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Stenographically Reported By:
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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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(The following proceedings were had:)

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

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

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

Procedure.

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

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

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

So, now, Arthur, would you proceed?

MR. MILLER: Is Steve on the phone?

MR. BURBANK: Yes.

MR. MILLER: Steve?

MR. BURBANK: I am.

MR. MILLER: Hi, Steve.

MR. BURBANK: Hi.

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

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

MR. LABATON: The other David?

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

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

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

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

MR. MARCUS: Well, I teach civil procedure in

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

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

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

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

MR. MILLER: In the program?

MR. MARCUS: That's right.

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

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

MR. MILLER: Judge?

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

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

MR. MILLER: John?

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

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

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

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

Steve, introduce yourself.

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

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

MR. BURBANK: Mine?

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

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

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

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

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

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

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

MR. BURBANK: Right.

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

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

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

MR. BURBANK: No.

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

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

David, as litigator --

MR. GOLDSMITH: Um-hmm.

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

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

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

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

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

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

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

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

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

JUDGE KOELTL: Richard Hinckley Field.

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

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

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

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

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

JUDGE KOELTL: I don't recall that phrase.

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

MR. MILLER: Drawn from his characterization.

JUDGE KOELTL: Which defense counsel?

MR. MILLER: Milton Handler.

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

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

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

JUDGE KOELTL: Which federal judge?

MR. MILLER: Oh, he will remain nameless.

But you thought well of them as a device.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Right.

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

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

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

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

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

MR. BURBANK: May I get in here?

MR. MILLER: Go ahead.

MR. BURBANK: I agree with David, as he knows. And I think that 23F is the rule analog to the Class Action Fairness Acts, and then in thinking about the phenomenon that David describes, we really need to think about both of those changes. The Class Action Fairness Act brought into the federal courts -- I think John Barkett pointed out -- a whole bunch of cases of the sort that they rarely saw before. It provided more opportunities for the development of what was a progressively conservative jurisprudence by the federal courts, including in particular the Supreme Court, and it provided more varied opportunities to apply that jurisprudence.

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

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

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

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

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

MR. MILLER: Yeah.

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

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

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

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

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

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

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

JUDGE KOELTL: You --

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

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

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

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

JUDGE KOELTL: So you devoted yourself to Rule 26.

MR. MILLER: No, no.

MR. BURBANK: Rule 11.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE KOELTL: He will edit the transcript.

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

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

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

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

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

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

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

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

MR. BURBANK: It goes way back before 1994.

MR. GOLDSMITH: Thank you. It does.

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

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

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

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

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

MR. MILLER: David, you have an observation?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Right. Slightly later.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MILLER: David has already covered that.

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

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

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

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

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

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

through his or her paces in that regard.

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

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

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

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

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

MR. MILLER: This is not an inevitable part of

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

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

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

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

MR. BURBANK: What's that?

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

MR. BARKETT: Those days are long gone.

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

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

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

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

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

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

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

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

JUDGE KOELTL: Was there a Department of Justice representation?

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

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

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

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

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

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

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

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

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

MR. BURBANK: Until Escott.

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

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

MR. MARCUS: Yes.

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

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

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

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

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

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

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

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

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

that progressive step, you locked into the rule.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MILLER: Thank you.

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

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

that. I had --

MR. GOLDSMITH: But the standard -- how is that different than what we do for final approval? Because it's almost like you go through it twice, and --

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

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

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

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

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

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

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

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

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

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

preliminary draft. So --

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

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

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

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

Who wants to answer that question?

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

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

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

larger political debate.

MR. MILLER: Anybody want to add a footnote?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

declare this discussion at an end. Thank you.

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

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CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

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

Dated this 17th day of April, 2016.

Sharon Velazco

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SHARON VELAZCO, RPR
Registered Professional Reporter

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