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INSTITUTE FOR LAW & ECONOMIC POLICY (ILEP)

ANNUAL SYMPOSIUM

3025 Collins Avenue
Miami Beach Florida 33140

April 7, 2016
5:58 p.m. - 7:32 p.m.

Stenographically Reported By:
SHARON VELAZCO, RPR
Registered Professional Reporter

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APPEARANCES

INTRODUCTORY REMARKS: EDWARD LABATON, ESQUIRE

PANEL:

ARTHUR MILLER, ESQUIRE
New York School of Law

DAVID MARCUS, ESQUIRE
University of Arizona
James E. Rogers College of Law

JUDGE JOHN KOELTL, ESQUIRE
U.S. District Judge, SDNY

DAVID GOLDSTEIN, ESQUIRE
Labaton Sucharow

JOHN BARKETT, ESQUIRE
Shook Hardy and Bacon

STEVE BURBANK, ESQUIRE
(Appearing by Phone)

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1 (The following proceedings were had:)

2 MR. LABATON: We have Steve Burbank on the phone.
3 We have a full panel. Professor Miller will
4 introduce the panel and himself, I assume, as you get
5 them started. I'm very proud to have our 22nd annual
6 symposium. The 22nd -- it will have been done in
7 21 years. Don't ask me how we did that. But they
8 have all been wonderful, and this will be as good or
9 better than any that we've had before.

10 This is in honor of Jim Cox, who is the only one
11 of the three original faculty advisors who made this
12 type of program possible. I'm not going to go
13 through this again. I won't go through it now. And
14 I will go through it tomorrow. But it was Jim and
15 Harvey Goldsmith, who unfortunately passed away a
16 year ago, and Joel Seligman, who offered the
17 University of Arizona to us, but then later became
18 president of Rochester. And he's still a great
19 supporter of our organization. In fact, last year,
20 after Harvey passed away, he came down and made a
21 special trip just to give a wonderful speech in
22 memory and in honor of Harvey.

23 I'm -- we'll start the program. It's always
24 exciting when Arthur Miller moderates the program,
25 even on a subject like Federal Rules of Civil

1 Procedure.

2 And by the way, next year, he's already committed
3 to moderate a panel on what the new Supreme Court
4 will look like, and that will be April of 2017. So
5 you can't miss that one.

6 But right now, Arthur, would you introduce the
7 rest of the panel and start?

8 Thank you all very much, and we'll see you. Oh,
9 we have to start early tomorrow. We have a very
10 limited program, limited amount of time. And because
11 it's in honor of Jim Cox, Randall Thomas, who is on
12 our panel, has prepared a paper to describe Jim's
13 contribution to the scholarship, and it has been a
14 great contribution in the area of securities and
15 corporation law. And we'll end the evening with a
16 talk by Dean Levy of Duke Law School, who will, I
17 assume -- I don't know what he is -- I think he'll
18 talk about what Jim has meant to do. All I know is,
19 he has the time, and he can say whatever he wants.
20 But he knows what the conference is for.

21 So, now, Arthur, would you proceed?

22 MR. MILLER: Is Steve on the phone?

23 MR. BURBANK: Yes.

24 MR. MILLER: Steve?

25 MR. BURBANK: I am.

1 MR. MILLER: Hi, Steve.

2 MR. BURBANK: Hi.

3 MR. MILLER: Contrary to what Ed said, I am not
4 going to introduce the panel. I'm going to let the
5 panel introduce themselves. Let's start with David.
6 Oh, we have two Davids.

7 MR. GOLDSMITH: Hi, I'm David Goldsmith. I'm a
8 partner at Labaton Sucharow. I am a recent
9 substitute, I believe, for Elizabeth Cabraser, who
10 unfortunately couldn't be here for the event. So I
11 just want to thank Ed Labaton very much for inviting
12 me to participate in this very distinguished panel.
13 I'm delighted to have this opportunity, and I look
14 forward to the discussion.

15 MR. LABATON: The other David?

16 MR. MARCUS: I'm the other David. I'm Dave
17 Marcus from the University of Arizona.

18 MR. MILLER: Oh, surely, there's more to your
19 life than that.

20 MR. MARCUS: I am enjoying heat with humidity
21 instead of just plain heat. It's very nice to be
22 here. I'm very grateful.

23 MR. MILLER: Tell the group what you do. Why the
24 hell are you here?

25 MR. MARCUS: Well, I teach civil procedure in

1 conflict litigation, and I am in the midst of a now
2 eight-year project in the history of the class
3 action. I'm on part three, which covers the years
4 1980 to 1994. Part four will probably cover
5 1994-1995, and then I'll do it in six-month
6 increments from then on. And I'll complete this
7 project sometime when I'm about 80 or 90.

8 But I want to put in one quick plug. I know that
9 there are a number of lawyers here who are members of
10 NASCAT. If any of you was involved with securities
11 litigation in the 1980s or early '90s and would be
12 interested in talking with me about it, I would very
13 grateful for the chance to speak. Thank you.

14 MR. MILLER: Isn't part of your book published
15 already in Washington Lawyers?

16 MR. MARCUS: That's right. One of the previous
17 installments was --

18 MR. MILLER: In the program?

19 MR. MARCUS: That's right.

20 MR. MILLER: What's taking you so long?

21 MR. MARCUS: I'm fighting off two small children.

22 MR. MILLER: Judge?

23 JUDGE KOELTL: My name is John Koeltl. I am
24 delighted to be in Miami. The picture in the program
25 is not accurate. We are trying to find out exactly

1 who it's a picture of, but it's not a picture of me.
2 You can debate on whether it's a better picture or
3 not. I'm a trial judge on the Southern District of
4 New York. I've been a trial judge for about
5 21 years. Before that, I practiced law for about
6 20 years. I was on the Civil Rules Advisory
7 Committee for seven years, a term that spanned the
8 2015 amendments, or the development of those
9 amendments that went into effect in December of 2015,
10 and ended as the committee was beginning its work on
11 the proposed amendments to Rule 23.

12 MR. MILLER: John?

13 MR. BARKETT: I'm John Barkett. I practice law
14 with the Law Firm of Shook, Hardy & Bacon in the
15 Miami office. I thought I was here as a substitute
16 for Elizabeth Cabraser, but I'm assuming that -- I'm
17 assuming that Ed invited me and then, after talking
18 to me, realized he couldn't disinvite me. So invite
19 this David, and so, I'm here.

20 I am a member of the Advisory Committee on Civil
21 Rules, and I overlapped with John Koeltl for several
22 years, and I sit with Judge Dow from the Northern
23 District of Illinois, and Elizabeth and Bob Conoff
24 from the Lewis & Clark Law School, and the reporters
25 to the committee on the Rule 23 subcommittee, of the

1 Advisory Committee on Civil Rules. And I assume that
2 we will talk about today the proposed changes to Rule
3 23 that will be presented to the advisory committee.
4 Next week we meet on Thursday and Friday, actually,
5 here in Florida for the -- in the spring. We
6 normally travel, usually go to the law school in the
7 spring. So that's who I am, and I'm assuming I'm
8 here because John Koeltl suggested me when he found
9 out that Elizabeth couldn't be here.

10 MR. MILLER: It was a good session, and you are
11 relevant.

12 Steve, introduce yourself.

13 MR. BURBANK: My name is Steve Burbank. I teach
14 at the University of Pennsylvania. I'm almost as old
15 as Arthur, and I've been writing about and
16 participating in law reform activities concerning
17 federal civil procedure for 35 years.

18 MR. MILLER: Well, you know what you get for
19 having the distinction of being almost as old as I
20 am. What was your first exposure to the class
21 action?

22 MR. BURBANK: Mine?

23 MR. MILLER: Yes, yours. How far back in the
24 history -- well, remember, we're at, what, the 50
25 year mark?

1 MR. BURBANK: Right. Well, I think probably when
2 I was clerking for Chief Justice Berger in the mid
3 '70s would have been my first exposure, because prior
4 to that, I've clerked for a State Supreme Court
5 Judge, so I had no direct exposure. Obviously, you
6 know, one learned a little bit, but it was very
7 little, in those days, about class action in law
8 school because I took civil procedure in '69, '70,
9 when the potential impact of the 23 revisions in '66
10 was -- seemed to be totally unappreciated.

11 MR. MILLER: Well, this panel is supposed to be
12 about changes in Rule 23 over that 50-year span. I
13 have a feeling I know what you think today. I'm
14 wondering what you thought about the class action
15 back then, when you were clerking for the chief.

16 MR. BURBANK: Well, the -- as you know, the
17 court's attitude towards class actions has waxed and
18 waned, as it were, over time. I mean, there were a
19 few early cases where we were absolutely petrified
20 about the possibility that the federal courts would
21 be deluged with small claims, state law class action.
22 They made that very difficult, if not impossible.

23 In Don and Snyder, they also ratcheted back on
24 small claims, federal class action -- federal law
25 class actions, in the Eisen case. But following

1 that, and from about, I think, '75 on, there were a
2 lot of pro private enforcement, pro class action
3 decisions, particularly in the area of
4 justiciability. So the -- you know, I conceived that
5 there was a general receptiveness to federal law
6 class actions, but not -- they weren't very
7 enthusiastic about federal small claims class
8 actions. And -- but they were two cases involving
9 federal statutory constitutional rights and the
10 justiciability cases where -- what was my evidence at
11 that time.

12 MR. MILLER: You are in the post-Brown era?

13 MR. BURBANK: Right.

14 MR. MILLER: It's one of the marked changes that
15 one might note, that in the era you're talking about,
16 Snyder, Zahn, and Eisen, they were doing everything
17 possible to keep diversity-based small claims class
18 actions out. And of course, the --

19 MR. BURBANK: Well, not just diversity-based.
20 Eisen, of course, was a securities case.

21 MR. MILLER: Yeah. Okay. Touche on that one.
22 But I'm thinking Snyder and Zahn and the
23 jurisdiction, they didn't want them.

24 MR. BURBANK: No.

25 MR. MILLER: Didn't want them. Which is in

1 marked contrast, of course, to Congress's decision to
2 pass the Class Action Fairness Act.

3 David, as litigator --

4 MR. GOLDSMITH: Um-hmm.

5 MR. MILLER: -- what was your first exposure to
6 the class action as a litigator?

7 MR. GOLDSMITH: My first exposure to the class
8 action was in 1995, when I was a 2L at law school. I
9 was taking the class called Securities Regulation,
10 where we learned about exciting things like offerings
11 and red herrings and dropping the green shoe and
12 things like that. And our professor came in one day
13 and had a set of, you know, handouts, and she said,
14 "There's a new statute that was passed by the
15 Congress that no one understands, and no one knows
16 what to do about it, and no one -- no court has dealt
17 with it at all. But -- it's not going to be on the
18 exam, but here it is. And, you know, I'm going to
19 pass it out and you can read about it at your
20 leisure."

21 And I read and I said, "Okay. Well, it's not
22 going to be on the exam," and I put it in the back of
23 my bookbag and didn't do much with it since. That,
24 of course, was the Private Securities Litigation
25 Reform Act.

1 The next time I dealt with a class action was in
2 1998, when I joined the firm currently known as
3 Labaton Sucharow, and worked with Tom Dubbs and other
4 partners who are here today. And that's when we got
5 into it. And the first thing we had was looking into
6 those very provisions, and the -- you know, the
7 version of Rule 23 that preceded the 2003 amendments.
8 And, you know, we have -- we have those changes, and
9 then, of course, the changes that are, you know, teed
10 up, you know, currently. That's where we are.

11 MR. MILLER: What was your impression when you
12 first bumped into the class action?

13 MR. GOLDSMITH: My impression was that I thought
14 it was a useful vehicle. You know, to help, you
15 know, investors vindicate their claims. I thought it
16 was, you know, an interesting way to, you know, to
17 litigate. I thought it made a lot of sense, frankly.
18 You need to have some kind of parity between the
19 power of a very large defendant and, you know,
20 relatively small investors. And, you know, I think
21 that, you know, basic structure, you know, that the
22 sort of fundamental leveling of the playing field is
23 still very relevant right now.

24 MR. MILLER: Judge, did you encounter the class
25 action first in practice, or as a judge?

1 JUDGE KOELTL: Even before practice -- this will
2 date me some -- but I had Louie Loss in law school
3 for both corporate law and securities regulation. I
4 don't remember very much about class actions in law
5 school, but I'm sure that they were covered.

6 MR. MILLER: Wait, wait, wait. Who'd you have
7 for procedure?

8 JUDGE KOELTL: Richard Hinckley Field.

9 MR. MILLER: You didn't have any class action. I
10 had Ben Gatlin. We didn't touch class action.

11 JUDGE KOELTL: But in terms of the substantive
12 law, it was being developed in class action. So in
13 terms of securities regulation and MP-5 cases, we
14 were into class actions. And while I was clerking
15 for Judge Hornfeld, I am confident that class actions
16 came up in the Southern District of New York. And I
17 don't remember any cases while I was clerking on the
18 Supreme Court where we dealt with class actions, but
19 as soon as I came out into private practice, it was
20 sort of the heyday, to my recollection, of securities
21 class actions. There were prominent plaintiffs'
22 class action lawyers. There were prominent defense
23 lawyers. Judge Pollack was making a name for himself
24 in terms of class actions.

25 And class actions, I was -- I was on the defense

1 side. They were viewed very well. It was -- it was
2 unusual in the securities area to be able to defeat a
3 class action motion. And they were -- well, I mean,
4 they were well thought of as a procedural price.
5 That would have been in the mid -- mid 1970s into the
6 beginning '80s.

7 MR. MILLER: Yet, in that period, one of the most
8 prominent members of the New York defense bar
9 referred to them as "Frankenstein monsters." You may
10 recall that.

11 JUDGE KOELTL: I don't recall that phrase.

12 MR. MARCUS: It's the title of one of Arthur's
13 articles.

14 MR. MILLER: Drawn from his characterization.

15 JUDGE KOELTL: Which defense counsel?

16 MR. MILLER: Milton Handler.

17 MR. LABATON: That was the American College of
18 Trial Lawyers' report.

19 He was a classmate in high school to Dave Conrad
20 and he never forgave him.

21 MR. MILLER: The concept of the Frankenstein
22 monster was Handler's. The concept of the shining
23 Knight, which is the other part of the metaphor in
24 the title of my article, that was -- that was voiced
25 by a federal judge.

1 JUDGE KOELTL: Which federal judge?

2 MR. MILLER: Oh, he will remain nameless.

3 But you thought well of them as a device.

4 JUDGE KOELTL: I did. I did. And so, after
5 practice -- so for 20 years on the Southern District,
6 they continue to be thought well of. I mean, the
7 cases have become exceedingly more -- more complex, I
8 think. In part, because of one of your favorite
9 subjects, which is Iqbal and Twombly. We get -- and
10 of course, perceptions change over time. I have this
11 rosy view about what things were like 30 years ago or
12 so.

13 Now, the complaints are overly long. You know,
14 what used to be simple statements about what false
15 statements were in a prospectus now go on for three
16 single-spaced pages, and it says something in that
17 statement was false, and there are then ten different
18 statements from the prospectus, and then there is one
19 claim that there was a violation of 10b-5 or
20 Section 14, or -- one claim based upon all of that,
21 and then a defense motion, inevitably, to move to
22 dismiss under Rule 8 and Rule 9, including failure to
23 sufficiently state with particularity what was wrong.

24 And, you know, I've begun telling lawyers, "You
25 are really not looking to dismiss the complaint.

1 You're looking to give it a haircut." And so, the
2 burdens have shifted enormously as the pleadings
3 have.

4 MR. MILLER: All a by-product of pleading,
5 though.

6 JUDGE KOELTL: Not only a by-product of pleading,
7 but it helps. It helps.

8 MR. MILLER: John, your exposure through practice
9 on the defense side?

10 MR. BARKETT: Well, I think my first exposure was
11 a notice I got in the mail that I was member of a
12 class.

13 I -- honestly, I spent most of my time dealing
14 with class actions as a neutral, as a mediator, and
15 not as an advocate. And I spent the last three years
16 spending a lot of time thinking about class actions
17 on the rules committee. I'm just listening to what's
18 been said, and then reflecting on all the historical
19 information that we've been discussing. The Class
20 Action Fairness Act really has changed the character
21 of lots of class actions in federal courts in the
22 United States, and you're seeing more and more of the
23 consumer class actions. And I think a higher level
24 of concern over whether these are a vehicle to
25 provide meaningful redress to consumers or they're a

1 vehicle to provide attorney's fees to a plaintiff's
2 counsel, and the consumers really don't do very well.

3 As a neutral, what I've seen are situations,
4 particularly involving the Tele Consumer Protection
5 Act, the Fraudulent Debt Collections Practices Act,
6 where lawyers have used a threat of certification to
7 extract additional dollars from a defendant, and then
8 drop the class allegations, and so, settle the case.
9 I don't pass judgment. I'm just a mediator. Parties
10 settle cases for lots of different reasons. But I've
11 seen quite a bit of that happen, as well, which
12 raises questions about whether or not the bona fides
13 of the plaintiff, in making the class allegations,
14 are really there.

15 So I've seen it from different angles. I think
16 there's a lot of concern, certainly, with -- I'm sure
17 we will talk about SECERRA or -- SECERRA. The Chief
18 Justice made reference in a decision not to accept a
19 Facebook class action case. He made reference to the
20 SECERRA provisions in that particular class action
21 settlement.

22 So there are, I think, a number of difficult
23 issues facing the device, facing the judges that have
24 to deal with the mechanism, dispute resolution
25 mechanism on joint basis.

1 And, of course, from a company standpoint,
2 certification usually means settlement discussions.
3 Because there's -- there frequently is just too much
4 at stake to try and take the case forward. So I'm
5 interested in continuing to dialogue, but I really
6 have not litigated a case as either a plaintiffs'
7 lawyer or defense lawyer. My main involvement is
8 what's known as a neutral.

9 MR. MILLER: David, I've saved you for last.
10 Because I'm just making a guess that you are the
11 youngest member of the panel, and therefore, you were
12 not there at creation or anything like that. But you
13 are an historian. You are doing this monumental
14 history of the class action. And I know you're not
15 up to 2016 yet, but I do know that you have fairly
16 clear notions of changes in pathway.

17 MR. MARCUS: Something that the Judge just
18 mentioned is memory of class actions seeming much
19 simpler in the '70s than they are now. I think
20 that's surely true, but I think the question is, why
21 is that true? And I think one of the major
22 developments that's probably in development even
23 since I had my first taste of class action litigation
24 as a first-year associate at Elizabeth Cabraser's
25 firm in 2003, one of the major changes is the

1 remarkable overlay of law that the U.S. Courts of
2 Appeal and the Supreme Court have fashioned for the
3 class action. And I think that I'm perhaps -- I
4 don't think that society is any more complex or
5 intricate than it was in the 1970s. Maybe some
6 aspects are, but I don't think that that's
7 necessarily true. And -- but what I think is true is
8 that the law is much more complex. The class action,
9 to my mind, has transformed the last two decades from
10 an instrument for case management, flexible and
11 pragmatic, into a rule bound very rigidly by a pretty
12 finely-wrought legal overlay. And to my mind, that's
13 perhaps one of the most significant changes of at
14 least the recent past.

15 MR. MILLER: Now, you mark the advent of 23F,
16 which provides for interlocutory appeals in
17 certification decisions, which came in when, 1998?

18 MR. MARCUS: Right.

19 MR. MILLER: You say that's been transformative.
20 And what do you mean by that?

21 MR. MARCUS: I think that what Rule 23F provided,
22 as many of you know, is it increased the ability of
23 the party that loses the class certification motion
24 to seek interlocutory review. This dramatically
25 expanded the opportunity for -- particularly for

1 defendants to ask for appellate review of class
2 certifications decisions, class certification orders,
3 granting class certifications. And I think that
4 this -- this is probably, to my mind, the most
5 significant doctrinal change, a doctrinal change from
6 which many other doctrinal changes have flowed.

7 I think the real irony of Rule 23F is that Rule
8 23F was the end result of four years of intense
9 deliberations over the future of class actions in the
10 mid 1990s, deliberations that began with the question
11 of whether Rule 23 should be greatly sort of expanded
12 to enable plaintiffs to get class certification in
13 mass tort cases.

14 There were all sorts of proposed revisions
15 contemplated, but what comes out of this is what
16 seems like a fairly modest change, simply providing
17 for easier access to appellate review. But what the
18 result of that amendment is, I think, in my opinion,
19 is this remarkable flowering, or if -- if that's
20 perhaps too rosy of a term -- this remarkable
21 elaboration of case law on various aspects of Rule 23
22 procedure, aspects that I think those who began the
23 rules amendment process in the early '90s would never
24 have imagined coming down the pike.

25 MR. BURBANK: May I get in here?

1 MR. MILLER: Go ahead.

2 MR. BURBANK: I agree with David, as he knows.

3 And I think that 23F is the rule analog to the Class
4 Action Fairness Acts, and then in thinking about the
5 phenomenon that David describes, we really need to
6 think about both of those changes. The Class Action
7 Fairness Act brought into the federal courts -- I
8 think John Barkett pointed out -- a whole bunch of
9 cases of the sort that they rarely saw before. It
10 provided more opportunities for the development of
11 what was a progressively conservative jurisprudence
12 by the federal courts, including in particular the
13 Supreme Court, and it provided more varied
14 opportunities to apply that jurisprudence.

15 And of course, when a court, reacting to the
16 perception that it may have that a case really is
17 just for the benefit of the lawyers, tightens up on
18 the requirements for class certification, the
19 resulting law doesn't just get applied in those
20 cases. It gets applied across the board. So I think
21 that an aspect of the phenomenon that David described
22 is that this is increasingly a demanding, gatekeeping
23 type of jurisprudence that has effectively
24 assimilated the class certification process, to the
25 trial process through the imposition of burdens, much

1 more evidence through discovery, it's just a lot more
2 time and expense spent on class certification.

3 That's being applied across the board, and some
4 us are concerned not so much about some of these, you
5 know, defect-in-a-box cases, but about the impact of
6 the resulting jurisprudence on cases that most
7 fair-minded people, I think, can agree, really,
8 deserve class action treatment.

9 MR. MILLER: Such as? What kinds of cases do you
10 think everybody would agree deserve class treatment?

11 MR. BURBANK: Cases that traditionally have been
12 brought under B2, for instance.

13 MR. MILLER: Yeah.

14 MR. MARCUS: I can give you an example. There's
15 a case pending in Texas right now challenging the
16 state's -- the administration of the state's foster
17 care system. This is the heartland of Rule 23. This
18 is what the authors of the rule in this -- early '60s
19 had in mind -- a civil rights case, not a case for
20 monetary relief -- a case for broad, injunctive
21 relief to try to refashion the defective state
22 institution. At the time, it was public schools, and
23 now, it's this foster care system. The district
24 judge issued a nice 12-page decision certifying a
25 class in the mid 2000s. And then I think the State

1 of Texas was able to delay the case for a while until
2 the Wal-Mart decision was rendered. The Fifth
3 Circuit ordered decertification and, on remand, the
4 district judge certified the class again, but this
5 time in a 120-page decision that she felt obliged to
6 author because of all of the intricate legal rules
7 that now kind of -- now surrounds the rule.

8 MR. MILLER: Now, it's interesting, almost
9 morbidly interesting, that if you just look at class
10 action rules over time and simply count the words in
11 the rules, the magnification of the rule is stunning.
12 What started under the old equity rules is two
13 sentences. In '38, gets enlarged. In '66, it gets
14 enlarged again, but not by an order of magnitude.
15 And then you get this emergence of 12 -- of 23Gs and
16 23Hs. And it gets longer and longer and more
17 detailed, so that the original conception of this
18 being a procedure rooted in equity principles to be
19 exploited by judges exercising their discretion is
20 now a rule that's administered in the court of
21 appeals by virtue of 23F.

22 What do you have to say about that, Judge? What
23 have you done usefully, other than making the goddamn
24 thing longer?

25 JUDGE KOELTL: I had -- I had no changes in Rule

1 23 in the seven years that I was on the Civil Rules
2 Advisory Committee.

3 MR. MILLER: Oh, yeah, that's said. You see, I
4 didn't make that --

5 JUDGE KOELTL: You --

6 MR. MILLER: Go ahead. I'll let you talk, what
7 the hell.

8 JUDGE KOELTL: You probably had, while you were a
9 reporter, responsibility for --

10 MR. MILLER: Oh, you fell into the trap. You
11 fell into the trap. When I was the reporter, there
12 was a moratorium on Rule 23. The committee had
13 decided, because of the extraordinary political
14 explosion about the class action by the mid 1970s,
15 that when I became reporter, the committee was under
16 a moratorium not to touch Rule 23.

17 MR. BURBANK: And so was the Justice Department's
18 bill.

19 JUDGE KOELTL: So you devoted yourself to Rule
20 26.

21 MR. MILLER: No, no.

22 MR. BURBANK: Rule 11.

23 MR. MILLER: We made the mistake of enlarging 16
24 so that you judges can manage more. Instead of
25 decide, you can manage.

1 JUDGE KOELTL: A comment on Rule 26F. I would be
2 interested to hear David and you, Arthur. My
3 impression from the Second Circuit is the Second
4 Circuit has said that they will use 23F rarely, and
5 they do. They do it rarely. Their decisions have
6 been major decisions under 23F: What's the standard
7 of proof that you need at the class certification
8 stage, but relatively few decisions. I don't know
9 what the other circuits are like.

10 MR. MILLER: Well, if you look at the Third,
11 John --

12 JUDGE KOELTL: And I suspect the Seventh has a
13 lot.

14 MR. MILLER: In the Seventh, they're battling
15 away almost daily. Unfortunately, from my
16 philosophical perspective in recent days, the Seventh
17 has issued some very, very progressive opinions. In
18 some of the circuits, it's not limited to
19 certification. They take everything else as
20 ancillary or supplemental. And it's all coming down
21 after a proverbial two-year delay, which generally
22 takes to get a 23F up.

23 But the law is being made at the court of appeals
24 level, and I don't know. You're a mighty district
25 judge, but I suspect you have some colleagues who

1 feel that their discretionary powers may be somewhat
2 limited because of what's coming down.

3 JUDGE KOELTL: I don't -- I sit from time to time
4 on the -- on the court of appeals. As a district
5 court judge, I have -- I have not felt constrained by
6 the court of appeals. It's -- I really don't think
7 that we spend our days, you know, looking over our
8 shoulders at the court of appeals. I mean, we follow
9 the law as, you know, as best we can. And as I said,
10 at least in the Second Circuit, the number of Second
11 Circuit decisions that come down under Rule 23F are
12 not that -- not that many. And we still have
13 enormous discretion.

14 MR. MILLER: Now, maybe you were blessed or
15 cursed by being in a circuit that doesn't have
16 opposed nor a need to. I mean -- and now, Diane Wood
17 is chipping in there. They write fascinating,
18 intelligent -- I'm not criticizing the content, even
19 the content, let alone the quality of what's coming
20 down, but it's coming down. It's not moving up.

21 MR. GOLDSMITH: But in the cases that -- if I can
22 make a comment on that -- in the cases that the
23 Second Circuit has taken up on a 23F, and you say
24 they're few -- and I can take your word for that --
25 can have a huge effect on litigation, and an adverse

1 effect for plaintiffs. I mean, one of the cases, you
2 know, one of the major cases that my firm is handling
3 right now against one of the very large investment
4 banks, there was a 23F appeal that was made by the
5 defendants as a tactical -- as a tactical means to
6 try to slow the case down. It's a very well-reasoned
7 class certification opinion that seems to be, you
8 know, on all fours, and doesn't, you know -- seems to
9 follow the law, as the Judge said, and didn't seem
10 vulnerable to attack.

11 But the defendants took an appeal and the Second
12 Circuit took it. I'm not exactly sure why, but they
13 also stayed the case. So now -- but, you know, the
14 Second Circuit can take time with a busy docket, so
15 now, our client, which is a major pension fund and a
16 very large class of investors, has to sit and wait
17 for two years, let's say, before they get relief.
18 And this is a case that we believe is obviously
19 meritorious, and we believe that they should be
20 getting their relief. And I don't think -- you know,
21 I don't think the activity there, you know, helps
22 anyone. I mean, it's basically a vehicle so that the
23 defense counsel can bill and write more briefs.

24 JUDGE KOELTL: The argument -- I know nothing
25 about that case.

1 MR. GOLDSMITH: I haven't told you anything.

2 JUDGE KOELTL: The argument on the other side is,
3 you know, courts realize that the decision on a class
4 action motion can have enormous impact on the case.
5 And if it's an extraordinary, and -- and the cases in
6 the Second Circuit say it's got to be an
7 extraordinary decision for the court of appeals to
8 step in. And I think one of the factors that the
9 court of appeals applies is if the court of appeals
10 thinks that there was error. So you've got three
11 judges on the court of appeals who think that there
12 was an erroneous decision, and they know it's going
13 to have an enormous impact, it should have -- it
14 should be a decision that's going to have an effect
15 on the law, and not only the individual case.

16 And it's -- you know, it's very much like, you
17 know, a 1292 interlocutory appeal. It should be used
18 very rarely, but in some cases, can be appropriate.

19 MR. GOLDSMITH: I would just say, I appreciate
20 what Your Honor is saying. I think the in terrorem
21 argument is overused a lot. I think these are very
22 sophisticated defendants. Whether -- regardless of
23 what happens, they're going to want a global release.
24 They're going to want peace. So they're going to
25 have to pay for a class release no matter what. They

1 know exactly what the -- you know, complaint covers,
2 no matter what.

3 So the idea that all of a sudden they get worried
4 when you have a class certification decision, when
5 they weren't worried before, I think, you know, gets
6 -- I think the defense tends to overplay that card.
7 And I think the stay aspect of it, you know, I think
8 that's where it really comes down. I think when the
9 court stays that -- and I appreciate that in the rule
10 it says it will not be stayed unless the court says
11 that it is. But I think that when you have a stay in
12 place, when a 23F appeal is taken up, I think that
13 can be damaging to a plaintiff class that has rights
14 that need to be mitigated.

15 MR. MILLER: Don't you think of yourself as in
16 the extortion business, David?

17 MR. GOLDSMITH: Yes. Yes, I do. I have always
18 thought that, and it's in our marketing materials,
19 actually. Oh, I'm sorry. I wasn't supposed to say
20 that.

21 JUDGE KOELTL: He will edit the transcript.

22 MR. GOLDSMITH: No, that's okay. You can leave
23 it. That's fine.

24 MR. MILLER: What do you say? John voiced it
25 20 minutes ago. And you see it as early -- not as

1 early as -- but you see it prominently in Souter's
2 opinion that the great fear is that you guys are in
3 the extortion business.

4 MR. GOLDSMITH: The day that these giant
5 companies, or these giant investment banks are like
6 the fear of God is really put into them by firms like
7 ours representing public entities, I look forward to
8 that day. Like, you know, the idea that somehow --
9 you know, they're worried about us, or it's dangerous
10 to have us, you know, actually having the right to go
11 to court, you know, and sue them. I really just
12 don't think that they have a lot to worry about
13 there.

14 MR. MILLER: How come you can't convince anybody
15 of that?

16 MR. GOLDSMITH: Why do you say that? I mean --

17 MR. MILLER: You haven't convinced him. You
18 haven't convinced Souter. You still see it in the
19 opinions.

20 MR. GOLDSMITH: I think because there's been this
21 campaign by defendants, by the Chamber of Congress,
22 by lobbyists from 1994 and continuing through today
23 to try to hammer and chip away at class actions.

24 MR. BURBANK: It goes way back before 1994.

25 MR. GOLDSMITH: Thank you. It does.

1 MR. MILLER: How far back does it go, Steve?

2 MR. BURBANK: It goes back into the '70s, and,
3 you know, basically the start is Lewis Powell's
4 memorandum two months before he was nominated to the
5 Supreme Court of the United States, his confidential
6 memorandum to the chair of the education committee of
7 the Chamber of Commerce about attacks on the American
8 free enterprise system, and what the Chamber needed
9 to do to respond.

10 But if you're asking, Arthur, why people continue
11 to say these things, it's what Cass Sunstein and
12 others call an "availability cascade," what you used
13 to call a cosmic anecdote. There are some things
14 that, if you say them often enough, people, even
15 bright people, even federal judges, will believe them
16 even though there's contrary evidence. I mean, we
17 had the same problem in the area of discovery, where
18 notwithstanding the absence of any methodically sound
19 empirical evidence, that discovery is this gigantic,
20 ubiquitous problem, as opposed to a problem in a
21 fairly discrete set of cases. The Chamber of
22 Commerce does keep saying the same thing, and people
23 buy it.

24 I mean, you've got Paul Niemeyer in the late
25 1990s publishing a law review article in which he

1 quotes the counsel on competitiveness, saying that 80
2 percent of the cost of discovery -- of litigation is
3 discovery. He said -- now, I have no empirical
4 evidence to support this, but the fact that the claim
5 is made means that we need to study this again.
6 Well, that's just nonsense.

7 MR. MILLER: David, you have an observation?

8 MR. MARCUS: Yeah. So I think it's absolutely
9 the case that these arguments have been voiced from
10 the early days, from the early '70s, on, and I think
11 that, to my mind, the question then becomes well, why
12 do these arguments prove influential when they do?

13 And I think that one of the key developments, in
14 addition to the availability of access to -- to the
15 courts of appeals, another important development, to
16 my mind, is the development of what I would call
17 class action institutions, or permanent ongoing
18 institutions devoted to class action advocacy of one
19 stripe or another.

20 So in the mid 1990s, the Chamber of Commerce,
21 U.S. Chamber of Commerce decides to make class
22 actions an important priority. And at that point,
23 the U.S. Chamber of Commerce began to do a number of
24 things, including intervening -- there is an amicus
25 with -- or as a party in many more cases, to the

1 point where every significant class action today,
2 either in federal or state court, will see an
3 appearance by the U.S. Chamber of Commerce. There's
4 a much more muscular advocacy behind these ideas,
5 starting in the mid to late 1990s. And I think when
6 you couple that with the -- when you couple that kind
7 of sophisticated advocacy with this access to
8 appellate review, you get some of these ideas perhaps
9 being -- where they may not have done quite so much
10 before.

11 MR. MILLER: Well, just as an observation, I'll
12 sort of blow my cover. I heard this extortion
13 argument and all of the damnations of the class
14 action as early as the 1960s, when I sat with the
15 advisory committee as Ben Kaplan's assistant and
16 listened to John Frank argue against the inclusion of
17 23(b)3. He didn't even want 23(b)2. He thought all
18 of the desegregation cases could come in under
19 23(b)1. He didn't want (b)2, but he fought -- am I
20 not right, Steve -- that he fought endlessly.

21 MR. BURBANK: Oh, yeah. He never gave up, to the
22 point that he made a last-minute motion to delete it
23 in May of 1965. And he lost only eight to five. I
24 don't think a lot of people know that. The committee
25 was split eight to five about (b)3 as late as May of

1 1985, which was long after -- from the comment
2 period.

3 MR. MILLER: There's right. He fought it in '61,
4 '62, when I was in the room. He fought it in '63 --
5 almost won it. That's one of the interesting things.
6 As you point out, the final in '65 was eight to five,
7 which kept (b)3. But all along the line, he kept
8 chipping away at (b)3, never getting enough votes to
9 strike (b)3, but close.

10 With these arguments about extortion and
11 plaintiff's lawyers, you know, you're not God's gift
12 to humanity.

13 MR. BURBANK: I think in fairness to John Frank,
14 it's worthwhile pointing out that the type of concern
15 -- the type of case that was his concern was not
16 people with small claims. It was people with big
17 claims. He was concerned about what he would call
18 "sell out settlements," basically, and he turned out
19 to be somewhat prescient in that regard.

20 MR. MILLER: He was also -- remember, this is a
21 time when the conception of the class action was, in
22 fact, the (b)2 civil rights action, which was very
23 primitive in the '62 to '64 period. Remember, the
24 civil rights statutes were -- didn't exist or hadn't
25 really gotten any traction. And then they would talk

1 about antitrust cases and securities cases and
2 occasionally a fraud case, and they meant the
3 commercial fraud.

4 What was clear in that committee is that the
5 notion of a mass tort or a mass accident case being a
6 class action got the support of no one. And the only
7 issue at that time was whether that should be stated
8 explicitly in the rule, whether it should be stated
9 explicitly in the note, whether it should be an
10 absolute bar, or simply a presumptive bar. So when
11 you think about the class action then and now, if you
12 think about change, the conception of the class
13 action in the '60s, when the rule was being
14 formulated, developed, published, and then
15 promulgated, was an inch wide compared to the yard
16 width that it developed.

17 If one thinks about what the mega change between
18 the '60s and the 2016s is, it is the dimension, both
19 in terms of size -- the point you made, John -- and
20 in terms of the range of applications. Remember, the
21 statutes we think of today as public policy statutes
22 didn't exist.

23 MR. MARCUS: It's pretty remarkable, the timing,
24 though, because many of them were passed almost
25 contemporaneously.

1 MR. MILLER: Certainly, that's true with the
2 civil rights. But when you think of environment, due
3 process, consumerism, that's --

4 MR. MARCUS: Right. Slightly later.

5 MR. MILLER: -- it's almost as if there was a God
6 out there creating new vehicles for the class action.

7 MR. MARCUS: That's how I like to think of it for
8 sure.

9 MR. MILLER: If you wallow in that, David, you'll
10 never finish.

11 MR. BARKETT: I can tell you I've been working on
12 changes to Rule 23 for two or three years now, and
13 when Arthur used the phrase "political explosion," it
14 resonated in my mind because I don't think I've seen
15 such passion of views held by folks from, "Get rid of
16 the whole thing and start over," to the symposium
17 addressed by our subcommittee. His basic attitude
18 was, "The rule doesn't need any change at all. The
19 judges need to read the rule and follow the rule,"
20 to some fairly extravagant and exotic additions to
21 make the rule longer to where we've ended up with the
22 five basically -- five proposed changes dealing with
23 objectors. Clearly, the thorniest issue -- and I'm
24 still not quite sure that there's a solution, but we
25 heard from numerous stakeholders that objectors are

1 both on the plaintiff's side and from the defense
2 side. So the only thing that both sides of the V
3 immediately agreed on is that committee had to do
4 something about objectors. But the "what" is not
5 easy to put your arms around.

6 And the other changes, I'll just mention them
7 briefly. A little tampering with just the definition
8 of a notice to make the claim; if yes, you can use
9 first class mail, you can also use electronic mail,
10 dealing with the pre-approval process for a
11 settlement, how much information does the judge need
12 to receive before the judge is comfortable that the
13 judge can give notice of a proposed settlement. It
14 has to be a sufficient likelihood that it will be
15 approved, or at least it looks attractive enough that
16 it makes sense to spend the money to give notice to
17 the class of the proposed settlement. And then
18 settlement approval factors are something that we've
19 now outlined, at least on a floor basis, where at a
20 minimum, Judge, you have to consider the following
21 things, but the circuits all have their own factors.
22 By the way, all designs, if you look at the case law,
23 which I have done, all the circuit approval factors
24 were created in the era that you're describing; the
25 antitrust employment, civil rights, securities case

1 law. They don't really deal with the consumer class
2 actions, and yet, those are being allowed in the
3 headlines, particularly because of situations where
4 class members get very little, lawyers get a lot.
5 And so one of the issues that we grapple with and a
6 lot of people talk to us about is how do you know
7 what the class is actually going to receive, and
8 should you set a common claim attorney's fee award
9 before you know what the class is going to receive?
10 Should it be provided in stages based upon the actual
11 reclaim rate, or whatever the right word is for
12 consumers to actually receiving funds.

13 And then we've tinkered, or we made a change to
14 the appellate provision to make it very plain that if
15 you get -- pre-approval of a class notice goes out,
16 that's not an appealable order. In the NFL
17 concussion case, an appeal was taken of that very
18 topic, and Third Circuit said it's not appealable.
19 We've now made -- expressed that in the rule.

20 So those are the changes in brief on that. I'm
21 happy to talk after we're done if anybody wants to.

22 MR. BURBANK: John, may I ask you a question?
23 Did you guys abandon the notion of doing something
24 about settlement classes?

25 MR. BARKETT: Yes, we did. There was -- it

1 pretty incredible to me. We went to the defense bar
2 and said, "Do you want us to do something about
3 settlement classes? You're arguing against
4 certification, and then all of a sudden you show up
5 and say, 'Well, we want the class to be certified
6 because we're settling the case,' but what happens if
7 the settlement doesn't get approved and you've now
8 gone on record as supporting" -- no one on either
9 side of the V could come up with -- by the way, when
10 you sit on the rules committee, all you hear about is
11 the effect of the administration of justice. I never
12 realized, when I was a party, that I would be
13 lobbied. I just had no clue. I didn't think about
14 it that way.

15 So you have to sort of tune out. My firm
16 primarily does defense work. I honestly -- I
17 primarily serve as a neutral these days, so I don't
18 think about plaintiffs or defendants. But I think
19 about what's fair. And on the settlement class
20 issues, Steve, there was just no real consensus that
21 anybody could come up with. And in this environment,
22 trying to push anything that was controversial is
23 not -- not necessarily a good idea.

24 MR. BURBANK: The winking and nodding at MCAN
25 will go on.

1 MR. BARKETT. Yes. That's right. That's right.
2 According to the MCAN case, where Justice Ginsberg
3 said you really had to decide that the class would be
4 certified before you could approve it on a settlement
5 basis, and people wink and nod, that's exactly right.
6 It will go on.

7 We also decided not touch the pick-off. Some of
8 you may have read the Campbell Ewald decision from
9 the Supreme Court from two months ago. You bring
10 your Fair Labor Standards Act claim, and I say, "You
11 know, your claim is for \$5,000. Here's a check.
12 You're no longer an adequate class representative.
13 Your claim has been mooted, therefore, you can't have
14 a class action." The Supreme Court in the Campbell
15 Ewald case said, "No. Rule 68 doesn't allow an
16 unaccepted offer of settlement to represent
17 mootness," and overrejected -- the majority rejected
18 Chief Justice Roberts's view that there's no standing
19 any longer. We decided not touch that. The case law
20 is really developing. In fact, the Third Circuit
21 issued an opinion yesterday again refusing to moot a
22 class action because of an attempted pick-off, with
23 some uncertainty, what will happen if money is
24 deposited in an account and you concede or confess
25 judgment.

1 Justice Thomas's view, that that's a tender of
2 common law, and if that is done, that should end the
3 case. We'll see where it all develops. But so far,
4 the decisions have come down. Follow Campbell Ewald.

5 The other thing we didn't touch was
6 ascertainability. You -- it's a drugstore class
7 action, and you pay cash for something. How is the
8 court going to know who's a member of a class?
9 Clearly, if you used a credit card or some other
10 device, a gift card, where there's a record of you,
11 you can define a class. But some circuits have
12 elevated something that really isn't technically in
13 the rule to something that sounds like it's part of
14 the rule. Ascertainability. If a class isn't
15 ascertainable, then you can't certify it. Second
16 Circuit, Eleventh Circuit, Third Circuit have all
17 said that there's is a powerful dissent in a recent
18 Third Circuit case. Judge Rangel says they got this
19 all wrong. The Seventh Circuit says the Third
20 Circuit's got it all wrong, and the Supreme Court,
21 you would think, would resolve this, but I'm afraid
22 it's a 4/4 split right now. They've taken a pass on
23 all of the cases that have gone up there. There's
24 been three or four denials of cert in the past three
25 months where they could've addressed

1 ascertainability. Classic case of conflicts in the
2 circuits, but they haven't touched it.

3 So following up on Arthur's question before, at a
4 very general level, they instruct me that the
5 proposed changes seek neither to encourage or
6 discourage class action.

7 MR. BARKETT: I think that's a fair statement.
8 The objector rule was the most controversial of all
9 of them, and we'll see what the committee -- full
10 committee does next week with what we've come up
11 with. But yes, I think that that's right. They're
12 fairly neutral.

13 MR. GOLDSMITH: Well, as a practitioner, I mean,
14 I -- may I comment on some of the --

15 MR. MILLER: Why do you think I was pointing at
16 you? I see you sitting there waiting.

17 MR. GOLDSMITH: I thought we were talking about
18 1066, or --

19 MR. MILLER: David has already covered that.

20 MR. GOLDSMITH: Yeah. I mean, I applaud. I
21 applaud the drafters of this with regard to the
22 objection portion of this, actually, which I
23 understand was the toughest part. You know, I think
24 that the tightening of the rule to cover just where
25 there is consideration paid --

1 MR. BARKETT: Why don't you explain what it says
2 so everyone knows.

3 MR. GOLDSMITH: Oh, well, it's changed, the rule.
4 The rule used to be that you had to get the approval
5 of the court for the withdrawal of any objection.
6 And the rule, presuming that this is implemented,
7 will be that you have to get approval, the court's
8 approval after a hearing, if -- if any payment or any
9 other consideration is paid to an objector or the
10 objector's counsel in connection with the withdrawal
11 of an objection. Or also, the dismissal or
12 abandonment of any appeal from a judgment approving
13 the proposal, which I think is a very useful set of
14 provisions to have. I think the kind of tightening
15 of that to be limited to the consideration makes a
16 lot of sense, because that's really where the rubber
17 hits the road in terms of the problems.

18 I mean, we -- the plaintiff's lawyer, I think we
19 generally see this set as, you know, as helpful to
20 our interests. One thought that I had, and what I
21 would have liked to have seen with regard to the
22 letter A -- there's one portion here that maybe, I
23 guess, people don't have. There's one portion here
24 where it says the objection must state how it
25 applies, but it also says "And also must state with

1 specificity the grounds for the objection." I think
2 that's very helpful. You get a lot of objections
3 where you have just some person sort of mouthing off
4 and saying, "I don't like lawyers. I don't like you.
5 I don't like this case. You know, I don't like New
6 York." All that sort of thing. Those objections,
7 obviously, are batted aside by courts very quickly,
8 but I think it's good to have this in the rule, if
9 we're going to be adding, you know, these kinds of
10 specifics.

11 But one thing that I think might have been
12 helpful, also, is I think that we -- is that
13 objectors, also, I think should have the obligation
14 to show their standing to object. One area where
15 there can be, you know, some question is whether the
16 objector has the right to be heard in the first
17 place, where the objector is a member of a class.
18 Sometimes you get people who are gadflies and have no
19 business in the case in the first place, but just
20 saying, "I hate class actions, and I -- Your Honor, I
21 don't think you should approve the settlement." And
22 the person, you know, never bought a share of X
23 company in his or her life or never purchased the
24 product at issue. I think it would have been helpful
25 to have something like that so the objector is put

1 through his or her paces in that regard.

2 MR. BARKETT: You'll have an opportunity to
3 filter the comment period.

4 MR. GOLDSMITH: So I actually have a question for
5 you, if I may. I mean, there's a -- you mentioned
6 with regard to notice that it says the parties must
7 provide the court with sufficient information to
8 enable it to determine whether to give notice of the
9 proposal to the class. I'm curious what the genesis
10 of laying that out was. I mean, I would think that
11 -- it seems a bit obvious to me. I mean, I would
12 think that if I had a class action, say, before Judge
13 Koeltl, Judge Koeltl would understand that you would
14 have to decide whether his Honor had enough
15 information before him to make that determination. I
16 don't think you need -- necessarily need to write it
17 out. I'd be interested to hear your thoughts on
18 that.

19 MR. BARKETT: So first, the document that Dave is
20 looking at, Judge Koeltl is looking at, that I have
21 in front of me is on the administrative office of the
22 United States Court's website. It's the agenda to
23 the Rules Committee meeting next week. It's
24 available for the public, so if you want to download
25 it, you can easily do that.

1 As to the -- your specific question, there are
2 some wonderful class action practitioners and class
3 action judges throughout America. There are also
4 quite a number of folks that are -- don't really have
5 a clue what they're doing. And so, the variabilities
6 of submissions to courts on approval of settlements
7 is quite large. And we reached out to every
8 stakeholder group imaginable. Long laundry list. We
9 went to plaintiffs' bar groups. We went to defense
10 bar groups. We went to the academic community. We
11 heard from objectors. We had a mini conference where
12 people from all walks of the legal world were there
13 to tell us what to do or what not to do, public
14 interest groups and the like.

15 And, there was general support for the notion
16 that we should institutionalize somewhat what had
17 become, effectively, a custom in the class action bar
18 of how to get a settlement approved. So we took that
19 suggestion in the earlier draft of the language. We
20 actually had listed all of the items that needed to
21 be in the submissions to the court. We took all that
22 out and used, instead, the phrase "sufficient
23 information to allow the court," as you read the
24 second.

25 MR. MILLER: This is not an inevitable part of

1 rulemaking that each generation of rule makers -- I
2 witnessed it when I was a reporter. I certainly
3 witnessed it when they were doing the '66 revision.
4 You try to capture best practices. I mean, my
5 committee did that in Rule 16. Rule 16 is nothing
6 but a collection of best practices. Ben's group,
7 back in the '60s, if you look at 23(d), 23(d) is
8 really a collection of the best practices as they
9 came down from '38 to the mid '60s. The problem is
10 that you end up with the tax code. The goddamn thing
11 becomes increasingly impenetrable, and you breed
12 friction about the wording of each and every
13 sentence. That's a cost of doing that business.

14 MR. BARKETT: That's exactly true. And we heard
15 that quite a bit. And you make judgments, but
16 that's --

17 MR. BURBANK: It is striking, however, to hear
18 John describe the process that the subcommittee has
19 been going through. When you compare that with the
20 process that the advisory committee used in the '60s,
21 those were the days of closed door, smoke-filled room
22 meetings. There was very little public outreach.
23 There were no public hearings. There were less than
24 30 comments submitted on the entire package of
25 proposed amendments for 1966.

1 MR. MILLER: Are you propounding the rulemaking
2 process, or professional apathy?

3 MR. BURBANK: What's that?

4 MR. MILLER: I mean, there was just apathy. Who
5 gave a fig back then? The scale of involvement was
6 minuscule compared to what it is now. There were no
7 organized groups back then. I probably was the last
8 reporter who operated without public presence in the
9 room. We were, in fact, in a sealed room -- not
10 smoke-filled. Nobody smoked. But it wasn't a public
11 event. And we did publish that the bar was apathetic
12 and did not respond, just was a reflection of the
13 culture of the time.

14 MR. BARKETT: Those days are long gone.

15 MR. BURBANK: And the problem was created by the
16 '66 amendments to Rule 23. It became apparent very,
17 very quickly. You had amendments to the Truth in
18 Lending Act, serial amendments in the early '70s.

19 MR. MILLER: I loved Ben Kaplan, but he wasn't
20 clairvoyant. He didn't know that that legislation
21 was coming. That's one of the astonishing things
22 about that committee. That is a committee to be
23 revered because of its composition. That was an
24 extraordinary committee. But they were unaware that
25 we were beginning a legal social revolution where the

1 transformation of American federal substantive law
2 was going to experience a growth pattern never
3 previously or subsequently experienced.

4 MR. BURBANK: Right. Except that a number of
5 times, Ben and others said, you know, not very many
6 people in this room have much experience, and we
7 really should try to get the views of people who do
8 have experience. And rather than making extra
9 efforts in that regard, when they got 27 comments,
10 they just went ahead.

11 MR. MILLER: Well, it was going ahead, or not
12 going ahead, which is a neat binary choice. So you
13 would've been left with a '38 rule with all of that
14 spurious true and hybrid crap to try and deal with
15 the civil rights revolution.

16 MR. BURBANK: I simply was talking about using
17 some of the time -- because there was a lot of time
18 that passed before the rule finally went forward --
19 using some of that time to actually reach out and
20 say, you know, what are we missing, if anything,
21 here?

22 MR. MILLER: There were several prominent,
23 practicing lawyers -- you would be embarrassed to
24 know, there were no plaintiffs' lawyers on that
25 committee, but some extraordinary big firm-type

1 lawyers, judges of the skill of Wisinski, one of the
2 great district judges of American legal history.
3 Maris, my senior author, was a lot younger back then.
4 Charlie Wright, Ben and Al Sacks. But from '63 on,
5 were -- they did the best they could.

6 JUDGE KOELTL: Was there a Department of Justice
7 representation?

8 MR. BURBANK: There was a Department of Justice
9 representative and a Department of State
10 representative. That was a tradition that started
11 with that committee. I had them.

12 Arthur, there were no plaintiff's class action
13 firms in those days, but there were plaintiffs'
14 lawyers.

15 Then Pollack -- by 1955, when I -- or '58, when I
16 was a junior associate serving papers on his firm, he
17 was representing defendants. That was by 1958. The
18 Pomerantz firm was about the only firm that was --
19 and Will Powell. Two firms were doing derivative
20 suits. And they had, what, six, seven, or eight
21 lawyers in one firm, and nine or ten in the others.
22 Do you expect them to go lobby in Washington or
23 elsewhere on these issues? They just weren't there.
24 It was up to you guys to write the rules, and then
25 for people like Mel Weiss and others to react to

1 them. You built the class action bar. It didn't
2 exist before then.

3 MR. MILLER: I'm glad I built something in my
4 life. I mean, can I report that to my students, that
5 I built something in my youth?

6 MR. BURBANK: In 1964, before your rule, I was
7 in a firm with one partner. We were defending what
8 were then called "spurious representative actions."
9 That's what they were. And it wasn't until the
10 Escott against BarChris a year or two later that they
11 became meaningful. And I think that was before your
12 rule was promulgated, because members of the spurious
13 class could opt in after a judgment. But before
14 then, we -- I was not representing defendants at the
15 time. We were hoping that the statute of limitations
16 could run on all of the class members. And then
17 Escott came along and changed it, and your rule came
18 along.

19 But before that, there were no plaintiffs' class
20 action lawyers.

21 MR. MILLER: There really weren't class action
22 lawyers of any stripe. And Steve's point, in a
23 sense, is correct. As good as the people in that
24 room were, there was very little class action
25 experience. And the class action experience that did

1 exist was in this crazy world in which in the -- you
2 didn't know what a spurious class action versus a
3 true class action was to begin with. That was one of
4 the motivations for rewriting it, because it was
5 obscure as hell. You didn't even know whether a
6 spurious class action had binding effects.

7 MR. BURBANK: Until Escott.

8 MR. MILLER: You see that in the debates, that
9 introc committee debates, in which very talented
10 people -- a fine district judge by the name of
11 Roselle Thompson wasn't even clear whether a class
12 action judgment was binding.

13 MR. BURBANK: Who was Brown versus Board of Ed?
14 Was that a class action?

15 MR. MARCUS: Yes.

16 MR. BURBANK: So there was a civil rights bar,
17 but that was probably more than the NWAC defense and
18 the ACLU, that they weren't private firms who helped
19 privatize the attorney generals.

20 MR. MILLER: Brown and the entire civil rights
21 movement was number one on the consciousness of the
22 committee, probably led by Charlie Wright. Very
23 active in the Texas environment. And as I said
24 before, beyond that, they did recognize securities,
25 antitrusts, some fraud, and you see comments

1 throughout the discussions about people whose claims
2 were economically unviable. And that's why John
3 Frank fought (b)3. He was afraid of those cases, and
4 wanted to cut the class action off before you got to
5 torts and before you got to the nascent, very nascent
6 consumer orientation.

7 MR. GROSS: Could you just comment again why
8 didn't it become opt-in rather than -- opt-out as
9 opposed to opt-in, because that could have killed it
10 also. Was that because of the spurious class action
11 that was experienced?

12 MR. MILLER: Yes. There was -- the majority in
13 the room saw the world, the class action world. They
14 saw it as something that was developing, and number
15 one on their agenda was not doing anything that would
16 freeze it. Because if you froze it, you would not be
17 able to provide the vehicle to the growing
18 substantive law that was particularly in the civil
19 rights field. That's -- that's the debate between
20 Charlie Wright and Ben and Al Sacks on one side, and
21 John Frank on the other.

22 MR. BURBANK: And, Arthur, David Marcus has
23 written a wonderful article about this.

24 MR. MARCUS: Oh, yeah, you know more about this
25 than I.

1 MR. BURBANK: Showing how state courts
2 effectively deprived civil rights plaintiffs of the
3 benefits of their rulings by making aggregate
4 litigation impossible.

5 MR. MARCUS: Right. So one of the major -- one
6 of the issues that was -- with regard to opt-out,
7 opt-in business, there was a concern that if the
8 class action rule required class members to opt in,
9 you have these desegregation lawsuits wherever every
10 child who wanted to be part of this class would have
11 to identify him or herself, in the middle of
12 Mississippi or Alabama or East Texas, and nobody
13 wanted to do that. No one wanted to identify
14 themselves. Where the -- sort of the binding class
15 judgment came from in the first place, the judgment
16 that bound class members without having to opt in,
17 that came out of these civil rights cases. These
18 progressive judges in the -- on the Fifth Circuit,
19 and in the district bench, Judge J. Skelly Wright,
20 among others, who, just by judicial fiat extended the
21 force of judgments to benefit all children who fit
22 the description of the class representative. And
23 that invigorated the desegregation class action
24 considerably. And I think that the committee members
25 were concerned about -- very deeply concerned that

1 that progressive step, you locked into the rule.

2 MR. BARKETT: If I could just make another
3 observation, because you mentioned torts before. The
4 case law developed that made tort class actions not
5 necessarily attractive, and that really spawned
6 multidistrict litigation. And MDLs now represent --
7 I don't know what the number is. I don't know if you
8 know, 25 or 30 percent of the federal document. And
9 there are no protections on settlement -- approval of
10 settlement in MDLs, as you have in class actions.

11 MR. MILLER: Let me pick that up. John, have we
12 reached the point that the MDL process, and its
13 utilization of a variety of techniques, like
14 bellwether trials and all of that, is that causing
15 the diminution of -- in the significance of the class
16 action?

17 MR. BARKETT: I can only repeat what we've heard
18 along the way, because we looked at MDLs very
19 carefully. There was a large concern about the
20 absence of any kind of judicial approval of
21 settlements when you have an MDL. And those used to
22 be class actions before some decisions came down that
23 made individualized proof on a particular tort case
24 so significant that the class action advice was
25 rejected.

1 But I don't think there's a whole lot of question
2 that those used to be class actions, and they're not
3 anymore without the procedures protections that the
4 class action device was designed to give the class.
5 Because, you know, MDL --

6 MR. BURBANK: But your response, John, suggests
7 that the causal task goes the other way, which is to
8 say that the increasingly restrictive class action
9 jurisprudence has led to greater important of the
10 MDL.

11 MR. BARKETT: Yeah. And I will say that as it's
12 evolved, certainly, you can't look at the Court's --
13 Supreme Court's jurisprudence over the last two years
14 and decide that it's been class-action friendly. And
15 so, that would be a reason, again, why numerous
16 lawyers would prefer the MDL, apart from maybe why
17 MDLs first sprung up.

18 Now, there are other reasons to advance an MDL
19 versus a class. It's -- it's a -- the whole goal,
20 ultimately, is to make sure that whether it's an MDL
21 or it's a class, is that the members are treated
22 fairly; that they -- that they receive what they're
23 entitled to receive. And we can debate that probably
24 through dinner, but I don't think anybody would want
25 to do that.

1 MR. MILLER: No. The -- keep in mind,
2 historically -- sorry about that -- but it's my age,
3 I suppose. The advisory committee is working from
4 '61, '62, '63, right up to '65. Over in Chicago,
5 Phil Neal has a committee that eventually is going to
6 produce Section 1407, the multidistrict litigation.
7 The two of them are like two ships passing in the
8 night -- although there was liaison between them --
9 each deciding that they had a mission, and they
10 should complete their mission, even if it didn't mesh
11 with the other.

12 MR. BARKETT: We could have gotten a settlement
13 class -- an agreement on settlement class language
14 and amended -- we talked about adding the (b)4, that
15 might have brought MDLs back into the class action
16 world. But everyone on the defense side was very
17 nervous that if we tinkered with it at all, it would
18 make matters worse.

19 MR. BURBANK: Arthur, I think your description
20 probably accurately describes when you were in the
21 room, but, in fact, in the fall of 1963, there was a
22 fair amount of discussion among members of the two
23 groups, because Roselle Thompson, among other things,
24 was a member of the advisory committee, also a member
25 of the coordinating committee, and was one of the

1 judges who was fashioning what became 1407. Indeed,
2 I think it's fair to say, and Dave may know this, I
3 believe that's a superiority requirement, or at least
4 some of the language in either the rule or the note
5 came out of the discussions that Kaplan, in fact, had
6 with judges, with the MDL judges.

7 MR. MILLER: No, no. In the spring of '63, the
8 committee deputized the two committee reporters to
9 meet with Neal.

10 MR. BURBANK: And they did, and then they met
11 with the judges.

12 MR. MILLER: I don't -- do you have some stuff?

13 MR. MARCUS: No, not on that particular point.

14 MR. MILLER: Well, let's open it up. We have a
15 lot of people here. Some of them are still awake.

16 MR. GOLDSMITH: John, the -- could you give us a
17 little bit of insight as to what's going on with this
18 approval mechanism that seems to have morphed in the
19 Rule 23? I heard one version that said it was trying
20 to tinker more with preliminary approval prior to
21 notice, and what degree that you must have the
22 court's imprimatur on that. Is the intention really
23 to standardize what's going on now as it used to be
24 under the multidistrict -- what's the booklet that
25 you all use? Or, is it intended to give the judges a

1 little room to move away from that and say, "I'm not
2 giving primary approval on this," or "I'm not even
3 giving you preliminary approval. I'm just allowing
4 notice to go out."

5 MR. BARKETT: I'll defer to the Judge, John,
6 first.

7 JUDGE KOELTL: Okay. You're talking about the
8 Manual of Complex Litigation.

9 MR. MILLER: Thank you.

10 JUDGE KOELTL: When I read the new rule, I said,
11 "That's what we're doing." You know, this is a --
12 this is a detailed description of what judges in the
13 Southern District of New York and the Second Circuit
14 -- really, by design, is trying to institutionalize
15 best practices.

16 It's what you do. You know, if you're going to
17 settle a class action, which has not yet been
18 certified, you give papers to the judge, explaining
19 why there is sufficient information for the judge to
20 reach a preliminary determination that after notice
21 goes out and after the -- after any objections and
22 opt-outs come in, the judge will be certifying this
23 class as a settlement class, and this settlement will
24 be considered to be fair, adequate and reasonable.
25 And so, this is -- this is an outline of exactly

1 that. I had --

2 MR. GOLDSMITH: But the standard -- how is that
3 different than what we do for final approval?

4 Because it's almost like you go through it twice,
5 and --

6 JUDGE KOELTL: But that's what you do now.

7 MR. GOLDSMITH: I know. But I don't know why --
8 but, if anything, I would have hoped that perhaps you
9 --

10 JUDGE KOELTL: Well, the reason, and I'll just
11 give you my thought, and then --

12 MR. BARKETT: We did look at trying to figure out
13 a way do it. But go ahead, John. Because it was
14 very difficult to come up with an alternative.
15 Proceed.

16 JUDGE KOELTL: There are, certainly, in my mind a
17 couple of reasons to do it that way. One is, when
18 you're looking at it initially, you haven't -- you
19 haven't had the views of the class. You haven't had
20 an opportunity to find out if you're going to have
21 objectors and what they're going to say. You have no
22 idea what the opt-out rate is going to be, and you
23 really would like that information before you finally
24 approve the settlement. So you've got to send out --
25 you have to send out notice, and you really want the

1 rest of the information before you finally approve
2 the settlement. One other -- Phillip, before I turn
3 it over --

4 MR. BARKETT: I don't have anything else to add.

5 JUDGE KOELTL: Well, the one thing -- there are
6 at least two parts of the advisory committee notes
7 that talk about how this process is incorrectly
8 called preliminary approval. And the drafters are
9 very clear to say this is not preliminary approval,
10 even though everyone thinks it's preliminary
11 approval.

12 MR. BARKETT: Those are definitely the words that
13 everyone uses, preliminary approval, no matter what
14 you say. But this -- Rick Marcus did the drafting.
15 I'm not sure there the concern was over the appeal
16 building motion, the idea that it's approval,
17 therefore, it's appealable. But --

18 MR. GOLDSMITH: The committee was really troubled
19 by that language, preliminary approval. I've only
20 heard of one judge, to my recollection, who refuses
21 to use that term, and that's Judge Kaplan, in your
22 court. He calls it provisional approval. So I've
23 never heard of -- I read this and I said, "What's
24 wrong with preliminary approval?" I don't know.
25 It's preliminary. I mean, this also says a

1 preliminary draft. So --

2 MR. MILLER: Gentleman, you're just showing your
3 age. For me, what's wrong with directed verdict?

4 Come on. This is your chance to stump the
5 experts.

6 MR. STOCKER: So there's lots of issues that the
7 plaintiffs' bar and the defense bar disagree about.
8 But what is it about the class action as a legal
9 device that lends itself to politicization along
10 partisan lines? You won't be able to go a town hall
11 meeting in Nebraska and find people who have opinions
12 about res judicata. So what is it that --
13 essentially, in the panels's view, that lends itself
14 to that kind of energy?

15 MR. LABATON: Before you give the answer, anybody
16 from the audience, give your names so the reporter
17 can put it down. That's Michael Stocker who spoke.

18 Who wants to answer that question?

19 MR. BURBANK: I do, Arthur. I'm currently
20 writing a book with Sean Farhang. Our book is called
21 "Retrenchment: The Counterrevolution against Federal
22 Litigation," and it -- having provided, by way of
23 background, basically stuff from Sean's previous
24 book, "The Litigation State," which shows that so
25 much of the increase in federal litigation that

1 occurred in the late '60s and through the '70s was
2 due to consciousness decisions by Congress to provide
3 incentives for private enforcement. Then you had the
4 counter-reaction, which really started in the first
5 Reagan administration, and it had two different
6 strands. One was they were both ideological, I
7 suppose, but one was the view that basically,
8 government has been taken over by private parties,
9 and it's derogating from the proper precincts of
10 federal and state government.

11 That was very much the view of John Roberts, for
12 instance, when he was in the Justice Department. It
13 was very much the view of Antonin Scalia. And that
14 merged, eventually, with a more business-oriented
15 view that, you know, we don't think all this
16 litigation is good for the economy, and it's
17 certainly not good for us. So the whole question of
18 private enforcement of the law, particularly, of
19 federal law, but not exclusively federal law, has
20 become a very hot topic starting in the early '80s.
21 And it continued to be a very hot topic. And class
22 actions are a mechanism, a different mechanism, to be
23 sure, than an attorney fee shifting provision. But
24 comparable in terms of the incentives that they
25 provide. It became an -- obviously enveloped in that

1 larger political debate.

2 MR. MILLER: Anybody want to add a footnote?

3 MR. MARCUS: Yeah. This is a just a footnote,
4 because that's surely the most complete explanation.
5 But I think to add to that, what's amazing about the
6 class action is the many ways in which it mounts onto
7 ideological agendas. One addition to what Steve just
8 said, in the early 1980s, these Reagan administration
9 officials came in and vowed to stop bringing --
10 Clarence Thomas, EEOC, people of the Department of
11 Justice Civil Rights Division and elsewhere, they
12 vowed to stop bringing group lawsuits, including
13 class actions, on grounds that there were no groups
14 in American legal life, that groups were for
15 politics, not for law.

16 And so, this mounts onto ideas of affirmative
17 action and the like. This little rule just happens
18 to tap into a lot of deep ideological strands in
19 American political life.

20 MR. MILLER: The poster child for deep
21 philosophical differences about the role of
22 litigation in American society.

23 MR. GOLDSMITH: And there's also -- if I may,
24 there's also, you know, the easy -- or to be very
25 candid, you know, it doesn't always look so good on

1 its face when the lawyers get this much -- and I'm
2 holding my hands out -- and the individual class
3 members get this much.

4 Now, there's actually a lot of very good reasons
5 for that, and you add up all of the class members,
6 they're getting more, you know, than the lawyers by
7 many, many factors. And we can go on and on about
8 why it makes perfect sense that you have that kind of
9 disparity. But, you know, I think that there are
10 certain constituencies that have seized upon that and
11 have used that to their advantage. And it really
12 taps into a lot of political discourse we see today
13 about, you know, people getting more and, you know,
14 being left behind and unfairness and, you know, the
15 elites and that sort of thing. So I think that's
16 part of the --

17 MR. BURBANK: It's not without some reason here,
18 because what you have is a transsubstantive private
19 enforcement powerhouse drop into a landscape that
20 previously didn't recognize it, practically, and it
21 functions as a wildcard. And that's one of the
22 reasons you have all these instances of insufficient
23 overenforcement of things, like the Truth in Lending
24 Act. You know, if I were doing things, and I
25 encouraged this on people who consulted me in Europe,

1 I would never have a transsubstantive class action.
2 They don't in Israel. They have a central class
3 action in areas where the fit between the regulatory
4 policy and the level of enforcement that is desired
5 and what class actions can accomplish is good, and
6 not have it in situations where the fit is not good.
7 We don't have that.

8 JUDGE KOELTL: A couple of comments. Arthur has
9 written on the -- including reasons why class actions
10 are not perceived well in some areas, and mistakes
11 that people have made to bring discredit on -- but
12 let me just step back for a moment, because
13 transsubstantivity is sort of a -- one of my -- one
14 of my concerns in the sense that I am a big fan of
15 federal rules that are transsubstantive for a variety
16 of reasons, including the message that it sends to
17 people that we have one federal judicial system that
18 applies to everyone. No matter how big or how small
19 your case is, we provide, on the basis of our rules,
20 the same system.

21 Now, you can have individual rules within the
22 federal rules. You can deal with individual cases in
23 a way that's tailored to those cases. We do it in
24 employment discrimination cases. We do it in some
25 civil rights cases. We do it with expedited

1 discovery and form and pattern discovery. But it's
2 all within the concept of the federal rules. And
3 that's -- that's been with us for a long time. And I
4 think if we lost that concept, it would be losing
5 something that's very important.

6 The other -- just comment I'd make on the
7 political discussion and where class action fits into
8 that is, it is plainly a hotly debated topic, and the
9 fact that the rules committee has tried so hard to
10 come up with a proposal, which, when you read it,
11 does not appear to -- to tilt the balance on either
12 side of the debate over class action, good, bad, but
13 simply tries to come up with a rule that makes it
14 better, could be subject to criticism on the grounds
15 that it's simply a tinkering change.

16 On the other hand, it tries to make it better in
17 a way that is satisfactory to all of the sides of
18 what is a highly political debate, and that's an
19 enormous achievement. As Arthur knows, I feel the
20 same way about the 2015 amendments. So that's my
21 little talk about the objectivity of the rules
22 makers.

23 MR. MILLER: As in Shakespeare, the great plays
24 end with the highest-ranking person left alive
25 speaking last. Employing that principle, I now

1 declare this discussion at an end. Thank you.

2 (Proceedings concluded at 7:32 p.m.)

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6 CERTIFICATE OF REPORTER

7 STATE OF FLORIDA

8 COUNTY OF MIAMI-DADE

9

10 I, SHARON VELAZCO, Registered Professional
11 Reporter, certify that I was authorized to and did
12 stenographically report the foregoing proceedings and that
13 the transcript is a true record of my stenographic notes.

14

15 Dated this 17th day of April, 2016.

16

17 Sharon Velazco

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19 _____
SHARON VELAZCO, RPR
Registered Professional Reporter

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