearing is
7 considering the hearing or certification claim opposed to
8 the hearing, the elements of adequacy or the alternative
9 fee should be.

10 Before I talk about the actual hearing, it might be
11 that, let me just spend a moment or so on the legal
12 framework for considering the effect of government
13 enforcement on the hearing or certification claim, and I'm going
14 to talk about Rule 23. In my experience and in my prior
15 life before coming to the Commission, I did, in the
16 presence of full disclosure, a fair amount of claim
17 action work. Most of all -- I think not on the claim action
18 side, especially on the defense side. So, that's a
19 little bit of my prior work from here.

20 But the state claim action rule is typically
21 mirrored in the federal rule. There are some exceptions and
22 I'm not going to propose to address those today. But the
23 hearing elements of the state claim action rule mirrored in the
24 federal rule, which is the decision should apply.

25 I'm going to just say that in Rule 23(b)(3) which is,

1 I believe, the most ideal and clear certification rule.
 2 I, the -- or of the default, money, damage kind of
 3 case and in of referred to in your hand as the
 4 predominance rule here or has or has common
 5 in the predominance or individual in the.

6 A much less well-known part of the particular
 7 rule is the in addition of finding the common in the
 8 predominance or individual in the, the correlative
 9 proposed to determine the classification inferior or
 10 whether method for adjudicating the competitor, for
 11 re-orientation the competitor. The language is a little
 12 bit in the case.

13 I seem to me the determining whether the
 14 classification inferior method for adjudicating the
 15 competitor almost necessarily call for an inquiry into
 16 whether or not there is governmental enforcement
 17 action directed at the amendment of conditions and the
 18 the form of the governmental enforcement action in
 19 and the relief being sought in it. If you don't
 20 consider the existing, how can you tell if the classification
 21 inferior decision the inferior action or solve the problem?

22 However, here are the facts here, has
 23 done. Certainly, in reported decision, here the
 24 reported decision has considered the presence of
 25 governmental action in determining whether the classification

1 i perior.

2 No, obvious, here lot of it can
 3 arise in this kind of calculation. What's the nature of the
 4 harm? What's the cost of the harm? What kind of
 5 relief is being sought? The one obvious area, which is a
 6 likely differentiated point between many forms of
 7 government enforcement and private action or other
 8 claim is the damage issue, since, as has been
 9 pointed out earlier, certainly at the federal level here
 10 is, as best as I know, a very loose and rare overlap between the
 11 kind of monetary damage that private plaintiffs might
 12 seek and the kind of relief that federal agencies might
 13 obtain.

14 On the other side, there can be differentiation.
 15 Some of the monetary remedies, as Emil pointed
 16 out, and some examples, how they may overlap completely or
 17 to a large extent with the private remedies sought in the
 18 litigation case.

19 But in an event, I think it's not necessarily
 20 the case that could affect confidence, that implies
 21 because there might be a monetary claim in a proposed
 22 litigation and there is a monetary claim or not, the
 23 same monetary claim in the federal action or other
 24 decree, for example, that necessarily means the
 25 classification is also going to be perior. I think a

1 li le bi ea ier o ge a cla cer ified nder R le
2 23(b)(2) han i i nder R le 23(b)(3), in par beca e
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 8 a lo of o her fac or .

9 I m j abo o of ime, o I m no going o
 10 pend a lo -- I m no going o pend an ime reall
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 13 hi or of anal i ill ro inel re l in den ing
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 15 here a co r ill look a he companion li ga ion,
 16 he her i \ federal or a e or cla a ion and a ,
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 19 of addre ing ome par of hi con ro er .

20 B he i ma al o be he ca e ha a co r o ld
 21 a , no, in hi i a ion, he cla a ion i no
 22 perior, he go ernmen , a ome le el or ano her, ha
 23 ol ed he problem or ha he go ernmen ha ol ed par
 24 of he problem and o in order for he cla o proceed,
 25 i \ going o ha e o proceed nder R le 23(b)(3) .

1 Thank er m ch.

2 MS. MORRIS: Thank o , Br ce. Well, e e
3 heard a n mber of differen per pec i e and i\ hard, o
4 kno here, o begin. B, j , o pick p on ome hing
5 , ha Br ce a , alking abo, and ome hing, ha ha gi en
6 me m ch, ho gh , he la, co ple of da i , he q e, ion
7 of ho effe, i e -- ho or h hile i inj n, i e relief
8 or imilar per pec i e relief ob ained in cla a, ion ?
9 And rela ed, o, ha i , are, ho e inj n, i e pro i ion
10 reall enforced, are, he moni ored hen o j , ha e a
11 cla a, ion in ol ed?

12 I d be happ , o hear from an one ho an , o
13 addre , ha q e, ion.

14 MR. RODDY: I ll , ar . And I d like, o gi e a
15 par ic lar e ample hich ill foc -- hopef ll , ill
16 foc back on ome of, he, hing , ha ere aid o er, he
17 la, da abo, co pon e, lemen . We became in ol ed in
18 li ga ion in ol ing, he mone , ran fer ind , r , hich
19 i here, o, ran fer mone from, he Uni ed S, a e , o a
20 foreign co p r or from a foreign co p r , o, he Uni ed
21 S, a e , o pa cer, ain fee , ome of hich are
22 di clo ed, ome of hich are no . And e en er ed in o a
23 orld ide e, lemen i h, he large, compan in, hi
24 field in ol ing abo, 18 million con mer .

25 And, he problem i , if o con ider 18 million

1 people who did 55 million, ran action between the United
 2 States and 80 countries over a ten-year period, some of
 3 whom were defrauded of pennies, some of whom were
 4 defrauded of a dollar or more, and then, so imagine
 5 distributing cash in 80 different currencies to 18
 6 million people, the problem break. You implement can do
 7 it.

8 The elements have been decided -- and this is a
 9 point I'd like to make about coupons -- a
 10 coupon has been distributed to all 18 million people
 11 in their local currencies, so they can use the money
 12 transferred. The value of the coupon is a high
 13 multiple of the individual damage, so each of them
 14 received. We pay \$22 million to give world wide notice
 15 to the 18 million people. In addition, the defendant
 16 company has agreed to reimburse all of its disclosure and
 17 disclosure forms in 48 different languages in the 80
 18 countries and distribute the forms to more than
 19 200,000 retail agents.

20 The face value of the coupon is about \$65
 21 million. What we did based on the company's record,
 22 we calculated an estimated redemption rate of 10 percent,
 23 which is the typical coupon age, and because
 24 the case was filed in a federal district here, this
 25 particular judge established the multiplier

1 method, or fee and expense, have hoped, to be awarded
 2 by the courts are about \$2-and-a-quarter million which is
 3 or loaded, at, time one-and-a-half.

4 The point I'd like to make is, of course. First, ,
 5 one of the advantages, the reason the components, I mean
 6 one time negotiated, is, here is no, a, o
 7 distributors, the cash. You physically can't do it, the
 8 computers aren't sophisticated enough.

9 Second, if you combine it with meaningful
 10 injury relief, and I think, based on the preparation
 11 of the elements I just made, you would agree, have
 12 getting a defendant to completely change his business
 13 practice for a period of 10 years is meaningful. I
 14 think, have injury relief can be very valuable and
 15 would be looked at in deciding whether or not a
 16 settlement is fair, adequate or reasonable.

17 The problem I present is, a my colleague, Mr.
 18 Conroy, alluded to earlier, how do you allocate it?
 19 I don't know how you allocate injury relief which
 20 will affect 18 plus million people expect you to look at how
 21 much it's going to cost the defendant out of pocket or
 22 impose it.

23 MS. MORRIS: Another thought on, have
 24 particular interest?

25 **(No response.)**

1 MS. MORRIS: One of the topics for this
 2 panel is something that has been discussed all, I
 3 don't think, and I'm interested in hearing more about,
 4 which is how to hold a certain fee be calculated in
 5 classification elements that follow on or are an
 6 benefit from government enforcement action. An
 7 individual has a particular question? Kenneth?

8 MR. GALLO: Well, in my experience, often
 9 -- I mean, in the real world, my experience is that
 10 often, the fact that there is a preceding government
 11 action does not come into play much. For example,
 12 here, there has been a -- well, except in an indirect
 13 way, here, there is, for example, a price-fixing
 14 conspiracy and then the follow-on litigation is brought
 15 by private plaintiffs to recoverable damage and the
 16 case is settled. In my experience, it has not been
 17 explicitly addressed that because there is a government
 18 action, the fee has been reduced, except insofar as

1 the difficult of the case has been folded in on the
2 average fee calculation.

3 I don't mean to be on of a one-man -- a one-

1 i e here o ha e m l i p l e e n f o r c e m e n t l i g a t i o n a n d
2 t h e e f f e c t i h a o n a n o r n e \ f e e .

3 MR. GREVE: M i f e l i k e t o a h a
4 c o n e n i o n e i n o m p r e f e r r e d m o d e o f d i c o r e ,
5 i n o n l m o d e o f d i c o r e .

6 (Laughter.)

7 MR. GREVE: B o m m i n d , h i q u e s t i o n
8 a b o a n o r n e \ f e e a n d h o l d e r e b e a n d i c o p i f
9 t h e r e f o l l o - o n a c t i o n h i g h l i g h t t h e g e n e r a l p r o b l e m
10 i n t h e e m , w h i c h i h a s h e r e a l o t o f f o l l o - o n
11 a n d i d o e n o r e a l l m a t t e r h o m o e f i r m . S o m e t i m e
12 i n t h e A G m o e f i r m a n d t h e n t h e p r i a e c l a a c t i o n
13 b a r c o m e l a t e r , o m e t i m e i n a n i n d i d a l a n o r n e
14 a n d t h e n t h e A G d e c i d e t h a t , o h , a j a m i n u t e , I m e a n ,
15 t h a t -- i f I d o n o t d o o m e t h i n g , t h a t g o e s I a n
16 o n t o p o f i t . S o m e t i m e i n t h e F T C a n d o m e b o d
17 f o l l o w t h e m .

18 T h e r e i s -- i n t h e e n t i r e e m , t h e r e o n l y
19 o p p o r t u n i t y p o i n t , t h e r e o n l y p i l e - o n p o i n t , t h e r e i s
20 n o e r a t o p p i n g p o i n t . T h e r e i s n o b o d i n t h e
21 a u t h o r i t y t o a , e n o u g h i e n o u g h , o n c e i e n o u g h , a n d
22 t h a t d r i e s m e , q u i e f r a n k l y , t o c e r t a i n d i r e c t i o n .

23 K e i n t a l k a o b i o l m e a n t o r e a r e
24 p e o p l e , a n d l i k e e e r t h i n g t h i s f i r m d o e s , e r , e r
25 c o m p e t e n t l y d o n e . B u t i t w i l l l e a d m e n e r o , a n d

1 I'll give you three points.

2 The first thing is, a Ke in pointed out, his
 3 a self-coordinated enforcement. That is, of a the FTC
 4 and the plainiff bar created an action by acting
 5 together. None of them on their own could have done.
 6 I get remember, I have to admit -- look, call me
 7 old-fashioned, here are reasons the FTC, itself,
 8 possess only certain power, but not power. There are
 9 reasons here are limitations on the discretion
 10 process itself. There are reasons here are
 11 privilege. If people gang up and attack, all acting
 12 in concert, we created the law from hell and deprive
 13 of the defendant, of the defense would have in an
 14 single jurisdiction against an single enforcer, we
 15 make me remember.

16 Second, we make me remember, Ke in a very
 17 good a outlining the claim -- the average claim a the
 18 end of the day, I forget, \$199.07 --

19 MR. RODDY: Ca h.

20 MR. GREVE: Ca h, cold hard ca h. No -- and
 21 it's a narrow a full lot of claim. I wonder if, gee,
 22 we have a full lot of commission for, to know, a few
 23 hundred, how and back. What did it cost you to get the FTC
 24 to bring his action? More important, how much did
 25 Hagen Berman and his fellow in Florida clear on his

1 hich j came do n a fe mon h ago. And if o don
2 an o, ake Ralph Wip er ord for i , ake J dge
3 So oma or ord for i ho conc rred or ed i h J dge
4 Wip er in, ha ca e.

5 I i a li, le range, q i e frankl , for
6 A orne General, o parade aro nd, he co n r a
7 enforcer of an i r la hen, he , hem el e ,
8 crea ed, he bigge, monopol and, he bigge, bank
9 oligopol , ha e ha e in, he co n r .

10 And, he final remark on, ha i , i i I, hink
11 range -- a i happened, I j looked a , a e
12 enforcemen a i i ie in, he an i r area. The
13 re l ill be in, he pcoming Uni er i of Chicago La
14 Re ie . I ll j gi e o one brief n, hell. I i --
15 one of, he, hing o co ld a i , ha if, he
16 coordinat ion among e eral enforcer o ld be a li, le
17 be, er ch, ha AG reall a, hen o her enforcer
18 on, a, , ha o ld a, all make en e. B, , he
19 ob er ed pa, ern i no , ha .

20 One of, he, hing S, a e AG co ld er ef ll
21 do i , o c r ail , a e- pon ored car el . S, a e a, ion.
22 The FTC ha enormo problem proceeding again, , he e
23 , hing and pri a e enforcer don, like i ei her. So,
24 , ha , he S, a e AG co ld reall pring in o a, ion, here.

25 I look o er, he en ire repor ed ni er e of

1 case and, here are precisely those cases in which State
 2 AG proceeded again, a case upon which the court in their
 3 opinion is based. The bottom line of the
 4 enforcement pattern, a leader in the anti-racket area,
 5 which is observed, is that State AG, for the most part,
 6 pile on to fill an enforcement gap, not that one can
 7 see.

8 MR. RODDY: Let me respond briefly on
 9 points, and I do appreciate that Michael has done a

10 One of the ironies of the litigation has been that I
 11 didn't get involved because of the time limit and
 12 after we had negotiated a three-party global settlement and
 13 were preparing the deal, along on the scene came one of
 14 the California Companies Directors Association, the company will
 15 be referred to as DDA project which is a
 16 enforcement action and then basically showed up and put
 17 it hand over and said, give me a million dollars.
 18 I negotiated in this particular Directors
 19 Association and we agreed that a part of the settlement, to
 make the case go away, is to let the California

1 all d e r e p e s s o m f r i e n d a s h e F T C , a n d I d o

1 i\ nfair, o charac erize, he A. orne General a
2 piling on hen ha, he are ac all ge, ing i
3 differen relief, han, he federal agencie .

4 And econdl , o kno , i\ ea , o
5 charac erize, he A. orne General a a ing, ell, I
6 ho ld ha e ge, en -- o kno , I need, o ge in ol ed in
7 ha . B, he fac i , he ha e a p blic re pon ibili
8 o re ie , hing , ha are happening, o, heir ci izen in
9 heir , a e and, he , ake, ha re pon ibili erio l
10 and --, he pharmace, ical ca e are an e ample, I m orr
11 o a , Linda. B, , I mean, he fac i pharmace, ical
12 are impor an and o co ld cer ainl make, he claim
13 ha , o kno , ma be hoe are no a impor an . B,
14 he fac i pharmace, ical are impor an , and I, hink
15 ha A. orne General are going, o con in e, o be
16 in ol ed in, ha for, ha rea on.

17 MS. MORRIS: Michael?

18 MR. GREVE: Sorr , j , er -- I ear, o God
19 hi ill be brief. Look, on cer ain occa ion , in
20 cer ain circ m, ance , I, o all agree. The differen
21 form of relief ac all make en e, o me. So, for
22 e ample, , a e-demanded di e, i re remedie make a grea
23 deal of en e, o me, a lea, in, he ab, ras , p, ing
24 a ide an indi id al ca e beca e ha o re a ing
25 here i , ha deal , ha ha e global benefi ma , ill

1 paneli, \ ma erial and, he rela ed FTC ma erial are on
 2 o r eb i e and ill con in e, o be on o r eb i e and
 3 ha e ill be po, ing a, ran crip of, hi proceeding
 4 on, he FTC eb i e, hich i f c.go .

5 Before o lea e, I d like, o , re again,
 6 plea e, ake a momen, o fill o, , he e ork hop
 7 e al a ion form . The are e, remel criical for in
 8 crea ing, he e ork hop and making, hem be, er in, he
 9 f, re.

10 And, hen before o go, don, lea e e beca e
 11 no I d like, o elcome Commi ioner Thoma Lear ho
 12 ill offer ome clo ing remark for, hi ork hop.

13 Commi ioner Lear ?

14 **(Applause)**

(Ap5 ing remark for, , M 5.10 Ef7A/Fa d 20 211

1 from Mar , b. I came er clo e abo. o mon h ago
 2 beca e I a in China i h a delega ion, He Pa e and I
 3 and a b nch of o her people, alking o ome official in
 4 he Chine e go ernmen -- he e are Chine e Comm ni.
 5 ho ap o prom e free marke in i ion in China and
 6 ap o learn abo. compe i ion la and compe i ion --
 7 and con mer pro ection la from i i or from he Uni ed
 8 S a e .

9 So, He and I and a b nch of o her people ere
 10 o er here, o. alk. o. hem abo. hi . We re i. ing
 11 acro he. able, peaking hro gh in erpre er , of
 12 co r e, and i fell pon He a one poin o de cribe he
 13 m l i-face ed enforcemen . em. ha e ha e in he
 14 Uni ed S a e , here e ha e. he Federal Trade Commi ion
 15 and e ha e. he Depar men of J . ice and e ha e. he 50
 16 o ereign . a e and on. op of. ha e ha e pri a e
 17 con mer and con mer cla a ion . And, o kno ,
 18 e er fi e min. e or o, h , He . opped and. hen. he
 19 in erpre er goe . And I can ee. he e people on. he
 20 o her ide of. he. able looking more and more conf ed
 21 and perple ed. The e are. he men from Mar .

22 And o, He a feeling a li. le bi. apologe ic
 23 and diffiden abo. hi and he aid, I ill concede. o
 24 o . ha o r . em i a bi me , and. hen peaking
 25 hro gh an in erpre er, i a ei her a er . a f l

1 Comm ni~~r~~ par official or a er~~r~~ ac f l in erpre er
 2 and he aid, I -- i\ no for me~~r~~ o a~~r~~ ha o r~~r~~ em
 3 i me , b~~r~~ I do ob er e i\ ome ha comple .

4 (Laughter)

5 COMMISSIONER LEARY: So, e are here dealing
 6 i h a comple~~r~~ em hich e ha e inheri ed, and e, in
 7 the Federal Trade Commi ion, are par of~~r~~ ha~~r~~ em.
 8 And e ha e, o r el e , limi ed po er ; e ha e,
 9 o r el e , limi ed abili~~r~~ o moni or~~r~~ the orld. I e
 10 aid before e re a er mall agenc i h a er big
 11 mi ion beca e e co er i~~r~~ all the en ire econom .
 12 We ha e cer ain area e don~~r~~ deal i h, b~~r~~ i~~r~~ all
 13 the en ire econom , and e do i i h er mall
 14 re o rce . And e are dependen on o her go ernmen
 15 en i ie and on the pri a e eg or~~r~~ o pplemen o r
 16 remedie . So, e ha e a er keen in ere~~r~~ in ha~~r~~ the
 17 o her en i ie are doing.

18 Cla ac ion are j~~r~~ par of the o her
 19 remedie , pri a e remedie and o her go ernmen remedie .
 20 I m probabl the onl per on in the room ho a ac i el
 21 li ga ing a~~r~~ the~~r~~ ime the Cla Ac ion R le a amended
 22 in 1966 -- ha\ almo 40 ear ago -- o an cion op -
 23 in cla e -- op -o~~r~~ cla e , I m orr . And here ere
 24 o~~r~~ remendo ad an age , theore ical ad an age for
 25 op -in cla e . N mber one a the abili~~r~~ o a oid~~r~~ he

1 problem of having people who have suffered injuries by
 2 don't know it or don't know how to do about it and how
 3 do to compensate the people. And, the open-in mechanism
 4 doesn't work either.

5 And, the second major advantage -- and, his is a
 6 an advantage, has a qualified member of the defense
 7 bar in it, how can get all of our legal problem
 8 resolved once and can get re-judicated again,
 9 an appeal member, again, people who have never even
 10 heard of the litigation. They can be bonded by the
 11 court and have all pre-pay people from gaming, the
 12 them and bringing equal action and, finally,
 13 joining in when it look like one insider.

14 So, everybody who gets his is a great and, here
 15 are a number of unintended consequences, has people, I
 16 have, overall, 40 years ago did not realize. One of
 17 them is his fundamental problem of the difficulty of
 18 communicating it and getting people to respond, people
 19 who have claim, a non-eliminated by open-court case,
 20 is a implied postponed because of the reason, his is a
 21 real -- to know, the decision of the one case, has
 22 we had here, today here we had, I guess, a response of
 23 maybe 1 percent.

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

1 a , I m here and I e go a claim and here i m claim.
 2 So, o po, pone i , o don, ol e i .

3 The fac, ha, ha -- rai ing, he hand i
 4 po, poned mean, ha before, ha, ime, o don, reall
 5 ha e clien in con rol of, he ac ion. And I m no one
 6 of, he e people ho belie e, ha la er are ne hical
 7 or corr p or bad people. B, o ha e la er-dri en
 8 ac ion , and e en, ho e of ho are good people -- I
 9, hink e re all good people in, hi room, I cer ainl
 10, hink of m elf a a good per on, b, I can, ell o I
 11 ha e an ncann abili, o confla e m per onal in ere,
 12 i h, he p blic in ere, . I can, ell o ho le
 13 concerned I am abo, high marginal, a ra e no, ha I
 14 am orking for, he Federal Trade Commi ion.

15 (Laughter)

16 COMMISSIONER LEARY: I ee i in m on elf
 17 and, ha, j, --, ha, j, he a of, he orld.
 18 Tha, he a people are. I, a ma, er of incen i e .
 19 I, no a ma, er of e hic or morali .

20 Defendan, con el ha e, he ame problem ,
 21 ob io l . Their objec i e i no, o er e, he p blic
 22 in ere, , i, heir compan, long, erm, o er e, he
 23 p blic in ere, , I m re, or, he oldn, be
 24 cce fl. B, in a par ic lar piece of li ga ion,
 25, heir job, ob io l , i, o ge o, of, hi a cheapl a

1 he can.

2 No, theoretically, you have judges who are
3 appointed to be controlling, the thing, but the dynamic
4 doesn't work quite as well as you would like either
5 because a judge is a Bruce Aidala-like figure
6 earlier, the big battle is over certification. That
7 the big battle. In the real world, the real --
8 the real -- come determination because if the claim is not
9 certified, the action really goes to a minimal court.

10 If the claim is certified, there are immense
11 pre-removal defendant's problems. The case doesn't
12 And the judge, who are full of the manageability
13 problem and the difficulty of communicating with a
14 number of people, have a very powerful incentive
15 to let the case remain. And that doesn't mean the
16 immoral or bad people either, but the have an incentive
17 to get rid of the case.

18 And once everybody agrees that the behavior
19 to do is to get rid of the case, then you really don't
20 have an administrative process anymore. You have a hole
21 bunch of people with a common interest in eliminating the
22 case in a way that will make their life easier. And,
23 again, I'm not being -- I'm not being pejorative at all.
24 That's just the incentive that people have.

25 And so, you get this dynamic and so

1 ge ca e ha are led and ome of he lemep
2 are no all ha good.

1 ha he bo on line e lemen here o ha e ha
 2 e lemen ma ha e remendo de erren effec , ma ha e
 3 remendo de erren effec . I m no cricizing he
 4 e lemen . A a ma er of fac , I hink I ed for i .

5 (Laughter)

6 COMMISSIONER LEARY: I m no re, I don
 7 remember. Did I e for ha one?

8 UNIDENTIFIED FEMALE: Ye , o did.

9 COMMISSIONER LEARY: I did. Oka . So,
 10 ob io l , ha a a good e lemen .

11 (Laughter)

12 COMMISSIONER LEARY: An a , I m no a ing
 13 i a bad e lemen . All I m a ing i ha he
 14 con mer redre par of i , he cla ac ion par of i ,
 15 o kno , he no ice and o on, o onder he her ha
 16 a all or h he candle. Wha did ha add o he mi ?
 17 Well, oka , b e do ha e ome e lemen o
 18 here ha are reall bad -- ha appear o be reall
 19 bad. And o, e file amic brief , e make a emen
 20 and o on.

21 In addi ion -- in addi ion, i eem o me e
 22 ha e a longer erm objec i e -- a longer erm objec i e
 23 and ha i omeho or o her o ga her a b nch of
 24 kno ledgeable people oge her and alk abo ome of he
 25 more f ndamen al problem , and ha ha he la da -

1 and-a-half here ha been all abo .

2 We r o ome -- b airing, he e problem --
3 and a o kno , e ha e, he e hearing and ork hop and
4 li le eminar on a arie of i e and i a long
5 erm projec . We don e pec immedia e rel from
6 he e hing . So, don be di ma ed, ho e of o
7 ei her in ide or o ide, hi agenc . Yo migh i
8 here and o a o o r elf, oka , ha he big --
9 ha he big an er, ha he ol ion, o hi ? I
10 don think e re in a po i ion, o ha e one. There ma
11 ne er be one.

12 I don think -- one of, he paper ha
13 e pre ed -- I can e en remember ho e i a . I read
14 he paper ha ere a ailable before I came do n here
15 and, here a one paper b one of, he commen a or ho

1 So, I hope to leave here and have one more
 2 diappointed because I don't have a final answer today
 3 and I may never have a final answer for everything. We
 4 may implement a nibble at a time, the various
 5 problems in the incremental negotiation which may be
 6 hopeful to some degree or some legislation or ill legislation
 7 and will get something done.

8 My life experience, quite frankly, I have more
 9 issues and more questions do not lend themselves to
 10 implicit answer. We go here, here there are no, right
 11 now in a way, a kind of hock-ho men from Mars. We
 12 go through a long process of accretion, of remedial,
 13 knowledge and wrong have gone unredressed, have people
 14 acted to do something about, and we go here gradually
 15 and I think we will move on and eventually we will
 16 come of everything gradually.

17 So, have more participation. I hope to talk
 18 of here feeling, have to know a little bit more about
 19 the good side and the bad side of classification here.
 20 And now, finally, after that, I wish to sell. Good-bye.

21 **(Applause)**

22 **(Whereupon, the workshop was concluded at 12:13**

23 **p.m.)**

24

25

