NEW YORK LAW SCHOOL

NYLS Law Review

Volume 41
Issue 2 *Volume XLI, Number 2, 1997*

Article 2

January 1997

THE FEDERALIST SOCIETY CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: Do THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE? DAY ONE PANEL ONE: CLASS ACTION LITIGATION INTRODUCTION

Max Boot

Hon. Patrick Higginbotham

Sheila Birnbaum

James M. Finberg

Janet Cooper Alexander

See next page for additional authors

THE FEDERALIST SOCIETY CONFERENCE: CIVIL JUSTICE AND THE LITIGATION PROCESS: Do THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE? DAY ONE PANEL ONE: CLASS ACTION LITIGATION INTRODUCTION

Authors

Max Boot, Hon. Patrick Higginbotham, Sheila Birnbaum, James M. Finberg, Janet Cooper Alexander, and Hon. Michael Moore

THE FEDERALIST SOCIETY

CONFERENCE:
CIVIL JUSTICE AND THE LITIGATION PROCESS:
DO THE MERITS AND THE SEARCH FOR TRUTH MATTER ANYMORE?

DAY ONE

PANEL ONE:
CLASS ACTION LITIGATION

INTRODUCTION

MAX BOOT, MODERATOR*

I will keep my opening remarks mercifully brief, and then, ideally, we will get to the panelists and a good discussion quickly.

Our topic today, as I am sure many of you are aware, is "Class Actions, Useful Litigation Device or Tool of the Devil?" We have both sides represented in this debate, a debate that is convulsing the American legal system, and has been for a number of years. If we can just convince our panelists to overcome their natural inclination to be polite and respectful toward each other's viewpoints, we will have a wonderful, engaging discussion.

I am sure this audience needs little introduction to the history of class actions. Their modern history dates from the 1966 revision of Rule 23 of the Federal Rules of Civil Procedure.[1] It has been said that the authors of that revision had little idea of what they were unleashing on the world.

The lawyers who rewrote Rule 23 did so to make it easier for Southern blacks to win injunctive relief against Jim Crow segregation. What they also created was a seemingly endless line of cases that have enriched many lawyers, clogged many courtrooms, and occasionally even delivered a few dollars for plaintiffs.

---

* Editorial writer and deputy features editor at the editorial page of *The Wall Street Journal.*

1. *See* FED. R. CIV. P. 23. Federal Rule of Civil Procedure 23(a), for example, provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions o7 law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." *Id.*

The use of class actions has been tremendously controversial. Two main categories of criticism are made. First, it is argued that class actions are inherently incapable of dealing with mass torts. Indeed, the drafters of Rule 23 in that famous note alluded to this point.[2] Not only are class members' interests too divergent to be tried in one setting, but certifying a class often puts a gun to defendants' heads and forces them to settle cases that are largely meritless.

For these reasons, various appeals courts, including the Fifth Circuit, which is represented today on the panel, have been decertifying tort class actions, most recently in *Castano v. American Tobacco Co.*[3] Many of the appeals courts' fears about what class actions can do in a mass tort context were confirmed in the breast implant case, where Dow Corning went bankrupt despite joining a global settlement and despite the fact that to this day there is not a shred of credible scientific evidence that the company did anything wrong.[4] I am sure some members of our panel will disagree with this viewpoint.

The second common criticism of class actions is that they are driven primarily by the needs of lawyers rather than plaintiffs. Indeed, in many cases, namely the airline price-fixing settlement[5] or the America Online settlement,[6] many class members are not even aware of what is happening procedurally, because of the opt-out device that courts usually interpret as meaning that a class action can always be certified as long as class members have the choice to opt-out.[7] And, of course, I am sure all of

---

2. *See id.* 1966 amendment to advisory committee's note (stating that a mass tort is ordinarily an inappropriate class action because liability and damages affect individuals differently).

3. 84 F.3d 734 (5th Cir. 1996).

4. *See In re* Dow Corning Corp., 86 F.3d 482, 486 (6th Cir. 1996) (indicating that in May 1995, Dow Corning filed for reorganization under Chapter 11 of the Bankruptcy Code due to the burdens imposed by the massive tort litigation); *see also In re* Dow Corning Corp., 187 B.R. 919, 919-23 (E.D. Mich. 1995).

5. *See In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993) (approving the settlement of a class action which included $50 million in cash and discount travel certificates valued at $408 million).

6. *See* Hagen v. America Online, Inc., No. 971047 (Cal. Super. Ct. filed Sept. 20, 1996) (order approving modified class action settlement in which America Online will pay up to $500,000 and provide free online time to users).

7. *See* Timothy Wilton, *The Class Action in Social Reform Litigation: In Whose Interest?*, 63 B.U. L. REV. 597, 618 (1983) (stating that the 1966 amendment to Federal Rule of Civil Procedure 23(b)(3) redefined a class member by an opt-out rather than an opt-in system; because the vast majority of potential class members was unresponsive, the 1966 amendment served to magnify class actions and, consequently, raised attorneys' fees).

the lawyers in this room carefully read those fine-print notices they get in the mail and those ads in the back of newspapers; but I know that I do not, and most average people do not. Thus, we have no idea what is actually happening when class actions are certified, and we certainly do not choose to exercise to opt-out, because the stakes for the individual are so tiny it is just not worth it.

Nevertheless, the lawyers can go ahead and certify the class and reap millions in fees from representing these unwilling plaintiffs. The most extreme example is where, after settlement of a class action, Bank of Boston deposited less than nine dollars in each class member's account, but paid over eight million dollars in lawyers fees; the bank then withdrew upwards of ninety dollars from many accounts.[8] Thus, the class action wound up costing the plaintiffs money.

Incidentally, before turning to the panelists, I should note that class actions do not always pit plaintiffs versus defendants, or plaintiffs' lawyers versus defendants' lawyers. Many defendants embrace class actions as a way to limit their liability. We saw this with the *Georgine v. Amchen Products* settlement where the asbestos manufacturers struck a deal with Ron Motley and Gene Locks because they wanted to settle one hundred thousand future claims.[9] Conversely, many defense lawyers, including many "Naderite" people, say they often oppose these class action settlements because they short-change the rights of individual plaintiffs in favor of their class counsel.

That is all I will say about the background of class actions, because I think you are much more eager to hear from the panelists.

Our first panelist, Judge Higginbotham, is a distinguished member of the Fifth Circuit Court of Appeals and also occupies a significant place in class action history. Among other opinions, he authored the 1990 *Fibreboard* decision, which decertified an asbestos class and eventually paved the way for the decertification of the *Castano* class by the Fifth Circuit.[10] He now presides over the Judicial Conference's committee

---

8. *See* Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1349 (7th Cir. 1996) (describing the predicament of one such class member whose account had been credited $2.19 and debited $91.33 as a result of the Hoffman-Bank of Boston Mortgage Corporation settlement).

9. *See* Georgine v. Amchen Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996), *cert. granted sub nom.* Amchen Prods., Inc. v. Windsor, 117 S. Ct. 379 (1996) (stating that the class action most notably seeks to settle future claims where certain exposed individuals currently exhibit no physical ailments, which would extinguish future asbestos-related causes of action by exposed individuals).

10. *See In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990); *see also* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (decertifying a multi-state class because the district court had ignored both state law variations and the difficulties in

that is rewriting Rule 23, an effort that may not get much ink in the popular press, but is very controversial in the legal world. He has also witnessed the formation of the so-called Steering Committee to Oppose Proposed Rule 23, which is made up of various law school luminaries.[11] Before we started, I told the judge that if he is opposed by everybody in the law schools, then he must be doing something right.

The next speaker, Sheila Birnbaum, is not only one of the leading defense lawyers in mass tort litigation but also one of the nicest people on either side of these bitter fights. As head of the Products Liability Department at Skadden, Arps, Slate, Meagher & Flom, she and her staff have represented Dow Corning in the breast implant litigation,[12] American Stores in litigation over salmonella contamination of milk,[13] and Georgia Pacific in cases involving defective building materials.[14] Incidentally, I might add, although she is a defense lawyer, she is hardly cut from the typical Federalist Society cloth, in that she assures me that she is a genuine, longstanding Democrat.

Our third panelist will likely present precisely the opposite view from Ms. Birnbaum. James Finberg is a representative from Lieff, Cabraser, Heimann and Bernstein in San Francisco, which is one of the leading class action firms in the country. It has been involved in everything from the breast implant global settlement to the GM pickup general settlement that was rejected last year by the Third Circuit. Further, they have been prominently involved in the *Castano* case. If it is a class action, I think you will find Lieff, Cabraser somewhere on the plaintiff steering committee.

---

overcoming them).

11. *See* Henry J. Reske, *Making Class Distinctions: Critics Say Class Action Proposals Encourage Collusion as Well as Settlements*, A.B.A. J., Jan. 1997, at 22 (noting that 145 professors have criticized the Rule 23 proposals in a letter to the Judicial Conference of the United States Standing Committee).

12. *See* Vitolo v. Dow Corning Corp., 634 N.Y.S.2d 362, 364 (Sup. Ct. 1995) (holding that a physician who sued Dow Corning for fraud and sought recovery for damages to his professional reputation successfully pled his fraud claim, and had standing to sue under New York's deceptive acts and practices statutes, but that he could not recover for emotional harm).

13. *In re* Salmonella Litig., 618 N.E.2d 487, 488 (Ill. App. Ct. 1993) (holding that an employee who allegedly contracted salmonellosis from drinking his employer's milk was not constrained by the double recovery rule, which prevents accident victims from double recovery for their injuries, because the rule does not apply to such settlements).

14. *See* Pulte Home Corp. v. Ply Gem Indus., 804 F. Supp. 1471, 1475 (M.D. Fla. 1992) (holding that fact issues precluded summary judgment on a builder's claim for punitive damages and fraud, and that the builder had standing to sue defendants for damages).

The next speaker, Janet Alexander, clerked for Justice Thurgood Marshall and is currently a Professor at Stanford Law School. Although she teaches at Stanford, she received her law degree from my alma mater, Berkeley. She has been writing a significant amount on the impact of attorney fees in class actions, and that is the topic she is going to speak about today.

And, finally, our most famous panelist. Michael Moore's official title is Attorney General of the State of Mississippi. However, I think he is better known among the tobacco companies as "Public Enemy Number One," the man who started the current trend of states hiring contingency fee lawyers to sue tobacco companies to recoup their Medicaid costs. Although not technically class actions, the state Medicaid suits are broadly similar to the class actions that are filed now at the state level in the wake of *Castano*. Those actions purport to represent all of the people injured by the tobacco companies over the years, and I am sure Attorney General Mike Moore will defend the efficacy of this type of litigation.

CLASS ACTION LITIGATION

THE HONORABLE PATRICK HIGGINBOTHAM, FIRST PANELIST*

I thought I would quickly identify what is pertinent from the perspective of rulemaking, without getting into a lot of the boring details about their structure, to describe the rules process.

First, a couple of general observations about the work of the Advisory Committee on Civil Rules. There is a consensus, or a view, that when looking at class actions it is important to realize the limits of rules. Rule changes cannot solve the large problems before us.

Much of what we are seeing is not the product of rules, but the product of a complex interaction of events. I start with the Supreme Court's decision in *Bates v. State Bar of Arizona*.[1] When lawyers are allowed to advertise like shoe merchants, they may act as merchants. The open solicitation of cases is part of the mix in which this phenomenon that we are now seeing arises.

Add to that mix a tort law that is open-ended and suffering mightily from indeterminacy. For example, it is very difficult to understand exactly what the normative limits and push of the product liability rules are. The judge asks the jury, "Ladies and gentlemen of the jury, the first question you must decide in this case is whether or not the product was defective. I instruct you that the product is defective if its risk of injury to the public outweighs its utility of design. Now, if your answer to that question is 'yes,' then answer the next question. Was that defect a producing cause of injury and, if you answer yes, then how much in dollars would reasonably compensate the plaintiff?" Other instructions given would include matters of credibility. This simply demonstrates what inevitably is a difficulty: the underlying indeterminacy of the substantive law itself. Add to this mix the talk shows and the role of the media, and we begin to see the complex forces at play.

I think it is short-sighted to view mass tort class actions as the creatures of lawyers. Lawyers play a heavy role in these actions, but many of those lawyers are on the bench.

That said, the approach of the advisory committee has been to reach out to meet with plaintiffs' lawyers, and with defense lawyers, to listen to

---

* Judge, United States Court of Appeals for the Fifth Circuit. Judge Higginbotham also serves as an Adjunct Professor of Law at Southern Methodist University Law School.

1. 433 U.S. 350, 363-83 (1977) (holding that commercial speech which serves individual and societal interests in assuring information and reliable decision-making is entitled to some first amendment protection, and hence truthful legal advertising by attorneys may not be suppressed).

the debate and try to learn as much as we can. As a result of these meetings, we came forward with eight proposals, what we term the "minimalist proposal." What the advisory committee did not recommend may be the larger story. For example, we declined to address future classes and left those to the development of the law itself.

The central proposal rests on the proposition that we need more appellate involvement in the development of the law. Therefore, the proposed rules will provide a right of appeal for the party that loses the class certification decision. The "right" of appeal is a petition for leave to appeal, and the court of appeals may decide not to grant it. But under the proposal, parties will have a right to take that decision to the court of appeals. This will relieve some of the stress that is placed on mandamus, which is important because the courts are now reviewing some of these claims. We think this is important.

Today, the law of class actions consists of a set of legal cultures that revolve and oscillate around distinct substantive areas of the law. The law of class actions in the antitrust field is different from the law of class actions in the securities field, and the law of class actions with regard to discrimination cases is also different in the same way. We cannot back away from this interplay of substance and procedure.

In the securities field, substantive law will determine the ultimate ability of these cases to be processed, or aggregated. For example, fraud on the market theories and the elimination of reliance cases, without face-to-face negotiation, are vehicles by which these cases are aggregated. In the antitrust field, case law provides the substantive rules and the facilitators of aggregation, more so in the real world than the bare-bone outlines of Rule 23.

I am not going to go through each of the other proposals. However, one of the other powerful suggestions that we are going forward with is to move away from the traditional approach of Rule 23, which is quick, early certification. The rules now urge district judges to certify early and quickly. Frequently, that is done with soothing words to: "certify now, decertify and redefine later, and it will all work out."[2] Until recently,

---

2. *See* Scott v. University of Del., 601 F.2d 76, 92 n.15 (3d Cir. 1979) (discussing the practice of courts construing the requirements of Rule 23 liberally, particularly when the determination of the propriety of the class action is being made at an early stage of the proceedings, and to modify the order as necessary to comport with subsequently developed facts); Shannon v. Hess Oil Virgin Islands Corp., 96 F.R.D. 236, 239 (D.V.I. 1982) (stating that, by its own terms, Rule 23(c) provides for a flexible determination as to the existence, scope, and size of a proposed class); *see also* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785 (2d ed. 1986) (noting that the power to change the class certification decision under Rule 23 has encouraged many courts to be quite liberal in certifying a class at an early stage in the litigation, because the action can be decertified if later events suggest it is appropriate).

that has been the emphasis. The shift is to wait, which involves allowing some cases to mature and to not move so quickly to class certifications.

One of the other central recommendations addresses the problem that Max Boot referred to: the difficulty of screening out cases in which the returns to the class are de minimis from those cases in which class action is necessary to deal with large numbers of people who have been injured by some common phenomenon.

A particularly egregious example of the former is the coupon cases, where attorneys make millions and the return to individual class members is negligible.[3] By the time a class member sends in a claim form, it may cost him money. Not exactly a win, by any definition, for that member of the class.

Where the class members themselves simply do not benefit from the action, the class has become nothing but a vehicle to pay lawyers. The sense was that the district judge should be armed with the ability to screen those cases out. However, the judges do not want, in that process, to eliminate—and I do not think the committee is authorized to do so—the consumer class actions. Congress should decide the particular remedy for the particular statutory wrong.

Correspondingly, we ought not to create an enforcement mechanism that Congress did not create. We do not think the district judges or other courts ought to have the power to say that it is in the public interest that a particular class action proceed to vindicate particular public values. The definition of public value should belong to Congress. That has come to be known as the "Just Ain't Worth It Provision" and it has been the subject of a great deal of discussion.

Finally, settlement classes will receive significant attention. The proposals for change in that area are quite modest, as I mentioned earlier. We do not deal with the larger and more difficult problem of futures, which I think is the most difficult issue in this whole area of class actions. At this point, I will subside.

---

3. *See, e.g.*, Barry Meier, *Fistfuls of Coupons*, N.Y. TIMES, May 26, 1995, at D1 (criticizing settlements where plaintiffs' attorneys get large cash fees and plaintiffs get nontransferable coupons toward future purchases from defendant).

CLASS CERTIFICATION—THE EXCEPTION, NOT THE RULE

SHEILA BIRNBAUM, SECOND PANELIST*

I think before we even focus on class actions, we need to look at the modern technology that has created mass tort litigation. When I first started practicing law, carbon paper still was used, and if a mistake was made on a complaint or a pleading, it had to be changed manually on multiple copies. One cannot imagine having a breast implant litigation if still forced to use carbon paper. Word processors, fax machines and computers have given us a new world and the Bar has embraced that world.

The problems with class actions are numerous. One development in the last two years is that appellate federal courts have recognized that lower courts have gone astray in certifying mass tort class actions. Thus, the Third Circuit,[1] the Fifth Circuit,[2] the Sixth Circuit,[3] and the Seventh Circuit[4] have all scrutinized mass tort class actions and have decided that national mass tort classes are improper.

In medical device and tobacco litigation, national class actions are not appropriate. First, there is the conflicts of law issue. It is not possible, in my opinion, for a court to certify a national class of anything in the tort area. Basically, the law of the fifty states varies in significant ways, and the nuances, even in negligence, as Judge Posner pointed out, make it impossible to have a class action if tort law is indeed state-made law, which it is. As some courts have explained—and as I have experienced first-hand—it is simply impossible to synthesize the products liability law of the fifty states into a meaningful jury instruction for a class action trial without trampling on the sovereignty of those states, which have made some fundamentally different policy choices in their products liability rules. In fact, Congress had an opportunity to pass a federal products liability bill and declined to do it.[5] The passage of a federal products liability law might have created some interesting issues as to whether such

---

* Partner and head of the Product Liability Department, Skadden, Arps, Slate, Meagher & Flom LLP. I would like to thank my associate, J. Russell Jackson, who assisted in the preparation of this address.

1. *See* Georgine v. Amchen Prods., Inc., 83 F.3d 610, 617 (3d Cir. 1996), *cert. granted sub nom.* Amchen Prods., Inc., v. Windsor, 117 S. Ct. 379 (1996); *see also In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995).

2. *See* Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

3. *See In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

4. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

5. *See* H.R. 10, 104th Cong. § 103 (1995).

a uniform act would overcome some of the issues that Judge Becker and Judge Posner raised concerning conflicts of law.

With conflicts of law the way they are, and with state law dominating the tort area, unless there is a single factual issue, there is no possibility that a court can certify a national class action in mass torts. Some of our appellate courts have come to grips with, and understand, this reality.

But the plaintiffs' bar is very creative. Thus, some cases I currently am litigating started out as putative nationwide class actions, but the lawyers are now seeking certification of only a statewide class. "Judge, just give me a class action of all of the residents of the State of Florida, or the State of Pennsylvania." As you all know, after the *Castano* case was decertified, plaintiffs' lawyers immediately initiated a number of state class actions that were filed in state, not federal, courts.[6]

Hence, class actions for mass torts are still extant, notwithstanding the kinds of decisions we have seen. But with the apparent trend of filing these suits in state courts, we will have less ability to predict the disposition of these cases. In states like Alabama, it is not inconceivable—in fact it has happened on many occasions—that the class is certified before defendants are even served with the complaint, or prior to a contested hearing.[7] This is an outrageous denial of due process, particularly when one considers the enormous consequences to defendants of class certification, both in the litigation and in the financial markets. Most often the problem in such situations is not the state's written class action rule, as most states follow the federal rule. Rather, the problem is that state court trial judges are given too much discretion in applying the rule. I think that the Bar and the bench are going to have to explore how to resolve these issues, particularly in light of the change in focus in mass torts from federal class actions to state class actions.

Another problem with class actions lies in the financial incentives that give rise to a race to the courthouse. The position of "lead class counsel" typically goes to the law firm that gets a class action filed first or, in the case of multi-district litigation (MDL), wins the fight over where the MDL will be venued. Lead class counsel often has more control over the conduct and settlement of litigation—and may be entitled to more fees—than other plaintiffs' lawyers involved in the litigation. As a result, the major plaintiffs' firms do their best to be the first to file a class action lawsuit over a particular product or mass tort. This creates an incentive

---

6. *See More Post-'Castano' Cases*, NAT'L L.J., Aug. 19, 1996, at A8 (reporting that eight states have filed class action suits since the decertification of *Castano*).

7. *See, e.g.*, *Ex parte* Sizemore, 611 So. 2d 1069, 1074 (Ala. 1993) (Houston, J., dissenting) (discussing Melof v. Hunt, 718 F. Supp. 877 (M.D. Ala. 1989), a class action where the class was certified prior to defendants being given notice or the opportunity to file defensive pleadings).

for counsel to neglect the factual investigation required to determine whether the case truly does present a classwide problem, as opposed to an individual problem. One clue that a purely individual problem may exist is where numerous class actions are filed where there previously has been little or no individual litigation over a particular product or course of conduct.

Let me provide an example of what I think prompts class litigation where there is no, or at least very little, actual litigation. This particular example mimics a case that was decided by the Ninth Circuit involving a product called Felbatol.[8] A drug is used. Some adverse reactions arise, and a study is conducted. The manufacturer alerts the FDA to the study results and proposes sending a "Dear Doctor" letter to apprise the medical profession of the newly-discovered risk. Within days, multiple putative nationwide class actions are filed by multiple law firms in courts across the country on behalf of all the users of this particular product. That is precisely what happened in the *Valentino* case.[9] An MDL was created, and the MDL judge certified a class of all users of the drug, regardless of whether they were injured. Not all users were injured, nor were all users afflicted with aplastic anemia, the alleged illness this drug causes.

In this particular case, the class was certified before there was one individual claim in the entire country filed against the company. This is an excellent example of what becomes mega-litigation before there really is any litigation.

So what is a court supposed to do with a class action that has been filed prematurely? As you might expect, I believe it should be promptly dismissed. But some courts—particularly where the science of causation is inconclusive, but extensive study is underway—may postpone the class certification decision until later in the litigation.

One part of the problem I would like to address, which was recently raised by Judge Schell in Norplant,[10] is this: If courts are going to make decisions about class actions later in the process, we cannot lose track of the fact that, under the principle announced in the Supreme Court's decision in *American Pipe & Construction Co. v. Utah,*[11] many states hold that their statutes of limitations are tolled during the time period

---

8. *See* Valentino v. Carter-Wallace Inc., 97 F.3d 1227 (9th Cir. 1996) (vacating and remanding a lower court decision certifying a class in a products liability activity against manufacturers of an epilepsy drug).

9. *See id.* at 1229 (noting that in August and September 1994, Carter-Wallace sent letters to the physician community warning of the risks of aplastic anemia and liver failure associated with the use of Felbatol).

10. *In re* Norplant Contraceptive Prods. Liab. Litig., 907 F. Supp. 244 (E.D. Tex. 1995).

11. 414 U.S. 538, 561 (1973).

between when the class action is filed and when the certification decision is made.

The tolling caused by an improperly certified class action can span a number of years. For example, in one instance involving a medical device, it took nearly four years for an improper class certification to be overturned on appeal.[12] Thus, as a result of the improper application of a federal procedural rule, the substantive policies of the states—embodied in their statutes of limitations—were thwarted, and the window in which the defendant could be subjected to individual suits was significantly enlarged.

What do these types of class actions cause? They lead to "legalized blackmail."[13] My friends in the plaintiffs' bar say that defendants settle class actions that have merit and do not settle meritless class actions.

This argument, although attractive in its simplicity, is wrong. The certification of a class action fundamentally alters the litigation calculus for the party opposing certification, placing enormous pressure on that party to settle prior to trial, even where the class proponents' likely individual recoveries (or their likelihood of success on the merits) are low. To the defendant, one thousand individual cases are not equivalent to a class action involving one thousand members. Faced with a large number of individual cases, the defendant may seek to quantify its litigation risk by evaluating the cases individually, taking note of their strengths, weaknesses, and venues; thereby predicting a win-loss ratio and an average jury award. Once a trial class is certified, however, the defendant must evaluate its litigation risk in the aggregate, taking into account the fact that it may face at trial only the strongest representative class members selected by class counsel. On the basis of one trial, the defendant may be found liable to all named and identified class members and, in many instances, to thousands of class members who have yet to be identified. Given the uncertainties of litigation, few defendants can withstand the pressure to settle after the class is certified rather than risk an adverse jury verdict in a single class action trial.

Moreover, one cannot forget the environment we live in. The uncertainty embodied in the kind of massive contingent liability a class action represents hangs over a corporate defendant's head, affecting its stock price, borrowing power, and, ultimately, all aspects of its business.

---

12. *See In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (vacating an order of class certification and holding that plaintiffs in a penile implant class failed to satisfy the requirements for class certification).

13. The term "legalized blackmail" appeared in Milton Handler's antitrust review and described class actions that are used to threaten parties with unmanageable and expensive litigation in order to compel settlement. *See* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971).

If the class is certified, the markets read this as increasing the likelihood that the contingent liability will materialize. Markets value certainty, and the pressure to bring an end to even meritless class actions can be almost irresistible to corporate defendants, particularly when one figures in the enormous litigation costs inherent in the protracted process of defending a class action. Thus, the class action—a "procedural" device intended to achieve certain efficiencies of scale through aggregation—is a mighty sword that can affect the substantive outcome of the litigation without regard to the "merits" of the claims.

There are no free rides. When companies pay out large sums of money to settle class action lawsuits—even meritless class actions—someone pays the price. Often it is in higher product prices. Or it may be through the complete unavailability of certain products, whether by bankrupting the defendant, or by having a viable company decide to discontinue (or simply not develop) a product. For example, raw materials suppliers have been added as defendants in breast implant litigation, in addition to the manufacturers of the implants. As a result, raw materials used in making medical devices, sometimes called "biomaterials," are becoming unavailable to device manufacturers because the suppliers have determined that it costs more to defend themselves in lawsuits involving finished medical devices than the small profit they may make in selling these versatile materials to medical device manufacturers.[14]

In the end, we must recognize that the class action device is more than just a procedural tool for aggregation. It is instead a very unique instrument—one with as much, if not more, potential for wreaking havoc and perverting the "incentives" normally associated with tort law. This characteristic suggests that class certification should be the exception, not the rule, and that where a class is certified, it must be subjected to constant judicial scrutiny.

---

14. *See, e.g., Biomaterials Availability: A Vital Health Care Industry Hangs in the Balance* (Aronoff Assoc., 1997) <http://www.himanet.com/news/mediakits/biomaterials/bioavail-index.htm>; Barnaby J. Feder, *Implant Industry Is Facing Cutback by Top Suppliers*, N.Y. TIMES, Apr. 25, 1994, at A1.

CLASS ACTIONS: USEFUL DEVICES THAT PROMOTE JUDICIAL ECONOMY AND PROVIDE ACCESS TO JUSTICE

JAMES M. FINBERG, THIRD PANELIST*

Some class actions do go to trial. My partner, Elizabeth Cabraser, is currently on trial in Alabama State Court in a class action involving defective hard board siding. The closing arguments are today. We will find out what the merits are according to an American jury.[1]

Plaintiffs' lawyers are really like Bob Dole. We say, do not trust the government; trust the American people. Let the jury system tell you whether there are meritorious claims.

When class actions go to juries, the American people speak. They conclude that many class action claims are meritorious. In the *Apple* securities litigation, the jury reached a one hundred million dollar verdict.[2] In the *ACC/Lincoln Savings and Loan* securities litigation, the jury reached a multi-billion dollar verdict.[3] In the *Exxon Valdez* case, the jury reached a verdict in excess of five billion dollars.[4] The American people tell us what justice is.

Class actions serve very important and useful functions. The first function is judicial economy. When thousands of people have the same claim, it does not make sense to have the same evidence going in over and over again or to have the same people deposed over and over again. Nor does it make sense for the same witnesses to appear over and over again in different courts or to have multiple courts re-analyze the same issues and perhaps come to inconsistent rulings. Class actions serve judicial economy.

Even more importantly, they provide access to justice. Our justice system is not a system only for the rich and powerful. It is also a system for everyday Americans who need legal redress when they have been wronged. Class actions give them that opportunity by allowing them to

---

* Partner, Lieff, Cabraser, Heimann & Bernstein, LLP.

1. Shortly after this symposium, the jury found that Masonite's exterior siding was defectively designed. *See* Naef v. Masonite Corp., No. CV-94-4033 (Ala. Cir. Ct. Sept. 13, 1996).

2. *See In re* Apple Computer Sec. Litig., C-84-20148(A)-JW (N.D. Cal. Sept. 6, 1991); *see also* Ken Siegmann, Apple *Verdict Stuns Lawyers; They Fear Flood of Litigation*, S.F. CHRON., June 1, 1991, at B1.

3. *See In re* American Continental Corp./Lincoln Sav. & Loan Sec. Litig., MDL No. 834 (D. Ariz. 1992); Elliot Blair Smith, *$4.4 Billion Awarded in* Lincoln *Case; Jury Orders Keating and Cohorts to Pay*, ORANGE COUNTY REG., July 11, 1992, at A1.

4. *See In re* Exxon Valdez, No. A89-0095-CV (HRH) (D. Alaska Sept. 16, 1994) (Special Verdict for Phase III of trial).

aggregate their claims and to fight rich and powerful corporations. By aggregating their claims, they can hire the experts and lawyers who can do the analysis that is necessary.

In the discrimination area, class actions have had a tremendous positive impact. I refer you to two examples of cases that improved the American workplace by making available to women and African Americans employment opportunities that they were previously denied. The *Shoney's* case[5] was a race discrimination class action against a restaurant chain for excluding African Americans from higher paying, higher visibility positions. The *Wall Street Journal* published a front page article this last April.[6] In the article, the company's management conceded that the suit ended up being a very good thing for the company. The suit forced the company to hire African Americans for jobs that they are now performing very ably. The suit made Shoney's a better company. Shoney's is now thriving, even though it paid approximately $105 million in this race discrimination class action to compensate the victims of the company's past discrimination.

Similarly, the *State Farm* gender discrimination case[7] forced State Farm in particular, and the insurance industry overall, to give women the opportunity to be insurance agents.[8] Twenty years ago in California, there were about eleven hundred State Farm insurance salesmen and there was only one female agent, who had inherited her husband's business. That was not because women were not able to sell insurance; it was because State Farm was not hiring women to sell insurance. In the gender discrimination class action, State Farm paid approximately $260 million in back pay and front pay. As a result of the suit, State Farm has changed its practices. Men and women are now almost equally represented in the employment work force of State Farm insurance agents in California. And that case also had an impact on other insurance companies who looked at what happened to State Farm and said, it is not going to happen to us. They started hiring women for their agent work force.

Class actions are good for the American economy. They deter racist conduct and encourage employers to tap the talents and abilities of all Americans, not just white men.

Now, the Judge mentioned the consumer case where the individual might not get a huge return and that there is a concern that the case is only for lawyers. On the other hand, one does not want companies

---

5. Haynes v. Shoney's, Inc., No. 89-30093-RV (N.D. Fla. 1991).

6. *See* Dorothy J. Gaiter, *Eating Crow: How* Shoney's, *Belted by a Lawsuit, Found the Path to Diversity*, WALL ST. J., Apr. 16, 1996, at A1.

7. Kraszewski v. State Farm Ins. Co., No. C 79-1261 TEH, 1985 WL 1616 (N.D. Cal. Apr. 29, 1985).

8. *See id.*

defrauding individuals on the rationale that since the individual only has a fifty dollar claim and it would cost the individual one thousand dollars to sue, he or she will not do anything about the fraud. Lack of meaningful access to the judicial system by consumers would create a license to lie for companies.

My firm had a case involving light bulbs where the package said that the bulb is the environmentally sensitive light bulb.[9] A consumer paid twice as much as he or she paid for the normal one hundred watt light bulb to get this environmentally sound light bulb. Well, the reason that this light bulb was environmentally sound was it provided only eighty watts. So the consumer was getting less light and paying more.

No individual is going to hire a lawyer about that case based on her individual losses alone. It simply does not make sense. But that does not mean that the behavior of that company is appropriate and should be rewarded. The company should not make millions as the result of deceit. That suit should go forward on a class basis.

Now, what should happen in terms of the attorneys' fees? In both state and federal court, the attorneys' fees paid to attorneys representing a class must be awarded by a judge, who must determine that the fees awarded are reasonable. In California, the courts generally take into account the hours the attorney worked, the hourly rates of the attorneys involved, whether a benefit was conferred, and whether there was contingency risk. If appropriate, the court gives a multiplier on the attorneys' hours times rates (which is sometimes referred to as the attorneys' "lodestar"). Federal courts often award a percentage of the fund created. Courts can and should determine the appropriate amount of attorneys' fees. The fact that attorneys receive a fee for their work (as do all other employed Americans) should not be a reason to prevent meritorious suits from going forward.

In terms of blackmail and the size of settlements, if a suit has no merit, fight it. Make the motion to dismiss. Make the motion for summary judgment. Knock it out.

If a company pays $500,000 to settle a case, maybe that is the cost of defense. But when the accountants and lawyers in *Lincoln Savings* paid, collectively, approximately $145 million to settle those cases,[10] that was not cost of defense. They paid such a large sum because they did something wrong. They paid because of their misconduct and the harm caused by that misconduct. Such payments are appropriate because they deter other companies from engaging in similar behavior.

---

9. *See In re* GE Energy Choice Light Bulb Consumer Litig., No. C-92-4447-BAC (N.D. Cal. filed Oct. 22, 1993).

10. *See* Jeff Rowe, *Lawsuit Results*, ORANGE COUNTY REG., July 11, 1992, at A1; *see also* Smith, *supra* note 3.

One of the reasons that the American securities markets thrive is that people feel confident investing in American companies. One of the reasons they feel confident is because companies are afraid of engaging in fraud because of private class actions.

Let me turn now to the mass tort area. With respect to the laws of the fifty states, there are two ways that plaintiffs approach this issue. One is to say that the laws don't vary much from state to state and a court could apply the laws of all fifty states. There have been three courts that have done this. One of them was my firm's case, the *Cordis Pacemaker* case[11] in Ohio, which eventually settled prior to trial. A second was Judge Brimmer's *Albuterol* case[12] in Wyoming, which was tried for several months before settling. The third is the *Masonite* case,[13] which is now being tried in Alabama.[14]

The *Albuterol* and *Masonite* cases show that it is possible to go to trial with the laws of the fifty states and give the jury special interrogatories about various issues such as recklessness, negligence, defective design, and whether the plaintiffs proved their case by clear and convincing evidence or by a preponderance of the evidence. In this way, one can apply the various laws.

There is a constitutional issue about applying the laws of the fifty states. In *Phillips Petroleum v. Shutts*,[15] the United States Supreme Court said that if one is going to apply the law of a state to a company, there has to be a nexus between that state's law and the company. And I believe, in the future, plaintiffs will bring mass tort lawsuits in the home state of a major defendant and urge the court to apply the state law of that defendant. In such circumstances, the defendant can anticipate that it should have to obey the law of its home state. That will get around the problem of having conflicts of law that were seen in the *Castano* tobacco litigation.

But let me now focus on the *Cordis* case[16] for a little while. *Cordis* was a case where the pacemaker manufacturer knew that its pacemakers were defective. The pacemakers would stop working. There were two

---

11. *In re* Cordis Pacemaker Prod. Liab. Litig., No. MDL 850, C-3-86-543, 1992 WL 754061 (S.D. Ohio Dec. 28, 1992).

12. *In re* Copley Pharm., Inc., 161 F.R.D. 456 (D. Wyo. 1995).

13. Naef v. Masonite Corp., No. CV-94-4033 (Ala. Cir. Ct. Sept. 13, 1996) (order certifying class).

14. Recently, after the Symposium, Judge Spiegel of the Southern District of Ohio certified a mass tort class involving defective pacemaker leads in *In re Teletronics Pacing System, Inc.*, MDL-1059 (S.D. Ohio Apr. 1, 1997). To address varying state laws, the court grouped the class into subclasses by state and issue.

15. 472 U.S. 797, 822 (1985).

16. 1992 WL 754061.

kinds of defective pacemakers: one that had holes in the back that caused short-circuiting of the pacemaker and another that had a lithium bridging problem with the battery that caused the battery and the pacemaker to stop. The company continued to sell these defective pacemakers to over thirty-three hundred people, knowing them to be defective. The company and its officers were criminally indicted for this, and pleaded nolo contendere.

Now, this is not the type of behavior that should be encouraged. My firm filed a class action suit. The people who participated in that suit shared a substantial settlement. The plaintiff class members received substantial awards, including one individual who received $225,000, and they were very, very grateful. Hundreds of them wrote unsolicited letters of thanks to us telling our firm that the lawsuit helped them pay medical bills and other necessary expenses that they never would have been able to pay but for this class action.

So if mass tort class actions are eliminated, we will not only wipe out some cases without merit, but also cases that have merit. That is why I urge extreme caution when considering changes in the procedural rules in this area. One must give judges the flexibility to have class actions in mass tort areas when it is appropriate.

In summary, if Americans are to have faith in the judicial system, they need to believe that they have access to the courthouse. The way to do that is to keep the class action in place.

THE AGENCY PROBLEM: SOME PROCEDURAL SUGGESTIONS

JANET COOPER ALEXANDER, FOURTH PANELIST*

A few years ago, I wrote an article about settlements in securities class actions entitled, "Do the Merits Matter?"[1] Ever since then I have wanted to write the sequel, "Making the Merits Matter." That is what I would like to talk about today—procedural reforms for securities and consumer class actions.

In doing law reform, it is important to take a structural and institutional approach, looking at what is actually happening in a particular type of litigation we are focusing on. We must try to figure out what it is that is causing the conduct of that litigation to deviate from what we think of as the normal or ideal way that such litigation should be resolved. Then we should fix that, rather than taking the view that the problem is too much litigation or frivolous litigation or greedy lawyers. I do not think that attitude leads to helpful solutions.

I want to talk about a type of reform that addresses what may be the core issue in representative litigation, and that is the agency problem. When litigation is brought by a representative on behalf of people who are not before the court, the issue is whether the lawyers' interests and the representatives' interests may diverge from those of the class. In securities cases, there is some evidence that cases settle without regard to the strength of the case on the merits. In addition, some of the other speakers have referred to settlements in consumer class actions that appear to provide negligible benefits to the consumer class members, but substantial fees to the lawyers.

I think there are two basic kinds of solutions to the agency problem. One is to have a client present to monitor the lawyers' performance. The other is to take steps to align the lawyers' interests more perfectly with the class's interest. In terms of having a client present, I think there is actually a possibility of doing that more effectively in securities class actions because they do not fit the paradigm of class actions. In that paradigm, class actions are needed because there are many small claims that individually are not worth bringing suit over. The problem is that although class actions empower people to bring such claims, there is nobody with a stake big enough to justify monitoring the lawyers' performance.

---

* Professor of Law and Justin M. Roack, Jr., Faculty Scholar, Stanford Law School.

1. Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

In securities class actions, however, there are claimants who have a lot at stake. In fact, one study showed that the top ten claimants account for about thirty-five percent of the total claims.[2] Thus, some class members, who for the most part are institutional investors, have sizable claims in this setting.

Institutional investors have received significant attention from academics and legislators recently. If you are interested in solving the agency problem, institutional investors appear to be the answer to your dreams, because they are big enough to perform an effective job of monitoring and their interests seem to be almost perfectly aligned with the public interest in the securities laws. They consume large amounts of information about companies, and thus have a strong interest in maintaining a disclosure environment that is not tainted by securities fraud. On the other hand, they are investors and make their money from their investments, so they have a strong interest in making sure that companies are not paying high costs for suits that have no merit. The lead plaintiff provisions of the Private Securities Litigation Reform Act of 1995 represent an effort to get large investors involved.[3]

I would propose, and this is the most radical thing I would propose today, to have an "opt-in" requirement for securities class actions that would affect the largest investors. The opt-in threshold would be set so as to cover approximately the top ten or twenty claimants in the class. Those investors would have to opt-in if they wanted to participate in the recovery. If they opt-in, they thereby signify their willingness to serve on a plaintiffs' steering committee that would monitor the conduct of the litigation, including the choice of the class counsel.

The opt-in requirement would identify potential members of a plaintiffs' steering committee to monitor the litigation and perform the traditional role of the client. Additionally, it would make the amount of potential damages more certain and more verifiable, because the large claimants would be required to specify the relevant information concerning their trades. Only the small claims would have to be estimated. If large claims opted out, they would be excluded from the damage calculation. This would reduce the uncertainty in damages, and the disparity between the parties' estimates, and would make the calculation of damages more realistic.

---

2. *See* Vincent E. O'Brian & Richard W. Hodges, A Study of Class Action Securities Fraud Cases II-3 (June 1991) (unpublished study, on file with *New York Law School Law Review*) (reporting that the top five claimants accounted for an average of 25% of the claims filed, and the top ten claimants accounted for 34.49% of the claims filed).

3. *See* 15 U.S.C.A. §§ 77z-1(a)(3)(B), 78u-4(a)(3)(B) (West Supp. 1997).

The second type of reform that I would propose is a "truth in labeling requirement" in consumer and securities cases. The amount of a settlement or judgment would only be permitted to be stated in per-claim or per-unit terms (in securities cases, an amount per share), not as an aggregate lump sum.

The primary reason for this is that when the class members get the notice of settlement and have to decide whether to object to the settlement, to opt-out, to file a claim or to do nothing, the most important information they need to know is how much they are going to get out of the settlement. That is information that the class members in securities cases do not have. All they know is the total amount to be distributed to the class. Usually, they get some idea of what the attorneys' fees might be, but often they have no information about how many shares there are in the class or how many shares will claim. Moreover, if this information were made available before the fairness hearing, it would help the judge evaluate the fairness of the settlement.

In addition, this proposal would help promote settlement (at least initially). Typically the plaintiffs say there are many shares in the class and the defendants deny this and say there are very few. If the parties really believed their numbers, and if settlement offers had to be stated in per-share terms, there would be a greatly expanded zone of agreement. The parties could say, "Let's settle for two dollars a share," which would seem like a small amount to the defendants and a large amount to the plaintiffs. Now obviously, at the end of the day somebody is going to be surprised, but over time people ought to learn to estimate more accurately.

Finally, I propose reforms that would better align the interests of the plaintiffs, the lawyers, and the class. These reforms relate to fee awards. I propose that there be no negotiation or discussion of the fee award until after the final approval of the settlement. Further, rather than having one lump sum settlement amount from which the attorney fees are deducted, there should first be an agreement or a judgment on the amount that will go to the class. After final approval of the settlement, there should be an adjudication of the amount of the attorneys' fees, which would be paid directly by the defendant.

What these two reforms would accomplish is to ensure that the defendant has an interest in presenting an adversary presentation on the fee issue. Currently, there is an acute conflict of interest between the class and the lawyers on the fee request, because every dollar that goes to the lawyers comes directly from the class recovery. Yet that is the very point where there is no longer an adversary presentation. There are some quixotic folks who go around filing objections, but I think it is unwise to rely on Larry Shoenbrun to do everything.

Next, I would tie the amount of the fee more directly to the benefit conferred on the class by holding the hearing on the fee award only after the close of the period for filing claims. If the recovery is stated on a per-

share basis, then once all the claims are filed you know exactly what the benefit is that has been conferred on the class, and the fee can be determined in that light. In determining a reasonable fee, the judge should be required to make an explicit reference to the proportionality of the fee to the benefit conferred on the class.

This reform would not add much to current securities settlements, where the total amount of the class recovery is known, at least in all-cash settlements without give-back provisions.[4] It would have real bite, however, in consumer class actions where non-cash—"coupon" or "in-kind"—settlements are common and frequently criticized.[5] Examples come readily to mind: the Cuisinart food processor price-fixing settlement, where purchasers received half-off coupons for future purchases of non-food-processor Cuisinart products;[6] the airline coupon price-fixing settlement, where class members got coupons with a face value of $408 million toward future purchases and $50 million in cash, and class counsel received $14 million cash;[7] the proposed GM pick-up truck product liability settlement, which would have given class members a coupon good for $1000 off on the purchase of another GM truck, plus $9.5 million in attorneys' fees;[8] and the proposed settlement of the Ford Bronco II litigation, which would have given class members a free inspection, an educational video, an owner's manual supplement, a safety sticker for their sun visors (much of which was already required by government regulation), and $6 million in fees.[9]

---

4. A "give-back" provision directs that unclaimed funds revert to the defendant.

5. *See* Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996).

6. *See In re* Cuisinart Food Processor Antitrust Litig., MDL 447, 1983 WL 153, *2-3 (D. Conn. Oct. 24, 1983).

7. *See* In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993).

8. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (reversing the settlement approved by the district court, in part on the issue of the adequacy of the settlement), *cert. denied*, 116 S. Ct. 88 (1995).

9. *See In re* Ford Motor Co., Bronco II Prod. Liab. Litig., CIV.A.MDL 991, 1997 WL 104971, at *4 (E.D. La. Mar. 7, 1997) (finding that there was no consideration because consumers only received information to which they were already entitled, and that fee request was "so far out of the range of what I consider reasonable as to suggest . . . collusion"); *see also* Emily Barker, *Class Members Claim Duplicity in Photocopier Suit*, AM. LAW., May 1994, at 29 (discussing proposed settlement of antitrust suit against Xerox by customers and copier repair companies; the proposed settlement consisted of discount coupons to end-users with a face value of $223 million, $2 million in coupons to 4000 copier repair class members, $5 million cash to five named plaintiffs, and a clear sailing clause for $35 million in fees).

Such nonpecuniary settlements have been criticized for delivering little if any benefit to the class, while generating large attorneys' fees.[10] One problem for courts in evaluating such settlements is the difficulty in valuing the non-cash component. By deferring the attorney fee award until the class has actually filed claims, my proposal would take much of the uncertainty out of this endeavor. Similarly, it would eliminate uncertainty as to how many members of the class would actually file claims.[11]

These reforms would be superior to many of the reforms that have been proposed legislatively, and except for the opt-in requirement, these reforms could be adopted by judges without congressional action.

---

10. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); Note, *supra* note 5.

11. *See* Janet Cooper Alexander, *The Value of Bad News in Securities Class Actions*, 41 UCLA L. REV. 1421, 1448-49 (1994).

TOBACCO LITIGATION*

THE HONORABLE MICHAEL MOORE, FIFTH PANELIST**

Good morning, everyone. That is how we do things down in Mississippi. I do not know if I am in a hospitality state today or not after hearing Sheila Birnbaum and Max Boot and having read many of the wonderful things that Mr. Boot has written about some of my friends, such as Dick Scruggs and others in this room, and hearing him use the terms "tool of the devil" and then the term "legalized blackmail"—I know that I am not involved in any of that.

My presentation is much different than any of the things that are being talked about today. I am going to give an update about the tobacco litigation, where we came from, where we are now, and where we hope to go.

Tobacco litigation is a much different situation than any class action lawsuit. As attorney general of Mississippi, I have various duties, and one of those duties that is paramount to me is to protect the public health and the public interest.

The backdrop of the following case is the tremendous burden on the health care budget of this country caused by one industry—the tobacco industry. The estimates are that anywhere from fifteen to twenty-five percent of the total health care costs in this country are attributable to tobacco-related disease.[1] It is likely that everyone in this room today has a loved one somewhere in the family that has contracted or died from lung cancer, heart disease, or emphysema. And, probably, each of you in this room knows of a child or some other who has died from either sudden infant death syndrome or some of the many other cancers, we say, are caused by tobacco-related disease. It is a personal issue with many people in this country, but it is a professional and a public responsibility issue with the attorneys general of this country.

We did not just start working on this when, in the last couple of years, it became the popular thing to do. Mississippi began working on our case back in early 1993. No one in my state told me it was an advisable course of action—to go against the tobacco industry. As a

---

** Attorney general of the State of Mississippi. Attorney General Moore is also Chairman of the National Association of Attorneys General Criminal Law Committee and is the Chairman of the National Alliance.

1. *See generally* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,575 (1996) (to be codified at 21 C.F.R. §§ 801, 803, 804, 807, 820, 897) (discussing the incidence of higher reported lifetime medical costs for smokers than non-smokers).

matter of fact, I remember the day we sued the tobacco industry. When asked what he thought about my lawsuit my governor stated, "It makes me want to throw up." At least I had support from my governor.

One of the things that an attorney general does is go to the legislature to get appropriations. So two or three weeks after the initiation of the suit, I went across the street to ask Chairman Capps, who is the head of the Appropriations Committee, for money to run my office. Now, Chairman Capps is a big smoker and plays in all of the RJR golf tournaments. Well, he had a long cigar at the end of the table, and, of course, he said, "Mr. Attorney General, I do not want you to spend one penny on that damned tobacco lawsuit."

I said, "Well, what if we recover a bunch of money?"

"I don't want to hear anything about it," he replied. So again, I had tremendous support.

The most horrible call I received was from one of my law school buddies, who called me from New Orleans. He is one of those awful plaintiffs' lawyers who makes all this money and leaves other people without anything. He knew that I had been a prosecutor and that I had been involved in prosecuting the drug cartels and organizations like that for ten or twelve years. He said to me, "Hey, Moore, you ain't suing the cocaine boys; these are the tobacco companies." So I felt good, steady, and ready to go. The last two-and-a-half years have been that kind of ride.

I am sure I have many supporters in this group. I recognize many of you from the law firms, and you really should say "thank you," because I know how much money I have made for you over the last two-and-a-half years. My friend, Dick Scruggs, remarked to me earlier that you have all probably taken out key man insurance plans on me, because if I die, many of you are going to go out of business.

In my estimation, the tobacco case is the most important public health litigation ever filed. The backdrop is that 420,000 people die from tobacco-related disease each year;[2] it is the number one preventable cause of death in this country. Furthermore, three thousand children start smoking every day, and one in three of those kids will die from tobacco-related disease.[3] So from that standpoint, I cannot think of a more important role for attorneys general or even lawyers to play than in trying to protect the public health. Yet one can argue, as the tobacco companies do—and I still cannot believe I have seen this in some of the transcripts from these smokers cases—that cigarettes do not cause cancer, and that nicotine is not an addictive drug. They also claim they do not manipulate

2. *See id.* at 44,398.

3. *See id.* at 44,399.

the levels of nicotine. Remember the testimony before Congress in 1994?[4]

The defense theories presented in these cases are perplexing: the tobacco industry says that smokers assume the risk. They do not cause the injury but smokers assume the risk. That is the strangest thing I have ever seen in the law.

With that backdrop, what we began to look at in Mississippi, and frankly in the whole country, is the tremendous cost to the public health of treating tobacco-related illness. In our particular case, we primarily focused on indigent people. In Mississippi—I know it is a small southern state with a population of only two-and-a-half million people—about twenty to twenty-five percent of the people are on Medicaid, which constitutes 500,000 to 550,000 people as of this year. We also have the highest instance of heart disease. We spend, in little Mississippi, about $100 million a year just to treat poor people for tobacco-related disease. We cannot afford that in Mississippi. When that number is multiplied across the country, it amounts to between six and eight billion dollars a year that states and the federal government spend just treating poor people.

Not only did we want to recover these costs for the taxpayers, we also wanted to stop the tobacco companies from marketing, advertising, and selling their products to children. The enforcement provisions to prevent the sale of tobacco to minors in all states have not worked.

One of the things we have accomplished, and will continue to accomplish in these cases, is to expose the truth about the industry. There are sixteen states now that have filed cases against the tobacco industry.[5] We filed our first case in May of 1994. Shortly after that, four other states filed.

Within those sixteen states, there are different causes of action. Most of them have equitable causes of action that involve unjust enrichment, restitution, indemnity, public nuisance, and requests for injunctive relief. Other states filed and added consumer protection or antitrust planks, and traditional tort theories. Others filed in federal court. Texas filed a

---

4. On June 21, 1994, FDA Commissioner David A. Kessler stated that regulation may be necessary if it proves true that tobacco companies manipulated levels of nicotine to get more smokers addicted. The tobacco companies vehemently denied this allegation. *See* Keith Glover, *Latest FDA Tobacco Testimony Suggests Regulation Is Near*, 52 CONG. Q. WKLY. REP. 1722 (1994).

5. As of May 1997, 29 states had filed suit against the tobacco industry. *See* John Schwartz, *In Tobacco Suits, States Find Strength in Numbers: Mississippi Attorney General Rallies Coalition of Colleagues in Landmark Legal Battle*, WASH. POST, May 18, 1997, at A6.

federal racketeering action against the tobacco industry.[6] So, primarily, fifteen state cases and one federal case have been filed.

There have been significant events in these cases. In my own case, for example, not only am I facing the tobacco industry on one side, but I have been sued by both the governor of my state—yes, sued by the governor of my own state in an attempt to stop our case—and the tobacco companies, to stop our lawsuit. We argued the case last week before the Supreme Court of Mississippi.[7]

Whistle blowers have also been present. Frankly, I have never seen such a dodge to hide the truth in my life as from this litigation. I have also never seen such a misuse of the attorney-client privilege and the work product privileges as in these cases. This was revealed by the documents, whether borrowed or stolen, of Brown & Williamson.

It is hard to find a tobacco case where any of those documents have been turned over in discovery, even though they have been made public over the past two years. When Dick Scruggs and I got those documents, we took them to the Justice Department, the Food and Drug Administration, and Congress, and now they are even on the Internet. I point that out because I have heard so much criticism about lawyers and what they do. I think some of the shining examples of this litigation are what lawyers are doing in the search for truth.

There is one thing that is always challenged in these cases: the contingency, the contracts. We do not have a contingency fee contract in Mississippi; our lawyers will only get paid, in our particular case, should we win our case. The court will be asked to award reasonable attorneys' fees at that point. All other states do have contingency fee contracts that range anywhere from fifteen to twenty-five percent.

Ours is the first case that will be tried. The trial is set for March 23, 1997.[8] The judge has declined to stay the action, even though the tobacco companies have attempted time and time again to have the action stayed. We think our case will be tried that day. Discovery is going very well from our side and we have turned over millions of documents to the tobacco companies. However, it is very slow from the other side.

---

6. *See* Barnaby J. Feder, *Texas Joins Other States in Suing Tobacco Industry*, N.Y. TIMES, Mar. 29, 1996, at B5 (stating that Texas became the seventh state to sue the tobacco industry).

7. *See* Suein L. Hwang, *Wigand Testifies in Mississippi Lawsuit*, WALL ST. J., Nov. 30, 1995, at B10.

8. On March 13, 1997, the Mississippi Supreme Court ruled that Attorney General Moore's suit seeking to recoup the state's health care costs can go to trial. *See Mississippi High Court Rejects Move to Block Tobacco Trial*, WASH. POST, Mar. 14, 1997, at A3.

Of the other cases set for trial, the next case will probably be the Florida case.[9] As you know, Florida not only has a very solid case, but also a statute that was passed through the legislature, which has been the center of some controversy and lots of litigation.[10] I predict the next case to be tried after the Florida case will be the Texas case.[11] So in 1997, I think we will see the Mississippi case, the Florida case, and the Texas case—each a different type of case—being tried. And the next case that will be tried, perhaps in late 1998, will be the Minnesota case.[12]

The one settlement that we did have, the Liggett settlement, was the first time any tobacco company has ever paid any money in any case.[13] It looks like the settlement will be worth about twenty-five million dollars. And the lawyers did not make any money out of those settlements. There have been no fees paid, and there will be no fees paid out of that settlement. My lawyers are working pro bono.

---

9. *See* Florida v. American Tobacco Co., No. CL 95-1466 AH (Fla. Cir. Ct. filed Feb. 21, 1995) (asserting racketeering charges against the tobacco industry in a Medicaid reimbursement action).

10. *See* FLA. STAT. ANN. § 409.910 (West Supp. 1997); *see also* Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996) (upholding section 409.910, the Medicaid Third-Party Liability Act).

11. *See* Texas v. American Tobacco Co., No. 596CV91 (E.D. Tex. filed Mar. 28, 1996).

12. *See* Elizabeth A. Frohlich, *Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing Identifiable Harm?*, 21 AM. J.L. & MED. 445 (1995) (noting that the State of Minnesota and Blue Cross and Blue Shield brought suit against the tobacco industry in *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565 (D. Minn. filed Aug. 17, 1994)).

13. Until March 1996, the tobacco industry vowed not to settle and to defeat every lawsuit brought against it. Liggett was the first company to break ranks and settle with anti-tobacco lawyers. *See* Richard Tomkins, *First Chink in Tobacco Manufacturers' Armour: Maker of Chesterfield Cigarettes Breaks Ranks and Offers a Deal to Anti-Tobacco Lawyers*, FIN. TIMES, Mar. 14, 1996, at 4.

PANEL ONE:
PANELIST RESPONSES

MAX BOOT: I would imagine that the panelists are just itching and dying to jump in and respond to what they have heard.

SHEILA BIRNBAUM: I would just like to respond to my friend on the plaintiff's side. I get very disturbed when six people sitting in Cheyenne, Wyoming, or in any other place in the country, are going to decide whether a corporation's existence continues or does not continue. It is not the American people that are deciding class actions if they go to a jury, but six people, sitting in a local courthouse, that are deciding the fate of an entire corporation or, in some cases, an entire industry. That is a very different kind of thing. That is why corporations are afraid to put their whole corporate existence on the line.

With class actions, up to one million people might be riding the coattails of the representative plaintiffs, and six people in some local community will be making the decision. That is very scary.

Also, with regard to the cases that were mentioned and the issue of applying the law of fifty jurisdictions, I know what happened in the *Copley* case[1] in Cheyenne, Wyoming; it never went to the jury where there could have been a charge. What was to go to the jury was the law of three different jurisdictions, because the representative plaintiffs came from three jurisdictions.[2] So the jury would have been charged with separate law on negligence, strict liability, punitive damages, and causation. On top of that, the court thought it was merely going to charge the Restatement of Torts 402A[3] and a plain negligence charge. As a result, all people in states that had similar law would be bound. Judge Brimmer even noted in his fairness hearing that there was a lot of controversy regarding whether the charge would be upheld on appeal.

The *Cordis* case[4] was inferentially overruled by the Sixth Circuit in *American Medical*,[5] which held that the 304 district court cases that had been certified, including *In re Dow Corning Corp.*,[6] *Dante*,[7] and

---

1. *In re* Copley Pharm., Inc., 161 F.R.D. 456 (D. Wyo. 1995).

2. *See id.* at 465.

3. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

4. *In re* Cordis Pacemaker Prod. Liab. Litig., No. MDL 850, C-3-86-543, 1992 WL 754061 (S.D. Ohio Dec. 28, 1992).

5. *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

6. 86 F.3d 482 (6th Cir. 1996).

7. Dante v. Dow Corning Corp., 143 F.R.D. 136 (S.D. Ohio 1992).

Cordis,[8] were not proper class actions.[9] So I still believe we cannot have a trial class, a national class, in tort cases.

THE HONORABLE PATRICK HIGGINBOTHAM: I think this discussion highlights a point that bears mentioning again: the problems we are talking about are largely confined to one segment of class actions. Interestingly, I hear counsel start to talk about mass torts and then very quickly shift to discrimination cases as the model of success.

What we found in the course of our study in the rules process is that class actions have been working reasonably well. There are some serious problems, but, by and large, the legal culture that surrounds securities class actions is working reasonably well. The discrimination model has worked reasonably well. We find no mass tort cases, in fact, that actually have been tried. It does not happen. There may be some out there, but we have not located them, as we defined them. Thus, the problem becomes not about the trial of mass tort cases but about the settlements of these large cases.

It also bears mentioning that it simply defies reality to deny the powerful effects of aggregation. When I was a little lad, we used to buy—against my mother's counsel—firecrackers. Back then they were called by the politically incorrect name "ladyfingers." They were little, tiny firecrackers about so big, and you could hold them in your nails to light the fuse and they would pop. I quickly discovered with my cousins that we could take about thirty or forty of those ladyfingers and put rubber bands around them, and they would blow your hand off.

As for the aggregating effect, the class is proper if within the Rule, even though it may bring with it an interim extortionate effect. On the other hand, what you do not want to bring forward are cases that gain their strength not from the merit of the claim, but from the aggregation itself. That is one of the problems that the Rules Committee has been trying to get at—to separate out those cases. For some time, we looked very seriously at insisting upon an inquiry into the merits of the class claims as an element of the class certification. We played with formulations such as insisting that there be some demonstration of the likelihood of success—something akin to the injunction model.

We looked seriously at that formulation over a long period, and there was initially a lot of support for it across the board. But as time went by, we began to realize that the price for it would be too large, and I won't take the time to go into that, except simply to remind people, as we talk

8. 1992 WL 754061.

9. *American Med. Sys., Inc.*, 75 F.3d at 1074.

about this problem, that it is very useful to talk about mass tort as the problem and not something else. There is an internal dynamic in the economics of the mass tort that does not exist elsewhere.

Class actions are not the creatures, necessarily, of lawyers. There is something else going on there, and part of it has to do with economy of scale. Once a lawyer gains the information, resources, and all the mass discovery needed to maintain a single suit, then he or she can deal with cases on a marginal cost basis; he or she can virtually franchise out to other lawyers. Hence, the economics of the structure itself stem from the patterned nature of the phenomenon we are talking about—a common product, a common disaster. That is what drives these cases, and that is one of the powerful contributions to aggregation—the economics itself. On a related note, our legal structure has, in the name of efficiency, pooled these cases together through the class action process, and we have been very quick to pull cases from their moorings and send them to be consolidated before a single judge. That may sometimes be counter-productive.

My last observation is to be very wary of extrapolating from the asbestos phenomenon. Asbestos appears in the background of many of the mass tort cases, but very few of them are asbestos cases. Asbestos evolved to the point where the science was very clear; the cases became essentially, as Francis McGovern would call them, commodities—the commoditization of torts. Very experienced lawyers in asbestos cases can price those cases incredibly accurately and reach quick agreements on valuations. It is a different ballgame than breast implants.

I mediated the Ahern settlement,[10] and I was involved in the mediation of the breast implant cases. They are very different. In those breast implant cases, there was no developed science. We are dealing with very different sets of problems, and my observation is simply one of definition: trying to locate where the problems are, so that we can begin to talk constructively, not necessarily about solutions but at least about helpful approaches.

MR. BOOT: I think that's an excellent point. I will now ask the panelists to address a basic premise that Judge Higginbotham and the others were discussing, which is that the problems are really in the mass tort cases. The underlying assumption is that these are basically meritorious cases, but the problem is adjusting the figures so the plaintiffs' lawyers do not get ninety-nine percent of the benefits but only get sixty or seventy percent of the benefits.

---

10. *See In re* Asbestosis Litig., 90 F.3d 963 (5th Cir. 1996), *reh'g en banc denied*, 101 F.3d 368 (5th Cir. 1996), *petition for cert. filed*, No. 96-1394 (Mar. 3, 1997).

Let me also ask the panel about the basic assumption that these cases involve problems that ought to be dealt with by the legal system and not by regulatory agencies. For example, John Cracken, an up and coming young plaintiffs' lawyer in Texas, sued Allstate and Farmers Insurance, charging that the companies have been incorrectly calculating their premiums for years through an obscure process known as "double rounding."[11] I will save you the tedious details of what double rounding involves, but, basically, it is theoretically a small error that costs each driver no more than $3.50 per year. But, obviously, once you add up $3.50 over ten years, you get a $100 million lawsuit from which Mr. Cracken hopes to receive $30 or $40 million.

Now, assuming that he is successful, and he probably will be because it has been certified as a class,[12] what will the insurance companies have to do if they have to pay out up to $100 million? They will, of course, raise their premiums to make up for that loss. So it is hard to see how the drivers will be better off one way or the other. They will be worse off under the suit.

My real point is that this is a case involving an industry that is regulated rather strictly by the Texas Department of Insurance, just as securities offerings are regulated strictly by the Securities and Exchange Commission (SEC). So my question is, does it make any sense at all for the legal process to be attempting to rectify these $3.50 wrongs?

JAMES M. FINBERG: It absolutely does. The SEC does not have the time or resources to go after all the potential or actual securities fraud. And the legislative history of the Private Securities Litigation Reform Act of 1995,[13] a rather conservative bill from a Republican Congress, talks about the importance of private enforcement of the securities laws.[14] Private enforcement of the securities laws is absolutely essential.

---

11. *See Dollar-Rounding at Issue*, NAT'L L.J., July 22, 1996, at A8 (stating that six named plaintiffs represented by John Cracken filed suit against Texas Farmers and Allstate insurance companies for an estimated $109 million in damages, stemming from the companies' practice over the last ten years of over-charging customers by millions of dollars).

12. *See id.*

13. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

14. The Joint Explanatory Statement of the Committee of Conference stated:

> Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and guarantee that corporate officers, auditors, directors, lawyers, and others properly perform their jobs.

141 CONG. REC. H13691-08, H13699 (daily ed. Nov. 28, 1995).

Let me address Professor Alexander's point about the securities area. The Private Securities Litigation Reform Act of 1995 adopted many of her suggestions to some extent. For example, the Private Securities Litigation Reform Act says that there is a presumption that the investor or group of persons with the largest financial interest will be the class representative and that individual or group of persons will pick his or her counsel.[15]

Now, there are a few problems with that. There have been about one hundred suits filed since the Reform Act was passed. Institutional investors stepped forward in only two cases. The reasons are two-fold: first, the institutional investors are not interested in being involved in discovery; and, second, the loss—although large in absolute terms—is a relatively small percentage of their overall portfolio. For an individual investor, in contrast, the loss may be a high percentage of his or her life savings, and thus it means a great deal more. For example, I have a case where a Marin school teacher lost $40,000. That might not be as much as Fidelity Magellan lost, but it was almost eighty percent of her life savings. To her, it is much more important; it is a much bigger deal in her life than it is to the institutional investors.

I should tell you that I represent the Colorado Public Employee Retirement Association (ColPERA) and the California State Teachers Retirement System (CalSTRS) in *In re California Micro Devices Securities Litigation*[16] as local counsel. I think it is a good thing when institutions get involved, but it is not going to happen very often.

The truth in labeling requirement is also part of the new law. It says that settlement notices now must give disclosure on a per-share basis.[17] The problem at the outset is that it is unknown generally how many people are going to submit claims. What is known is that plaintiffs take the amount of money that is available to distribute. One has to divide that number by the number of claims submitted. Therefore the per-share award would not be known until the end. So there must be an estimate, which is what I think is going to happen in the settlement notices. But, again, that is a good thing.

With respect to attorneys' fees, attorneys in securities cases generally apply for a percentage of the common fund created for the benefit of the plaintiff class. The benchmark of the Ninth Circuit is twenty-five percent, which means that the class gets seventy-five percent of the money and the attorneys get only twenty-five percent.[18]

---

15. *See* 15 U.S.C.A. § 78u-4 (West Supp. 1997).

16. No. C-94-2817-VRW (N.D. Cal. Aug. 4, 1995).

17. *See* 15 U.S.C.A. § 78u-4.

18. *See* Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268 (9th Cir. 1989).

As to the issue of choice of law, I think it is cleaner to sue the defendant in the defendant's home state and to apply the law of the home state. We will see more of that in the future. As to mass tort cases, I think the answer is to give discretion to the district court judges. To some extent, it is like the pornography cases: They will know meritorious cases when they see them.

And, if summary judgment is allowed to come before class certification, the truly meritless cases are going to be dismissed on summary judgment before the class certification determination. But, if it is a strong case, and it can survive that kind of attack, it should continue. One does not want to have a case such as the *Cordis* case[19]—where the corporate officers pleaded *nolo contendere* to a criminal charge of knowingly selling a defective product—not to be certified. Such a result would deny access to the justice system in meritorious cases. In the *Cordis* case, the victims were largely senior citizens who could not afford to spend hundreds of thousands of dollars on experts. That is what it costs to pursue one of these complex mass tort cases. The class action device gave these innocent persons, who were done wrong, access to the justice system; it gave them a voice and redress.

A subset of the mass tort cases are the toxic spill cases. Maybe Your Honor differentiates them. In these cases, one has to have a modeling expert to figure out where the toxic air plume went or where the water flow went. These are very expensive cases, and many people are seriously harmed. My firm handled the Southern Pacific railroad spill case[20] in California, where a toxic pesticide was dumped into the Sacramento River. No individual could have brought that case. Only through collective action could those meritorious claims have been resolved.

JUDGE HIGGINBOTHAM: There is one question that I think should be strongly emphasized: Who decides whether or not this particular social policy reflected by this statute should be enforced by these means?

The assumption that people will go uncompensated, that people who have been wronged will not be protected, rests upon the assumption that the protection of the statute, as written, has accorded that type of protection to them. One of the problems with Rule 23 is its potential for shifting the decision-making responsibility for enforcement of these social policies from the Congress to the courts—that is, to the lawyers.

---

19. *In re* Cordis Pacemaker Prod. Liab. Litig., No. MDL 850, C-3-86-543, 1992 WL 754061 (S.D. Ohio Dec. 28, 1992).

20. *In re* Sacramento River Spill Cases I & II, Jud. Council Coord. Proc. Nos. 2617 & 2620 (Cal. Sup. Ct. filed Sept. 20, 1993).

In those situations where Congress has said that this is the policy and this is the way it is to be enforced, it is very difficult to deny the legitimacy of this type of aggregation. But, in the situations where they have not made that statement, reluctance to imply private rights of enforcement ought to take over.

So I think beneath the surface of this question of consumer rights lies the familiar question of who decides the allocation of power. Eddie Becker made a vital point in the *General Motors* case[21] in pointing to the underlying federalism concerns of an overly generous reading of Rule 23 which can move these cases from state courts into federal courts. It is easy to say that we will dispense with the nuanced differences among the state laws, but, remember, those nuanced differences are reflections of state policies. Whether Texas elects to go one way and Wyoming another reflects considered judgments of those states, and the price you pay for this efficiency is to step on those differences.

Now, that may be permissible if the national interest and the Commerce Clause is so consciously invoked that we decide to step on these state interests. In other words, if it is a federal problem, it ought to be approached that way. But then the question is, who decides that? And I think these lurking questions must ultimately go back to Congress.

In fairness to Attorney General Moore, if we say that we cannot proceed through the private class action device, if we are saying in part that it lacks legitimacy, what we are saying is that the elected officials, who have legitimacy, ought to be willing to enforce them.

I express no opinion about the tobacco litigation; but, certainly, attorneys general, who have the statutory enforcement power, have a much higher claim to legitimacy in enforcing those rights, one would say, on its face, then perhaps volunteers. At least the argument is made: Can you have your cake and eat it too? Can one say simultaneously that we cannot maintain these class actions, neither can the lawyers in private enforcement, nor can states, nor can the federal government, nor can any other agency?

Well, those are difficult social questions, and my comments do not concern their merits. I want to pull them up, so that we realize that what initially comes to us dressed as light, little procedural issues can quickly reach very deep social judgments. I think that is part of the perplexity that confounds many of us who struggle with these problems.

---

21. *In re* General Motors Corp. Pick-up Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 790-91 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 88 (1995).

QUESTION: I am from Public Citizen. I am glad that you guys have a balanced moderator who does not have an opinion, and I am glad to see that Max Boot is now going to support all our efforts to strengthen the regulatory agencies as an alternative to tort litigation.

MAX BOOT: That is a different panel discussion.

QUESTION: We are not used to having any time to talk to you, Mr. Boot, so I figured I would get that in.

I am curious if any of the panel would like to talk about Public Citizen's work on breaking up collusive class actions. We have now intervened in over a dozen cases to go after plaintiffs' attorneys' fees, because we are concerned that the remedy for consumers is not large enough and that the corporations are using a select group of plaintiffs' attorneys to create settlements where the consumer's benefit is small and the attorney's fee is large.

We are more involved than any other group, and yet we continue to get attacked as being "in the pocket" of the Trial Bar. I am curious if any of you would like to talk about this trend. In fact, Judge Higginbotham mentioned Fred Baron, who has been working with us and is one of the stalwarts working to clean up this process so that we can make sure the class action device survives and is not abused.

I think the consumer movement gets very little credit for intervening in these cases and going after both the corporations and the Trial Bar.

JAMES M. FINBERG: Attorneys' fees in class actions have to be approved by the court; there has to be notice to the class members; and the class members have to be given an opportunity to object. A judge should take that seriously. It is completely inappropriate for attorneys' fees to get higher than the amounts that are given to the class. I absolutely agree with that.

Consumer groups are to be applauded for taking an interest in attorneys' fees. There should always be vigilance about attorneys' fees. I can say that in every case we have had, the class members have always gotten more than the attorneys, and that is the way it should be.

QUESTION: Mr. Moore, I am really pleased that you are here today because I am not a professional litigation attorney. I read about the tobacco lawsuits as an interested shareholder of Philip Morris, and I get most of my information from the *Wall Street Journal*, so as you know, the information is pretty one-sided.

The issue that interests me is not about fundamental human liberty and the ability of an adult to make a choice and to assume a risk, or whether we are going to have a free society. I am interested in the economic point of view. Everything I read about those lawsuits indicates that there is no economic cost to the government from tobacco-related deaths because smokers tend to die in their sixties, just at the point when they are about to go onto Social Security. I wonder if that is a net savings. I have never seen a response as to that; I only see one side of the analysis.

Even if you say that it does cost Mississippi something in the form of Medicaid payments, I would like to know if you have actually looked at whether there is a savings to Mississippi—just looking at the economic point of view. Is there any way to look at this where it would make a difference to you?

Suppose the federal government picked up all of the Medicaid costs. Is there any way that economic analysis would have an impact on you that would make you stop that litigation?

THE HONORABLE MICHAEL MOORE: Sure, and I thank you very much for that question. Of the defenses that the tobacco companies have espoused, the "early death" defense is the one that I love the most. The last time that I remember a tobacco company brought that argument before the court, they said, "Okay, Judge, just assume for a minute that we do kill these people. Just assume that we do. We're not saying we do, because cigarettes do not cause cancer, nicotine is not an addictive drug, and we do not sell to children. But just assume that they prove that we do, that they die early in Mississippi. Think about how much money we save the taxpayers of the State of Mississippi, and the federal government, because grandma and grandpa die early. We do not pay Social Security anymore; we do not pay Medicaid and Medicare anymore; we do not pay retirement benefits; and these people do not earn any more. And, also, just think about the money that those doctors make and the taxes that they pay from treating all these poor people. We are economic development in your state."

During the first three hearings, this was the only time that our judge ever said a word or ever looked up. Of course, we were scratching our heads; we were loving this argument. It is a wonderful jury argument—just wonderful. But, you can talk to Peter Huber later, a panelist who is the king of the doctor death defense.

What we get in the State of Mississippi, and all of the other states, are taxes that are paid by whom? The tobacco companies want to make people believe, and they even try to make our judge believe, that the tobacco companies paid those taxes. Tobacco companies do not pay those taxes. Smokers pay the fifty million dollars in excise taxes, yet tobacco companies also want an offset for the money they "save" us because they kill our people early. No other area of law gives credit for the damage,

or for the offset, one achieves. Imagine if we were going to fine someone in court ten thousand dollars for destroying a building? The analogous argument would be: "Wait a minute, Judge. I added it up, and over the last twenty years, I've paid $250,000 in taxes, so you owe me money." It is a ridiculous argument, and it is the kind of argument that only the tobacco companies would make.

SHEILA BIRNBAUM: Can I respond? Although it is ridiculous as a jury argument because of its political incorrectness, as an economic argument it is not. It is a fact that tobacco companies pay more taxes. Each cigarette pack in most states carries a large tax over and above the normal taxes that people pay.

I would just like to say one other thing. I worry about the tobacco litigation that the attorneys general have brought because I am concerned about who is next. If you can do it to tobacco, you can do it to hundreds of other people. For example, many people get heart disease from high cholesterol food. Are we next going to attack the dairy farmers or the people who manufacture all this high cholesterol food?

It is easy to pick on an industry that is politically incorrect at the moment, but we may have let a genie out of a bottle who can, ultimately, create havoc down the line. I think it is a very interesting problem.

MR. MOORE: It is interesting. My governor made the very same argument. Obviously, we can have a disagreement today, but we sincerely believe that the cigarette is the only product that causes damage when used exactly as intended. We do not believe that pepperoni or milk, which have health and nutritional benefit, have that effect. Please tell me what health or nutritional benefit there is in a cigarette.

MS. BIRNBAUM: I think there is a psychological benefit to cigarettes. A cigarette can relax people who feel they are under stress.

MR. MOORE: So I guess it's a drug, then.

MS. BIRNBAUM: No.

MR. MOORE: It is not a drug. Is it a food?

MS. BIRNBAUM: It is a substance.

QUESTION: Attorney General Moore, how different is alcohol?

MR. MOORE: I have to tell you, I do not know if I agree with the numbers on television. I watch doctors and read the reports about the

"health benefits" of wine and other alcohol. However, I have seen no documentation that shows any health benefit in the use of a cigarette.

Comparatively, the numbers are pretty large. Alcohol deaths in this country range anywhere from 90,000 to 100,000 people a year from alcohol-related disease—and, for comparison, cocaine and all the illegal drugs kill about 20,000 people a year—versus 420,000 a year from tobacco.[1]

So frankly, I do not think it applies to any other product because of the product itself.

MR. FINBERG: I agree with Attorney General Moore that tobacco is distinguishable. In addition to the points that he made, in a tobacco case, you have evidence of manipulation of nicotine, evidence of addiction, and intentional fraud. You simply do not get that with pepperoni pizza or dairy products.

QUESTION: Judge Higginbotham, you touched briefly on settlement class actions, but no one really talked much about it. I would be interested in hearing your perspective, and a plaintiffs' lawyer's perspective and maybe a professor's perspective, on whether the dangers of collusion are greater where you are just certifying in order to settle and whether fairness hearings are enough. Why is it that there is such a controversy about these now?

THE HONORABLE PATRICK HIGGINBOTHAM: Yes, I think there is a risk of collusion. The quick answer is that any time you have both parties to the lawsuit in agreement, there is obviously an increased risk of collusion. No one, I think, seriously contends that there is not that risk. The question is, how do we respond to it appropriately?

Historically, our numbers show that approximately twenty-five percent of all class action dispositions were actually settlement classes—meaning that these cases were settled before a class was certified.

This is not a recent phenomenon. Its utilization in the mass tort area itself has brought the settlement class front and center. I emphasize again to look at the substantive area of the law you are talking about.

The Advisory Committee on Civil Rules proposal now simply mandates a hearing. The question then is, are the courts adequately addressing the possibility of collusion and of conflicts and adequacy of representation? Well, can one locate cases of collusion in the federal

---

1. *See* Centers for Disease Control, U.S. Dep't of Health & Human Servs., *Symptoms of Substance Dependance Associated with Use of Cigarettes, Alcohol, and Illicit Drugs—United States, 1991-92*, 44 MORBIDITY & MORTALITY WKLY. REP. 830 (1995).

system that have not been smoked out and dealt with? Are the procedural processes adequate? Sure there is a risk, but the critical question is, where are those cases? The cases in which there is a higher risk are the cases that are being litigated very forcefully by very able people, by public interest groups, some of which are self-interested in the traditional American way.

PROFESSOR JANET ALEXANDER: In my opinion, classes will be certified for settlement because not all class actions can be tried. So it is not a question of whether you have classes for settlement. I think the hard question is whether you ought to be able to certify a class for settlement purposes only, and that is a very troubling issue.

JUDGE HIGGINBOTHAM: That is the phenomenon I am talking about, and that is well over twenty-five percent of all class actions that we have had. I did not particularize that answer to the question, but I was talking about exactly that group of cases.

PROFESSOR ALEXANDER: But, the question is whether the class gets appropriate value when there is no threat of litigation.

MR. FINBERG: The safeguard has to be the fairness hearing. The fairness hearing has to be taken seriously. And to prevent the race to the bottom—when lawyers think that they can get more than the plaintiffs' proposed settlement—claimants have to feel free to go to the fairness hearing and object to the settlement, and the court has to take those objections seriously.

JUDGE HIGGINBOTHAM: One quick point: The proposal says that a settlement class can go forward, but it requires an opt-out right. What that means from a claimant's perspective is that when they receive notice of a class certification, they can get out of it.

Now, let us assume we are not going to allow any settlements before certification. The class is required to be certified. They are locked in; the case is settled. Unless there is some bargained-for opt-out right as part of the settlement, the claimants do not have the right to dial out, only a right to attack. So between cases that are settled before certification and cases that are settled after, from the claimant's perspective, they are certainly benefitting.

What is critical to understand about the Rules Committee's proposal is that it insists upon notice, and it insists upon an opt-out right, and it does not deal with futures. Once that is on the table and clear, I really do not know if plaintiff lawyers or defendant lawyers have problems with it. The discussion always drifts off into futures, inadequate notice, opt-out

rights, et cetera, which are a different ballgame and a more difficult subject.

QUESTION: Every couple of days, another large public contract is granted to the contractors potentially worth billions of dollars. And, if this had been about highway resurfacing or some other traditional state government contract, we would immediately ask two questions: first, how competitive was the bidding; and second, are they actually going to do the work or are they going to be able to piggyback on the highway resurfacing efforts of lawyers in other states?

Could any of the panelists, particularly Mr. Moore, comment on how competitive this process has been, and how strong are the safeguards to prevent billions of dollars from going to a lawyer who has piggy-backed?

MR. MOORE: I will say again, and it does not matter how hard and how many times I say it, we do not have contingency fee contracts in Mississippi. We did that for the sole purpose of keeping our eye on the case, rather than on the lawyers of the debate. It is amazing to me that the debate always switches.

In our complaint, we asked the court to award attorneys' fees in whatever reasonable amount they determine, should we win our case. It was not requested from the state, but from the tobacco companies.

Now, your question was about the other states. The attorneys general from many states have requested proposals from law firms who were interested in being involved in these cases. Some attorneys general have received ten or fifteen and others five or six. Many of them organized outside panels to make the selections.

The big determining factor is who is willing to front the cost for this litigation. The guy who files today is better off. In Mississippi, we have probably already spent three million dollars on our case, without any compensation going back to the lawyers. In every state I know, the contingency fee contract is a public record. It would be in my state if there was one.

QUESTION: To follow up, it would be quite surprising if the lawyers, at the successful termination of your case, asked for a fee based on an hourly basis even though they had achieved an enormous settlement. They will, in fact, be likely to ask for something related to the size of the settlement. Therefore, you, in fact, have conferred on them a standing that, in effect, gives them likely compensation based on the share of the settlement.

MR. MOORE: Yes, if we win, we lawyers will probably make some money. But it will be based, at least in our case, on the work that we do and on the risks that we took.

PROFESSOR ALEXANDER: I do not understand what the problem is; here there is a client hiring a lawyer. Generally, I think the problem arises in class actions when there is not a client there to supervise the lawyer. If there is an active client, I do not see why it is a problem how the defense lawyers get paid.