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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: TICOR TITLE INSURANCE COMPANY, ET AL., Petitioners v. WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT

CASE NO: No. 92-1988

PLACE: Washington, D.C.

DATE: Tuesday, March 1, 1994

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TICOR TITLE INSURANCE :

4 COMPANY, ET AL., :

5 Petitioners :

6 v. : No. 92-1988

7 WALTER THOMAS BROWN AND :

8 JEFFREY L. DZIEWIT :

9 - - - - - - - - - - - - - - - - - -X

10 Washington, D.C.

11 Tuesday, March 1, 1994

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 10:02 a.m.

15 APPEARANCES:

16 RICHARD G. TARANTO, ESQ., Baltimore, Maryland; on behalf

17 of the Petitioners.

18 GERALD D. W. NORTH, ESQ., Philadelphia, Pennsylvania; on

19 behalf of the Respondents.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 RICHARD G. TARANTO, ESQ.

4 On behalf of the Petitioners 3

5 ORAL ARGUMENT OF

6 GERALD D. W. NORTH, ESQ.

7 On behalf of the Respondent 25

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 now in Number 92-1988, the Ticor Title Insurance Company

5 v. Walter Thomas Brown and Jeffrey Dziewit. Mr. Taranto.

6 ORAL ARGUMENT OF RICHARD G. TARANTO

7 ON BEHALF OF THE PETITIONERS

8 MR. TARANTO: Mr. Chief Justice and may it

9 please the Court:

10 This case presents the question whether it is

11 constitutionally permissible to insist that certain claims

12 be litigated all at once in a single Federal class action,

13 rather than through numerous repetitive and possibly

14 inconsistent lawsuits.

15 Our position is, first, that there is no due

16 process bar to this useful procedure where, as is no

17 longer disputed in this case, the class action court has

18 jurisdiction over the class and the interests of the class

19 members were fairly represented.

20 Where those conditions are met, the choice

21 whether to have a mandatory class action for particular

22 kinds of claim should remain only a matter of policy,

23 including where monetary claims are at stake, and second,

24 even if the Constitution requires more than the interest

25 in avoiding multiple suits to justify mandatory class

1 action, such as the interest reflected in (b)(1) and
2 (b)(2) of current Rule 23, those additional interests are
3 present in this case.
4 Now, if I can put aside the question of personal
5 jurisdiction, which is now conceded here, I want to begin
6 with the relevant history as to class actions. That
7 history has two aspects, the first --
8 QUESTION: Mr. Taranto, I hope in your history
9 you will cover whether you think (b)(2) and (b)(3)
10 classifications are interchangeable so that if you have a
11 group where some might prefer the (b)(3) class, that is,
12 making compensatory damages the thing, and others are
13 content with the (b)(2) classification, a court can
14 nonetheless force on the people who might prefer the
15 (b)(3) class the one in which you cannot opt out.
16 MR. TARANTO: I think that as a constitutional
17 matter, it is permissible for the rulemakers or for
18 Congress to decide that once the conditions of numerosity
19 and adequate representation are fully guaranteed, that the
20 interests in having a single mandatory class and therefore
21 denying opt-out rights are constitutionally sufficient,
22 necessarily notwithstanding the desire of certain
23 individuals to pursue their own litigation, and I think,
24 as a constitutional matter, that is in fact consistent
25 with the history of this Court's treatment and the

1 evolution of the rules.

2 This Court has, beginning in the 1854 case of

3 Smith, on through the insurance benefit cases in the early

4 decades of this century, then on through Hansberry v. Lee

5 and later cases, always identified adequacy of

6 representation as the constitutional benchmark, and some

7 of those cases, notably the insurance cases, specifically

8 involve monetary claims where in some sense (b)(3) in

9 current terms might have been available for certain people

10 who wanted to opt out.

11 What the Court has never done is to declare the

12 particular circumstances where mandatory class actions

13 have been permitted are the only ones where that is

14 constitutionally so, and in particular, the one sentence

15 in Shutts, Phillips Petroleum v. Shutts, that the Ninth

16 Circuit relied on, doesn't do that, because Shutts is only

17 about the prerequisites for personal jurisdiction.

18 The second aspect of the history that I think is

19 important here is precisely the evolution of choices about

20 when mandatory classes are appropriate. One set of

21 choices is, of course, embodied in the current Rule 23.

22 Another set of choices is currently under consideration by

23 the advisory committee.

24 An earlier set of choices was embodied in the

25 original 1938 rules, and still before that, before the

1 rules in 1938, there was a wide variety of opinion among
2 all sorts of courts about when mandatory class actions
3 were appropriate with -- and the important point about
4 that variety of opinion and the evolution of choices is
5 that the debate has always been on nonconstitutional
6 grounds, insofar as relevant today. There was once a jury
7 trial issue, but that's not any longer a live issue after
8 the merger of law and equity.
9 So what the history I think stands for is
10 precisely flexibility as a policy matter about when the
11 interests in consolidating all actions in a single
12 proceeding override any remaining individual interest, and
13 that flexibility I think is perfectly correct under the
14 prevailing due process analysis of Mathews v. Eldridge.
15 The reasons for mandatory class actions derive
16 from the basic defining characteristic of numerosity.
17 Where that is present, there are strong interests in
18 avoiding costly, repetitive, possibly inconsistent
19 results, and these interests have a number of overlapping
20 aspects that can appear in different mixes in different
21 kinds of cases.
22 QUESTION: May I ask if it's your view that if
23 the district judge here had determined that (b)(3) was the
24 appropriate mode for this, that that would also be all
25 right, that this is totally a matter of discretion for the

1 initial trier?

2 If he styles this a (b)(2) class, then that's

3 okay, but equally, it wouldn't have been wrong, would it,

4 for the trial judge to have said, this case I think

5 belongs under the (b)(3) mold, and there should be notice

6 and an opportunity to opt out, because some people might

7 prefer compensatory relief?

8 MR. TARANTO: I think it is a matter of

9 discretion in the sense that courts of appeals review

10 certification decisions under a fairly deferential abuse

11 of discretion standard. I think a certification under

12 (b)(3) rather than under (b)(1) or (b)(2) where those

13 conditions are met can in fact be an abuse of discretion.

14 One of the points that has been made by many

15 courts is that (b)(3) is a kind of catch-all provision,

16 and most cases that would properly fall under(b)(1) and

17 (b)(2) could also come within (b)(3), and the structure of

18 the rules therefore suggest that there will be some cases

19 that really should be categorized under (b)(1) and (b)(2).

20 There are cases, and I think this is properly

21 one, in which at a minimum it was proper to certify the

22 case under (b)(1) and (b)(2). Whether the certification

23 was so clearly proper under those standards that

24 certifying it under (b)(3) instead would have been an

25 abuse of discretion, I don't know.

1 Of course, if this had been certified under
2 (b)(3), this whole constitutional issue would not in fact
3 have arisen, because then opt-out rights would have been
4 provided in the original lawsuit.
5 QUESTION: Mr. Taranto, can -- do you think a
6 State or Congress could establish a system in which you no
7 longer have the choice of your own lawyer to prosecute
8 causes of action, saying, you know, lawyers have gotten
9 too expensive, we're going to establish a career attorney
10 system, and you simply get assigned your lawyer when you
11 want to vindicate some civil right?
12 MR. TARANTO: Well, I think that the analysis
13 that would have to be followed would be a Mathews v.
14 Eldridge analysis, and I'm, as I'm standing here,
15 uncertain what kind of weighty State interest there might
16 be in saying that any particular individual has no right
17 to choose an individual's own lawyer.
18 QUESTION: Well, it should just be expense of
19 attorneys. But that's how you'd approach it. Every --
20 despite the fact that we've had a tradition that you can
21 pick your own lawyer in the past, it's an open question,
22 and you simply balance --
23 MR. TARANTO: Well, I think -- no. No, I
24 don't --
25 QUESTION: -- the elimination of that historic

1 right against -- against the utility to the State.

2 MR. TARANTO: Well, I think that what the

3 Mathews v. Eldridge analysis does provide for is the

4 change from earlier, the traditionally established ways of

5 proceeding.

6 QUESTION: So does what you're proposing. I

7 mean, the cases that you've mentioned are cases that

8 involve either equity or limited funds, the historic

9 cases, so this is really a new proposal.

10 MR. TARANTO: Well, the kinds of cases that have

11 been permitted as mandatory class actions under (b)(1) and

12 (b)(2) since 1966 have extended beyond --

13 QUESTION: Well, I consider --

14 MR. TARANTO: -- (b)(1) and (b) --

15 QUESTION: Yes, I'm sorry, I have a warped

16 timeframe. I mean, as far as the Due Process Clause is

17 concerned I consider 1966 recent.

18 (Laughter.)

19 QUESTION: 175 years too late.

20 (Laughter.)

21 MR. TARANTO: But the history in particular of

22 monetary claims, and it does go back to 1854, it's a

23 little --

24 QUESTION: It goes back to that date in a very

25 different context, where you have a limited fund.

1 Everybody can't possibly get it, and maybe you could
2 extend that to the situation where defendant is likely to
3 be bankrupted by too many private claims, and I suppose
4 that would be analogous, but where that isn't -- where
5 that isn't in the cards, or there's no indication of that,
6 and the only problem is there are a lot of lawsuits, I
7 think that's pretty new.
8 MR. TARANTO: Well, I don' think so, Justice
9 Scalia.
10 QUESTION: How about a mass tort -- a plane
11 crash, a railroad disaster? Could you bring that as a
12 mandatory (b)(2), and then after you settle the liability,
13 just have individual hearings on damages?
14 MR. TARANTO: Well, if the question is as a
15 constitutional matter, I think that the answer is yes. I
16 think that rulemakers or Congress could determine that, if
17 the issues are truly common, so that any particular
18 interest is in fact adequately being represented, then a
19 mass tort case could constitutionally be consolidated in a
20 single proceeding.
21 QUESTION: And a mass tort case in fact isn't,
22 so it remains an academic question. Is it not so that you
23 might get a (b)(3) but you would not get a (b)(2) class
24 certified?
25 MR. TARANTO: It is -- mass tort cases are

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1 commonly treated under (b)(3), not under (b)(2). There is
2 an increasing development to treat at least some aspects
3 of mass tort cases, maybe even all of them, under (b)(1),
4 under (b)(1)(B), which is roughly speaking about limited
5 funds, where the assets of the defendant would -- might
6 well be exhausted by tens of thousands of tort suits, and
7 then the traditional limited fund justification comes in.
8 But let me return if I may for 1 minute, it is
9 true that this Court has not -- had not had to deal with a
10 class action, a mandatory class action outside some broad
11 view of what a limited fund is, but other courts did in
12 fact deal with such cases, and if one looks at some of the
13 prior history, prior to 1938, some of the cases discussed
14 in the influential articles by Professor Chafee, I think
15 what that shows is that various courts were in fact
16 treating the avoidance of multiple litigation as, by
17 itself, a sufficient interest to have a single, mandatory
18 proceeding.
19 So there is, in fact, some historical precedent
20 for this, though admittedly not in this Court.
21 QUESTION: Congress could repeal outright any
22 private claim of antitrust for antitrust liability against
23 a defendant, couldn't it?
24 MR. TARANTO: Yes. I think in --
25 QUESTION: So why couldn't it do this lesser

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1 thing of requiring a certain degree of consolidation take
2 place?
3 MR. TARANTO: I think with respect to a Federal
4 statutory claim, there probably is an additional
5 congressional power to, in effect, condition the kinds of
6 proceedings in which certain kinds of claims created by
7 Congress can be brought.
8 This case, of course, is one in which we do have
9 a Federal statutory claim, but I do think that as a
10 constitutional due process matter the point extends
11 further, and the basic reason is, aside from the fact that
12 I think the history is relatively open on the subject and
13 precisely allows flexibility of choice, is that what's on
14 the individual side of the balance is an interest in
15 controlling one's own litigation to ensure against
16 incorrect adjudication or unfair compromise.
17 QUESTION: Mr. Taranto, your response to the
18 Chief Justice surely doesn't suggest that simply because
19 Congress can eliminate a claim entirely it can provide for
20 that claim to be tried with any process whatever?
21 MR. TARANTO: No, I don't think that's right. I
22 think this Court's --
23 QUESTION: The one doesn't necessarily include
24 the other. If you allow the claim to subsist, there are
25 certain process requirements for its trial that apply

1 nonetheless.

2 MR. TARANTO: Yes, I think that's right, but

3 what Congress has done in a number of contexts is to say,

4 in particular when an administrative agency makes a

5 ruling, sets prices, for example, under the price

6 administration regime of World War II, that there shall be

7 one forum at one time in which that can be challenged, and

8 if -- I assume there are hundreds of such challenges

9 brought within the 30 days in the D.C. circuit or the

10 Emergency Court of Appeals. There is going to be,

11 necessarily, some kind of consolidated, representative

12 proceeding in which that claim will be heard.

13 What the mandatory class action device does is

14 essentially mirror that kind of consolidated proceeding

15 where the justification of numerosity calls for it.

16 Now, many different choices, I think are

17 permissible about when that can -- that ought to be done,

18 and the current rules clearly do weigh different interests

19 somewhat differently. The interests that are present in

20 (b)(1) and (b)(2) are interests that the rulemakers deem

21 somewhat greater of greater weight than the interest

22 present in what -- in the residual (b)(3) category. In

23 addition to the shear burden of multiple litigation, there

24 are the additional interests of avoiding inconsistent

25 obligations or the so-called cohesion interests that

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1 respondents refer to.

2 QUESTION: Mr. Taranto, given the reflection of
3 those interests, if you're right on due process, does a
4 court have any discretion in applying preclusion rules?
5 In other words if we were to say, sure, there's no due
6 process problem in your position, does that -- does that
7 leave a court with any opportunity to hear a claim simply
8 based on the inappropriateness of applying preclusion in a
9 given case, given the fact that the preclusion rules
10 themselves embody a -- ultimately a flexible, a kind of an
11 equitable circuit breaker standard?

12 MR. TARANTO: I think so. I mean, the --
13 Rule 23 does not itself determine the preclusive effect of
14 judgments. It plainly was intended to provide that
15 everybody included within the judgment shall be bound by
16 the judgment but does not itself lay down the preclusion
17 rules. The preclusion rules continue, by and large, to be
18 a matter of Federal common law, and those rules, if one
19 looks at the Restatement or this Court's cases, basically
20 say that a representative action where adequacy of
21 representation is guaranteed shall have preclusive effect.

22 There are certain elements of discretion
23 embodied in those rules, but in general the finality and
24 efficiency purposes that preclusion rules are designed to
25 serve do in fact require a certain measure of clarity as

1 to those standards as well, and therefore the discretion
2 as to preclusion is relatively minimal, though there is a
3 genuine important judgment to be made about when the
4 representation was truly adequate.
5 Now, that judgment, of course, was made in this
6 case. The principal challenge to the binding effect of
7 the Philadelphia class action in this case was a challenge
8 based on adequate representation.
9 QUESTION: But would it make any sense to
10 conclude here that the representation was adequate, again
11 so far as any due process standard might be concerned. It
12 was certainly adequate in the sense of competence, but
13 that there was in fact at least a sufficient disparity of
14 interest between, we'll say, the intending Arizona
15 plaintiffs here, so that for res judicata purposes we
16 would not apply preclusion against them. Would that -- is
17 there any way that would make sense?
18 MR. TARANTO: Well, let me say two things about
19 that. First, I think that that would necessarily present
20 a question about adequacy of representation that is not
21 presented in his Court, but second, I think in this
22 particular case that would not make sense.
23 If one puts oneself back in the framework of
24 1985 and 1986, and looks in particular at the dispute over
25 whether Arizona and Wisconsin and certain other States

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1 were different in relevant respects from the other States
2 affected by the class, I think it is very hard to question
3 the judgment of not only adequate but in fact quite
4 vigorous representation.
5 Recall, back in '85, within 3 months of the
6 filing of this lawsuit, this Court decided the Southern
7 Motor Carriers case, suddenly creating a much more
8 substantial -- indeed, what the district court in
9 Philadelphia thought, a pretty clearly winning State
10 action defense on antitrust grounds.
11 There is also the McCarran-Ferguson question,
12 which has still not been finally resolved in this case.
13 Those are questions that, of course, have taken the FTC
14 9 years to litigate, and the judgment is still not final
15 as to them.
16 Beyond those two questions there is at least the
17 question, not present in the FTC case, of seeking damages,
18 and where damages are alleged, there would be the
19 additional burden of establishing that, even if the
20 participation in the rating bureaus was illegal under the
21 antitrust laws, that the resulting rates were higher than
22 what they would have been in a purely competitive system.
23 And with respect to all of those factors, what
24 Judge Van Artsdellon decided, and what the lower courts in
25 this case decided, was that there really were no concrete

1 appreciable differences between Arizona and Wisconsin on
2 the one hand, and the other States on the other.
3 And whatever differences there may have been
4 were so outweighed by the prospect of 9 years of
5 additional litigation, all for the prospect of possibly no
6 damages at the end of the day, that it was a perfectly
7 reasonable, responsible choice of a vigorous advocate to
8 say, we will settle for the following sorts of injunctive
9 relief, some of which is retrospective, in the sense that
10 it provides additional insurance benefits to all members
11 of the class, and so I think in this particular case there
12 really is no ground for deciding that some higher level of
13 representative adequacy is necessary.
14 QUESTION: I suppose it would follow from what
15 you say that it would at least be constitutionally open to
16 provide a trial regime in which a Court could conclude
17 that one were -- that a given plaintiff was not subject to
18 a summary judgment motion, and was not subject to a
19 dismissal motion, but on grounds of unlikelihood of
20 success, in effect could suffer a dismissal, because that
21 in effect is the standard by which you are judging, or I
22 think you were judging the reasonableness of the decision
23 that was made about the adequate representation of those
24 who wanted to go all the way for damages, or at least
25 claimed they did.

1 MR. TARANTO: Well, I think it is important to
2 separate the question of adequacy of representation
3 leading to an adjudicated decision and adequacy of
4 representation leading to a settlement, although the two
5 are necessarily, in practical terms, interlinked.
6 Here, I think, in fact both of those that the
7 representation was perfectly adequate as to both, just as
8 I think it was perfectly reasonable to certify this
9 particular class under both (b)(1) and (b)(2), and (b)(1),
10 the critical point is -- what (b)(1) says is that we
11 should certify a class if there's a risk of varying
12 inconsistent or varying adjudications.
13 And what that has been used for time and again
14 are cases not simply in which the defendant might be told
15 by one court to do something and another court to do
16 precisely the opposite, but rather for a whole range of
17 circumstances involving Government benefits and other
18 kinds of situations where the defendant has some kind of
19 legal obligation to act consistently toward all the
20 plaintiff class.
21 Here, the defendants do have that obligation,
22 and they have that obligation not only prospectively in
23 terms of the rates that they would charge or their
24 behavior in establishing insurance rates within a
25 particular State, but retrospectively as well, because any

1 damages that would be paid would in effect create a
2 retroactive rate, and all the -- all the State regulatory
3 regimes here declare that there shall not be
4 discrimination through all of the writs.
5 QUESTION: Wasn't this class originally --
6 wasn't there a question in the complaint originally for
7 (b)(3) certification?
8 MR. TARANTO: Well, there were a dozen
9 complaints, eventually reduced to, I think, nine. Some of
10 them asked for (b)(3), some of them did not specify. They
11 simply said, under Rule 23. I think four of the
12 complaints did not specify what subsection they were
13 seeking to proceed under.
14 That would, though, however, have been quite
15 dramatically changed by this Court's decision in Southern
16 Motor Carriers, because by the time the FTC brought its
17 action in early 1985, and these actions were then filed
18 literally within days of the FTC action, the participation
19 in the rating bureaus was by and large over, so in that
20 sense, at that time, they were mostly looking for
21 retrospective relief.
22 What Southern Motor Carriers did was suddenly,
23 in a very real sense, to raise the prospect of future
24 participation in rating bureaus being permitted. There
25 was now something very much forward-looking to think

1 about, and at the same time there was very much a weaker
2 claim for any kind of retrospective relief, so --
3 QUESTION: Mr. Taranto, in the chronology of
4 these proceedings, what was the last point at which these
5 respondents or other persons in their position could
6 object to the certification of the class? Was the issue
7 of miscertification open to them at all points? At what
8 point were they barred from rearguing the certification of
9 the class?
10 MR. TARANTO: Well, I think that if the question
11 of certification is not a constitutional one, then I think
12 the question of certification is not open in a separate
13 collateral suit. These particular plaintiffs, as well as
14 the various attorneys general who pursued this interest in
15 the Philadelphia action, were entitled to, and did, press
16 the question of certification in that action and took an
17 appeal and eventually cert was denied.
18 On the other hand, if the certification
19 standards of (b)(1) and (b)(2) become constitutionalized,
20 and it becomes a matter of due process right to have an
21 opt-out opportunity in those circumstances where one can
22 only be in (b)(3) but not in those circumstances where
23 (b)(1) and (b)(2) are appropriate, then at least I think I
24 have a hard time seeing how the certification question,
25 now constitutionalized, wouldn't be open on collateral

1 attack.

2 QUESTION: Well, under your view of the case,

3 under your submission, when was the last point at which

4 these respondents could have asked the class be

5 recertified or objected to the miscertification of the

6 class? Sometime before our decision in Southern Motor

7 Carriers?

8 MR. TARANTO: Well, they could have made the

9 argument about certification at any time in the

10 Philadelphia proceeding before there was a final judgment.

11 I think the argument would have, in fact --

12 QUESTION: But any time before final judgment.

13 MR. TARANTO: Yes, I think so, and indeed, that

14 issue was taken up to the Third Circuit eventually on

15 certiorari, but one reason I think that, aside from the

16 fact that this is a case in which (b)(1) and (b)(2) were

17 found to be present and have not been challenged in this

18 Court, and I think were quite proper because of the need

19 for uniformity in the treatment by defendants of all of

20 their consumers, even aside from that, I think one

21 important reason why the current Rule 23 categories

22 shouldn't be constitutionalized any more than the original

23 1938 Rule 23 category should be constitutionalized, is

24 that --

25 QUESTION: Mr. Taranto, are you saying that no

1 one of the other side is claiming that it was wrong to
2 make this a mandatory class as distinguished from a
3 class -- from a (b)(3) class in which people can opt out?
4 I thought that was what the case was about on the other
5 side, that there was a constitutional right here to
6 notice, and an opportunity to opt out, and that was -- it
7 was wrong for the district judge in Philadelphia to
8 preclude that, and it remains wrong, and that it's a
9 matter of due process. I thought that was the very
10 argument the other side was making.
11 MR. TARANTO: I agree that the argument the
12 other side is making is that due process requires an opt-
13 out right either for all monetary claimants or for some
14 monetary claimants. What I think has not been contested
15 and certainly was not contested in the lower courts is
16 whether the conditions laid out for mandatory treatment in
17 (b)(1) and (b)(2) are present here. It has never been
18 disputed that this was properly certified under (b)(1) and
19 (b)(2).
20 QUESTION: Could one take the position, so far,
21 yes, as far as injunctive relief is concerned, the class
22 is delighted with that, but you can't cut out the damage
23 remedy without giving us an opportunity to have notice, an
24 opportunity to be heard on our own. That is, to accept
25 the mandatory class for purposes of injunctive relief, but

1 not for purposes of cutting out compensatory relief.

2 MR. TARANTO: I think that that is a reasonable

3 policy choice, but it's not constitutionally required,

4 because monetary claims have always -- some monetary

5 claims have always --

6 QUESTION: Is it possible to argue that that's

7 the policy choice that a fair reading of the entire rule

8 made?

9 MR. TARANTO: I think the current rule -- I

10 think it is possible to interpret the current rules as

11 making that policy choice. I think it is also possible to

12 interpret them otherwise.

13 QUESTION: But if we interpret the current rule

14 as having made that policy choice, we wouldn't -- and if

15 we agreed with your opponent, having made that policy

16 choice, then we wouldn't reach the constitutional issue,

17 we would reverse on a construction of the rule, wouldn't

18 we?

19 MR. TARANTO: Except that the construction of

20 the rule has not in fact been litigated in this particular

21 case. It has never been disputed in this case that (b)(1)

22 and (b)(2) were proper, and --

23 QUESTION: Yes, but has it not been disputed

24 that -- whether you could recover damages, whether that

25 would foreclose the damage claim? Haven't they contended

1 right along that the certification, as Justice Ginsburg
2 suggested, is only good for equitable relief?
3 MR. TARANTO: As a constitutional matter they
4 have made an argument that adequate representation is not
5 present, and that due process under Shutts always requires
6 monetary claims to be separated out, which it plainly
7 cannot do in (b)(1), and I don't think it needs to in
8 (b)(2) either, and even if it were -- that were true under
9 (b)(2) as a matter of interpreting the rule, I don't think
10 it's true as a constitutional matter.
11 QUESTION: If it follows that for the monetary
12 claims the people who would like to press such claims
13 can't be taken out, then the label that you put on it,
14 then you say well, to that extent it belongs under (b)(3),
15 but the claims don't come into court with some kind of
16 magic label ahead of time.
17 If you decide that there is -- that the damage
18 claim is something that can't be cut out because some
19 people in the group like it that way better than others,
20 then the classification is under (b)(3).
21 MR. TARANTO: I think that that is an argument
22 that was made in the Philadelphia proceeding, can be made
23 under the rules, but the constitutional question is
24 whether that categories that are laid out in (b)(1) and
25 (b)(2) and (b)(3), highly imprecise as they are, must be

1 present as a constitutional matter.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

3 Taranto. I think you've answered the question.

4 Mr. North, we'll hear from you.

5 ORAL ARGUMENT OF GERALD D. W. NORTH

6 ON BEHALF OF THE RESPONDENTS

7 MR. NORTH: Mr. Chief Justice and may it please

8 the Court:

9 I think there is a nonconstitutional basis for

10 deciding this case, and it has been asserted, it was

11 argued in the Ninth Circuit, and it's been argued here.

12 It stems, however, not from whether the certification in

13 MDL 633 was itself proper, but whether the judgment below,

14 in determining the preclusive effect of the judgment, was

15 proper.

16 What actually occurred in MDL 633, and the

17 record is quite clear, is the cases both as individually

18 filed and --

19 QUESTION: Mr. -- would you state your

20 nonconstitutional argument again?

21 MR. NORTH: Yes. The damage claims that were

22 purportedly foreclosed in MDL 633 could not have been

23 asserted there in the proceeding as it was constituted in

24 that court. Therefore, there was never an opportunity for

25 these plaintiffs to litigate that issue. No proceeding

1 has a preclusive effect with respect to issues that could
2 not have been litigated, and I'd add that since these were
3 absent plaintiffs, we have no splitting of cause of action
4 type problem.

5 QUESTION: So this is the law of judgments
6 and --

7 MR. NORTH: Precisely.

8 QUESTION: -- estoppel by judgment, that sort of
9 thing, that you're urging now?

10 MR. NORTH: Exactly.

11 QUESTION: But why isn't the argument the deal
12 that was made in the MDL cases the group adequately
13 represented decided to surrender its claims for monetary
14 relief in exchange for these 5(c) equitable type remedies?

15 MR. NORTH: Well, the problem is -- there's a
16 small procedural problem, but the reality, if I can begin
17 with that -- the reality of what occurred is this. The
18 cases as filed all sought treble damages and were
19 predominantly for money damages under section 4 of the
20 Clayton Act. Only incidentally was injunctive relief
21 sought, because as my opponent has pointed out, there was
22 nothing left to enjoin. All the rating bureaus had
23 already been disbanded.

24 Class counsel during the proceeding decided not
25 to pursue the treble damage claims in both the district

1 court and the MDL 633 proceeding, and the district court
2 below in this case concluded that those claims had been
3 dropped, and that is the language those courts used. The
4 claims were dropped.
5 Instead, without ever filing a new case,
6 injunctive claims were asserted, and the case was settled
7 in a manner that both courts deemed primarily or literally
8 exclusively injunctive in nature.
9 In the process of settling the case, the class
10 attorneys who had declined to continue to represent the
11 damage cause of action traded it to settle the injunction
12 case. That was improper. There was never an opportunity
13 by the plaintiffs in this case either to litigate their
14 damage case in MDL 633 or to exclude themselves from that
15 and pursue those claims.
16 We know the claims were substantial. MDL 633 in
17 the approval decision itself called them tens of millions
18 of dollars, and we know because this case was already
19 settled, that these particular claimants had substantial
20 damage claims in the millions of dollars.
21 QUESTION: Well, is there an argument, assuming
22 you lose on the constitutional aspect of the case, that
23 the court's ruling is res judicata as to your clients on
24 this point, that you could have objected to the
25 certification, or the miscertification?

1 MR. NORTH: We were absent parties in the case,
2 so we never really had an opportunity to object, and
3 frankly, since there was no first class mail notice,
4 merely notice by publication, I think Mullane would bar
5 that kind of an argument. These plaintiffs never even
6 knew this was going on. They never had an opportunity to
7 come in and object.
8 Yes, the Attorney General of Arizona and the
9 Attorney General of Wisconsin objected, but they were
10 never accepted by the MDL 633 court in a parens patriae
11 capacity, only in their capacity as representing the State
12 and its subdivisions, which also had a damage interest.
13 QUESTION: Mr. North, the question which we
14 granted certiorari is whether a Federal court may refuse
15 to enforce the judgment in Nationwide class actions
16 certified under Rule 23 on the ground that unnamed class
17 members have a constitutional right to opt out of any
18 class action asserting monetary claims.
19 Now, your argument here is directed to really
20 what is an alternate ground for affirmance, I take it.
21 MR. NORTH: It is, although that we do argue
22 that the answer to the certified question is that yes, the
23 district court most certainly can refuse to give
24 preclusive effect, and we believe this Court's decision in
25 Shutts establishes that.

1 QUESTION: Yes. I hope you'll cover that in
2 your argument.
3 MR. NORTH: I will right away, if I may.
4 Shutts has been argued, and we were guilty of
5 this below as well, to some extent, in terms of personal
6 jurisdiction by many, many courts and many parties, but
7 when it is read in light of its predecessor decision,
8 Hansberry v. Lee, it can't mean that.
9 The basic principle that's at issue here is the
10 principle that parties that are not -- persons who are not
11 party to a lawsuit may not be bound by a judgment entered
12 in that litigation, and that an attempt to enforce such a
13 judgment against such a person is violative of both the
14 Fifth and the Fourteenth Amendments, and that is in the
15 critical paragraph spanning pages 40 to 41 of Hansberry v.
16 Lee.
17 So we already know that there is a principle
18 that is equally applicable under the Fifth and Fourteenth
19 Amendment. The question is the exception to the basic
20 principle, which is what our opponents urge. They urge
21 the exception which is the class case. Hansberry v. Lee,
22 and subsequently this Court's decision in Shutts, sets out
23 the minimal procedural due process protections that are
24 required for that exception for class representation type
25 litigation to overcome the more basic principle. Those

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1 protections were not accorded here. There was no right to
2 opt out.
3 QUESTION: Certainly reasonable people could
4 disagree, I think, about your reading of the Shutts
5 opinion as to whether it's dealing with personal
6 jurisdiction or procedural due process.
7 MR. NORTH: Reasonable people have disagreed, so
8 the answer must be that they could, but the truth is --
9 the truth is that it doesn't stand analysis, because the
10 due process protections accorded absent class members
11 stems from the Due Process Clause, not from Article 3, so
12 all of the arguments that are made by our opponents about
13 the greater sovereignty of the United States v. that of
14 individual States has nothing to do with the right that is
15 being asserted, which stems from the Due Process Clause,
16 the same clause that appears both in the Fifth and
17 Fourteenth Amendments.
18 In fact, this Court, when dealing with foreign
19 nationals, has treated their right to protection from
20 jurisdiction of any United States court as stemming also
21 from the Due Process Clause, not from Article 3, so
22 arguments about greater sovereignty of a Federal court
23 potentially, had Congress granted that, versus a State
24 court, really can't be what Shutts is about.
25 QUESTION: Well, but Shutts could be about the

1 jurisdictional requirements for State courts dealing with
2 these sort of things as opposed to Federal courts.
3 MR. NORTH: Well, it could, but it doesn't seem
4 that it is, because the pattern of thinking and the
5 pattern of argument reflected in Shutts is the same as is
6 reflected in Hansberry v. Lee and Mullane.
7 In each case, this Court addressed first the
8 territorial jurisdictional issue and concluded that State
9 courts did have territorial jurisdiction to entertain
10 class actions in which some of the class members were
11 nonresident.
12 Having disposed of that issue, as this Court did
13 in Shutts by concluding that there was no requirement for
14 minimum contacts by absent class members, the Court then
15 went on and described what was required as a matter of
16 minimal due process, and it does so in terms of a host of
17 protections that are traditionally thought of in terms of
18 procedural due process equally owed by a Federal court.
19 There is nothing in the opinion, other than in
20 responding to the personal jurisdiction arguments that had
21 been raised below, that suggests that the decision should
22 not apply to a Federal court.
23 If Shutts has not resolved this issue, however,
24 and if a Mathews analysis is appropriate for the first
25 time in this case, then we submit that the absent class

1 members win hands down, and they do because there is no --
2 no competing governmental interest to weigh in the
3 balance.
4 The argument that has been asserted here is that
5 if we allow opt-outs we will have multiple suits. Well,
6 (b)(3) actions avoid multiple suits just as readily as
7 (b)(2) actions, with the exception --
8 QUESTION: You concede that there are class
9 actions that would fit in the (b)(1) or the (b)(2)
10 category where it is not necessary to give individual
11 notice and an opportunity to opt out.
12 MR. NORTH: Well, we concede that the rules so
13 provide, and that this Court has allowed such actions in
14 the past, yes. That's certainly true.
15 QUESTION: For example, for injunctive relief.
16 MR. NORTH: But typically in those cases the
17 individual interest and the value of having an opt-out
18 rate is much less than in cases that would otherwise
19 properly be brought under the (b)(3) label. In (b)(1) and
20 (b)(2) phases, properly so categorized, the interests of
21 the class are common. The case will be decided by a
22 judge, and the relief to be accorded will be common to
23 all, whether they opt out or not.
24 If the named plaintiff proceeds, even without a
25 class being certified, and succeeds in obtaining

1 injunctive relief, all of the class members who might have
2 opted out will benefit from that relief.
3 The damage case presents some peculiar problems
4 because of the likelihood that individuals within the
5 class will have differing damage claims or be subject in
6 some cases to defenses that other members of the class are
7 not subject to. That is why (b)(3) has typically been
8 thought of as a joinder device, not a true class action.
9 That is why there is a greater need for opt-out. Also, it
10 is more effective. There is actually, and the history of
11 the litigation shows that allowing an opt-out right is
12 efficacious in cases involving monetary damages.
13 QUESTION: Mr. Taranto brought up the limited
14 fund case as a case that you could proceed, where you
15 could force -- you could have a mandatory class, force
16 everyone into the forum to get pieces of this very limited
17 pie.
18 MR. NORTH: Well, the constitutional issues, if
19 there are any, in a (b)(1)(B) class action have perhaps
20 more to do with Article 3 and the interrelationship of
21 sitting Federal judges and bankruptcy judges than any of
22 the issues that have been presented in this case. Since
23 those issues really haven't been joined in this case, we
24 would have to concede that in that situation a mandatory
25 class is appropriate.

1 The governmental interest in avoiding multiple
2 suits, we contend, is equally protected in (b)(3) actions
3 with one exception, and the one exception is where, in the
4 case of a settlement class, the settlement is not fair to
5 all of the claimants, and where the settlement is not
6 fair, the governmental interest in avoiding multiple cases
7 must give way to the fairness that is owed to the
8 adversely affected class members.
9 Few people opt out of settlements that are fair,
10 particularly where they need to then go fund the
11 litigation, and particularly in class action situations
12 where the amount of damages typically is not as large as a
13 normal private suit might involve.
14 So the reason for attempting to avoid opt-out
15 can't be because there's a strong governmental interest in
16 avoiding multiple suits. The principal reason is because
17 defendants seek to avoid all future litigation in the
18 settlement, seek to use it as a way to cut off any future
19 claims.
20 Well, allowing that to occur certainly does
21 foster greater efficiency in the sense that it ends
22 litigation, but it doesn't foster greater fairness. If
23 opt-out is allowed, those who opt out are opting out
24 because they believe their claims will be adversely
25 affected by the settlement that is proposed, or in the

1 more typical case, which is not this case, where the
2 certification occurs at the beginning of the case, not
3 when the case is being settled and those individual class
4 members are able to exercise their full -- their full
5 power under the basic principle of Hansberry v. Lee to
6 decide their own litigation fate.
7 QUESTION: Mr. North, assuming you're right
8 about this, that you had to be given a right to opt out,
9 why didn't you have to assert that right in the original
10 litigation? Why didn't you have to assert that right in
11 the Third Circuit, when that MDL case was appealed there?
12 MR. NORTH: Two reasons. First, I believe
13 Hansberry v. Lee and its progeny established that
14 collateral attacks of the kind brought here are the
15 appropriate vehicle for testing the preclusive effect of
16 such a judgment, but more importantly, as I think I
17 mentioned a few moments ago, there was no first class mail
18 notice in this case, so that most, if not all the affected
19 class, did not know there was anything to object to.
20 It is true that a handful of States attorneys
21 general knew about the case, and one way or the other, a
22 handful of individuals learned about the case through
23 notice by publication, but most of the class, most of the
24 people whose claims were foreclosed, purportedly, never
25 knew that that was happening.

1 They didn't know there was a case in the first
2 place. They didn't know they were represented by an
3 attorney. They didn't know the attorney had dropped the
4 damage claims. They didn't know that new claims had been
5 asserted of an injunctive nature, and they didn't know
6 that the damage claims were being traded for the
7 injunctive relief.
8 QUESTION: What about the people who did have --
9 from what you say, I gather some people did have actual
10 notice.
11 MR. NORTH: Yes, and they --
12 QUESTION: What about them?
13 MR. NORTH: Well, the Attorney General of
14 Arizona sought to opt out, and took that to the Third
15 Circuit, which affirmed the judgment without opinion, and
16 in a subsequent opinion explained that decision as likely
17 reflecting their understanding and the argument that the
18 petitioners here had advanced that collateral attack was
19 the appropriate vehicle to test the right to opt out.
20 QUESTION: If the Attorney General had been
21 recognized as parens patriae, would you still have had a
22 constitutional opt-out right?
23 MR. NORTH: Probably not.
24 QUESTION: Well, why not, under your theory?
25 MR. NORTH: Well --

1 QUESTION: Why is the Attorney General in any
2 better stead --
3 MR. NORTH: If the Attorney --
4 QUESTION: -- than someone who is certified as
5 being an adequate representative after an adversary
6 hearing in the court?
7 MR. NORTH: Well, had he been certified as a
8 representative, had the Attorney -- perhaps I
9 misunderstood the question. Had the Attorney General of
10 Arizona been certified as the class represent -- as
11 attorney for a proper class representative of the Arizona
12 class, well then, of course there would be -- the issue
13 would have been decided on direct appeal, and there would
14 be nothing left to decide, because the absent class
15 members would have been proper parties at that point.
16 Here, they never were proper parties. They weren't named
17 parties.
18 QUESTION: Well, why don't you have a
19 constitutional right to drop out of a suit where the
20 Attorney General is acting parens patriae?
21 MR. NORTH: Well, we would have that right, but
22 all I'm saying is that had we been in the case as proper
23 parties, that right would have been adjudicated in the
24 Third Circuit and we would no longer be able to challenge
25 it again, but that didn't occur. We never had that

1 opportunity. The Attorney General tried, but the
2 plaintiff here did not.
3 QUESTION: Mr. North, you said that the Attorney
4 Generals were not appearing as parens patriae for the
5 citizens of the State at the time. Were they asserting
6 damage claims on behalf of the State institutions they
7 represented?
8 MR. NORTH: They were, the school boards and so
9 forth. They sought also to appear as parens patriae but
10 were not so accepted by the district court.
11 QUESTION: I see, but they were denied the right
12 to assert damage claims at the time of the class
13 certification decision?
14 MR. NORTH: Yes. They were as equally adversely
15 affected as the other absent class members, but for the
16 fact that they chose to participate, because they learned
17 of the case and appeared and objected.
18 QUESTION: I don't really understand what
19 happens in parens patriae, since you say if the Attorney
20 General of the State suing in that capacity wins,
21 everybody benefits, but if he loses, those who didn't get,
22 what, first class notice so that they can opt out, can
23 nonetheless sue again?
24 MR. NORTH: Well, no, I don't believe I said
25 that. Perhaps I --

1 QUESTION: No, I'm asking.

2 MR. NORTH: Oh -- no, I was not asserting that.

3 QUESTION: You asserted that there is a right to

4 opt out in parens patriae cases as well, right? You did

5 say that.

6 MR. NORTH: No, I think what I asserted was that

7 had the Attorney General of Arizona been appointed as

8 class counsel for a class representative from Arizona,

9 yes, there would still have been an argument that we had a

10 right to opt out, but that argument would have been

11 adjudicated in the Third Circuit where the Attorney

12 General for the State of Arizona -- in fact --

13 QUESTION: But there was -- there were

14 representatives that were designated to represent the

15 entire class.

16 MR. NORTH: None of them were from Arizona or

17 Wisconsin.

18 QUESTION: But they were -- purported

19 representatives. At least, they were certified as such.

20 MR. NORTH: Yes, they were.

21 QUESTION: And you said something about notice.

22 The Mullane case on which you rely doesn't require that

23 every person in the class get notice in order to bind them

24 to the adjudication, does it?

25 MR. NORTH: Not everybody, but everybody whose

1 address can be found. That was the holding in Mullane.

2 QUESTION: Had to get first class mail notice.

3 MR. NORTH: Correct. In other words, when you

4 can give people the notice that is due them, they should

5 get that notice. Yes, we have the problem where there are

6 trust common fund situations where there are beneficiaries

7 who cannot be found, and so forth, and a court must

8 proceed. Mullane recognizes that kind of an exception,

9 but here, there were certainly many purchasers of title

10 insurance in the States of Arizona and Wisconsin who could

11 have received first class mail notice.

12 QUESTION: Well, Mullane was dealing with an

13 existing property right and a trust. I'm not sure that

14 carries over bag and baggage into the plaintiff's

15 notification in a class action suit.

16 MR. NORTH: Well, I think that in all of the

17 cases that have come after Mullane, most class lawyers

18 have thought that Mullane means that first class mail

19 notice is required if it is possible, in an appropriate

20 case.

21 Now, there are provisions in the rule, in Rule

22 23, for avoiding that, but the issue comes up, if you

23 will, only in terms of explaining why the absent class

24 members did not have an obligation to come appear and

25 challenge their inability to opt out in MDL 633, and my

1 answer to that is, in many cases they didn't know there
2 was anything to challenge.
3 QUESTION: Well, you say -- several times you've
4 said, in many cases. Now, is it a fact that some people
5 other than the Attorney General of Arizona, who are simply
6 private plaintiffs, did have actual notice?
7 MR. NORTH: I can't know that, but it must be
8 the case that if the notice by publication which the
9 petitioners here certified they did at the time was done
10 and was done properly, someone must have read it in the
11 newspaper.
12 QUESTION: Mr. North, am I not correct that you
13 argued that the notice was not only inadequate as a
14 constitutional matter, but was inadequate under the rules,
15 because it was the equivalent of a (b)(3) action --
16 MR. NORTH: Correct.
17 QUESTION: -- and the judge responded by saying
18 all the damage claims are dropped so the notice by
19 publication is okay.
20 MR. NORTH: Yes.
21 QUESTION: So you argued not only constitutional
22 inadequacy of notice, but inadequate under the rules.
23 MR. NORTH: We believe that it was inadequate
24 under the rules.
25 QUESTION: Yes.

1 MR. NORTH: It depends on how you look at what
2 actually transpired in MDL 633, because technically the
3 complaints never were amended to drop the damage claims,
4 but as a practical matter and by judicial decision, they
5 were.
6 The class lawyers who had brought these treble
7 damage claims, clearly (b)(3) type cases, decided they
8 would not pursue those claims because they didn't think
9 they'd win, so they brought, in effect, another case, and
10 then traded the claims they were no longer going to pursue
11 for the claims they now wished to pursue, the net result
12 being the payment of substantial attorneys fees and no
13 recovery for the class.
14 That's what we object to. We think there's two
15 ways of looking at that. One is that the certification
16 itself was okay under (b)(1) and (b)(2), but what was
17 improper was the attempt by the trial court in 633 to
18 foreclose damage claims that were never really litigated.
19 QUESTION: What would the class -- assuming the
20 class loses here, would they have a cause of action
21 against the lawyers who did that to them?
22 MR. NORTH: Probably barred by the statute of
23 limitations, Justice Scalia. Probably at this point
24 barred by the statute. I might add, however, just --
25 since you've raised it, because the case has settled, this

1 case will proceed on its track in a sense regardless of
2 the outcome here, and so I don't think that issue will
3 ever actually arise.
4 QUESTION: We're talking about a different
5 settlement now, and maybe --
6 MR. NORTH: The settlement that's actually in
7 this case.
8 QUESTION: Yes. Can you tell us at what stage
9 that is -- you -- I forgot, now, which side moved to
10 dismiss the petition for cert because you were pursuing
11 settlement.
12 MR. NORTH: We -- it was our side, and what we
13 moved for was a deferral of the briefing and the argument
14 pending final approval in the district court.
15 The status is that since the court denied that
16 motion, a final settlement agreement has been entered into
17 between the parties, a motion has been filed in the Ninth
18 Circuit seeking a limited return of a mandate for purposes
19 of allowing the district court to consider the settlement,
20 and I believe we're within a few days of finalizing a
21 proposed order to submit the entire matter to Judge
22 McNamee in Arizona for preliminary and ultimately final
23 approval.
24 QUESTION: How -- what is the projected
25 timetable for when that settlement agreement will be --

1 final order will be entered in the district court on it?

2 MR. NORTH: That would be very difficult for me

3 to say. I believe that we will be able to submit it to

4 Judge McNamee in the month of March, possibly early in the

5 month of March, because there are very few issues between

6 us on the proposed order at this point. There are some

7 matters that he will want to consider when we bring it to

8 his attention, and I don't know how quickly he'll act.

9 QUESTION: And then because it's a notice of a

10 class settlement you'd have to give notice --

11 MR. NORTH: Yes.

12 QUESTION: -- and opportunity to people.

13 MR. NORTH: Yes. There will be a month or two

14 period for notice, and opportunity to object in the final

15 approval hearing. Perhaps this is a 6-month matter, but

16 that's just a guess.

17 QUESTION: Because it's conceivable that a

18 judgment by this Court might have an effect on those

19 pending settlement --

20 MR. NORTH: I don't think so.

21 QUESTION: -- proposals.

22 MR. NORTH: I don't believe it would. I believe

23 that -- well, except in -- it's difficult to predict a

24 result that hasn't -- an outcome that doesn't exist yet,

25 but it's my belief that regardless of what happens in this

1 Court, the settlement process will go forward. We have an
2 agreed-upon settlement, and certainly from the side of the
3 petitioners, they've bound themselves to the settlement
4 both 3 days before cert was granted and now again, since
5 cert was granted, so we believe that the settlement would
6 certainly be binding upon the petitioners, regardless of
7 the outcome.

8 QUESTION: So the opposite result is more
9 likely. That is, that the settlement will affect the
10 decision of this Court, rather than that the decision of
11 the Court will affect the settlement.

12 (Laughter.)

13 MR. NORTH: I think that entirely depends upon
14 the speed with which you --

15 QUESTION: That's right.

16 MR. NORTH: -- dispose of the case.

17 QUESTION: Mr. North, just so I'm sure about the
18 state of the law, your opponent cannot cite common law
19 cases, by which I mean pre-1966 cases, in which -- in
20 which actions of this sort were brought for money damages,
21 but on the other hand, you cannot cite any in which such
22 actions were denied. Am I correct?

23 I mean, you point out that there are no bills of
24 peace allowed for money damages, class actions for money
25 damages, but you don't have any cases where that was

1 sought to be done and the Court said no.

2 MR. NORTH: I can't provide that to you standing

3 here, Justice Scalia. I will point out, however --

4 QUESTION: No, I'm -- you can answer that

5 question standing there. Do you know of any?

6 MR. NORTH: No, I cannot --

7 QUESTION: Okay.

8 MR. NORTH: -- give that to you here, but I can

9 point out to you that the traditional, the old and

10 original equity rule under which the permissive joinder

11 cases were allowed as a matter of the rule specified that

12 there would be no binding effect as a result of any

13 judgment entered on absent class members, those who chose

14 not to interplead under the procedures of the day.

15 Post --

16 QUESTION: But you're not questioning that in

17 (b)(1) and (b)(2) actions that the rule framers meant

18 those to be binding on all members of the class, like it

19 or not?

20 MR. NORTH: We're not questioning that.

21 I have nothing further to add in my argument.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. North.

23 The case is submitted.

24 (Whereupon, at 11:00 a.m, the case in the above-

25 entitled matter was submitted.)

CERTIFICATION

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

TICOR TITLE INSURANCE COMPANY, ET AL., Petitioners v. WALTER THOMAS BROWN AND JEFFREY L. DZIEWIT CASE NO: 92-1988

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