

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: GUY E. ADAMS, ET AL., Petitioners v. CHARLIE  
FRANK ROBERTSON AND LIBERTY NATIONAL LIFE  
INSURANCE COMPANY

CASE NO: 95-1873

PLACE: Washington, D.C.

DATE: Tuesday, January 14, 1997

PAGES: 1-52

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   GUY E. ADAMS, ET AL.,                   :

4                   Petitioners                   :

5           v.                   :   No. 95-1873

6   CHARLIE FRANK ROBERTSON AND                   :

7   LIBERTY NATIONAL LIFE                   :

8   INSURANCE COMPANY                   :

9   - - - - -X

10                                   Washington, D.C.

11                                   Tuesday, January 14, 1997

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:10 a.m.

15 APPEARANCES:

16 NORMAN E. WALDROP, JR., ESQ., Mobile, Alabama; on behalf  
17 of the Petitioners.

18 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of  
19 the Respondents.

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1 PROCEEDINGS

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-1873, Guy Adams v. Charlie Frank  
5 Robertson.

6 Mr. Waldrop.

7 ORAL ARGUMENT OF NORMAN E. WALDROP, JR.

8 ON BEHALF OF THE PETITIONERS

9 MR. WALDROP: Mr. Chief Justice, and may it  
10 please the Court:

11 There were 206,255 class members like  
12 petitioners who had fraud claims for substantial money  
13 damages as a result of Liberty National exchanging their  
14 cancer policies in August of 1986, beginning in August of  
15 1986. The money damage claims of these plaintiff class  
16 members were for fraudulently inflated premiums both as a  
17 result of the new policy being more expensive and the  
18 shifting of policyholders without their knowledge into  
19 higher, more expensive age bands.

20 QUESTION: Mr. Waldrop, you are here before the  
21 Court asking this Court to decide a Federal due process  
22 issue, and whether the Federal Constitution requires an  
23 opt-out provision for plaintiffs in the class, is that  
24 right?

25 MR. WALDROP: Yes, that's correct.

1 QUESTION: And can you show us today or point to  
2 a place in the record in this case where that issue was  
3 raised by you before the Alabama supreme court?

4 MR. WALDROP: Yes. In our brief on page 21 --

5 QUESTION: The blue brief.

6 MR. WALDROP: The blue brief.

7 QUESTION: At page 21.

8 MR. WALDROP: Twenty-one, we start our  
9 discussion --

10 QUESTION: Are you talking about the blue brief  
11 in this Court or in the other court?

12 MR. WALDROP: Oh, I'm sorry. The Court -- I  
13 thought Justice O'Connor was asking about the court -- the  
14 Alabama --

15 QUESTION: I'm just asking you what document  
16 you're referring to.

17 MR. WALDROP: Yes.

18 QUESTION: Is there some document we can look at  
19 in the record here before us, or --

20 MR. WALDROP: Well --

21 QUESTION: -- are you referring to something --

22 MR. WALDROP: I'm --

23 QUESTION: -- that isn't in the briefs but would  
24 be in the record?

25 MR. WALDROP: Well, I'm referring to the briefs

1 to the Alabama supreme court.

2 QUESTION: And would they now be in the record  
3 before this Court?

4 MR. WALDROP: Yes.

5 QUESTION: Okay, and can you tell us --

6 MR. WALDROP: If you start on page 21, and then  
7 on page 23 of our brief we state that the minimum due  
8 process requires that class members be given the right to  
9 opt out, to exclude themselves from the class, and there  
10 we begin talking about the decision of Shutts v. Phillips  
11 Petroleum.

12 QUESTION: Well, what were the questions that  
13 you raised, the legal issues and the claims in the Alabama  
14 supreme court? I thought there were three.

15 MR. WALDROP: Well --

16 QUESTION: You raised three issues.

17 MR. WALDROP: Yes, we did.

18 QUESTION: And one of those issues was that  
19 because there was no opt-out provision for the class it  
20 violated the Alabama constitutional right to a jury trial.

21 MR. WALDROP: We did argue that before the  
22 Alabama supreme court.

23 QUESTION: Okay. That was one issue that you  
24 raised.

25 MR. WALDROP: That was one issue.

1 QUESTION: And there were two others, but  
2 neither of them appeared to me on reading them to raise a  
3 Federal due process violation like the failure to have an  
4 opt-out provision.

5 MR. WALDROP: Well, we felt like we raised it  
6 with sufficient clarity, because, for example, the  
7 respondents' brief, both class counsel in their very  
8 first -- the class counsel raised it as one of their  
9 statement of issues, and then, when you would look at  
10 their brief, for example, in their summary of argument,  
11 their very first page starts out by saying the mandatory  
12 class and class action settlement on a no-opt-out basis  
13 was proper and does not violate constitutional guarantees.

14 QUESTION: All right, but we do know, I guess,  
15 or will you concede that the Alabama supreme court did not  
16 address this issue.

17 MR. WALDROP: Well --

18 QUESTION: Do you, yes or no?

19 MR. WALDROP: Well, they --

20 QUESTION: Did it or did it not?

21 QUESTION: You can answer that yes or no and  
22 then explain.

23 QUESTION: You can say that and then explain  
24 what you would like to explain.

25 MR. WALDROP: No, the Alabama supreme court did



1 not directly address the no-out, opt-out issue in regard  
2 to due process.

3 QUESTION: Right.

4 MR. WALDROP: They did cite the Shutts opinion,  
5 but they cited it merely for the fact that a class action  
6 was a type of joinder. We felt like it was raised with  
7 compelling clarity because class counsel responded to it  
8 for some 20 pages in their brief. The Liberty National  
9 responded to it for some 29 pages in their brief. So we  
10 felt like the issue was in fact thoroughly briefed to the  
11 Alabama supreme court, and they chose not to address it.

12 QUESTION: And you did not raise it in any of  
13 your claimed issues before that court.

14 MR. WALDROP: Well, we felt that we did because  
15 of our subheading on page 23 of our brief, when we stated  
16 that minimum due process required the right to opt out.

17 QUESTION: So you refer us now to pages 21 and  
18 23 of your brief to the Alabama supreme court.

19 MR. WALDROP: Yes. Twenty-one --

20 QUESTION: Was your brief that specific? When  
21 you recharacterized what was in it a moment ago I thought  
22 you said that you had claimed in there that the lack of  
23 opt-out did not violate any constitutional provision, and  
24 now you refer specifically to due process. Did you say in  
25 the brief that it does not violate Fourteenth Amendment

1 due process?

2 MR. WALDROP: Well, what we said --

3 QUESTION: Well, were you that explicit?

4 MR. WALDROP: Well, we were explicit in saying

5 it violated due process in citing the Shutts v. Phillips

6 Petroleum case.

7 QUESTION: No, did you expressly say, the lack

8 of the opt-out does not violate Fourteenth Amendment due

9 process? I mean, was that statement contained --

10 MR. WALDROP: Well --

11 QUESTION: -- in page 23?

12 QUESTION: I guess your position was that it

13 would violate it.

14 MR. WALDROP: Exactly.

15 QUESTION: Or vice versa. Did you state that

16 explicitly in your brief?

17 MR. WALDROP: Well, we stated it in our head

18 note, Justice Souter, when we said minimum due process

19 requires an opt-out, and then we were discussing --

20 QUESTION: But I mean, that -- all I want to

21 know is that statement, minimum due process requires an

22 opt-out, was in your brief?

23 MR. WALDROP: Yes.

24 QUESTION: Okay.

25 QUESTION: But it was in the brief consistently

1 on pages 23 and 24, referring to the jurisdictional right  
2 of a plaintiff who is absent from the State. Is that the  
3 argument you're making here? I thought you were making  
4 quite a different argument.

5 MR. WALDROP: Well, we're making the argument  
6 here that Shutts requires an opt-out.

7 QUESTION: Yes, but you never raised that point.  
8 That is to say, as I read every single sentence on pages  
9 23 and 24 and 25, which I have in front of me, every time  
10 that you refer to it you talk about the rights. You say,  
11 in Shutts the trial court asserted jurisdiction over  
12 nonresident class members in a class suit. Then you quote  
13 it.

14 Then you go on to talk about, this action does  
15 not provide absent class members the opportunity to remove  
16 themselves. The U.S. Supreme Court similarly held that  
17 the State wishes to bind an absent plaintiff, et cetera.

18 And I can't find anywhere here the quite  
19 different argument that you are now making, which I take  
20 it is an interesting question, about whether people who  
21 are within a State have a right to be opted out.

22 If you're making the argument about absent  
23 plaintiffs, I guess it was decided in Shutts, and you're  
24 certainly right about that one.

25 MR. WALDROP: Well, two things, Justice Breyer.

1 First, the very last sentence we made on page 25, where we  
2 state that the United States Supreme Court clearly held  
3 that if a State wishes to bind an absent plaintiff, and  
4 our term, absent plaintiff, we believe in Shutts means  
5 residents and nonresidents.

6 QUESTION: But it certainly didn't in Shutts.

7 MR. WALDROP: Well, Mr. Chief Justice, we  
8 believe that Shutts v. Phillips Petroleum does, in fact,  
9 say that absent plaintiff in fact refers to residents and  
10 nonresidents.

11 QUESTION: But it doesn't say that in the brief,  
12 and moreover, the clause you didn't quote says it's our  
13 view that it has to provide minimal procedural due process  
14 protection. It requires absent class members be given the  
15 right to opt out, which is the point that you're making in  
16 this section of the brief, so where in the brief do you  
17 make the claim which you're now making that resident class  
18 members have to be given the right to opt out?

19 MR. WALDROP: Well, our view is that on page 23,  
20 when we said in our head note about minimum due process,  
21 we were referring across the board. We --

22 QUESTION: Is there a word in the brief anywhere  
23 that says it's across the board?

24 MR. WALDROP: Well, only the head note, Justice  
25 Breyer, on page 23. We have -- of course, in our



1 petitioners we have residents and nonresidents in our  
2 group. We believe that Shutts v. Phillips Petroleum in  
3 fact states that it applies to residents and nonresidents.

4 QUESTION: Well, let's just suppose that we  
5 don't agree with you that it dealt with non-State  
6 residents and furthermore that we conclude that the  
7 question you want this Court to address on the Due Process  
8 Clause and an opt-out requirement for residents of the  
9 State was not cleanly presented by you below, and that the  
10 Alabama supreme court did not address it.

11 Now, let's say we get that far in our analysis.  
12 Is that failure jurisdictional or is it simply a  
13 prudential concern we might have?

14 MR. WALDROP: Well, we, of course, believe it  
15 would be a prudential concern, because we believe that the  
16 Alabama supreme court did not want to look at Shutts v.  
17 Phillips Petroleum because in our situation we had  
18 objectors who were nonresidents. If you look at Shutts,  
19 and if you -- the most narrow reading in Shutts would have  
20 declared at the very least there would have been opt-out  
21 rights granted to nonresidents.

22 For example, if I could refer you to the joint  
23 appendix in volume 1, on page 238 and 239 you would see,  
24 for example, at the trial court level there were notice of  
25 opt-outs filed, for example, at the -- in the Barbour

1 County Circuit Court and citing Phillips Petroleum v.  
2 Shutts. There were also pleadings filed, for example on  
3 behalf of Mississippi residents saying that the fraud had  
4 occurred in Mississippi, and they were -- and the policies  
5 were delivered in Mississippi.

6 So we believe that the reason that the Alabama  
7 supreme court did not, in fact, want to look at Shutts  
8 even in the most narrow sense is because opt-out rights  
9 would have surely had to be granted in that type of  
10 situation.

11 QUESTION: How many members of this class were  
12 from out of Alabama?

13 MR. WALDROP: Well, we have -- the objectors,  
14 the petitioners are 543 people, and we have 30 petitioners  
15 who are nonresidents.

16 QUESTION: But you have 400,000 in the class.

17 MR. WALDROP: That's correct, and -- well, as  
18 far as being nonresidents, that particular number was not  
19 available to us, although we know that these policies were  
20 sold in seven or eight States, so we know that the number  
21 has to be in the ten of thousands of nonresidents, because  
22 when the class was certified in Barbour County it was --  
23 it covered all the States, and the problem was, that was  
24 one of the problems in the Barbour County Circuit Court.  
25 There was no discovery that was ever conducted in any of

1 the other States.

2 Now, in regard to the type of money damages that  
3 the absent plaintiffs have, in addition to the  
4 fraudulently inflated premiums there were money damage  
5 claims in this case for the denial of certain medical  
6 benefits, for chemotherapy, radiation, and drugs outside  
7 the hospital. There were money damage claims for mental  
8 anguish, and there were money damage claims for punitive  
9 damages. The class --

10 QUESTION: How many claims for money damages of  
11 this type have gone to judgment in Alabama? Is there any  
12 case other than the McAllister one, where there was a  
13 thousand dollars compensatory, a million punitive?

14 MR. WALDROP: There were -- there have been two  
15 cases that have gone to judgment. There was the  
16 McAllisters case which we tried. There -- which was a  
17 thousand dollar -- there was a thousand dollars in  
18 compensatory damages and a million dollars in punitive  
19 damages.

20 There was one other case that was tried that was  
21 a verdict for the defendant.

22 QUESTION: But that was upset, wasn't it? Oh,  
23 there was -- it was actually tried. There was one that  
24 was, pretrial, thrown out and then sent back.

25 MR. WALDROP: Well, there were two cases that

1 actually went to a jury verdict. The McAllister case was  
2 then appealed to the Alabama supreme court, and it was  
3 affirmed on appeal.

4 QUESTION: And in any of the individual cases  
5 that have been brought so far, have any of those sought  
6 anything other than monetary relief?

7 MR. WALDROP: There were 32 cases outside the  
8 class when the class was certified on March 10, 1993. To  
9 my knowledge, all of those cases that had been filed  
10 sought money damages.

11 QUESTION: How about the two that were -- there  
12 were two brought by class counsel.

13 MR. WALDROP: Class counsel filed on behalf of  
14 five individual clients, and in each one of those there  
15 was a claim for money damages.

16 What we believe is -- in regard to Shutts, where  
17 Shutts says that -- and when it establishes that an absent  
18 plaintiff who has a claim for money damages is entitled to  
19 the due process right of opt out, what we believe is this.  
20 In trying to determine when there is a claim for  
21 predominantly money damages, we believe that the test  
22 should be three things.

23 First is, we believe that the Court should look  
24 at the cause of action that is constitutionally protected.  
25 In this case, it's a fraud cause of action. What is the



1 traditional remedy for a fraud cause of action? The  
2 Alabama --

3 QUESTION: When we look at that, as we do after  
4 the fact in a case like this, should we bear in mind which  
5 of the fraud damages can be satisfied out of these special  
6 funds which have been set up?

7 MR. WALDROP: Well, Justice Souter, these  
8 special funds were declared to be punitive.

9 QUESTION: Well, regardless of how they might  
10 otherwise be characterized, and I want to hear what you  
11 say, but is it at least a subject that we ought to look  
12 to?

13 MR. WALDROP: We think the most unreliable thing  
14 to look to is what was settled. What did --

15 QUESTION: Okay, but how about the answer to my  
16 question? Just yes or no. Do we look to whether the  
17 fraud damages, or some of them, can be satisfied out of  
18 the funds that have been set up? Do we consider that at  
19 all?

20 MR. WALDROP: No, sir.

21 QUESTION: Okay.

22 QUESTION: You say that we look to the complaint  
23 as it was going in and not -- that the settlement, it's  
24 the claims that were stated and given up and not the terms  
25 of the settlement. Is that what your position is?

1           MR. WALDROP: No, Justice Ginsburg. What I was  
2 saying is, first we think you should look at what is the  
3 traditional remedy for the cause of action that's being  
4 asserted? The traditional remedy -- not looking at the  
5 complaint. What is the traditional remedy for a --

6           QUESTION: But how -- I think that's up to what  
7 the individual wants. One individual might say, I've been  
8 defrauded by this insurance company. I want nothing more  
9 to do with this insurance company. I want money in my  
10 pocket and I'll find another insurer.

11           Another plaintiff might say, well, I'd like to  
12 have my insurance contract reformed so it will get rid of  
13 the form -- fraud, and so the claim for fraud, it can be  
14 regarded as neuter in that respect.

15           One individual might say, I've got a good common  
16 law claim for money for fraud, and another one could say,  
17 I like this contract, some things about it, so I just want  
18 it to be reformed to get rid of the fraud.

19           So how can you say that just the fraud  
20 inevitably is money? It could be whatever the individual  
21 wants, right?

22           MR. WALDROP: Well, no in this sense, that the  
23 remedy -- the Alabama courts have held in regard to fraud  
24 in regard to an insurance policy, they have held numerous  
25 times that you can affirm the contract and sue for money

1 damages, or rescind the contract and sue for money  
2 damages. That is what has been traditionally held is the  
3 remedy.

4 The second thing we think that the Court should  
5 look at is, what is the absent plaintiff being asked to  
6 give up? What is the predominant thing the absent  
7 plaintiff -- in this case, the predominant thing is money  
8 damages.

9 QUESTION: Well, in particular, punitive  
10 damages.

11 MR. WALDROP: In particular.

12 QUESTION: Now, what is your response to the  
13 argument from the other side that punitive damages are not  
14 substantively anybody's entitlement, and it's really up to  
15 the State to decide the conditions in which they may be  
16 available, and if the State class action rules don't make  
17 them available, that's certainly within the power of the  
18 State to decide? What is your response to that?

19 MR. WALDROP: Well, Alabama law appears to us to  
20 be in conflict. Henderson v. Alabama Power Company, that  
21 struck down a \$250,000 legislative cap on punitive damages  
22 because it violated the right to trial by jury under the  
23 Alabama constitution, so they in fact said that the cause  
24 of action was constitutionally protected. However, in  
25 another case --

1 QUESTION: But that's a question of State law,  
2 it's not a question of Federal due process, isn't it?

3 MR. WALDROP: Well --

4 QUESTION: Even on your own argument. Isn't  
5 that what you just said?

6 MR. WALDROP: Well --

7 QUESTION: It's just a question of State law  
8 whether it be constitutional or statutory?

9 MR. WALDROP: Well, no, sir, Justice Souter. I  
10 believe that once you're given the cause of action and  
11 it's vested, as in this case, then you are entitled to due  
12 process in the manner --

13 QUESTION: Who is it vested in?

14 MR. WALDROP: It may be taken away from --

15 QUESTION: You were just talking about the  
16 punitive side of it. I understand the compensatory side,  
17 that every member of the class relinquished that, but the  
18 punitive, you were about to say, I think, that there's  
19 something else going on in Alabama, that there's some --  
20 from the courts coming -- that not all 400,000 people are  
21 going to get a million dollars punitive damages. You were  
22 telling us about some change in Alabama --

23 MR. WALDROP: Well, all -- what I was saying is,  
24 in Johnson v. Life of Georgia, in response to Justice  
25 Souter, was in that case they said that once you got the



1 award they could take half of it away and give it to the  
2 State, and so I really think Alabama law there is saying  
3 that constitutionally you have the cause of action, and  
4 it's discretionary with the jury as to whether or not you  
5 can -- whether or not you get punitive damages.

6 But once you get the award, it can be taken  
7 away.

8 QUESTION: Well, I wish I knew more about  
9 Alabama law, and one reason I don't is because the Alabama  
10 court never addressed any of this stuff. Any -- I mean,  
11 you know, I'm coming back to the jurisdictional point.  
12 Even if it is, as you say, prudential, and I guess that  
13 depends on the terms of the 1257(a) --

14 MR. WALDROP: Well --

15 QUESTION: -- which requires that the issue --  
16 final judgments or decrees rendered by the highest court  
17 of a State in which a decision could be had may be  
18 reviewed by the Supreme Court by writ of certiorari where  
19 the validity of a statute of any State is drawn in  
20 question on the ground of its being repugnant, and I guess  
21 that -- the issue is whether that means is drawn in  
22 question here in the petition for cert, or was drawn in  
23 question in the State court.

24 MR. WALDROP: Well --

25 QUESTION: Is that the distinction?

1 MR. WALDROP: Well, yes. Justice Scalia --

2 QUESTION: Let's assume it means in the State  
3 court, and therefore let's assume that our cases that have  
4 dismissed some of these cases are all based on  
5 discretionary judgments.

6 Why isn't a valid basis for answering that  
7 discretion that I have no idea what the State courts think  
8 of these issues that you're raising, and they might have  
9 interpreted their State statute differently had they seen  
10 these issues, had they addressed them, and had they seen  
11 Federal constitutional problems?

12 Isn't that a good prudential reason for us not  
13 to jump into the mess?

14 MR. WALDROP: No, sir, because we felt that this  
15 issue was, in fact -- we had been raising the opt-out from  
16 the very beginning.

17 QUESTION: I think Justice Scalia's question is,  
18 assuming that we were to decide that you did not properly  
19 raise it, and the question then is, is it jurisdictional  
20 so we must dismiss this petition, or is it prudential, and  
21 he says is it a good prudential reason that you did fail  
22 to raise the question before the supreme court of  
23 Alabama?

24 MR. WALDROP: Well, we believe certainly that it  
25 is -- it is not jurisdictional. We believe that it was,

1 in fact --

2 QUESTION: Mr. Waldrop, it's an important  
3 question. Would it not be better -- since you admit that  
4 you've just got snippets in your brief. You don't have it  
5 in the questions presented -- to have the Alabama court  
6 face this important constitutional question squarely so  
7 that we could then be a court of review, instead of saying  
8 the Alabama courts didn't touch this. Maybe you raised  
9 it, but hardly in the clearest way.

10 MR. WALDROP: Well, Justice Ginsburg, in the  
11 class counsel's brief they in fact stated it as an issue  
12 presented, and so we believe --

13 QUESTION: Which brief are we talking about now?

14 MR. WALDROP: Well, we're talking about the  
15 brief, Appellee Charlie Frank Robinson. If you will look  
16 on page 11 of their brief --

17 QUESTION: A brief in the Alabama supreme court?

18 MR. WALDROP: Yes. If you will look at the  
19 brief of class counsel on page 11, issues presented for  
20 review, issue 4, whether an opt-out provision is required  
21 by the due process and our trial-by-a-jury guarantees of  
22 the U.S. and Alabama Constitution --

23 QUESTION: Isn't that referring -- I've already  
24 asked this --

25 QUESTION: To the --

1 QUESTION: I don't know what your answer is,  
2 though. It's referring to -- there seem to be two claims  
3 you're making. One is, Alabama court, if you characterize  
4 this as anything other than a money claim you're going to  
5 run afoul of the United States Constitution in respect to  
6 absent plaintiffs. Cite, Shutts. I read that as what you  
7 were talking about on pages 23 and 24.

8 Then I found another claim on 21. On 21 you  
9 say, look, given these absent plaintiffs out there who  
10 have a claim under Shutts for due process, don't, please,  
11 characterize this as if it were nonmoney.

12 Now, maybe that's the same argument, or maybe  
13 it's two, but I don't see anything at all, not a word,  
14 that seeks to generalize the Shutts claim to the problem  
15 of the resident non -- plaintiff, which is a totally  
16 different problem, or quite a different problem. Now,  
17 what is your response to that? I'm not -- I'm -- you'd  
18 say maybe I'm wrong, or you'd say it doesn't matter. It  
19 has to be one of those two.

20 MR. WALDROP: Well, Justice Breyer, all I can  
21 say is that we felt like, starting on page 21, that we had  
22 raised it, and we felt like we had made that argument,  
23 particularly by our head note.

24 It is absolutely true that we argued the right  
25 to trial by jury to the Alabama supreme court very



1 strongly, because that is something that they look at. We  
2 felt that the Alabama supreme court would be much more  
3 interested in that issue, but we did, in fact, raise the  
4 no-opt-out, and we felt that we had raised that issue.

5 We --

6 QUESTION: May I ask you one question on the  
7 merits, which I -- which I -- how we get to this. It just  
8 -- is this your view -- I'm trying to understand how this  
9 works, but suppose that we have a defendant who is being  
10 asked by different groups of plaintiffs to do inconsistent  
11 things, the classic case where you don't get an opt-out,  
12 and each of those plaintiffs adds a clause to his  
13 complaint saying, in addition I'd like punitive damages.  
14 What's supposed to happen then?

15 In your view, is the addition of the words  
16 punitive damages -- if you go to each of the plaintiffs,  
17 by the way, and say is it important to you, they say, sure  
18 is. It might be a lot of money.

19 So is the simple addition of the word, punitive  
20 damages to a class action that plainly is not an opt-out  
21 class suddenly converted, making it an opt-out class, or  
22 making it a no-opt-out class?

23 MR. WALDROP: Well, yes, and for this reason in  
24 Alabama it would be an unliquidated claim, and it would --  
25 that would be the case everywhere, but secondly in Alabama

1 if the settlement fund in the class was sufficient to  
2 punish the defendant, then opting out would serve you no  
3 good under Green Oil v. Hornsby, because if you opted out,  
4 if there was already a sufficient fund, the Green Oil  
5 curtain would come down in Alabama.

6 So we believe that under Alabama law that  
7 punitive damages in a class action, you should have the  
8 opt-out right. I mean, I'm aware from other  
9 jurisdictions --

10 QUESTION: Well, isn't it true that it doesn't  
11 have to be all one thing or another? You want to have a  
12 class for punitive damages, but then you're -- doesn't  
13 Alabama, in addition to having part of the award go to the  
14 State, have some sense that you don't punish the same  
15 defendant 5,000 times? Is there none of that in Alabama  
16 case law?

17 MR. WALDROP: There is in Green Oil v. Hornsby.  
18 One of the things that you look at is successive punitive  
19 damage awards.

20 In this particular case, for example, in the  
21 settlement 99.9 percent of the absent plaintiffs don't  
22 share in the funds for punitive damages. The respondents  
23 make the argument about punitive damages, but in this case  
24 99 percent of them are not going to share at all in  
25 anything to do with punitive damages. They traded their

1     punitive damages claims for nothing.

2             So in this case opting out in regard to punitive  
3     damages would clearly be the thing to do, because they  
4     were traded for nothing, and so that is the reason in this  
5     particular case that, as we say, they all had money  
6     damages, compensatory, they had money damages, punitive  
7     damages.

8             If I might reserve the remaining time.

9             QUESTION: Very well, Mr. Waldrop.

10            Mr. Roberts, we'll hear from you.

11            ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

12            ON BEHALF OF THE RESPONDENTS

13            MR. ROBERTS: Thank you, Mr. Chief Justice, and  
14     may it please the Court:

15            I would like to begin with the jurisdictional  
16     issue. Even in the section of the brief that the  
17     petitioners cited that was under the heading claiming a  
18     right to a jury trial under the Alabama constitution,  
19     Alabama law requires a statement of issues that are to be  
20     presented to the supreme court and limits the issues to  
21     those that are stated. The Federal Due Process Clause  
22     issue is not in those statement of issues.

23            QUESTION: You mean a statement of issue at the  
24     beginning of the brief, Mr. Roberts?

25            MR. ROBERTS: Yes, Your Honor, and there was

1 also a subheading to make it clear what the constitutional  
2 issue was.

3 QUESTION: Do you know, Mr. Roberts, what  
4 happens if the Alabama supreme court sees a Federal  
5 constitutional issue when the briefs have been presented  
6 to them in the fashion you describe, and the Federal  
7 constitutional issue is not -- what does the Alabama  
8 supreme court do then, do you know?

9 MR. ROBERTS: I don't know as a matter of  
10 practice. If it went on to address it, of course, then it  
11 would be --

12 QUESTION: Of course.

13 MR. ROBERTS: Could be presented here, but it  
14 quite clearly did not do that.

15 QUESTION: I take it under their rules they're  
16 free to go ahead and address it if they see a Federal  
17 constitutional issue.

18 MR. ROBERTS: Yes, Your Honor, which I think  
19 partly explains the reason it was in the respondent's  
20 briefs before the Alabama supreme court, because it was  
21 decided by the trial court in Alabama, and since we went  
22 ahead and addressed it because it certainly could have  
23 been addressed by the Alabama supreme court, but that  
24 doesn't cure the appellant's failure to raise it properly  
25 before the Alabama supreme court.



1 QUESTION: Did -- you did bring up Ticor Title I  
2 think, didn't you, in your -- in a long footnote in your  
3 brief?

4 MR. ROBERTS: Yes. Yes. I'm not disputing that  
5 we addressed the Federal due process issues in our brief.  
6 I'm explaining that we did so --

7 QUESTION: Yes. Yes.

8 MR. ROBERTS: -- because the trial court did,  
9 because that doesn't cure -- and the Alabama supreme court  
10 is certainly free to say, under our rules we're not  
11 addressing any such question because we don't see it  
12 presented.

13 QUESTION: Mr. Roberts, I think the respond --  
14 neither -- one respondent made no response to the petition  
15 of certiorari. An individual respondent did and did not  
16 make any jurisdictional point.

17 MR. ROBERTS: Yes. That was a --

18 QUESTION: And so what do we do about that?

19 MR. ROBERTS: That was a mistake, certainly, not  
20 to file the opposition --

21 QUESTION: Oh, indeed.

22 (Laughter.)

23 MR. ROBERTS: -- and not to mention it in the  
24 one that was filed. We think, however, that that doesn't  
25 waive the objection because it's jurisdictional under

1 Rule --

2 QUESTION: Could you address that question,  
3 whether it is jurisdictional or prudential? This Court  
4 has not quite solved that, has it, as yet?

5 MR. ROBERTS: Well, it -- it did, and then it  
6 sort of stepped back away from it. I thought it was  
7 decided in 1836 in Justice Story's opinion in *Crowell v.*  
8 *Randell*.

9 More recent opinions have said that it's  
10 unsettled, it may be prudential, and the Court's been  
11 careful not to decide that question, usually saying the  
12 prudential reasons are sufficient for us not to find a  
13 waiver, and we think that's the case here as well.

14 The most obvious one is the federalism concerns.  
15 If this Court were to address the Federal due process  
16 issue without the Alabama supreme court having been  
17 afforded an opportunity to do so, it will be reversing a  
18 State judgment when, for example, the Alabama supreme  
19 court may have adopted a different construction of the  
20 rule that might have avoided the Federal issue, or it may  
21 have -- or at least it should be given the opportunity to  
22 address it in the first instance.

23 QUESTION: A prudential reason on the other  
24 side, on the other hand, Mr. Roberts, is that our own  
25 processes make it important that counsel do raise these

1 problems at the outset, and the fact that it wasn't raised  
2 in the brief in opposition frankly induces me to say that  
3 as a prudential matter, if we're going to be serious about  
4 our demands that these issues be presented in the BIO and  
5 prevent the waste of our time, we should say whatever  
6 prudential considerations there are on the other side has  
7 been washed out --

8 MR. ROBERTS: Well --

9 QUESTION: -- by the failure to raise it in a  
10 timely fashion.

11 MR. ROBERTS: I don't think the federalism  
12 concerns and the Alabama supreme court's opportunity to  
13 address the validity of its rules in the first instance  
14 under the Federal Constitution should suffer simply  
15 because of a mistake by counsel in not filing an  
16 opposition to certiorari.

17 QUESTION: Well, Arizona can, you know, after  
18 our opinion on the merits, should we find --

19 QUESTION: Alabama.

20 QUESTION: I'm sorry, Alabama. Should --

21 (Laughter.)

22 QUESTION: Arizona has enough troubles.

23 (Laughter.)

24 QUESTION: Should we find that it is not  
25 jurisdictional the State can proceed to patch up its law

1 to meet any objections that our opinion might have. I  
2 mean, I --

3 MR. ROBERTS: It's -- well, it's also a concern  
4 for this Court in its decisional processes just to make  
5 sure another reason, prudential, for having a requirement  
6 that the issue be raised is that a full record be  
7 developed on that.

8 We don't have that here. There are a lot of  
9 issues in which there's disagreement about the record, a  
10 lot of things we don't know about with respect to some of  
11 these particular issues because it wasn't raised below. I  
12 think that's a concern that the Court ought to weigh at  
13 least as heavily as incentives to encourage the filings of  
14 proper briefs.

15 QUESTION: Well, it was raised at the trial  
16 level.

17 MR. ROBERTS: It was raised at the trial level,  
18 but we don't know precisely -- and again, the Alabama  
19 supreme court could have a different construction of its  
20 rule, and the claim has evolved or changed as it's  
21 developed.

22 To the extent it now focuses on nonresidents, we  
23 don't know who the nonresidents are from the record. We  
24 don't know what their contacts with the State of Alabama  
25 are. For example, we don't know that -- whether they



1 moved after getting the insurance policy or not, so a  
2 fuller record would have been ensured, I think, if the  
3 issue had --

4 QUESTION: Mr. Roberts, at least as the question  
5 was presented to this Court, and I think as Mr. Waldrop  
6 stated it in Court this morning, they are not raising opt  
7 out just for nonresidents. I thought the statement of  
8 their question presented in their cert petition was that  
9 opt out is the right of any class member where the relief  
10 relinquished is money damages.

11 MR. ROBERTS: Yes. I agree that that is the  
12 question before this Court. However, in their reply brief  
13 and in their main brief as well they seem to also be  
14 arguing rights of nonresidents, questions I don't think  
15 are before the Court, again issues that could have been  
16 clarified if the issue had been raised before the Alabama  
17 supreme court and decided by that court.

18 QUESTION: What is the argument that it would be  
19 jurisdictional?

20 MR. ROBERTS: I think it's based primarily on --  
21 well, a number of things. First of all, Crowell v.  
22 Randell and then the recodification of that statute after  
23 that opinion is on the books, a federalism concern that  
24 this Court should not -- that the authority that this  
25 Court has to review a State court judgment rests on the

1 assumption that it contains within it a decision on an  
2 issue of Federal law that may be erroneous.

3 Now, if it does not because the highest court in  
4 the State has not been afforded the opportunity to address  
5 that question, then that authority is not present.

6 QUESTION: Mr. Roberts, do you think Michigan v.  
7 Long cuts either way on this issue?

8 MR. ROBERTS: No, I don't. That's in terms of  
9 how you analyze what may be an ambiguous state decision,  
10 but here we don't have that.

11 QUESTION: Because they clearly refer to the  
12 Alabama constitution here.

13 MR. ROBERTS: They relied only on the Alabama --

14 QUESTION: So you'd say if Michigan v. Long is  
15 implicated it was complied with.

16 MR. ROBERTS: Yes. If there were some confusion  
17 about what the Alabama supreme court decided Michigan v.  
18 Long would cut the other way.

19 QUESTION: We sometimes grant, vacate, and  
20 remand in light of new congressional statutes, in light of  
21 the decisions of this Court. I'm not sure, if we say that  
22 this is jurisdictional, that that wouldn't confine our  
23 authority in those cases, if we say it's jurisdictional if  
24 the State hasn't even raised it because there's good  
25 reason for it not to have done so.

1 MR. ROBERTS: Well, the State courts, of course,  
2 can always address the question in another case, the next  
3 case that comes along. I don't think this is quite -- I  
4 think there's more flexibility in the Federal system.

5 The Alabama supreme court is not an inferior  
6 court with respect to this Court, so that you could say,  
7 take a look at this a little more closely or something, as  
8 you may with respect to one of the Federal circuit courts.

9 QUESTION: I don't think you understood Justice  
10 Kennedy's point. I think he's saying that our GVR  
11 practice assumes that we have jurisdiction when we remand  
12 for the State court to consider a Federal question that it  
13 didn't consider, but if this is a jurisdictional statute,  
14 the fact that the State court didn't consider it means  
15 that we don't have the case in front of us. We have no  
16 power to vacate the judgment of the State --

17 QUESTION: We can't even GVR.

18 QUESTION: -- because it's not in front of us.

19 MR. ROBERTS: I'm not familiar precisely with  
20 the practice in the cases you're thinking of and whether  
21 they apply in the State court system as well as with  
22 respect to Federal courts, but I would agree that if  
23 there's no -- if it's not a question of, there's some  
24 confusion, you don't know if you addressed it or not, then  
25 yes, if it's jurisdictional there would not be

1 authority --

2 QUESTION: Well, I'm not sure that's consistent  
3 with the Court's practice prior to Michigan v. Long. It  
4 frequently GVR'd when it was uncertain whether it had  
5 jurisdiction --

6 MR. ROBERTS: Oh --

7 QUESTION: -- and I think it would have the  
8 power to do that even if the ultimate decision is there's  
9 no jurisdiction.

10 MR. ROBERTS: I -- yes, if the basis for action  
11 is that the Court is uncertain whether it had  
12 jurisdiction, but if it is clear that it does not because  
13 there -- it's not a question of an ambiguous --

14 QUESTION: But on the other side of the coin  
15 there, Mr. Roberts, at least in Newsom v. Smyth which you  
16 cite, and other cases, I think the practice of the Court  
17 has been to DIG, to D-I -- dismiss as improvidently  
18 granted rather than to dismiss for want of jurisdiction  
19 when this problem arises.

20 MR. ROBERTS: Yes. I don't think the Court  
21 precisely distinguishes, for example, when it denies  
22 certiorari whether it's doing so --

23 QUESTION: Correct. It could do it on  
24 jurisdictional or other grounds, but at least they have --  
25 that practice has left open the possibility that we might



1 have jurisdiction.

2 MR. ROBERTS: And it is -- and it was expressly  
3 recognized as an open issue.

4 QUESTION: Yes.

5 MR. ROBERTS: -- whether it was jurisdictional  
6 or prudential.

7 QUESTION: Correct.

8 MR. ROBERTS: My point is simply that one, we  
9 think it's jurisdictional for the -- at least for the  
10 reasons given by Justice Story, and if not, the prudential  
11 reasons cut strongly against deciding a Federal  
12 Constitution, particularly concerning the validity of  
13 State court rules, when the State supreme court has not  
14 had an opportunity to address that question.

15 Turning to the merits, petitioners' property  
16 interest, their choses in action, typically may be  
17 resolved in an individual lawsuit brought at a time and  
18 place of the plaintiff's own choosing, but nothing in the  
19 Federal Constitution prevents a State for good and  
20 sufficient reasons from providing that in certain  
21 circumstances they must be resolved in a different manner  
22 through another remedial mechanism.

23 And when the State does that, the question is  
24 whether the procedural protections provided in that  
25 different mechanism comport with due process, not whether

1 the petitioners, the prospective plaintiffs, have some  
2 overriding right to avoid the chosen procedure and opt for  
3 an individual lawsuit instead.

4 QUESTION: Mr. Roberts, if that's what Alabama  
5 had done -- and it sounds to me like things States do all  
6 the time. They take away tort remedies and give you  
7 Workers Compensation instead. But that's not what Alabama  
8 did. Alabama said, Edith McAllister, you get a thousand  
9 dollars in your pocket and a million in compensatory, and  
10 there are 30 other suits like that. Indeed, this class  
11 counsel brought two such suits.

12 So that seems to me very odd that Alabama should  
13 say, we need to have everybody treated alike in this pot,  
14 but not those 30 suits, including two that class counsel  
15 filed for straight money. That's what mixes me up about  
16 this. How can Alabama say it must be a unitary thing, and  
17 yet the Alabama supreme court very shortly before it  
18 decided this case affirmed that award?

19 MR. ROBERTS: The procedure, the mandatory class  
20 action, depends upon a representative plaintiff coming in  
21 and invoking it. In Mrs. McAllister's case, that was  
22 prior to the institution of this class action.

23 QUESTION: Well, at least the two that were  
24 begun the day before this complaint was filed, shouldn't  
25 they have -- shouldn't Alabama have said, okay, now we

1 have -- we have a representative action going. We ought  
2 to dismiss all those individual actions.

3 MR. ROBERTS: Well, that's in fact what happened  
4 with those suits. They were dismissed so that the  
5 plaintiffs in those suits became members of the class.

6 QUESTION: So there are no individual suits  
7 going forward now?

8 MR. ROBERTS: There -- none going forward now.  
9 There was one, the Peel suit, where the plaintiff refused  
10 to have the suit dismissed and the counsel disassociated  
11 himself from carrying that forward.

12 The class action mechanism, once it's invoked it  
13 doesn't go back and say, now, last year one of these  
14 claims was raised, and start at the beginning, but it says  
15 from now on we're going to resolve -- the claims that have  
16 not already started, haven't already left the gate, we're  
17 going to resolve them in one proceeding.

18 QUESTION: Now, I can understand saying that,  
19 but it does seem to me that class counsel would be taking  
20 inconsistent positions if at the same time that he's  
21 putting people, even people who don't want to be in this  
22 pot, there and saying, but I have my private clients and  
23 I'm taking care of them.

24 MR. ROBERTS: The concern in each of those cases  
25 was that -- the particular members in the two suits that

1 you're referring to were former officers of Liberty  
2 National. There was a concern that they may not fit the  
3 definition of the class, and the individual suits were  
4 filed. When it became clear that they would be covered by  
5 the class as certified, the cases were dismissed and they  
6 recovered as members of the class and no more.

7 Now, once Alabama says that from now on, prior  
8 cases -- the issue hadn't come up, but now it's come up  
9 we're going to resolve your claims in the procedural  
10 device of a mandatory class action, the question is are  
11 the procedural protections in that mandatory class action  
12 sufficient to satisfy due process, not whether there's an  
13 overriding right to file an individual lawsuit, and here  
14 there plainly were in two complementary and overlapping  
15 respects.

16 Individual class members received written notice  
17 and an opportunity to be heard before their choses in  
18 action were resolved. That was individual written notice.  
19 The opportunity to be heard was in court before a judge,  
20 with counsel, including the right to examine witnesses,  
21 present expert witnesses, and other evidence. It was a  
22 right that the petitioners fully availed themselves of in  
23 this case. They had their own day in court. It was  
24 January 20, 21, and 24, 1994.

25 QUESTION: Mr. Roberts, I don't think anybody is



1 questioning that there was notice and there was an  
2 opportunity to come in, but what does seem strange is a  
3 person who says, I've got this insurance policy that I  
4 acquired because the company was fraudulent. I don't want  
5 to have anything to do with that company. I want to take  
6 my money and buy another policy.

7 And then in this class suit this person is being  
8 told, you're going to get a better policy from the same  
9 company and you must stay with them.

10 There's something unseemly about that, isn't  
11 there?

12 MR. ROBERTS: Well, I can certainly understand  
13 that reaction, but the question is not whether any  
14 individual class member had that reaction, but what was  
15 appropriate relief for the class as a whole.

16 The district court, the trial court found that  
17 the policy that was given in the settlement was not  
18 available anywhere else in the market.

19 QUESTION: So we have a new rule now of  
20 Federal -- well, this is State procedure -- the greatest  
21 good for the greatest number, and the fact that some  
22 people who would have had perfectly good individual money  
23 claims, that's too bad.

24 MR. ROBERTS: No. To deal with the last part of  
25 your question first, they did not have perfectly good

1 money claims. The trial court found that these claims for  
2 higher premiums were largely speculative because the  
3 policies that they received by and large with rare  
4 exceptions provided more total benefits.

5 They looked at the McAllister case. The  
6 evidence developed in this case demonstrated that for the  
7 vast majority of insureds the new policies were better.

8 QUESTION: But Mr. Roberts, the trial court did  
9 not have the Alabama supreme court's affirmance in the  
10 McAllister case, and that's --

11 MR. ROBERTS: It did not.

12 QUESTION: Now, at that point, Liberty National  
13 has been found fraudulent. That issue was raised,  
14 litigated, and decided in the McAllister case. Wouldn't  
15 that be preclusive against Liberty Mutual?

16 Let's forget about this class action going on.  
17 Fraud in a classic action at law, raised, litigated, and  
18 decided, the insurance company loses. Isn't policyholder  
19 number 2 and number 3 entitled to use issue preclusion  
20 offensively so that --

21 MR. ROBERTS: No, not in this instance,  
22 because --

23 QUESTION: Why not?

24 MR. ROBERTS: The evidentiary record that was  
25 developed in the subsequent case was quite different, and

1 the allegations were broader in the second case.

2 QUESTION: I'm not talking about your case. I'm  
3 talking about, just look at what Edith McAllister won, a  
4 thousand dollars compensatory, a million punitive. That  
5 was based on the litigated determination of fraud.

6 Now, couldn't person number 2 say, I like that.  
7 In fact, I don't even need the punitives. Just give me  
8 the thousand dollars.

9 MR. ROBERTS: No. The evidence of record on  
10 which Mrs. McAllister relied involved specific  
11 interactions with the agent, and the evidentiary record  
12 that came in a later case was the broader question of the  
13 policy program that the agents were operating under, and  
14 it was a different evidentiary record.

15 It demonstrated -- the trial court was aware of  
16 the McAllister verdict. It -- and the supreme court of  
17 Alabama was aware of its affirmance in McAllister when it  
18 decided this case, and the evidence demonstrated that in  
19 the vast majority of cases the higher premiums were  
20 justified because there were more benefits.

21 QUESTION: But each individual in this \$400,000  
22 class didn't have the opportunity that Edith McAllister  
23 had to show what their situation was, what the agent said  
24 to them.

25 MR. ROBERTS: No, and they never would. There's

1 no way that the 400,00 of them are all going to get a  
2 million dollars in punitive damages. That's the  
3 justification, one of the justifications --

4 QUESTION: My hypothetical was, they're modest  
5 people. They just want a thousand dollars.

6 MR. ROBERTS: The question, when you're trying  
7 to decide whether the relief under the class that the  
8 class is given is equitable and monetary is, what is the  
9 appropriate relief for the class as a whole?

10 The reason these people took out cancer  
11 insurance policies was not to get a thousand dollars, it  
12 was to get coverage, and the way you get coverage is to  
13 reform the policies to give them what they say they should  
14 have, the benefits under the old policy, and to compensate  
15 further, give them also the new benefits under the new  
16 policies.

17 They got, as it was said, the best of both  
18 worlds, something they couldn't get anywhere else. That's  
19 the most appropriate relief, because the complaint is, you  
20 took away our coverage. The answer is, give it back.  
21 Not, here's a thousand dollars. That doesn't give them  
22 the coverage they wanted. That's why I think it was  
23 appropriate --

24 QUESTION: So it is the idea of the greatest  
25 good for the greatest number. Now, I understand when



1     there's a finite sum and that's all that there is, and you  
2     have to find some way of equitably distributing it. I  
3     also understand when somebody has to conduct themselves in  
4     a certain way, and it's got to be one way and it can't be  
5     two ways.

6             But this one can be -- it could be everybody  
7     just sues for damages.

8             MR. ROBERTS: Oh, well, with respect, the  
9     circuit court decided that it couldn't be. If everybody  
10    just sued for damages the court found that what you would  
11    have is a race to the courthouse among 400,000 people with  
12    essentially similar claims, a lucky few would get the  
13    punitive damages windfalls, the vast majority would be  
14    left with nothing. The --

15            QUESTION: So what else is new? That often  
16    happens.

17            MR. ROBERTS: Well, that doesn't mean it's the  
18    most --

19            QUESTION: That most often happened under common  
20    law.

21            MR. ROBERTS: And the State of Alabama can  
22    decide that we think it would be better to bring everybody  
23    together in one proceeding and --

24            QUESTION: Well, that's exactly the issue,  
25    whether it can.

1 MR. ROBERTS: -- and the question -- this is a  
2 due process claim, not whether the settlement was fair,  
3 although we think it was fair, but the question is, were  
4 petitioners afforded due process before their claims were  
5 resolved in this manner.

6 QUESTION: Well, may I ask in that connection,  
7 going back to Justice Ginsburg's conclusion that it's the  
8 greatest good for greatest number analysis, what would  
9 have happened if Edith McAllister had not sued first and  
10 had in fact objected to a class certification covering  
11 her? What would the result have been?

12 MR. ROBERTS: Her objection that she had  
13 received individual notice of the proposed settlement.

14 QUESTION: Could she have gotten out of the  
15 class?

16 MR. ROBERTS: No. There -- it's a mandatory  
17 class and no opt-out. The court --

18 QUESTION: So that despite the peculiarity of  
19 her facts, which I thought you were telling us justified  
20 the special or the separate treatment, if her timing had  
21 been different she would have been in the same boat with  
22 everybody else and those special facts, in fact, would not  
23 have justified anything but the greatest good for the  
24 greatest number.

25 MR. ROBERTS: They were covered by the release

1 in the settlement. I don't think that necessarily --

2 QUESTION: No, but if she didn't -- that's  
3 the -- yes, but --

4 QUESTION: She gave away something that other  
5 people didn't have to give away.

6 QUESTION: Yes.

7 MR. ROBERTS: No --

8 QUESTION: And doesn't this go to the accuracy  
9 of the definition of the class? If there are people like  
10 McAllister who have peculiar claims, can you chuck them in  
11 with everybody else and say, you know --

12 MR. ROBERTS: I didn't mean to suggest --

13 QUESTION: -- we're treating you all alike?

14 MR. ROBERTS: I didn't mean to suggest that they  
15 were peculiar claims. They were the claims of the class,  
16 but the evidentiary record focused on her particular  
17 interaction and therefore would not, I think, be a basis  
18 for preclusive effects --

19 QUESTION: I see.

20 MR. ROBERTS: -- on the class claims. The point  
21 is not --

22 QUESTION: But the ultimate fraud and the  
23 ultimate damages, those were common. McAllister in those  
24 respects were in the -- was in the same boat?

25 MR. ROBERTS: Absolutely.

1 I wanted -- I didn't mean to seem to agree that  
2 it's a question of the greatest good for the greatest  
3 number. It's not. It's a much more multifaceted inquiry  
4 into the fairness of the settlement.

5 Here, what the settlement did, for example --

6 QUESTION: The fairness of the settlement really  
7 hasn't been raised by these petitioners, has it?

8 MR. ROBERTS: No, but it is -- their attack on  
9 its fairness seems to be the main basis on which their  
10 claiming a due process violation, and again, I agree --

11 QUESTION: I thought that the main basis, and  
12 Mr. Waldrop confirmed this, was that they can't be made to  
13 relinquish a claim for money damages without an  
14 opportunity to opt out.

15 MR. ROBERTS: If -- that is their claim, and it  
16 has no basis. Claims for money damages are frequently  
17 resolved in some fashion other than an individual lawsuit.

18 Your Honor mentioned Worker's Compensation, a  
19 good example. Bankruptcy. You may have a chose in action  
20 against someone. If they declare bankruptcy you don't get  
21 an individual lawsuit, and what Alabama has done here,  
22 along with 39 other States and the Federal system, is say  
23 one situation in which your chose in action, normally  
24 resolvable in an individual lawsuit, may be resolved in  
25 some other manner is when the prerequisites for a



1 mandatory class --

2 QUESTION: That may be different in Alabama,  
3 because this is all rules, and the Worker's Compensation  
4 and the other things we've been talking about, bankruptcy,  
5 these are highly statutory. Alabama does copy to  
6 considerable extent Federal Rule 23, and one thing we know  
7 about the Federal rules is that the Federal courts are not  
8 authorized to write statutes. They can write rules of  
9 procedure.

10 So when I brought up the Worker's Compensation  
11 model I had that in mind, that that's a substantive  
12 legislative judgment, and I think there would be a serious  
13 question if you would interpret a Federal rule to take  
14 away from somebody a good damage action.

15 MR. ROBERTS: The issue is whether the procedure  
16 that they've been provided under these rules comports with  
17 due process. There's no overriding right to assert under  
18 the Federal Constitution that your chose in action must be  
19 resolved in State court.

20 QUESTION: Would your answer be different if we  
21 were talking just about the Rules Enabling Act? Let's  
22 just switch for a moment, because Alabama does seem to  
23 think it's instructive, to the Federal rule, and the  
24 Federal rule says that -- the Rules Enabling Act says that  
25 such rules, rules of procedure, shall not abridge and --

1 or modify any substantive right.

2 MR. ROBERTS: I don't think this is abridging or  
3 modifying a substantive right. It's setting forth another  
4 procedural mechanism to resolve the chose in action.

5 QUESTION: What if the State of Alabama had  
6 simply removed -- had eliminated the action for fraud  
7 against insurance companies? Could it have done that?

8 MR. ROBERTS: Yes. It is --

9 QUESTION: So if it can do that, a fortiori it  
10 can do this?

11 MR. ROBERTS: I don't want to make a bitter-  
12 with-the-sweet argument because that doesn't work in  
13 procedural due process, so I don't think that that  
14 lesser --

15 QUESTION: Well, it would really convert this  
16 into something other than a procedural due process case.

17 MR. ROBERTS: Yes, and the point I want to  
18 emphasize is that here, as far as procedural due process  
19 goes they had notice and opportunity to be heard, and the  
20 complementary protections of the class action rules.

21 QUESTION: And you would say, Mr. Roberts, that  
22 the State could abolish that cause of action for fraud not  
23 only by legislation but by judicial decision if it chooses  
24 to operate that way, and that that wouldn't violate due  
25 process.

1 MR. ROBERTS: Certainly it would not violate due  
2 process.

3 QUESTION: Well, certainly there's nothing in  
4 the Federal Constitution that requires Alabama to  
5 distribute the powers of government the same way that the  
6 Federal Government does. The, you know, judiciary,  
7 legislative --

8 MR. ROBERTS: Separation of powers rules don't  
9 apply to the --

10 QUESTION: Yes. The only point was that  
11 Alabama, since it seems to try to follow Federal Rule 23,  
12 might be influenced by how the Federal development went.  
13 There would be a problem.

14 MR. ROBERTS: I think your question highlights  
15 again a reason that -- a prudential reason the Court  
16 shouldn't reach out and decide the issue, because we don't  
17 know how they would have addressed it in this instance  
18 because it wasn't presented to them.

19 There were two different regimes at issue here.  
20 Petitioner's view, even though its chases in action were  
21 shared by 400,000 other people, that each one has a right  
22 to an individual lawsuit even though the courts found it  
23 would lead to a race of the courthouse, windfalls for a  
24 few, and nothing for the vast majority, or the rule that  
25 Alabama has adopted, which is when the two requisites for

1 mandatory treatment are met we're going to bring everybody  
2 together, we're going to resolve all the claims in this  
3 one instance, and give the people who -- the class members  
4 individual notice and opportunity to object, and only have  
5 this issue come up after we've determined that they're  
6 adequately represented in a class action.

7 I think it's the former system that is subject  
8 to a serious due process challenge, not the latter one  
9 that Alabama adopted and that the Alabama supreme court  
10 affirmed in this case.

11 Thank you.

12 QUESTION: Thank you, Mr. Roberts.

13 Mr. Waldrop, you have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF NORMAN E. WALDROP, JR.

15 ON BEHALF OF THE PETITIONERS

16 MR. WALDROP: Well, we believe that a cause of  
17 action, a fraud cause of action, this Court had already  
18 said in Mullane v. Central Hanover Bank back in 1950 that  
19 a cause of action is a constitutionally protected right.  
20 In -- so in this case, once -- and under Alabama law once  
21 you have -- a cause of action for fraud is vested, it  
22 cannot be taken away.

23 Secondly, this settlement perpetuated the fraud,  
24 because the various class members had to continue to pay  
25 premiums if they were to get any benefit out of the



1 settlement at all.

2 Lastly, in regard to Shutts, we believe that if  
3 Shutts in fact was only a territorial jurisdictional case,  
4 which we believe that it was not, we believe that  
5 fundamentally it should apply across the board for two  
6 reasons.

7 One, there's no fundamental difference between a  
8 nonresident and a resident. If you're going to put them  
9 together for money damages on the front end for  
10 certification -- that is, they have the same unity,  
11 cohesiveness, typicality, and commonality on the front  
12 end -- then on the back end you can't make a difference as  
13 to whether they should have a right to opt out or not,  
14 because that would be arbitrary if you're going to put  
15 them together on the front end in regard to money damages.

16 Secondly, in regard to Rule (c)(2) of the  
17 Federal rules as well as the Alabama rules, in regard to  
18 (b)(3) actions, which are normal money damages, it is a  
19 mandatory notice that the -- that you have notice and  
20 opportunity to be heard and the right to opt out.

21 The advisory comments to the Federal rule says  
22 that that has constitutional underpinnings. In its  
23 cites -- Mullane, and it cites Hansberry v. Lee. In  
24 fact, this Court in 1974, in the Eisen case, cited those  
25 advisory comments with approval, so we think that if

1 Shutts was only a territorial jurisdictional case, which  
2 we don't believe that it was, because when the court in  
3 footnote number 3 in Shutts said that we're going to limit  
4 our holding --

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
6 Waldrop. The case is submitted.

7 MR. WALDROP: Thank you.

8 (Whereupon, at 12:07 p.m., the case in the  
9 above-entitled matter was submitted.)  
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## 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:*

GUY E. ADAMS, ET AL., Petitioners v. CHARLIE FRANK ROBERTSON AND LIBERTY NATIONAL LIFE INSURANCE COMPANY  
CASE NO. 95-1873

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Don Mari Fedrizzi-----

(REPORTER)