### OFFICIAL TRANSCRIPT

#### PROCEEDINGS BEFORE

## THE SUPREME COURT

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SUPREME COURT, U.S MARSHAL'S OFFICE

# OF THE

# **UNITED STATES**

CAPTION: MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET

AL., Petitioners v. LAWRENCE EPSTEIN, ET AL.

CASE NO: No. 94-1809

PLACE: Washington, D.C.

DATE: Monday, November 27, 1995

PAGES: 1-54

### CORRECTED COPY

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1	IN THE SUPREME COURT OF THE UNITED STATES
2	X
3	MATSUSHITA ELECTRIC INDUSTRIAL :
4	CO., LTD., ET AL., :
5	Petitioners :
6	v. : No. 94-1809
7	LAWRENCE EPSTEIN, ET AL. :
8	X
9	Washington, D.C.
10	Monday, November 27, 1995
11	The above-entitled matter came on for oral
12	argument before the Supreme Court of the United States at
13	11:03 a.m.
14	APPEARANCES:
15	BARRY R. OSTRAGER, ESQ., New York, New York; on behalf of
16	the Petitioners.
17	HENRY P. MONAGHAN, ESQ., New York, New York; on
18	behalf of the Respondents.
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1	PROCEEDINGS
2	(11:03 a.m.)
3	CHIEF JUSTICE REHNQUIST: We'll hear argument
4	now in Number 94-1809, Matsushita Electric Industrial
5	Company v. Lawrence Epstein.
6	Mr. Ostrager, you may proceed.
7	ORAL ARGUMENT OF BARRY R. OSTRAGER
8	ON BEHALF OF THE PETITIONERS
9	MR. OSTRAGER: Mr. Chief Justice and may it
10	please the Court:
11	The issue in this case is whether the Ninth
12	Circuit should have given a final judgment of the Delaware
13	supreme court the same effect it would have been given in
14	Delaware. The Delaware judgment approved a class action
15	settlement and incorporated a release of all claims
16	arising out of the transaction at issue, including
17	exclusively Federal claims.
18	This Court's decision in Marrese teaches that
19	the Full Faith and Credit Act applies to all State court
20	judgments, including State court judgments which have a
21	preclusive effect on exclusively Federal claims. Thus, we
22	believe that section 1738 requires that a State court
23	judgment incorporating a consensual release of exclusively
24	Federal claims must be given full faith and credit.
25	The Ninth Circuit's decision does not cite

1	Marrese at all, and ignores this Court's full faith and
2	credit jurisprudence as reflected in this Court's
3	decisions in Allen, Kremer, Migra, and Parsons Steel.
4	These cases all teach that if a State court judgment bars
5	subsequent litigation under the law of the rendering
6	court, that a Federal court must grant full faith and
7	credit to that judgment
8	QUESTION: Subject to due process, though, is
9	that not right? No full faith and credit if there's been
10	no due process in the rendition of the judgment.
11	MR. OSTRAGER: Yes, Your Honor, and in addition
12	the Marrese test indicates that full faith and credit must
13	be granted unless there is an express or implied repeal by
14	the after-enacted statute.
15	QUESTION: So can you tell me how the due
16	process adequate representation, which I think is the
17	focal point of this case how did the Delaware judgment
18	satisfy the adequacy of representation essential to due
19	process requirement?
20	MR. OSTRAGER: The Delaware Rule 23 procedure,
21	which is precisely the same as the Federal Rule 23
22	procedure, constituted a full and fair opportunity for the
23	absent class members to contest the process which bound
24	the class, and notice was sent to all class members which

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contained the outcome of the case.

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1	Class members were told that a settlement had
2	been reached and precisely what the class members were
3	receiving and what they were giving up. Each class member
4	had the right to opt out. Each class member had the right
5	to appear and object.
6	This Court held in the Shutts case that failure
7	to opt out constitutes consent to the jurisdiction
8	QUESTION: I'm still concerned
9	MR. OSTRAGER: of the class action.
10	QUESTION: with the adequacy of the
11	representation, because you said in your brief, I believe,
12	that that was actually litigated and decided, and
13	therefore would have issue-preclusive effect, so can you
14	describe because I don't quite get from the briefs what
15	was the record that was established on the adequacy of the
16	representation. I know there are these two boiler plate
17	phrases in the chancery court's decision, but what was
18	behind the determination that there was adequate
19	representation of this class?
20	MR. OSTRAGER: In this case, Your Honor, the
21	objectors appeared and were heard. The objectors had the
22	opportunity to conduct discovery concerning the decision-
23	making process of the class representatives. That appears
24	in the record at Joint Appendix cites 255 and 256.
25	The objectors specifically raised the issue of

1	the adequacy of representation. The objectors contended
2	that there was something collusive about the Delaware
3	settlement. That appears in the Joint Appendix at pages
4	242 to 244. This is not a case where the
5	QUESTION: So what was the evidence they made
6	those charges, and then was there any kind of hearing on
7	them? What happened?
8	MR. OSTRAGER: There was a hearing before the
9	Delaware chancery court. The objectors raised their
0	arguments that there was inadequate representation. They
- 1	raised arguments
2	QUESTION: But whose burden is it to show
13	adequacy of representation? Is it the objectors' burden
4	to show inadequate representation? What was the showing
15	made of the adequacy of this representation?
16	MR. OSTRAGER: In this case, the class in
17	Delaware was represented by 12 class representatives
18	QUESTION: Were they named?
1.9	MR. OSTRAGER: named class representatives,
20	and they were represented by 20 sets of lawyers. Four
21	sets of the lawyers were named as co-lead counsel, and
22	16 sets of lawyers were named as part of a committee of
23	the whole.
24	QUESTION: What do you do with the problem that
25	the chancery court judge initially said. I'm not even

1	going to I'm not going to accept this first settlement
2	because there's nothing in it for the shareholders,
3	there's only something in it for the lawyers? Wouldn't
4	that create a special necessity to show the adequacy of
5	this same representation?
6	MR. OSTRAGER: Your Honor, our position is that
7	if this settlement had been presented to the Federal
8	court, which had dismissed the Federal claims, and the
9	state of the record was the same record which was
10	considered by the Delaware chancery court and the court
11	was looking at the settlement ex ante, and looking at the
12	settlement at the time it was entered into, the same
13	result would have been reached.
14	Our position is that the Delaware chancery court
15	and all State courts are equally capable, as Federal
16	courts are, in considering the fairness and adequacy of
17	the settlement.
18	QUESTION: So you say that any court, looking at
19	the record that was made on the adequacy of representation
20	here, would conclude on that record that the
21	representation was adequate.
22	You agree with me, do you not, that it is the
23	representatives' burden to show the adequacy and not the
24	objectors' burden to show the inadequacy?
25	MR. OSTRAGER: We believe that it is for the

1	court before whom the case is pending, consistent with
2	Rule 23 procedure, to make a determination concerning the
3	adequacy of representation.
4	QUESTION: Who has the burden under Rule 23?
5	MR. OSTRAGER: I believe it would be the class
6	representatives, and I believe it important to know that
7	in this case, in which the adequacy of representation was
8	actually litigated, the respondents in this case were not
9	the type of sideline-sitters who were referred to by
10	Justice Stevens in his dissent in Martin v. Wilks.
11	QUESTION: There was an appeal to the Delaware
12	supreme court. Was the adequacy of representation one of
13	the grounds for appeal, because I the judgment of the
14	Delaware supreme court is simply of straight out
15	affirmance. It doesn't indicate what issues were raised.
16	MR. OSTRAGER: Yes. This was challenged on
17	appeal, and I think it
18	QUESTION: Who appealed?
19	MR. OSTRAGER: The objectors appealed.
20	QUESTION: Who are the objectors?
21	MR. OSTRAGER: The objectors in this case were a
22	Mr. Krupman and two relatives of Mr. Minton, and
23	significantly, and this goes to the point I made about
24	sideline-sitters, significantly the respondents in this
25	case prepared a draft objection which was utilized by the

1	objectors in the Delaware fairness hearing. That appears
2	in the record at the Joint Appendix at pages 250 to 251.
3	So we have a situation where there was full
4	litigation on the issue of adequacy of representation.
5	Many of the due process issues that are asserted here but
6	which were not considered by the Ninth Circuit at all in
7	its opinion, were raised in the Delaware chancery court.
8	QUESTION: But the full litigation is still what
9	I don't have a clear picture of, and you told me that
10	there were objections, and then I didn't I wasn't clear
11	on how the representative met its burden of showing that,
12	despite those objections, its representation was indeed
13	adequate.
14	MR. OSTRAGER: The
15	QUESTION: What was the evidence of that?
16	MR. OSTRAGER: The representatives presented to
17	the Delaware chancery court a full record of the totality
18	of circumstances that preceded the settlement.
1.9	QUESTION: Where would I find if I wanted to
20	look for what evidence the chancery court considered in
21	making that determination, where would I find it?
22	MR. OSTRAGER: The hearing before the chancery
23	court appears beginning at page 222 of the Joint Appendix.
24	QUESTION: Just tell me everything that's
25	relevant to the adequacy of the representation.

1	MR. OSTRAGER: What is relevant to the adequacy
2	of the representation is that these class members were
3	represented by
4	QUESTION: No, I mean where do I find it,
5	because I don't want to detain you any more, just so I can
6	check on my own. Everything the record on which the
7	chancery court made the determination that the
8	representation was adequate, the full record.
9	MR. OSTRAGER: The full record includes the
10	submissions by the class representatives of all the
11	proceedings in the court, and among the places where these
12	are found are at the Joint Appendix at 269, 270, 271, and
13	those pages reference exhibits that were included in the
14	submissions to the Delaware chancery court which reflected
15	the entire history of the litigation before the Delaware
16	chancery court and the entire history of the litigation in
17	the Federal court.
18	QUESTION: Was it after that record had been
19	assembled and reviewed at the trial level that the trial
20	judge made the remark that there was perhaps a whiff of
21	collusion but that was not proof of it?
22	MR. OSTRAGER: Yes, Your Honor.
23	QUESTION: So he had seen all of that, and he
24	seemed to put the burden of proof on the other side.
25	MR. OSTRAGER: I believe that

1	QUESTION: And express a suspicion.
2	MR. OSTRAGER: I believe that the issue of
3	suspicions abounding was raised. These types of
4	suspicions unfortunately exist in every class action.
5	QUESTION: Yes, but I guess my point is, he both
6	expressed suspicion and, if I understand his remark
7	correctly, assumed that the burden of proving inadequate
8	representation was on those who objected to it, isn't
9	that is that correct?
10	MR. OSTRAGER: Your Honor, I believe that what
11	the Delaware chancery court found was that the
12	representatives were adequate, and that the settlement was
13	fair and reasonable, and that the suggestions
14	QUESTION: Well
15	MR. OSTRAGER: that there was something
16	inappropriate about the representations were not
17	QUESTION: Help me out. I don't want to put
18	MR. OSTRAGER: established
19	QUESTION: I don't want to put words in your
20	mouth, but as I recall his remark, which I don't his
21	statement, which I don't have in front of me, he said
22	there was something, a whiff or suspicion or what-not, of
23	collusion, and then he went on to say, as I recall, that
24	that, however, is not enough. That does not prove that it
25	occurred.

1	And doesn't that further statement suggest that
2	he thought the burden of proof on the issue of adequacy
3	was upon those who objected, not upon the class
4	representatives?
5	MR. OSTRAGER: I don't believe that to be the
6	case, Your Honor. I believe that
7	QUESTION: Am I tell me where I'm wrong on my
8	factual assumptions.
9	MR. OSTRAGER: I believe that his conclusion was
10	that the representatives were adequate and had fairly
11	represented the class, and that any suggestion to the
12	contrary was unfounded.
13	QUESTION: Mr. Ostrager, on what authority do
14	you base your statement to Justice Ginsburg that the
15	burden of proof was on the class members to prove the
16	adequacy?
17	MR. OSTRAGER: Well, I believe that the concept
18	of representative action is such that the court must make
19	a finding in order to bind class members that
20	representation is adequate. That is implicit in both the
21	Shutts case and the Eisen case.
22	QUESTION: Did either of those cases talk about
23	the burden of proof?
24	MR. OSTRAGER: I don't believe they explicitly
25	referenced the burden of proof. I believe in this case we

1	can meet that burden of proof and have demonstrated that
2	this issue was fully and fairly litigated before the
3	Delaware chancery court, and as to that issue, there
4	should be issue preclusion.
5	QUESTION: Is there any case authority for who
6	has the burden of proof on the adequacy of representation?
7	Do you know of any cases that decide that question?
8	QUESTION: I cannot cite the Court to a specific
9	case on that issue.
10	QUESTION: Can I ask you a slightly the
11	Delaware court finds that the representation is adequate,
12	let's say that's affirmed on appeal in Delaware, and that
13	notice was adequate, and all the constitutional requisites
14	are complied with.
15	Then is that finding itself binding upon a later
16	Federal court for full faith and credit purposes, or can a
17	person who believes to the contrary come into Federal
18	court and ask them to relitigate that on the ground that
19	they weren't fair.
20	I, says this person who's never been heard of
21	before, you see, never have been to Delaware, know nothing
22	about this, don't read my mail, and I would like to now
23	litigate in Federal court whether that was a
24	constitutionally adequate protection of my rights because
25	I wasn't even in Delaware and the representation was so

1	terrible that, of course, it violated the Due Process
2	Clause of the Constitution to take property from me.
3	How does that work? Is me now, the imaginary
4	me, bound by this finding as to the constitutional due
5	process adequacy of the representation in Delaware by the
6	decision of the Delaware court, or can the Ninth Circuit
7	or the Federal Circuit relitigate all that?
8	MR. OSTRAGER: I believe this Court answered
9	that precise question head on in the Shutts case.
10	QUESTION: In Shutts.
11	MR. OSTRAGER: In Shutts the Court, discussing
12	an opt-out settlement and we are dealing in this case
13	with an opt-out settlement. Any class member who wanted
14	to pursue a Federal claim in a Federal forum could have
15	merely by executing the opt-out form, and in the Shutts
16	case
17	QUESTION: And they said, by the way, in
1.8	Delaware, Breyer got that piece of paper, and I say in the
19	Ninth Circuit, no, Breyer never even got it. They sent it
20	to the wrong address.
21	Now, is Breyer bound by that finding in
22	Delaware, and Shutts says he is it is.
23	MR. OSTRAGER: Under Mullane and under Eisen the
24	notice that should go out has to be the best notice

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practicable.

1	QUESTION: Yes, and they said that it was, but
2	what I want to show is, not only is it not the best
3	notice, it's horrible. It all went to the North Pole. O
4	course Breyer didn't get his notice. I'm bound?
5	MR. OSTRAGER: I believe I believe that you
6	are bound. I believe in this case the adequacy of notice
7	is another issue that was specifically litigated
8	QUESTION: And Shutts
9	MR. OSTRAGER: in the Delaware court.
10	QUESTION: is the case that says I'm bound.
11	MR. OSTRAGER: Yes, and the Shutts case says
12	that it is the rare absent class member whose claim is so
13	important that he shouldn't be bound if he doesn't execut
14	an opt-out opportunity.
15	QUESTION: Yes, because I never got it. They
16	sent it to the North Pole.
17	MR. OSTRAGER: I believe if the if the best
18	notice practicable was used, then that is sufficient to
19	bind absent class members.
20	QUESTION: And I'm bound by the finding that it
21	was the best notice practicable
22	MR. OSTRAGER: I believe that even though
23	QUESTION: I've never heard of this case
24	before.
25	MR. OSTRAGER: I believe that is correct, Your
	15

7	Honor.
2	QUESTION: Shutts says that.
3	QUESTION: Did the Ninth Circuit deal with these
4	questions at all about adequacy of representation or due
5	process?
6	MR. OSTRAGER: No, it did not, Your Honor.
7	QUESTION: Let me go back to Justice Breyer's
8	question. I suppose ultimately the justification for the
9	conclusion that you press on him is that somehow there's
10	got to be a way of managing class actions, and once in a
11	while somebody's going to get hurt, possibly, but not hurt
12	very much, and that's simply a price that we've got to
13	pay.
14	One, I guess, objection to that line of argument
15	is, is the argument that in fact when State courts are
16	dealing with settlements of class actions which purport to
17	cover exclusively Federal claims, they have no legal
18	authority to authorize class representatives to make these
19	ostensibly binding agreements with respect to the Federal
20	claims at all.
21	What is your answer to that?
22	MR. OSTRAGER: Other than the Ninth Circuit
23	decision, we are aware of no decision in the Federal
24	system which holds that a court cannot resolve
25	consensually

1	QUESTION: Yes, but why shouldn't there be such
2	a decision?
3	MR. OSTRAGER: There shouldn't be such a
4	decision because in a long line of cases this Court has
5	recognized the importance of finality in transactions and
6	litigations.
7	If I may for one moment talk
8	QUESTION: May I ask you just before you
9	proceed on that line, we left one thing dangling, I think.
10	The question was, who has the burden, and you suggested to
11	the Chief that that's not really clear.
12	As a matter of Delaware law, to say nothing of
13	Rule 23(a)(4), isn't it absolutely clear since the Prezant
1.4	case that the representative has that burden?
15	MR. OSTRAGER: We have accepted that burden,
16	Your Honor.
17	QUESTION: But doesn't Justice O'Connor asked
18	you for a case. Doesn't that case, that State law case,
19	subsequent to this decision, just stand out for making
20	clear that there is a very strong burden on the
21	representative to establish adequacy?
22	MR. OSTRAGER: The Prezant case held
23	specifically, I believe, that it is incumbent upon the
24	reviewing court to make a finding of adequacy of
25	representation, and I don't mean to quibble with Your

1	Honor. We are accepting the burden of proving that
2	representation was adequate, and we believe it was met in
3	this case.
4	And if I could come back a moment to the
5	practical aspects of allowing the Ninth Circuit decision
6	to stand, if a finding that a class action settlement is
7	fair and is and one which is entered with all due
8	process can be the subject of collateral attack, it
9	eliminates all finality with respect to the scores of
10	other cases which are have been concluded in the State
11	court system and which involve a germ of a Federal claim.
12	It effectively forces all actions into Federal
13	court, because it's impractical for any litigant to settle
14	any case unless all claims arising out of a particular
15	transaction, actual or potential, State or Federal, are
16	concluded.
17	It allows class members to completely bypass the
18	ordinary and regular State court class action procedures.
19	QUESTION: Let me ask this about the power of
20	the Delaware court to order release of the Federal claims.
21	Suppose the chancery court said, I think there's very
22	little merit to this Federal claim, and therefore I am
23	going to approve the settlement, I think this Federal
24	claim is probably not destined to succeed, and in the
25	course of his analysis, he makes a misstatement of Federal

1	law.
2	Now, would his certification be reviewable on
3	certiorari to this Court on the grounds that he made a
4	mistake of Federal law?
5	MR. OSTRAGER: Certainly, if anything that
6	occurred in Delaware was violative of any Federal right,
7	review would be available on certiorari after review in
8	the Delaware supreme court, and
9	QUESTION: Do you think it would be reviewable
.0	if he didn't make an explicit statement but just made an
1	assessment of the Federal claim that was arguably
.2	erroneous?
.3	MR. OSTRAGER: I believe that Federal issues
4	that are decided in a State court are properly reviewable
.5	on direct appeal to this Court pursuant to 1257 rather
.6	than collateral attack.
.7	QUESTION: Is an assessment of the likelihood of
.8	success of the Federal claim an issue of Federal law?
.9	MR. OSTRAGER: I believe that in this case,
20	where the settlement court was looking at a situation
21	where the Federal claims had previously been dismissed and
2	was making an assessment of whether a settlement that was
3	available to a class then and at that point in time is
4	certainly something within the discretion of the State
.5	courts to resolve.

1	I might point out that
2	QUESTION: But you don't think that there was
3	any Federal issue there for us to review, assuming that
4	there had been a certiorari petition brought to us?
5	MR. OSTRAGER: I do not. I do not. I do not
6	believe that any issue that arises in the context of a
7	settlement impacts on Federal concerns. There's no impact
8	on the uniform enforcement of the Federal securities laws.
9	In this case, the opt-out right assured the respondents of
10	the right to pursue the Federal claims if they so chose.
11	The right to object enabled them which was availed,
12	enabled them to raise any Federal constitutional issues in
13	this Court on direct review.
14	The SEC could have reviewed any Federal issues
15	of consequence which arose out of this transaction wholly
16	apart from the disposition of this case by settlement.
17	Indeed, in this case, the only Federal interest
1.8	that was implicated by the settlement is the affirmative
19	Federal interest in ensuring efficiency of settlements.
20	QUESTION: Can you explain one thing about the
21	way this case unfolded? It was an initial determination
22	that these State claims were weak at best, and that stayed
23	at every stage.
24	When the chancery court said, the Federal the
25	State claims are of little or no value, there may be some

1	rederal claim here, why did the class representative
2	continue in the State forum when it appeared that the only
3	viable claim was a Federal claim over which the State
4	court had no jurisdiction? The Manage of the second
5	MR. OSTRAGER: I think we are dealing here with
6	the proverbial fluid situation. There was a State claim
7	asserted. The State claim certainly stated a claim upon
8	which relief could be granted. The State claim had issues
9	in it which, if litigated claim upon which could be
10	QUESTION: But you're a representative of a
11	class, and the judge has just told you, I don't think
12	these State claims are worth anything, maybe there's a
13	Federal claim here, and that's the same judge you're going
14	to be before. The State claims didn't change. They
15	didn't become any stronger.
16	MR. OSTRAGER: The class representatives in this
17	case most assuredly continued to monitor developments not
18	only in the State case but in the Federal case as well,
19	and there was ongoing discovery to which these class
20	representatives had access, and they
21	QUESTION: Isn't there something strange,
22	though, about a case being in State court when the only
23	really viable issue is a Federal one?
24	MR. OSTRAGER: I don't believe that the only
25	viable issue was a Federal issue, and I might point out

1	that Matsushita didn't initiate an action in the Delaware
2	chancery court. Matsushita was sued by 12 people
3	represented by 20 law firms in Delaware, and dealt with
4	that case as it defended the Federal case.
5	QUESTION: And probably could have gotten a
6	dismissal if it asked for it on the State claims. It
7	didn't ask for it. and release to the axtemu that the
8	MR. OSTRAGER: It was judgment of counsel that
9	the Delaware claim stated a claim upon which could be
10	granted. We question of due process or adequaty is raised
11	With the permission of the Court, I would like
12	to reserve the balance of my time for rebuttal.
13	QUESTION: Very well, Mr. Ostrager.
14	Mr. Monaghan, we'll hear from you.
15	ORAL ARGUMENT OF HENRY P. MONAGHAN
16	ON BEHALF OF THE RESPONDENTS
17	MR. MONAGHAN: Mr. Chief Justice, and may it
18	please the Court: In that position, the court is
19	My argument basically has two prongs. First,
20	I'd like to go into the issue of adequate representation
21	and, secondly, I'd like to convince the Court that in
22	fact, in view of the reply briefs, it's perfectly apparent
23	that there's no Marrese issue involved at all in the case.
24	QUESTION: Mr. Monaghan, the question presented
25	in the petition for certiorari is whether a Federal court

1	can withhold full faith and credit from a State court
2	final judgment approving a class action settlement simply
3	because the settlement included a release of exclusively
4	Federal claims.
5	Respondents phrase the question, did the court
6	below err in refusing to give preclusive effect to a
7	Delaware settlement and release to the extent that the
8	Federal claims were factually and legally unrelated to any
9	State law claims.
10	No question of due process or adequacy is raised
11	in the petition. You didn't cross-petition. This would
12	be a totally alternate ground for affirmance.
13	MR. MONAGHAN: Your Honor, two points. I think
14	first of all, we are respondents, and we can defend the
15	judgment on any ground consistent with the record. This
16	point was the central point of our argument below.
17	Secondly, even if we were in the petitioner's
18	point of view, are in that position, this question is
19	fairly included within the petition. The real question in
20	the case and they've reframed their question,
21	incidentally, from their brief to their reply brief. The
22	real question is, did the Ninth Circuit disregard
23	erroneously what happened in Delaware?
24	QUESTION: Well, that certainly isn't the

question -- it's a much narrower question presented by the

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- 1 petition, whether the State court can release Federal
- 2 claims as well as State claims.
- MR. MONAGHAN: It can't release those claims,
- 4 Your Honor, if in doing so it would violate the Due
- 5 Process Clause. They conceded that.
- 6 QUESTION: Well, that wasn't -- the Ninth
- 7 Circuit -- the Ninth Circuit said they couldn't do it
- 8 simply because State courts didn't have that authority.
- 9 MR. MONAGHAN: The Ninth --
- 10 QUESTION: And so I think, fairly understood,
- 11 that was the question presented on certiorari.
- MR. MONAGHAN: Well, I think -- well, all I can
- 13 say is, Your Honor, that whether or not that's the
- 14 question that they presented on certiorari, there was
- 15 countless case law in this Court that we can defend a
- 16 judgment --
- 17 OUESTION: Well --
- 18 MR. MONAGHAN: -- on any ground consistent with
- 19 the record.
- 20 QUESTION: -- Mr. Monaghan, I think you're at
- 21 some risk here today if you are unwilling to even argue
- 22 the question on which cert was granted.
- MR. MONAGHAN: Oh, I'm --
- 24 QUESTION: It's a question that I intend to deal
- with when I get to work on the case, and I would assume

1	you'd want to deal with it here
2	MR. MONAGHAN: I
3	QUESTION: and not go off on some peripheral
4	issues that aren't here.
5	MR. MONAGHAN: Well
6	QUESTION: I'm quite amazed.
7	MR. MONAGHAN: I will go exactly to the
8	question
9	QUESTION: You know, the Ninth Circuit seemed to
10	take the view that if it were an individual lawsuit in
11	State court, and there is a settlement in State court and
12	a judgment that disposes of a release of any Federal claim
13	as well, that the Federal court later would give full
14	faith and credit
15	MR. MONAGHAN: Yes, Your Honor.
16	QUESTION: to that judgment, but the Ninth
17	Circuit said it would not follow that rule or practice if
18	it's a class action, and I thought we were here to
19	determine whether that is correct or not.
20	MR. MONAGHAN: I'm perfectly I will turn
21	exactly to that point, Your Honor.
22	The there's a wide difference between an
23	individual releasing a claim within the exclusive
24	jurisdiction of the Federal court and a class
25	representative that's happy to do so.

1	When the individual releases his claim, the
2	State court judgment is not what effectuates the release.
3	The individual could release his claim sitting in his
4	rocking chair. The fact that he does so as part of a
5	proceeding before as part of a judgment, the judgment
6	isn't what effectuates the release. The judgment in the
7	State court has one advantage. It converts him from what
8	would otherwise be a simple contract creditor into a
9	judgment creditor which may give him affirmative rights
10	under the State lien law.
11	But when an individual releases his claim, as
12	this Court has recognized in the Mitsubishi case, he's
13	a) under no obligation to pursue it at all, and he can
14	release it outside the legal framework, and there's no
1.5	reason to believe he can't authorize it inside the
16	framework.
17	In this case, what happened is the class
18	representative gets his authority solely by virtue of his
.9	appointment. The complaint is organized entirely around
20	State law claims. We cannot understand how it is that the
21	State court, which could not adjudicate the claims, could
22	license a representative to go out, value those claims,
23	badger the defendant, value them, and then authorize a
24	release of those claims. This is directly inconsistent
25	with section 27.

1	If you will take a look
2	QUESTION: Why isn't the answer to this, if
3	there is an answer, that that is what the courts of
4	Delaware, at least, understand Delaware State law to be?
5	Why is Delaware why is it constitutionally impossible
6	for Delaware State law to grant this authority subject
7	always to a due process attack?
8	MR. MONAGHAN: Because the Supremacy Clause
9	forbids it. Section 27 forbids it.
10	QUESTION: Well, if there were a Federal statute
11	that expressly provided that no State court or no State
1.2	law system could authorize class representatives to make
13	this kind of an agreement in a way that would be binding
14	in the Federal court, I would see the argument, but
15	Federal law seems to be silent on it.
16	MR. MONAGHAN: Federal law is not silent on it
17	in our view, Your Honor. Section 27 provides for
18	exclusive jurisdiction to enforce these claims in the
19	courts of the United States. If I can and the question
20	is, what does that mean?
21	QUESTION: And what's the inconsistency there
22	with a State law saying, you are authorized to settle
23	these Federal claims?
24	MR. MONAGHAN: The question analytically is
25	whether a settlement in these circumstances amounts to an

- 1 enforcement of the claim.
- If you think about the structure of this case,
- 3 you had nonexistent State law claims. They were revived
- 4 at the last hour in a hope to extinguish a substantial
- 5 Federal appeal. All that occurred here in the chancery
- 6 court was a valuation of the worth of the Federal claims.
- 7 When --
- 8 QUESTION: Apart from this case, Mr. Monaghan,
- 9 though, I take it to be your position -- it's a rather
- 10 broad position -- that only a Federal court can approve a
- 11 settlement of a class action that releases a claim over
- which the Federal courts would otherwise have exclusive
- 13 jurisdiction.
- MR. MONAGHAN: We are prepared to defend that
- position here. We could adopt a narrower position, which
- is the Ninth Circuit's position, which the State court
- certainly can't do it with respect to claims which don't
- overlap, and there's no contention here that the claims
- 19 overlap. Delaware --
- QUESTION: But I take it from what you were just
- 21 arguing that that is the terminal point that you're going
- 22 to.
- MR. MONAGHAN: I'm perfectly happy to reach that
- 24 point, Your Honor. That's the way to vindicate the
- congressional judgment.

1	QUESTION: But then that would take all these
2	class actions out of the State arena and leave them
3	exclusively, if there's combined Federal and State claims
4	and there's securities claims, antitrust claims over which
5	there's exclusive jurisdiction, all of that has to be done
6	in the Federal courts, not in the State courts.
7	MR. MONAGHAN: There are a great many ways of
8	coordinating first of all, we should not exaggerate the
9	significance of the problem. There are no more than 300
10	securities class actions brought per year in the Federal
11	court, 300. There are presumably about 145 defendants
12	being sued. This information is collected in a recent
13	article in the Columbia Law Review.
14	What would happen in those circumstances is that
1.5	the State court you could file simultaneous suits in
16	both the State and Federal court. You could file the suit
.7	in the Federal court alone.
.8	If the argument ultimately is one of efficiency,
.9	I would say, Your Honor, you it's you shouldn't just
20	focus on efficiency of litigation costs. You ought to
11	look at efficiency of outcomes.
22	If the State court cannot adjudicate the claims,
3	it will systematically undervalue the Federal claims. You
4	can't be a good diplomat if you haven't got the power to
5	wage war.

1	But I'd go a step further, and I would say this.
2	Even if the Court were convinced that this is an
3	inefficient solution, this is the solution that expresses
4	Congress' will, in our judgment. Congress said
5	enforcement is in the Federal in the jurisdiction of
6	the Federal courts.
7	If you will look at point 1 of their briefs, the
8	heading of point 1
9	QUESTION: What page is it on, Mr. Monaghan?
10	MR. MONAGHAN: I'm sorry, Your Honor. Page 15.
11	This is how they describe the question: a grant of
12	exclusively Federal jurisdiction to adjudicate claims.
13	This is not what the statute says, and they've underlined
14	the word adjudicate.
15	We quote the statute on the opening page of our
16	brief. As a matter of fact, in the 70 pages of their
17	brief, they never quote section 27. You can't find it.
18	You can't find the text of it.
19	The on the opening page of our brief, this is
20	the statute, and my view is that I cannot understand how a
21	court which cannot adjudicate claims somehow gets the
22	authority to appoint a representative to do what Congress
23	has forbidden the court to do.
24	QUESTION: Suppose I have a divorce, and my
25	divorce is in Delaware, and I give my wife the right to

- use the Malibu beach house as part of the settlement.

  MR. MONAGHAN: Mm-hmm.
- 3 QUESTION: I mean, can't I do that, and couldn't
- 4 it be included in --
- MR. MONAGHAN: You've got personal --
- 6 QUESTION: -- the decree, and it all is in
- 7 California, all this property.
- MR. MONAGHAN: You've got personal jurisdiction
- 9 over both of those defendants.
- 10 QUESTION: Oh, but did -- they don't have
- jurisdiction here over the parties.
- MR. MONAGHAN: They do not have -- they have
- personal jurisdiction over the parties, but they do not
- have subject matter jurisdiction over the claims.
- QUESTION: And do they -- all right. My point
- is, I don't quite see -- it seems to me you have three
- separate arguments. The release argument I don't
- understand, because the word release is written right into
- 19 the judgment. We're talking about a judgment, not a
- 20 contract.
- I don't really understand the argument of -- I
- mean, the Williams Act seems to be a separate argument.
- 23 The Williams Act -- you have a lot of Federal statutes,
- like the antitrust statute and others, which are
- exclusive. I mean, the State courts cannot approve any

1	settlement that involves giving up any of these Federal
2	claims? Why? I mean, why not?
3	They can approve my giving up my beach house.
4	They can approve my giving up all kinds of things in a
5	settlement. Why can't they approve my giving up a class
6	action that's worth \$300?
7	MR. MONAGHAN: The beach house example is a case
8	of intrastate Federal
9	QUESTION: I know there are conceptual
10	MR. MONAGHAN: Right.
11	QUESTION: differences, but my point is
12	simply
13	MR. MONAGHAN: When you're talking about
14	QUESTION: but my point is simply that in
15	settlements people give up all kinds of things
16	MR. MONAGHAN: Individual
17	QUESTION: that have nothing
18	MR. MONAGHAN: Right.
19	QUESTION: to do with the case in front of
20	the person.
21	MR. MONAGHAN: That
22	QUESTION: Now, if, in fact, they can give up
23	all kinds of things, including beach houses, including
24	mineral rights somewhere, why, assuming the Due Process

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Clause is satisfied --

1	MR. MONAGHAN: Mm-hmm.
2	QUESTION: can't they give up a class action
3	right to some case, probably would never be broader, if it
4	was it would be worth \$300 to them?
5	I mean, I don't understand what in the law would
6	allow you to give up thousands of things, like houses, et
7	cetera, but you couldn't give up some kind of class action
8	right that's not worth too much to you?
9	MR. MONAGHAN: Your Honor, there's a fundamental
10	difference between an individual giving up something and a
11	class representative.
12	QUESTION: Yes. Yes, that's called the due
13	process problem. I'm leaving that out.
14	MR. MONAGHAN: No, it's not the Due Process
15	Clause. No, Your Honor, it's not the Due Process Clause,
16	with deference. The Due Process Clause claim is involved,
17	but if I'm an individual and I have an antitrust claim,
18	and I have 10 State law claims against you, I can release
19	them all by way of a general settlement.
20	It can be put into the decree in the State
21	court, but the decree in the State court doesn't do
22	anything with respect to releasing the Federal claim.
23	It's my contract release. This is Newton v. Rumery, which
24	we cite in our brief.
25	The judgment isn't what releases it. It's the

1	contract, the agreement that releases
2	QUESTION: Why?
3	MR. MONAGHAN: Because there are plenty of
4	Federal claims, Your Honor, and we cite two cases, Dicey
5	and Rumery, in which a release is effected without any
6	kind of a judgment.
7	QUESTION: Well, suppose in this hypothetical
8	the contract says, this contract shall be enforceable only
9	if it is entered into a judgment in the Federal court
10	in the State court?
11	MR. MONAGHAN: That's a matter of State law.
12	QUESTION: This is a part
13	MR. MONAGHAN: That's a condition on the
14	contract. That's a condition on the contract, but what is
15	effecting your release from a Federal point of view is not
16	the judgment, it is although the person now becomes a
17	judgment lienor, as I said, but what effects it is the
18	fact that he made a contract. He could make it he
19	could make that same contract without any reference to a
20	court at all.
21	QUESTION: Of course that's
22	QUESTION: Mr. Monaghan, let's I'm sorry.
23	No, please.
24	QUESTION: Just exactly the point. You're right
25	on the point that was worrying me when I asked that. This

1	is the part I don't understand.
2	Of course you can exercise a release to a
3	contract without a judgment, but why couldn't you also put
4	it in a judgment, and if you also put it in a judgment,
5	why wouldn't the Full Faith and Credit Clause require that
6	judgment to bind other States?
7	MR. MONAGHAN: If you put it in a judgment, you
8	get the status of a judgment lienor, to start with, as a
9	matter of State law, but if it's exclusively within the
10	if the claim is exclusively within the jurisdiction of the
11	Federal court, there can be no claim preclusion.
12	QUESTION: All right, let me ask you this
13	question just to modify the example.
14	Let's assume you're right so far as the
15	inadequacy of State law to in effect to effect the result
16	that Justice Breyer is talking about, is there any bar to
17	a rule of Federal common law in courts that do have
18	exclusive jurisdictions jurisdiction over these matters
19	that says, we will in fact recognize State court judgments
20	which purport to do this, subject always to collateral
21	attack for due process, so that now we're depending not on
22	the efficacy of State law and the full faith statute,
23	we're adding an element of Federal common law that says,
24	it's okay so long as we can look into it.

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MR. MONAGHAN: I think --

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1	QUESTION: Is there any bar to that?
2	MR. MONAGHAN: Yes. I think Marrese disposed of
3	that problem negatively. That's exactly the argument
4	that's exactly what Judge Posner did in the Seventh
5	Circuit in Marrese.
6	QUESTION: Did he he made the Federal common
7	law argument.
8	MR. MONAGHAN: He made exactly that argument.
9	He conceded that section 1738 would not bar the Federal
10	claim. He then decided to fashion a preclusion rule
11	broader than the State preclusion rule, and the opinion of
12	the Court in that case he was reversed on.
13	QUESTION: Okay.
14	MR. MONAGHAN: The but I would say that in
15	this case I think it's very important, Your Honor, with
16	respect to class actions particularly, to understand that
17	the State class representative gets his authority from the
18	complaint and from the complaint only. The complaint is
19	organized only around State law claims. If that's all he
20	has by way of all the State can give him, I don't
21	understand how he suddenly bootstraps himself up in
22	QUESTION: May I ask a question
23	QUESTION: I still don't understand. It seems
24	to me that based on your answers to me and to Justice
25	Breyer that it would be, if you prevail on this case,

- quite an abuse of authority and an exercise of authority in excess of jurisdiction for a State court ever to
- approve a release of a patent claim, of an antitrust
- 4 claim, of any claim where there is exclusive Federal
- 5 jurisdiction, even in a private action with a private
- 6 contractor. I don't see how the class action is any
- 7 different --
- 8 MR. MONAGHAN: Oh, I'm sorry.
- 9 QUESTION: -- if the private individual puts in
- the contract that the contract is conditional upon
- 11 approval and incorporation into a State court judgment.
- MR. MONAGHAN: Individuals can do this, Your
- 13 Honor. You have -- if I -- there's a -- I have to come
- 14 back again, and I don't want to sound like a broken
- 15 record. Individuals can do this as a matter of contract
- law. That's settled, because they can do it outside
- 17 court, they can do it inside the court.
- QUESTION: Well, they can't -- an individual
- 19 can't confer jurisdiction on a court that it doesn't have.
- MR. MONAGHAN: It's not conferring jurisdiction
- on the State court, Your Honor. What it's doing is, it's
- 22 making a contract with the defendant, and the State court
- 23 is approving it.
- QUESTION: You're saying a court can recognize a
- 25 contract but it cannot provide authority to a third party

1	to make a contract. That's where you're drawing the line.
2	MR. MONAGHAN: The representative must I'm
3	sorry.
4	QUESTION: Can State law authorize as a
5	principle of agency someone to represent an individual and
6	do this in an individual suit by virtue of State agency
7	law?
8	MR. MONAGHAN: Yes, Your Honor. There are a
9	guardian ad litem, for example.
10	QUESTION: Yes, so why can't it be done in the
11	class action context under State law, and why isn't the
12	remedy of those who object, such as your clients, simply
13	opting out? Why don't they opt out if they don't like it?
14	MR. MONAGHAN: Well, if we opted out, there were
15	two consequences of opting out. First of all, our own
16	individual claim would be not viable. We couldn't have
17	prosecuted that claim even if the defendants had admitted
18	liability.
19	Secondly, and more importantly, we were in
20	the
21	QUESTION: Why?
22	QUESTION: Why do you say that?
23	MR. MONAGHAN: They didn't have enough money.
24	QUESTION: Why do you say that?
25	MR. MONAGHAN: It cost money. This man had only
	38

- 1 1,000 shares.
- The second -- and very few securities litigants
- 3 would be in a position who opted out. This is one of the
- 4 points that the Chief Justice made in Shutts about the
- 5 desirability of class actions when you need people with
- 6 very --
- 7 The second point, and more important point is,
- 8 we couldn't opt out the class, the Federal class. We were
- 9 in the position of being fiduciaries.
- In the Federal proceeding, vindicating a Federal
- 11 claim, there are 500 docket entries in that case.
- 12 Contrary to what was suggested here, there were no
- 13 litigation entries in that -- in the Delaware case for a
- 14 period of 18 months.
- QUESTION: When you say 500 entries, that's in
- the Ninth Circuit, what became the Ninth Circuit case?
- MR. MONAGHAN: Three hundred in the Ninth -- 300
- in the -- 300 -- there are a total of 500 docket entries,
- 19 300 from the point at which the Delaware settlement was
- rejected by the chancellor in our appeal in the Ninth
- 21 Circuit.
- 22 QUESTION: That would have been the district
- 23 court of California.
- MR. MONAGHAN: Prior to the district court, yes.
- 25 The --

1	QUESTION: Mr. Monaghan, why can a State court
2	authorize a guardian to settle an individual claim arising
3	under exclusively under Federal action but not a class?
4	MR. MONAGHAN: Well, the in case I don't get
5	enough time, the best treatment of that topic is in
6	Restatement of Judgments, which is prepared by
7	Delaware's the reporter of which is their counsel.
8	The there are various kinds of representative
9	suits, and they're all described in section 7 in
10	section 41 of the Restatement of Judgment (Seconds).
11	There are some representative suits that exist
12	by virtue of an independent relationship. If I were a
13	trustee for you, I would have general authority to act for
14	you and litigate.
15	Some other kinds of representatives are
16	appointed by law. The guardian ad litem is one situation.
17	The
18	QUESTION: And the class representative is
19	another.
20	MR. MONAGHAN: The class representative is
21	another, and it's a they all have their unique history.
22	They all have their unique dangers. They all no
23	representative can bind on the basis of inadequate
24	representation. That's clear law.
25	But in the history of the class action case, the

- 1 class representative would pose severe problems, because
- 2 the class representative is -- the guardian gets a general
- 3 commission when he's appointed, take care of this person.
- 4 He may be a guardian only for the purposes of this suit,
- but it's, take care of this person, but he's a lot closer
- 6 to the individual.
- 7 In the class action --
- 8 QUESTION: May I interrupt you --
- 9 MR. MONAGHAN: Sure, yes.
- 10 QUESTION: -- and I apologize for this, but may
- I interrupt you on this?
- I take it the answer to my question is not an
- answer that depends on Federal law, it is an answer which
- 14 depends on a kind of a State agency law.
- MR. MONAGHAN: Yes, Your Honor, but the State
- 16 agency law --
- 17 QUESTION: Then the exclusiveness of the Federal
- 18 jurisdiction over the underlying action has nothing to do
- 19 ultimately --
- MR. MONAGHAN: No, that --
- 21 QUESTION: -- with your position.
- MR. MONAGHAN: No, Your Honor. The -- you
- 23 initially start with the dimensions of the agency created
- 24 by State law --
- QUESTION: Yes.

1	MR. MONAGHAN: but the question ultimately is
2	what the State court could authorize the representative to
3	do, and that representative
4	QUESTION: Well, let's assume the State, where
5	it says, we can authorize as a matter of State law, the
6	representative to bind this class, it's just like the
7	guardian ad litem situation. Assume that is State law.
8	What is the bar in Federal law, if Federal law
9	would recognize it in the case of the guardian but not in
10	the case of the class?
11	MR. MONAGHAN: Section 27 works differently with
12	respect to class actions. The class representative the
13	class representative is organized entirely around his
14	complaint, State law claims.
15	A guardian ad litem, pursuing '34 act claims
16	let me put it this way. The State could not authorize a
17	guardian ad litem to bring a '34 act claim in the State
18	court, couldn't authorize that, and therefore it can't
19	authorize him to do it in the Federal court I mean, in
20	the State court in in it can't authorize him to
21	bring it in in the State court and it can't authorize him
22	to settle it, in our point of view. That's inconsistent
23	with section 27.
24	What's happening here is
25	QUESTION: They why then it could not
	4.2

1	authorize him to settle a guardian to settle either.
2	MR. MONAGHAN: The guardian could not settle the
3	claim in the State court, no.
4	QUESTION: Okay.
5	QUESTION: What if the State court action is
6	brought and there are in the State by this guardian,
7	and there are Federal claims but there are State claims as
8	well, and district court, or the State superior court,
9	whatever, says I can only deal with the State law claims.
10	The others, I agree with Mr. Monaghan, I don't have
11	jurisdiction.
12	And then the parties reach a settlement, and
13	they want to settle not only the State law claims but the
14	Federal claims, execute general releases, just like so
15	many people. They can do that, I take it, can't they?
16	MR. MONAGHAN: If they did that, and they wanted
17	to make it effective, they would have to go into the
18	Federal court to get the Federal court's approval,
19	subject, of course, Your Honor
20	QUESTION: But there's been no
21	MR. MONAGHAN: to the statute of limitations,
22	which operates here to eliminate a lot of these problems.
23	QUESTION: So they couldn't even even a
24	general release wouldn't
25	MR. MONAGHAN: By an individual I'm sorry.

1	QUESTION: By individuals.
2	MR. MONAGHAN: A general release by an
3	individual is fine.
4	QUESTION: Or by a guardian ad litem.
5	MR. MONAGHAN: The by a guardian ad litem,
6	yes. General release
7	QUESTION: I thought your answer was that the
8	guardian could not.
9	MR. MONAGHAN: The guardian couldn't release the
10	Federal claim. The guardian ad litem could not release
11	the Federal claim well, I don't know
12	QUESTION: Why not?
13	MR. MONAGHAN: about that, Your Honor.
14	That's a very hard question.
15	QUESTION: But if the guardian can
16	MR. MONAGHAN: It's an individual, and an
17	individual, it's a difficult question, yes.
18	QUESTION: But I all right, let's assume for
19	the sake of argument that the guardian can release the
20	exclusively Federal claim.
21	If that's the answer, why can the class
22	representative not do the same, because the guardian's
23	authority comes from State law. It receives some kind of
24	Federal recognition.
25	The class representative's authority comes from

1	State law. Why should it not receive a parallel
2	recognition?
3	MR. MONAGHAN: Well, the guardian bear in
4	mind that you could not appoint a New York Delaware
5	could not appoint a guardian to act in New York for us.
6	The question is, what can be lawfully what
7	can the State lawfully confer upon somebody who is
8	whose authority is constituted by law?
9	My basic position is they cannot authorize these
10	persons to litigate cases in the Federal court. That's
11	not challenged. There's no suggestion they can litigate.
12	What you can't litigate
13	QUESTION: In the State court.
14	MR. MONAGHAN: In the State court, I'm sorry.
15	Thank you, Your Honor you can't you cannot also
16	release in the State court.
17	QUESTION: Then that covers the guardian.
18	MR. MONAGHAN: That covers the guardian, yes.
19	QUESTION: So
20	QUESTION: That wasn't the Ninth Circuit's view
21	of the matter, though, was it?
22	MR. MONAGHAN: No, it was not, Your Honor.
23	The Ninth Circuit's view of the matter was, and
24	it's a perfectly defensible view, was that the State court
25	can release parallel or mirror image claims but not and

1	we certainly are not abandoning that position.
2	The Ninth Circuit's view has this advantage,
3	Your Honor. It results in the Federal claim not being
4	systematically undervalued, because if you can't if the
5	State guardian can't affect a Securities Act claim in any
6	way, he can't protect it, because he can't fight.
7	In the overlap cases, the mirror image cases
8	where the State law and the State law are sort of a mirror
9	image of one another, you could make the argument that the
10	State representative, in settling, has got enough muscle
11	to protect the underlying Federal claim.
12	QUESTION: So if there were a State rule
13	comparable to Rule 14(d)(10), then under
14	MR. MONAGHAN: Yes, that's right. That's right.
15	QUESTION: the Ninth Circuit view, you would
16	lose.
17	MR. MONAGHAN: You have to understand the
18	reality of this, because I know Your Honor is not
19	disposed to the question of adequate representation, and
20	I'm not going to press it. I just want to say one thing
21	about it, if you'll permit.
22	If you will if you think it's before you, and
23	I think it's before you, if you will look, the State judge
24	made no inquiry into adequacy representation.
25	There wasn't in the record, you will find the

T	word adequate representation mentioned once in the
2	judgment, no inquiry at all, because he didn't think it
3	was relevant, and the reason he didn't think it was
4	relevant, because he was the judge in the Prezant case.
5	The vice chancellor in this case thought that
6	there was only one issue: is this a good settlement?
7	If you look at his initial opinion, if you look
8	at his subsequent opinion, if you look at the order of
9	notice scheduling a hearing, there is no mention that
10	there will be a challenge to the adequacy of
11	representation. He's the vice chancellor who was reversed
12	in the Prezant case because he didn't think it was
13	relevant.
14	QUESTION: What about the argument that you
15	should have come into Delaware to make that objection and
16	not stayed out of it?
17	MR. MONAGHAN: Had we gone into Delaware, our
18	judgment was we could not adequately protect the class.
19	If we for a number of reasons which I'll go into.
20	If we stayed out, relying on the Restatement of
21	Judgments, among other things, we knew that we could make
22	collaterally the attack on lack of adequate
23	representation, due process, and this addresses a point
24	that may be of particular interest to Justice O'Connor
25	there would be no Marrese problem because, on page 26 of

1	our brief, we point out that the Delaware court would
2	permit a subject matter jurisdiction attack.
3	QUESTION: How do you know that how could you
4	count on the fact that you'd collaterally attack the
5	adequacy of the representation?
6	MR. MONAGHAN: Because
7	QUESTION: Did you know in advance that this
8	vice chancellor would not inquire into it?
9	MR. MONAGHAN: Yes, from his first opinion. His
10	first opinion
11	QUESTION: That's a pretty high risk
12	MR. MONAGHAN: Nothing
13	QUESTION: to guess that he would not inquire
14	into it.
15	MR. MONAGHAN: Nothing, Your Honor, with respect
16	to the risk that we would have undertaken had we gone into
17	the Delaware court.
18	QUESTION: Can you summarize in one sentence,
19	say a properly constituted class representative in a State
20	court where the proceedings are completely fair, so
21	there's no due process
22	MR. MONAGHAN: Yes.
23	QUESTION: problem can bind the members of
24	his class to give up State claims, maybe even to pay some
25	money in an appropriate circumstance, but cannot bind

1	those members to give up some kind of Federal claim
2	because
3	MR. MONAGHAN: Because of section 27 of the
4	QUESTION: So it's all the Williams Act. In
5	other words, unless we find a congressional intent there
6	in section 27, you lose.
7	MR. MONAGHAN: Well, section 27 is not the
8	Williams Act. Section 27
9	QUESTION: I mean, Section 27, unless because of
10	section
11	MR. MONAGHAN: Right.
12	QUESTION: So that's what this turns on.
13	MR. MONAGHAN: Because there is no difference
14	between in terms of the act between adjudicating the
15	claim and releasing it. Section 27 doesn't make that
16	distinction.
17	QUESTION: Mr. Monaghan, I'm a little puzzled.
18	Suppose somebody who's incompetent has a Federal claim
19.	against me.
20	MR. MONAGHAN: Mm-hmm.
21	QUESTION: How do I get that Federal claim
22	released?
23	MR. MONAGHAN: He can if he's appointed by
24	the court, he could release the claim as a matter of

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25 contract.

QUESTION: He's appointed by a State court -- by 1 2 a State court. 3 MR. MONAGHAN: He's appointed by a State court, 4 he releases as a matter of contract law. OUESTION: Oh, he can. 5 MR. MONAGHAN: He can release as a matter --6 7 individuals can release as a matter of contract law. 8 Now, if he's appointed as a quardian for 9 purposes of litigation, he can't litigate it, but if I was 10 appointed your quardian, Justice Scalia, I could release all your Federal claims. 11 12 QUESTION: Not an easy assignment. 13 OUESTION: Yes. 14 (Laughter.) 15 MR. MONAGHAN: But I would submit, Your Honor --16 and I respect your predisposition, but I would submit that 17 the question of adequacy is before the Court. 18 QUESTION: You're quite right, the respondent 19 can urge affirmance on alternate grounds, but we rarely do 20 it. We generally want to decide the question on which we 21 granted certiorari. 22 MR. MONAGHAN: No further questions -- thank 23 you. 24 QUESTION: Thank you, Mr. Monaghan. 25 Mr. Ostrager, you have 4 minutes remaining.

50

1	REBUTTAL ARGUMENT OF BARRY R. OSTRAGER
2	ON BEHALF OF THE PETITIONERS
3	MR. OSTRAGER: With respect to the Supremacy
4	Clause argument advanced by respondents, we submit that
5	the respondents have made a fatal concession to that
6	argument in footnote 26 of their brief, in which
7	respondents concede that individuals can release Federal
8	claims in a State court proceeding, and a derivative
9	action in a State court can release Federal claims.
10	That same concession is made by the Ninth
11	Circuit in its opinion, and that appears in the
12	petitioner's appendix at page 38 and footnote 32.
13	Manifestly, if Federal claims can be dismissed
14	in the context of an individual action or in a derivative
15	action, then there's no Federal supremacy issue here, and
16	there's also no Federal preemption issue here.
17	QUESTION: Mr. Ostrager, your knowledge of
18	Delaware under your knowledge of Delaware law, if the
19	members purportedly represented here wanted to have this
20	judgment reopened on the basis of the Delaware supreme
21	court's full development in the Prezant case, would it be
22	possible to make an application to reopen this judgment
23	under Delaware law on
24	MR. OSTRAGER: Delaware law has the equivalent
25	of Federal Rule 60, and so there could be such an

1	application made.
2	I'd like, if I could, to address myself briefly
3	to the issue of the implied or express repeal of 1738.
4	This Court held in Shearson v. McMahon that parties could
5	contractually agree to have Federal securities laws
6	arbitrated.
7	In the Mitsubishi case, this Court held that
8	Federal antitrust claims could be arbitrated.
9	Since the Becher case in 1929, when Justice
10	Holmes wrote that there can be issue preclusion that will
11	terminate a Federal patent case on the basis of findings
12	in a State court, it can't seriously be contended that
13	what occurs in lawfully constituted State proceedings
14	cannot impact and, indeed, determine Federal proceedings.
15	In Allen v. McCurry, this Court, in terms of
16	interpreting section 1738, held "Congress has specifically
17	required all Federal courts to give preclusive effect to
18	State court judgments whenever the courts of a State
19	QUESTION: Yes, but supposing a State court had
20	litigated the whole case, including the Federal claims
21	over which it had no jurisdiction, and purported to enter
22	a judgment on the Federal claim
23	MR. OSTRAGER: If there had been an
24	adjudication
25	QUESTION: what would happen then?

1	MR. OSTRAGER: of Federal claims, that would
2	violate the Supremacy Clause. Then there would be a
3	manifest incompatibility with section 1738, but in the
4	context of a consensual settlement
5	QUESTION: But if the State court considered
6	that point
7	QUESTION: Yes, I don't think
8	QUESTION: and came to the conclusion that it
9	wasn't incompatible, and therefore we're going to render
10	this judgment
11	MR. OSTRAGER: I believe that in that
12	QUESTION: Fully litigated, and a State court
13	came to that conclusion.
14	MR. OSTRAGER: In that case, review would be
15	available to this Court under 1257, and that error could
16	have been corrected.
17	QUESTION: It could have been collaterally
18	attacked.
19	MR. OSTRAGER: We believe it probably could have
20	been collaterally attacked.
21	QUESTION: I think if you litigate jurisdiction
22	in the State court, the State court decides against you,
23	you lose on the Sunshine v. Treinies, and some of those
24	cases in the early forties.
25	MR. OSTRAGER: Certainly, Mr. Chief Justice,

1	under Underwriters National and Durfee v. Duke, there is a
2	rule of jurisdictional finality.
3	CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4	Ostrager. The case is submitted.
5	(Whereupon, at 12:02 p.m., the case in the
6	above-entitled matter was submitted.)
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## CERTIFICATION

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MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., Petitioners v. LAWRENCE EPSTEIN, ET AL.

CASE NO: No. 94-1809

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