ORIGINAL

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1493

TITLE THE GILLETTE COMPANY, Petitioner
v.
STEVEN MINER

PLACE Washington, D. C.

DATE November 10, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

THE GILLETTE COMPANY,

Petitioner

v. No. 81-1493

STEVEN MINER

Washington, D.C.

Wednesday, November 10, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

ARTHUR R. MILLER, ESQ., Cambridge, Massachusetts; on behalf of the Petitioner.

ROBERT S. ATKINS, ESQ., Chicago, Illinois; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Miller.

ORAL ARGUMENT OF ARTHUR R. MILLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MILLER: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the State of Illinois can assert jurisdiction over more than 168,000 citizens of every state, the District of Columbia, Puerto Rico and Canada when those people have had no contacts with Illinois.

QUESTION: Excuse me, Mr. Miller. May I ask at the outset, do we know that that's what the State of Illinois is going to do here?

MR. MILLER: Yes, Your Honor.

QUESTION: How do we know that? There's been no -- no determination of any of these issues, has there? What I'm getting at, do we really have a final judgment yet in this case?

MR. MILLER: We have a final judgment on the question of Illinois' capacity to assert jurisdiction over the non-resident class members under the Fourteenth Amendment. The Illinois Supreme Court quite clearly and unequivocally held that the International Shoe test established by this Court is inapplicable to

non-resident plaintiff class members. In that sense that issue is final at this time.

QUESTION: But we don't know whether actually a class will be certified as broadly as you just stated it.

MR. MILLER: No. The one issue that the Illinois Supreme Court leaves open to the Illinois Trial Court is the question of manageability. But I think it's reasonably clear given the directiveness of the mandate of the Illinois Supreme Court that at a minimum the Illinois Trial Court will certify a class consisting of all non-residents whose rights arise under laws that they would deem to be similar.

QUESTION: Well, I'm just wondering whether we have to address that issue until we find out that's what the Illinois court's going to do.

MR. MILLER: It is inconceivable to me, Justice Brennan, that there is any issue left open with regard to the question of the applicability of minimum contacts and the power of the State of Illinois to assert jurisdiction.

QUESTION: How about the class action? Has there been an order here?

MR. MILLER: There has been a mandate by the Illinois Supreme Court to the Illinois Trial Court to

consider this question of manageability under the laws of the other 49 states of the Union.

QUESTION: Well, I suppose one of your answers, Mr. Miller, might be that the Court granted certiorari.

MR. MILLER: Yes.

QUESTION: And perhaps a response would be that only four Justices are required to grant certiorari.

(Laughter.)

QUESTION: And another might be that there's an instrument called DIG which translates "dismissed as improvidently granted."

MR. MILLER: Well, I --

QUESTION: But as long as four want it granted, they're supposed to decide it on the merits.

MR. MILLER: I think --

QUESTION: That's the full four anyway.

MR. MILLER: I think you've covered all the possibilities now.

(Laughter.)

QUESTION: Yes, but no one raised the final judgment question at the certiorari stage. In all candor, I didn't think of it then, and I have thought of it now; so I don't consider myself bound by the four votes to the contrary.

MR. MILLER: Let me simply add that the last four cases that this Court has heard involving questions of state court jurisdiction -- Shaffer, Kulki, Woodson, and Rush -- have all come to this Court on a motion to dismiss for lack of personal jurisdiction.

QUESTION: But the difference is that in each of those cases the entire litigation might have terminated depending on how this Court decided the issue, whereas here it really is not even certain that there will be a class any broader than the Illinois residents, because it's theoretically possible that a judge sitting in Cook County might decide that all other states have different rules or they're enough different that he doesn't want to fuss around with anything except an Illinois class.

MR. MILLER: Yes. Two modest addenda. One would be in the Woodson case there was no certainty that the action would terminate because there were other defendants remaining before the Court.

Second, as I indicated to Justice Brennan, the mandate of the Illinois Supreme Court is so directive that the Illinois Trial Court would be hard-pressed to dismiss a non-resident subclass of those people coming from states whose laws were characterized as similar to the Illinois consumer protection statute.

QUESTION: Yes, I agree with that, but it does seem to me possible that the trial judge could say well, there are no other laws quite like ours. I mean we'd have to do some research to find out whether that's plausible or not, but it's at least theoretically possible.

MR. MILLER: It is theoretically possible, Justice Stevens. Might I just add that there is language in Cox Broadcasting v. Cohn and the comparable language in an in-chambers opinion in Rosenblatt v. American Cyanimide indicates that this is the kind of question where the issue, this issue, this central issue may never come back to this Court, and you have, in effect, a destabilized situation.

In Cohn you will recall it was the question of the restraint on publication in Georgia of a rape victim's name. The Supreme Court in that case felt that issue was important enough to resolve lest it not come back and leave everyone in a quandary.

I think as one looks around the country these days, one finds a greater and greater assertion by state courts, national class actions, some states not asserting those class actions; and we have a situation in which a good many judgments are potentially unstable and subject to collateral attack.

QUESTION: But as you argue on the merits, this case is the most extreme that has arisen.

MR. MILLER: Absolutely. I think this case is extreme because there is undisputed evidence in the record that Gillette is incorporated in Delaware, principal place of business is in Massachusetts. The Accent table lighter, which is the source of the consumer claim in this case, that promotion was planned and executed in Massachusetts. All receipts of applicants for the promotion were handled in Minnesota. No aspect --

QUESTION: Why Minnesota, do you know?

MR. MILLER: Yes, yes.

(Laughter.)

MR. MILLER: Spotts International, a promotional processing house, is located in Minnesota. So Gillette gave that company the business to improve the employment situation in that state.

All the promotions went to Minnesota. The requests for the Accent table lighter came from every state in the Union, Puerto Rico, the District of Columbia, and Canada. Nothing was done in Illinois except an attempt to promote responses to the promotion in Illinois. Only 11,465 of those who did not get the table lighter came from Illinois. Approximately 168,000

did not come from Illinois, have no contacts from Illinois, and there is no dispute about that.

QUESTION: The class -- is the class frozen in any sense now? It might be 268,000 before you get through.

MR. MILLER: No. The class is frozen now because the --

QUESTION: It is?

MR. MILLER: -- The promotion has ended. Four hundred and twenty thousand applications --

QUESTION: What about those who would claim they would have applied but for some theory?

MR. MILLER: I think one would be hard-pressed to make that claim four years after the promotion. The promotion took place in 1978. Again, I think it's unrealistic that anyone else will come out of the woodwork.

There is the possibility that the class actually will shrink to some slight degree if Illinois goes forward with the opt out option. There is also some indication that certain members of the class of people who did not receive the lighter feel that their claims, to the extent that they even thought that they had claims, were more than fairly compromised since Gillette did return their money, did send a letter of

explanation, and did send them a free Cricket lighter. Indeed --

QUESTION: Mr. Miller, how -- I suppose the real parties in interest here are the members of the class, if it's certified. They're the people whose cause of action we're talking about. And how does Gillette have the right to come in and raise the question now for their benefit or the lack thereof?

MR. MILLER: This Court in Hanson and Denckla allowed Florida defendants to assert a lack of jurisdiction over a Delaware trustee.

QUESTION: Wasn't that an indispensable party situation?

MR. MILLER: Yes, it was. Yes, it was.

QUESTION: Which would go to whether the Court had jurisdiction over the case. I don't think that's similar to letting Gillette come in and argue on behalf of the potential class --

MR. MILLER: With great deference, I would argue that there are very few people more indispensable to an action than the plaintiffs. We are talking about 168,000 involuntary, nonvolitional plaintiffs who have not indicated to any degree that they are interested in pursuing this claim.

The problem for Gillette from a standing

perspective is that if the Illinois Supreme Court opinion is allowed to stand, it will be subjected to the claims of these 168,000 nonvolitional plaintiffs in Illinois in what I think must be characterized as a frighteningly monstrous, in complexity terms, lawsuit followed by a judgment that has, unless this Court speaks, extremely dubious full faith and credit implications.

We are now in the position of looking at the 168,000 nonvolitional plaintiffs and realizing they have no incentive to come forward at this time. Pragmatically they have not received notice.

QUESTION: But under the Illinois court order they would be given notice, as I understand it.

MR. MILLER: They will be given notice.

QUESTION: And they can opt out.

MR. MILLER: But if I might just pursue the standing point for a moment, they have no notice at this point. They will not get notice until some time after jurisdiction is or isn't established. They have very little incentive to come in. Number one, their claims are only for $7.95 apiece. And number three, they're in a heads-I-win/tails-you-lose situation; because if they remain on the outside of the action and the case goes to judgment and the class prevails, they can take advantage

of it. But should Gillette prevail on the merits, they can then make the very argument that we are making at this point.

QUESTION: Well, that's just a typical class action suit. It may not be -- I suppose you would say they could have a class action of all Illinois residents.

MR. MILLER: Yes, yes.

QUESTION: Well, that would -- the same thing would be true of all of those people.

MR. MILLER: I do not think that is as clear.

QUESTION: Well, they can opt out and take advantage of it.

MR. MILLER: They can opt out, but if they opt out, my understanding of the Illinois opt out law is that they cannot then take advantage if they opt out.

QUESTION: Well, do you think Gillette would really, if it lost the case, really defend against another party in the same position?

MR. MILLER: It's very hard to speak to that issue at this point.

QUESTION: Well, I don't think it's hard to speak to it at all.

MR. MILLER: The fact remains, Justice White, that the theory of the Hanson and Denckla standing point is equally applicable in this situation because those

Florida defendants were making exactly the same point with regard to that indispensable Delaware trustee: unless you get him in now or determine that he can't be brought in now, we are subjected to this litigation and a threat of second litigation.

QUESTION: Right.

QUESTION: Mr. Miller, am I right in thinking that Gillette raises no minimum contacts constitutional arguments in its own behalf?

MR. MILLER: In its own behalf, no.

QUESTION: I am right.

MR. MILLER: You are right.

QUESTION: Could a plaintiff from Montana then come to Illinois and file an action against Gillette for the lighter?

MR. MILLER: In the Illinois court, yes.

QUESTION: Yes. And could a group of plaintiffs get together and do that?

MR. MILLER: A group of plaintiffs volitionally can accede or consent or seek out the jurisdiction of the Illinois courts.

QUESTION: So are you basically saying that due process allows an opt in procedure but not an opt out procedure?

MR. MILLER: I think if the State of Illinois

chose to pursue its consumer protection policy by enacting a statute that provided a mechanism of inviting non-resident class members to opt in to an Illinois action, that would be constitutional.

What it seems to Gillette offends the Constitution is the attempt by the State of Illinois to assert jurisdiction over a group of people who have not manifested any acquiescence in Illinois jurisdiction.

QUESTION: Even under the notice and opt out procedure.

MR. MILLER: I think what this Court has decided in an unbroken line of cases from International Shoe is that in the absence of minimum contacts between a state and a party, that state cannot assert jurisdiction under the due process clause of the Fourteenth Amendment.

QUESTION: But weren't those all minimum contacts required on behalf of the defendant?

MR. MILLER: Yes, yes, except conceivably the Mullane case. This Court last year in Logan v. Zimmerman Brush clearly stated that a cause of action is a property right under the Fourteenth Amendment.

It seems to me impossible to draw a distinction between holding a defendant liable for $7.95 and issuing a decree or a judgment that forecloses a

plaintiff from asserting a claim for $7.95. And it seems to me that is basically the issue that was before this Court in Mullane v. Central Hanover Bank and Trust Company where at issue were the claims by a variety of non-New York trust beneficiaries with regard to the settlement of a New York trustee's accounts. And Justice Jackson writing for the Court in that case made it very clear that he was quite concerned from a jurisdictional perspective about the foreclosure effect on those beneficiaries of not being able to charge the New York trustee with fraud or mismanagement or excessive fees.

It seems to me that this case is a little different -- indeed, it is not different -- from any attempt by say Gillette --

QUESTION: Mr. Miller, after all, there would be notice and an opportunity to opt out. And failing to opt out you think isn't equivalent to consent?

MR. MILLER: No, I do not. Again --

QUESTION: I'd certainly have to say that because you have just said that if there was consent, if they voluntarily came into Illinois, it would be quite all right.

MR. MILLER: I think that is right, but I think the Court's opinions, particularly the last four

opinions, have been absolutely clear in drawing distinctions between three elements -- among three elements of due process: jurisdiction, notice, and an opportunity to be heard.

The Respondents, and I fear the Illinois Supreme Court, have simply made it appear as if there were only requirements of notice and opt out or opt --

QUESTION: Suppose there was proof that a person hadn't -- a person had notice, and he decided not to opt out?

MR. MILLER: I do not see how the State of Illinois could bind that person. This Court's opinion --

QUESTION: He could say -- he could sit right there and say well, if it turns out well, that's fine; if it turns out bad, I'll sue him anyway.

MR. MILLER: The author of Insurance Corporation of Ireland one year ago said --

QUESTION: I thought you would get to that.

(Laughter.)

MR. MILLER: -- Made it very clear that an individual who feels there is no jurisdiction in the tribunal may simply ignore the proceedings.

QUESTION: He does so at some risk, of course.

QUESTION: At his peril.

MR. MILLER: He does so at some risk, but not

much risk if it is true that there is no jurisdiction.

QUESTION: They can't bind him just by his failing to object.

MR. MILLER: I do not see how the State of Illinois can write me a letter in Massachusetts and say "Hi, this is notice we have an action going. You have the privilege" --

QUESTION: Either speak up or be stuck.

MR. MILLER: That's right. That is not the purposeful availing that the Court has spoken of. That is not a contact or tie or relation with a forum. That is a unilateral act by a third person. And it does not seem to me that notice, opt out, or even adequacy of representation can constitutionally fill the gap.

QUESTION: What about our decision last term in Underwriters National Assurance Company where a state court exercised jurisdiction in what amounted to a class action involving people in other states?

MR. MILLER: That is one of the many, many cases that have come to this Court that are in appearance multi-state class actions; but when one looks at the facts of each and every one of those cases, each and every one of them, one discovers that either there's a clear satisfaction of minimum contacts or there is an entity created by the forum, which decisions as far back

as Pennoyer and Neff make clear the forum can adjudicate and make decisions about rights and liabilities, or there's a fear that there will be conflicting judgments resulting from sequential actions. In other words, it is either a res, an entity, a set of minimum contacts, an organization created by the forum, or a very palpable fear of conflicting judgments.

In this case you have nothing but 168,000 people with completely undifferentiated and individualized damage claims, with no contacts, no basis, no legitimate interest in the State of Illinois to regulate, none whatsoever.

QUESTION: What if these, instead of inexpensive Cricket lighters we have $10,000 value widgets, and the suit were brought in the district court, federal district court in Illinois? Would you say that a class action could be maintained in the federal district court?

MR. MILLER: And we're assuming diversity of citizenship jurisdiction.

QUESTION: Right.

MR. MILLER: Under the decisions of all of the circuits, according to language in the Insurance Corporation of Ireland case, the existing jurisprudence under the Irian-Thompkins doctrine strongly suggests

that a state-city-university has no further jurisdictional reach than the courts of the state in which it's in.

Indeed, your reference to a $10,000 claim I think very graphically shows what the threat to federalism is in this case. After all, the proposition that a non-resident without contacts, without acquiescence is free to litigate in his home forum before a tribunal that is constituted by political forces responsive to him, a tribunal that understands the social fabric of the law it's to be applying, a tribunal that has a direct and substantial interest not only in applying the law but applying it correctly, the whole theory there is first the fairness to that individual litigant, his right to claim the forum of his state; and second, to make sure, as Justice White remarked in the Woodson case, that the states recognize that they are co-equal sovereigns in a federal system.

QUESTION: But I take it your answer is the federal district court wouldn't have jurisdiction either --

MR. MILLER: That is correct. That is correct.

Let me just pursue the federalism point, because I think it really is central to this case. The fears that one perceives of allowing Illinois to

collectivize 168,000 cases, even though they have not been asserted by the individual holders of those claims, is first there is a substantial risk that this will allow cases to be tried in the wrong place. If you go back to cases like Mullane and Ibbs, indeed all of the cases cited in Respondent's brief, you have a forum with a significant interest in the dispute because it created the entity.

QUESTION: Well, Mr. Miller, you used the word "substantial risk" in the argument you just made, and I suppose that conveys your idea that we can't foresee exactly what would happen if an Illinois judgment including claims on behalf of some plaintiffs from out of state became final, and Gillette paid off on it, and then another complaint was brought by someone who had accepted the offer in another state.

Just as a matter of prudential jurisprudence wouldn't it make more sense for us in this rather unknown area that you're talking about to wait until that happens rather than to --

MR. MILLER: With deference, Justice Rehnquist, I think it's most prudential to maintain the unbroken line of minimum contacts cases, because that way and only that way are you likely to get states respecting each other in terms of jurisdictional

acquisition. And with great trepidation I suggest to you that given the Court's approach to state choice of law, it is now only through the maintenance of the jurisdiction principle under Shoe that this Court can guard against questionable, indeed potentially abusive applications of state law. Because in a situation in which you have no jurisdictional standing -- and that is what the Respondent and the Supreme Court of Illinois have decided -- in a situation in which you have no jurisdictional standing, where Illinois can take jurisdiction because it means well, then you have the spectre of cases being tried in the wrong fora, not the fora where the contacts are significant, indeed overpowering, like Ibbs and Mullane and Hansberry.

You also run the risk that that forum court being subjected to the normal pressures of judicial administration will have a great tendency to apply its own law, thereby violating the individual's constitutional right to have his property, her property, his claim, her claim adjudicated by a local forum under local law by a local judge before a local jury, unless that person manifests a willingness to accede to the jurisdictional power of another state.

It seems to me that must mean -- that must be what this Court means when it persists in the notion

that the states are co-equal sovereigns, that territorial boundaries have not been eliminated in this country, that each of the states must acknowledge and respect the rights of the other members of the polity.

I'll reserve my remaining time.

CHIEF JUSTICE BURGER: Mr. Atkins.

ORAL ARGUMENT OF ROBERT S. ATKINS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. ATKINS: Mr. Chief Justice, and may it please this Court:

I still believe, notwithstanding the remarks of my learned colleague, that we live in one nation, and we are one country, and we have many states. I feel compelled to say, however, that there was an air of divisiveness that I gathered from Professor Miller's remarks; and I think that if it was adopted, namely that there be a reversal of the Illinois Supreme Court's decision, it would have a chilling effect on consumer class actions which I think have been encouraged, certainly as indicated in the Snyder case by this Court, that it be tried in the state courts.

As a matter of fact, in the Snyder case it's very interesting. It was a multi-district or multi-state class. It involved state law. And we had people, 4,000 shareholders, and they lived in various

parts of the United States. And this Court said that suits involving issues of state law are brought on the basis of diversity of citizenship can often be most appropriately tried in state court.

And I suggest particularly under those circumstances and with the Court's statement in Standard Oil in terms of class action being a viable mechanism for the redress of these kind of grievances that with the state directly at the present time, I respectfully submit that the Supreme Court's decision in the State of Illinois should not be reversed. In fact, it should not be even addressed at this time; because I respectfully submit that there are two very important reasons why the decision of the Supreme Court of Illinois should not be addressed.

And that is principally on the basis of rightness for review and on the basis of standing. And with respect to the rightness argument, there's been no deprivation here. What has been deprived at the present time? There's been no class certification. There's been no adverse judgment. There's been no attempt to enforce or challenge any judgment.

What -- what we don't even know --

QUESTION: Well, what do you think we ought to do with the case, Mr. Atkins?

MR. ATKINS: I think, Your Honor, that this Court should dismiss the petition as improvidently granted and leave the Illinois Trial Court to determine this case, move on with this case, and have faith and reliance in its state court, because I think that that's where it belongs. As a matter --

QUESTION: Well, do you -- do you suggest there's not a final judgment or just that we should dismiss it as improvidently granted?

MR. ATKINS: I suggest that with respect to -- it may be a final judgment with respect to the issue before the Illinois Supreme Court, but it doesn't necessarily mean that it's right for review --

QUESTION: Right, right.

MR. ATKINS: -- Of the issue that has been raised. And the issue raised is the constitutional issues, which as Justice Brandeis has indicated in Ashwander, that the Court should be particularly reluctant and show judicial restraint with respect to getting into deciding constitutional issues. And the issue before this Court raised by the Petitioner is clearly a constitutional issue.

And it's very interesting in terms of the type of case that we have here. It's a class action. As Professor Miller has stated in one of his numerous

articles, he indicated that class actions, almost all of them are settled. Well, if almost all class actions are settled, I submit that this may never raise its head with respect to this piece of litigation because it may be disposed of and disposed of appropriately in the state court.

I suggest --

QUESTION: Would settlement of this particular class action by Gillette in the Illinois action really solve Gillette's problems, if Mr. Miller is right and the problem is later suits in other jurisdictions?

MR. ATKINS: I think it would, Judge, for this reason. I think that in my experience in class action litigation, also in accordance with Rule 23 in the statute of the State of Illinois, for any settlement -- we'll say a settlement that is classwide -- there will be notice given in terms of the class members, and they will have an opportunity certainly to opt out, as we have in the class. If it is disposed of by the Illinois Supreme Court in terms of a judicial approval of a settlement as being fair and adequate with respect to the class, there will be no further exposure with respect to those persons who didn't opt out.

Now, when we're talking --

QUESTION: Now, that just doesn't make any

sense at all to me, your answer. I would think anyone who didn't opt out, if Mr. Miller is right, could well have an action say in the State of Oregon where he lives under Oregon law.

MR. ATKINS: That's correct. That's correct. The people who could file their own lawsuit in their own state, that is correct. And if they do, I would classify that as an opt out. In other words, I would think that they are still hanging there, and realistically speaking, Gillette would have to make an accommodation with respect to those people.

But with respect to the 798 claims and in my experience with respect to the small claim class actions, that's really not realistic. And we're talking about a rightness, we're talking about -- we're talking about the possibility of conjecture and speculation and possible future harm. And I don't think these possibilities and I don't think these conjecture matters should really get into the central core as to whether or not this issue at this stage is right for review.

Also because, as this Court knows, there's not a firm factual background in terms of determining all the issues in this situation. And so I think that it is not right for review at this time.

QUESTION: Well, are you saying -- would your

position be different if the individual claims were say $2,500 each instead of $7.95 each?

MR. ATKINS: No. Judge -- Mr. Justice, the position would be the same. The position is that there is a mechanism, a class mechanism that basically disposes in federal court as well as state court these matters through settlement in most of the cases, and whether it's -- it still would be conjectural in terms of someone coming in and filing their own action, and whether it's in state court or federal court.

QUESTION: But, Mr. Atkins, do you get to the settlement posture till you know what the class is?

MR. ATKINS: We get to the settlement posture, Judge, in my -- in my experience at the time that we do notify, which sometimes is the same time.

QUESTION: But before you notify, you've got to certify a class.

MR. ATKINS: That's correct.

QUESTION: And then you send out a notice and you know who opts out, and then you start talking settlement.

MR. ATKINS: Yes, sir.

QUESTION: And I'm just wondering, you've got an $8.10 claim here. At least that's -- as I understand it, that's the maximum -- you seem to admit that in your

brief.

MR. ATKINS: That's -- that's pretty close, Judge, right.

QUESTION: And if that's true, I'm just wondering how many mailings back and forth you can afford and have anything left.

MR. ATKINS: As a practical matter, Your Honor, you've put your finger on a situation where the number in a class are important from an economical viewpoint that was recognized in Standard Oil. And we're talking about a million four hundred thousand case if our class is composed of everyone who didn't get their lighters throughout the United States.

QUESTION: And each one has a maximum recovery of around $8.00.

MR. ATKINS: That's right, Your Honor.

QUESTION: What's the economic justification for that kind of a lawsuit in the federal courts under any circumstances?

MR. ATKINS: We are in state court, Judge, in this case.

QUESTION: In state or federal courts.

MR. ATKINS: As far as judiciary concern, I suppose that if you -- if you cheat people a little bit but do it a lot that you can go by free. The position

of the consumer fraud statutes and class actions in particular, I think, Your Honor, is to provide a viable mechanism for legal redress.

QUESTION: Suppose you -- suppose you prevailed on everything. Is there any likelihood that the members of the class will get more than $4 apiece or thereabouts less all the postage?

MR. ATKINS: We have figured that out, Judge, and it's something in the neighborhood of over $5.00.

QUESTION: Five for each one of them.

MR. ATKINS: Yes, sir.

QUESTION: And the rest will be going where?

MR. ATKINS: Well, if our class includes everyone who does not opt out, then it would apply to everyone with respect --

QUESTION: Well, the rest of it's going to the lawyers, is that not so, and to the expenses of litigation?

MR. ATKINS: There is administrative expenses and there are judicial expenses that go into any class action litigation. And if we prevail and if Gillette has in fact deceived 180,000 people who were in our class, then you're correct.

QUESTION: You say judicial expenses. Are you suggesting you have to pay the judges?

MR. ATKINS: No. I didn't mean that.

(Laughter.)

QUESTION: You mean attorneys' fees.

MR. ATKINS: Yes. I -- I misspoke. I misspoke.

The other issue that is very important that we'd like to address is the standing issue, because for Gillette to come here -- and I think that Professor Miller has admitted today that he is asserting the rights not of Gillette here, but he's basically asserting the rights of the third party, absent class members. And as indicated in the case of Singleton v. Wulff, the Court will try to determine whether or not someone can come into this Court and assert the constitutional rights of third parties, because -- and it's a very interesting and important observation -- that it may well be that these parties don't want to assert these rights, and it may not necessarily even come up.

In Justice Powell said in the Singleton case in his dissent, that it must be a practical impossibility for it to be raised for the Court to go into.

QUESTION: When -- when there is a communication with the potential members of the class is

there any obligation to tell them what is the maximum recovery that they can possibly anticipate?

MR. ATKINS: Normally in my experience you indicate the parameters of the lawsuit or in the settlement, what the terms of the settlement. That's commonplace, Your Honor, and that is what was done.

QUESTION: Do you tell the individual who's reading the letter that the maximum that you can expect to get if you respond to this and join the class is $4.83?

MR. ATKINS: To be perfectly fair you would come pretty close to trying to tell them that, because the judge --

QUESTION: -- Not tell them.

MR. ATKINS: If I might say, because just as was brought up before, lawyers' expenses in the case, administrative expenses may not wholly have been determined at this juncture, so you can't wholly note. But you try to work out the parameters in terms of letting people know what the expenses are and what he could obtain or would obtain in connection with the lawsuit.

QUESTION: Do you enclose a return envelope with a stamp on it?

MR. ATKINS: It depends on whether there is

claims in the case or there are not claims in the case.

QUESTION: Well, if you're -- you're circulating a class of plaintiffs with an $8.00 claim do you put in a return envelope or not?

MR. ATKINS: In an opt out procedure probably not.

QUESTION: Well, it's going to cost him a few cents anyway to opt out.

MR. ATKINS: That's correct.

QUESTION: Twenty cents.

QUESTION: I said a few.

MR. ATKINS: That's correct.

QUESTION: F-e-w.

QUESTION: May I also ask, does the notice customarily in Illinois class actions discuss whether or not the class members, a) might be subjected to discovery, and b) might have to pay some costs?

MR. ATKINS: Well, one of the things that -- differences in terms of the class action that we have pointed out is that costs are not normally assessed against absent class members --

QUESTION: But maybe they're not normally, but can you say for certain that they would not be in a particular case? Say in this particular case here you had the whole class certified, and then the case went

along for a while and you found out that the rule in New York is a little different, and all the New York lawyer -- all the New York purchasers lose because they couldn't prove that they actually bought the material instead of having it given to them or something like that, who would pay for their mailings?

MR. ATKINS: I think that you have again addressed, Your Honor, a management problem, and whether or not they even should be certified; because if there are certain differences with respect to the laws of an individual state, these are some of the problems that may come up in a case that --

QUESTION: But perhaps -- what I'm suggesting is there may be differences that don't surface at the outset. At the time of the certification it appears that the laws are uniform, and then in a long case, and sometimes cases go on for quite a while, there's a decision comes out in New York that clarifies the law there, and you find out there's a little problem in New York.

MR. ATKINS: The flexibility of a class action device would be able to permit either a subclassing with respect to that or even a carving out with respect to that class.

QUESTION: I understand that, but the reason I

mention those examples, what is the -- in Illinois what is the practice with respect to telling a person who has a decision to make, shall I opt out or not, as to whether or not he might be subjected or costs and so forth? Is there anything --

MR. ATKINS: It's been my observation that he is not told because the state of the law is such that he does not have those expenses.

Now, if the law were something else, I suppose -- that's not our case.

QUESTION: Is it settled in Illinois that he is not responsible for discovery and not responsible for cost?

MR. ATKINS: That's my understanding, Your Honor.

It -- it -- in the -- in the point -- one more point with respect to standing which I think is important, and it sort of puts it in context; and that is that the absent class members, whether they're in Iowa, Michigan, California or Arizona -- I mean if they thought that Gillette, who as many of them may not know had deceived them with respect to this promotion, was in the United States Supreme Court and arguing that their constitutional rights have been violated because of the lawsuit that's been filed by a similar purchaser in the

same position, I think that they would not support that at all. I don't think that they necessarily would want Gillette championing their rights. I think that it's important -- it's almost akin to the fox telling the farmer that he would be a good protector of his chickens. I mean it's just not sincere. And I think that is one of the reasons that standing is important in terms of bringing this to the Court's attention.

I'd like to also address because I think it's important the type of due process considerations going beyond the standing of rightness issue which Mr. Miller has addressed. And I think the central issue is basically whether or not absent class members would receive adequate due process, not merely on a traditional static, ironclad kind of conception of contacts which basically relate to defendants, because we have a different kind of being here.

And their whole case, if I may suggest, Your Honors, their whole case seems to rest on the fact that they are the same; that defendants in the case are the same as absent class members. And they're not. We discussed the discovery, the costs, the attorneys' fees, differences. But in terms of the judgment itself, the term that in a judgment defendant must pay, what he faces, what a defendant faces is either staying away and

having default judgment against you or coming in to court and being hauled in if you're from a faraway forum, hiring a lawyer and contesting it.

And in International Shoe and other cases of this Court the due process aspect of it was what is fair, what is really fair for a defendant who faces this kind of coercive judgment.

QUESTION: I understood Mr. Miller to concede quite frankly that none of our cases had applied the contacts rule to plaintiffs, but I would think that maybe that's because up until now you have had real live plaintiffs as opposed to class action plaintiffs, and that if a real live plaintiff comes into a forum and sues somebody, certainly he has waived any right he had to challenge jurisdiction.

But here you have people who are associate on the plaintiff's side of the complaint who have not themselves made that choice.

MR. ATKINS: I understand that, Your Honor, that that particular issue with respect to absent class members had not been adjudicated before. However, what I was trying to analogize is -- is -- or state is that there is great differences between defendants and absent plaintiff class members in terms of the coercive effect of a judgment, for example, on a defendant as

distinguished from what -- the most that can happen as far as an absent class member is concerned is that he has lost his opportunity if and when there may be adjudication against him to contest that if he didn't opt out.

QUESTION: Well, he's also lost his right -- supposing he recovers the magnificent sum of $5.00 in the class action you're bringing for him in Illinois, and supposing he's in Oregon and Oregon has a statute that says anyone who is imposed upon the way you say Gillette imposed on these people shall have a right to recover actual damages plus $1,000 punitive damages.

Now, I presume Gillette would use the Illinois judgment to bar him or seek to bar him if he brought suit in his home state of Oregon.

QUESTION: That assumes that Illinois would not in any way be applying -- would be applying strictly Illinois law to the situation. We have two counts in this complaint. We have both a contract count and a statutory consumer fraud count. And states as well as the federal courts apply laws to the various states as they get to them.

Now, if -- if, as you say, there is a punitive damage count or -- or -- and there are certain states that have punitive damage situations, that may be up to

the trial judge in terms -- and in an adversary situation with Gillette on the choice of law relative to application; or if it becomes unmanageable because of those great differences, if there are such great differences, then they may have to be subclasses. But we're not real there yet. The record is not really complete yet in terms --

QUESTION: Well, Mr. Atkins, suppose we disagree with you that this case isn't right and proceed to decide it. Do you think we necessarily reach in the course of our decision the question of whether absent class members would be bound by an adverse judgment against your -- against you?

MR. ATKINS: Well, I think --

QUESTION: Suppose the case -- suppose the -- the -- suppose the case goes to -- goes to trial and there's a judgment against the class, a judgment in favor of Gillette. Now, would the binding nature of that judgment against absent class members, is it -- is that an issue before us if we reach the merits in this case?

MR. ATKINS: Well, I think that that is what Professor Miller is saying would happen, and I'm suggesting that we don't know at this juncture.

QUESTION: You don't know what?

MR. ATKINS: I don't know whether or not if when you say take the case on the merits in terms of deciding whether or not there's been a due process violation because of -- relative to the absent class members, and you decide what, Your Honor -- I'm not sure I understand the question..

QUESTION: Well, if we -- is part of our deciding whether there's a denial of due process the question of -- is part of that question whether or not absent class members would be bound.

MR. ATKINS: Well, I think that they would be bound under the -- under the Illinois decision.

QUESTION: Well, what if they wouldn't be, would there be a denial of due process?

MR. ATKINS: Well, I think that you run into the full faith and credit situation with respect to the validity of the Illinois court making a decision that -- that would affect them. The Illinois statute now says that they will have an opportunity to opt out, the mechanism, and I think with -- we don't reach -- we don't reach that decision -- we don't reach that decision, it seems to me.

QUESTION: Well, I'm just wondering, perhaps Gillette would win no matter how this case comes out.

MR. ATKINS: They may.

QUESTION: At least if we decided that there's no denial of due process because the absent class members would be bound, then they wouldn't be subjected to the possibility of double judgments. That certainly wouldn't hurt them too much.

MR. ATKINS: Well, I don't think there's any question that they would be bound under the Illinois decision at the present time.

QUESTION: There is --

MR. ATKINS: Assuming -- assuming --

QUESTION: There's no question.

MR. ATKINS: -- That we go through the adequate representation requirement which is essential to the due process in a class action. In other words, if they had the adequate representation, the question is -- in the collateral attack, that's when it would come into play.

QUESTION: Again, under Illinois law and Gillette prevails can it tax costs against the 168,000 or all those who joined?

MR. ATKINS: They can tax costs against the represented party.

QUESTION: Just the ones in Illinois.

MR. ATKINS: That's my understanding, yes.

QUESTION: How about on counsel?

MR. ATKINS: As far as counsel's concerned?

QUESTION: Yes.

MR. ATKINS: I don't believe so.

QUESTION: Is there any authority under the state laws to tax costs against counsel?

MR. ATKINS: I'm not particularly aware of that, Judge.

QUESTION: Or to tax counsel fees against -- can they tax counsel fees of the prevailing party against the members of the class?

MR. ATKINS: For -- for -- under certain situations which I suppose are gross violations, they may be able to.

QUESTION: In other words, under the American rule as distinguished from the English rule there is no such authority in most of the states, is that right?

MR. ATKINS: That's my understanding, Judge.

With respect to the opt in and opt out procedure that was brought up, we believe that the experience with Rule 23 is very important, because in Rule 23 there's a specific provision with respect to opting out. The advisers, the adviser committee notes the commentators, the manual of multi-district litigation have all commented on the requirement of an opt out situation; otherwise it would be destructive to

class actions.

We feel that this would be -- it would be unworkable to have an opt in situation. It would be a violation of discretion --

QUESTION: Let me interrupt you there, Mr. Atkins, for just a -- it would be unworkable because nobody's apt to spend 20 cents for a postage stamp to opt in to a case like this and take the trouble to send it in?

MR. ATKINS: The experience has been, I think in terms of the commentators as well as the courts, in the manual for complex litigation we're talking about federal as well as state, that it would not -- that people would not do that. As a matter of fact, Your Honor, the commentators -- Professor Kaplan's remarks about the being -- the timid, the people who would not do anything, came to play in terms of the determination to put that requirement, mandate the requirement merely an opt out in the rule.

So when I say it's unworkable, unworkable in terms of the purposes to be effectuated by this.

QUESTION: But the purposes of the class as a whole, it's better -- it's kind of an inertia. People don't want to do something that they're not quite fully under -- they don't understand thoroughly.

But it seems to me that there's almost zero probability of anybody opting out of an $8.00 claim when it costs you about 50 cents to opt out.

MR. ATKINS: I would -- I would --

QUESTION: And isn't it almost a certainty that there will be no opt outs in this case?

MR. ATKINS: I would have to go along with that assessment, Your Honor.

QUESTION: So that it's kind of a -- it's almost a charade in a way. You're in effect going through a procedure that is designed to give people a choice that you really just don't believe anybody's going to make. It seems to me it's a little different if it was a $100,000 claim, but with a $7.00 or $8.00 claim to say do you want to spend a dollar to tell us whether you want to take this big gamble or not --

MR. ATKINS: Well, I think because the flexible standards of due process which is central to this case, that also has to be put into the mix in terms of whether or not a proposition a constitutional law is --

QUESTION: They're not giving up very much, you're saying. If they lose an $8.00 claim, who cares?

MR. ATKINS: Well, I -- I -- I didn't say that. I --

QUESTION: Well, but that's the other side of the coin, I suppose.

MR. ATKINS: I say that it should work for all people. You should provide mechanism. I mean granted in a small case the person is not going to -- he may not more so than a large case. But it's been my experience in the large cases because of the supervision of the courts, because of the necessity of adequacy of representation these cases are settled and disposed of, and there are few opt outs, even in the large cases where literally hundreds of thousands of dollars are due and -- or whose attorneys review the situation or the settlement albeit, because they've reviewed it and they decide that they're better off to go along after reviewing it. That is a practical answer to what you said.

QUESTION: Well, the practical assumption, I guess, that underlies the -- the approach to the case is that the plaintiff is going to win. That's sort of the basic assumption that seems to be made in these cases.

MR. ATKINS: There have been class actions where plaintiffs have lost, Your Honor.

QUESTION: I know there have, but I'm not sure that --

MR. ATKINS: I've been involved in them.

QUESTION: Yeah, well --

QUESTION: Perhaps the rule should be changed to provide that there's no recovery for anyone who doesn't affirmatively opt in.

MR. ATKINS: Well, that changes the -- what you're suggesting, Your Honor, is changing Rule 23 with respect to the federal court and applying those to states or the entire country. I would suggest that for the reasons stated in the manual, in Professor Miller's book, in Rule 23, it's a destructive class action mechanism. And I would think that if it's going to work in terms of a vehicle to redress legal grievances for small claimants that the opt out procedure is fair.

QUESTION: Well, that's really up to Illinois, isn't it?

MR. ATKINS: Absolutely, absolutely. Absolutely, Justice. And Illinois has -- has -- legislature has decided to have -- to put into operation a statute that's similar to Rule 23 and which provides an opt out mechanism. And in terms of the -- it -- it supports the very policy of class actions.

And I should say this, that as this Court said in Snyder and said also in -- in the Standard Oil case in Hawaii in terms of support of class actions, in terms of the attorney generals who believe that it's -- it's

-- it's a necessary deterrent in terms of a problem that we have in our midst, that it's no time to turn back the clock in terms of permitting states to take these cases that are meaningful cases and shouldn't be in federal court and certainly can't be in federal court and provide some legal redress for the grievances.

QUESTION: Mr. Atkins, do I get your position clearly that if there are any due process rights of these non-resident class members, Illinois satisfies them simply by the opt out procedure?

MR. ATKINS: Not simply, Your Honor.

QUESTION: What else?

MR. ATKINS: I think that that's part of it. The adequate representation, the scrutiny of the courts. The opt out procedure complies with procedural due process. Rather than a static kind of mechanism in terms of no minimum contacts, you're out of court, we are saying let the Illinois courts within the framework of an Illinois statute, within the provisions of the Constitution relative to the due process, let this thing grow. Let the courts of Illinois or the courts of another state apply their mechanisms. And I think there is enough protections there and not the kind of bugaboos and conjectures and speculations that somehow may occur to the interstate system, may occur to some other

states. We have some very qualified state court judges, and I think that they should be able to handle these matters.

QUESTION: Well, you wouldn't suggest, would you, that -- that Illinois consistently with the Constitution could require Gillette to pay $8.00 times 168,000 in the court for distribution among class members, and at the same time concede that many of those members who did not opt out would not be bound?

MR. ATKINS: Well, if -- are you talking about an adjudication or are you talking about a settlement, Your Honor?

QUESTION: I'm talking about an adjudication. If they require -- if the judgment requires Gillette to pay in a certain amount of money for 168,000 people, that's on the premise that everybody who didn't opt out would be bound.

MR. ATKINS: That's correct.

QUESTION: And if that's wrong, Gillette, it seems to me, has some due process claim of its own, not just for absent class members.

MR. ATKINS: Well, Gillette could -- Gillette could argue the -- you're talking about Gillette's arguing their own due process rights?

QUESTION: Yes. Double liability.

QUESTION: Double jeopardy.

MR. ATKINS: The double liability in terms of --

QUESTION: Yeah, double jeopardy.

MR. ATKINS: In the collateral estoppel stage, Judge, that is the time and place to -- to raise those issues. And if -- if -- if it's to be enforced or challenged with respect to a judgment entered in Illinois court, that's the time to challenge --

QUESTION: Well, I know, but in the other -- in the other jurisdiction it's going to be -- in the other jurisdiction the claim is going to be there wasn't any jurisdiction in the Illinois court to bind me, none at all. And you wouldn't suggest that it's a very agreeable result if the defendant has to pay twice to the same people.

MR. ATKINS: I don't think that it would occur, Judge.

QUESTION: All right.

CHIEF JUSTICE BURGER: Thank you, counsel.

MR. ATKINS: Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Miller?

ORAL ARGUMENT OF ARTHUR R. MILLER, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. MILLER: I'd like to make it clear that as of this moment the Illinois decision on all federal questions is final. The only thing left open for Illinois at this judgment are Illinois state issues. And as this bench knows --

QUESTION: Mr. Miller, let me interrupt you on that. Don't you think that the binding effect of the judgment might be affected by the character of the notice that goes out? Supposing they sent out a notice saying we've got just the title of the case and do you want to opt out, or supposing on the other hand they write a notice that says you might get stuck with costs, you might have to respond to discovery, your maximum recovery is $4.80, and the lawyer is so and so. It seems to me it could make a great deal of difference as to how --

MR. MILLER: It can, Your Honor, but let me back up. There are at least three levels of potential collateral attack that Gillette must face unless this issue is resolved, and I think this may tie to some of the thoughts Justice White was expressing.

First, if you do not decide this question now, people will collaterally attack this judgment on the basis of a lack of personal jurisdiction. Second, no matter what you decide in terms of the power of Illinois

to go forward in this action, although that may prevent collateral attack on the personal jurisdiction point, it will not prevent collateral attack if Illinois goes forward on adequacy of representation grounds, Hansberry and Lee.

And third, Your Honor, your very point, there's always the potential for collateral attack on a state court judgment based on inadequate notice. That is why we believe we have standing in this case. In Hanson and Denckla those were the very threats facing the Florida defendants and why they said unless you decide the question of jurisdiction over that Delaware trustee, we are threatened by the potential for collateral attack down the line.

QUESTION: Those are Gillette's own concerns.

MR. MILLER: Those are Gillette's own concerns. I believe my learned colleague may have slightly mistook our argument, which is not necessarily a third party standing or surrogate standing argument; that is our concern under Hanson and Denckla.

I believe, by the way, that the third party standing argument is available to us since that has always been a rule of prudential administration. And I think it's abundantly clear first that we are injured by the assertion of jurisdiction in Illinois; and second,

that it is extraordinarily improbable that the third party is going to come in and assert the points that we are asserting at this juncture.

I'd like to point out that under the Illinois consumer protection statute the prevailing party secures costs. There are no opinions as yet whether that would embrace the ability to assess costs over a non-formal party class member.

I think Justice Stevens was getting at the enormous potential difficulties in choice of law problems here for any court that seeks to assert jurisdiction over non-resident, nonvolitional class members and then purports to apply the legal rules of the other states.

Which legal rules? The fee rules? The prevailing attorney fee rules? Or such rules as are now common in a state like my own, Massachusetts. In Massachusetts a consumer who feels aggrieved under the Massachusetts statute must write a letter to the company. The company is given 30 days to make a reasonable offer of settlement. If the reasonable offer of settlement is rejected and the case proceeds to trial and the consumer does not prevail to the settlement point, there's no liability for costs or fees.

Now, is the State of Illinois going to apply

that principle, or is the major consumer policy of the Commonwealth of Massachusetts -- and I could lists dozens of comparable illustrations -- simply going to be ignored as the State of Illinois plays PacMan with its little electronic monster going around the screen gobbling up $7.95 claims saying oh, they're just dots, they're just dots; because that really is what is at issue in this case: whether consistent with interstate federalism you will allow a court with no contacts to do that.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

The Gillette Company, Petitioner v. Steven Miner - No. 81-1493

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BY Pirie Hammond

(REPORTER)