OFFICIAL TRANSCRIPT ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AMCHEM PRODUCTS, INC., ET AL. v.

GEORGE WINDSOR, ET AL.

CASE NO: No. 96-270

PLACE: Washington, D.C.

DATE: Wednesday, February 19, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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AMCHEM PRODUCTS, INC., ET AL., :

Petitioners :

v. : No. 96-270

GEORGE WINDSOR, ET AL. :

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Washington, D.C.

Tuesday, February 18, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:17 p.m.

APPEARANCES:

STEPHEN M. SHAPIRO, ESQ., Chicago, Illinois; on behalf of the Petitioners.

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Respondents.

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P R O C E E D I N G S

(1:17 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 96-270, Amchem Products, Inc. v. George Windsor.

Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONERS

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

We're here today to contend that the Third Circuit was in error when it held that Rule 23 must be applied with a blind eye toward the settlement reached in this case.

In colorful language, the Third Circuit accused the district court and the proponents of the settlement of crafting a legislative solution to the asbestos crisis. In fact, it was the Third Circuit that fashioned a new restriction on class actions that has no basis in the text of Rule 23.

The court declared broadly that Rule 23 must be applied without reference to settlement, and that settlement is an impermissible consideration, but the Third Circuit cited nothing in Rule 23 that says that the court lacks authority to consider settlement, and even

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some of the respondents now concede that the settlement should not be ignored.

We are not, of course, asking for any relaxation of the protections or the standards of Rule 23.

QUESTION: Well, how about the limitations that are imposed by the Rules Enabling Act?

MR. SHAPIRO: That no substantive changes should be made in the law.

QUESTION: Yes, and that basically the rules have to be rules of procedure in a contemplated lawsuit.

MR. SHAPIRO: Your Honor, this, of course, was a lawsuit, but there is no requirement in Rule 23 that the lawsuit has to be determined to be triable. The rule uses generic language about issues being in common, about claims, but it doesn't say that the action has to be determined to be triable before the case can be certified for settlement and, indeed, we've had 30 years of practice now in the various courts of appeals where class actions settled -- cases certified for settlement have been accepted by --

QUESTION: Mr. Shapiro, has there been anything like this -- I'm not aware that there has been, and particularly this case comes up because of an antisuit injunction that stops every court in the country, State and Federal, I take it, from dealing with any of these

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claims. We have one group I think from California saying we could do much better on our own. How can you say that it doesn't affect substantive rights?

MR. SHAPIRO: These people, of course, have the opportunity to opt out of the class.

QUESTION: Well, that's a question. Did they?

MR. SHAPIRO: Yes, we believe they did. The court found that they had been given notification that satisfied due process standards and, indeed, it was one of the most massive notifications in history. Seven hundred thousand people received personal notifications through the mail, some 6 million people received notifications through union publications, there was television programming that included this warning, there was targeted newspaper coverage --

QUESTION: Now that, what you're describing, may fit a common fraud where each person is affected to a small degree, but here you have a personal injury suit where the normal rule is, I can go it alone, and when a restriction is made on that and says no, you have to travel with all these other people, I really don't understand how that doesn't involve substantive rights.

MR. SHAPIRO: Well, Your Honor, there have been many cases, class action settlements, where injunctions have been entered after the case was settled to prevent

splintering off, challenges to the class action settlement, provided that due process is satisfied in giving notification.

QUESTION: Can you give me an example of a personal injury lawsuit where 20 defendants are saved from every court in the country continuing litigation?

I've seen that in the bankruptcy context, but I don't know of it outside that --

MR. SHAPIRO: The Agent Orange case is an example like that, from the Second Circuit, where the manufacturers settled with a nationwide class of veterans from the Vietnam War, all of whom had been exposed. Some had diseases, some did not, and the court protected that settlement with injunctive orders that prohibited relitigation of the issues settled in the class.

QUESTION: It enjoined every court in the country, as this antisuit injunction did?

MR. SHAPIRO: Well, it entered ancillary injunctions against those that attempted to splinter off and relitigate.

Ever since this Court's decision in Supreme Tribe of Ben Hur v. Cobble it's been clear that if there's a class action settlement that satisfies due process the Court --

QUESTION: Well, that's a big question. The

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question is whether this notice -- and other categories, it seems to me, are not quite as sprawling, and you don't have the problem of people who don't even know they're in the class, or if the impossibility for you, in fact, to identify someone who worked around asbestos, then went off to some other occupation, is no longer a member of a union that might give notice --

MR. SHAPIRO: Well, this, Your Honor, was what the witnesses described as the most massive notification campaign ever undertaken until this time, and it specifically identified the people who were in the class -- occupational exposure to asbestos -- and it was carried on for 3 months.

QUESTION: Does the class include people who do not now know that they were exposed?

MR. SHAPIRO: It includes everybody who has occupational exposure.

QUESTION: Whether they know about it now or not.

MR. SHAPIRO: That's correct. The court found --

QUESTION: Now, how could any notice be adequate to those people? I don't know I've been exposed, so you know, I -- let's say I see a full page ad in the New York Times that says those who have been exposed to -- you

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know, have to join this lawsuit, or pull out now, or forever hold your peace. I don't even know that I've been exposed.

MR. SHAPIRO: The district court found that substantially everybody who has had occupational exposure knows it, because since 1972 OSHA's been requiring --

QUESTION: Substantially is what, 80 percent?

MR. SHAPIRO: We think it's virtually everybody who's --

QUESTION: Virtually everybody who's had occupational exposure knows it?

MR. SHAPIRO: There are, of course, exceptions, and --

QUESTION: And what about those exceptions? Have they had due process?

MR. SHAPIRO: Those persons do have due process, because the rule requires the best notice practicable. Those persons are protected by adequate representation --

QUESTION: That's assuming -- that's assuming that you can -- maybe the problem of notice reflects on the impropriety of proceeding in this case at all, as this massive class action.

Maybe you see that there can't be such a class, because one -- reflecting back from how can you possibly give notice to some of the widows who have brought suits

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and have been told, you can't maintain your suit?

MR. SHAPIRO: Your Honor, we submit that the exceptional case shouldn't determine whether the notification for the class itself meets constitutional standards. There are protections such as Rule 60(b) that Your Honor referred to in the Epstein case.

If there's some individual who has a truly exceptional situation, explaining we didn't really know that we had been exposed to asbestos and we couldn't be expected to know that --

QUESTION: Well, let's start from the very --

MR. SHAPIRO: -- there could be an exception for such a person.

QUESTION: Let's start from the very basic premise, and you tell me if I'm wrong about this, but it was my understanding that there is a right for one to litigate one's own claim, and that's the basic rule, and if that's going to be displaced, there has to be a good reason for it, and that good reason, I assume, is not for the courts to make up in the guise of procedure.

MR. SHAPIRO: Well, there is a superiority requirement which supplies the good reason. Judge Reed made elaborate findings of fact that this was superior to relegating people to a tort system where two-thirds of the dollars are spent on lawyer's fees where the capricious

results, many years of delay, AFL-CIO endorsed this settlement --

QUESTION: I am -- counsel, I am willing to accept that that is true, that it's superior.

It would seem to me also a superior way to proceed for New York City to say, you know, we know we're going to have 500 slip-and-fall claims. Why give all the money to the attorneys? We'll just have a class action for everybody that might have a slip-and-fall claim, and we'll adopt a Workman's Comp schedule of injuries, so much for an arm, so much for a leg, so much for a broken hip, and we'll just have a class action. That's far superior.

But I don't see the substantive source of law that the court can and ought to look to in order to determine what is fair, and on page 14 of your brief you say, the questions that remain in the case were common to class members, whether it's fair and reasonable to compromise tort claims for asbestos-related injuries with high transaction costs, et cetera, in exchange for the specific compensation system established by the settlement.

If I were the district judge I'd say, this is marvelously superior, but that is a substantive determination that you are going to displace existing law with a new, different, substantive regime, and I don't

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think the rules allow you to do that.

MR. SHAPIRO: Well, Justice Kennedy, this body of litigation is unique in the sense that this is the most mature body of mass tort litigation in the country. There's 30 years of experience here in settling these cases. The disease categories are very well-known, and one can assign values to these categories with a great deal of confidence.

Many other cases don't fit that description, and so the court would have a great deal of difficulty in --

QUESTION: I think slip-and-fall is much more well-established. Do you --

(Laughter.)

QUESTION: Could New York City do what I supposed? This is a much more intelligent way to proceed than having -- spending a lot money on legal fees, from many policy perspectives.

MR. SHAPIRO: There would be real difficulties in doing that, because in slip-and-fall accidents the variety of injuries and the variety of claims for harm are not just three or four, as there are in this --

QUESTION: Suppose it was comparable? Suppose that in fact you did have -- the water mains overflowed through negligence, and you had 500,000 people who over the course of a week due to New York City's negligence

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slipped and fell.

I guess you would say there are 500,000 people in that category. They were exposed to the ice. They fell, and we want to have a class action. We'll settle the cases. Would there be a problem with that?

MR. SHAPIRO: Well, I think if you're talking about people who haven't had their exposures, haven't had any slip and fall --

QUESTION: They've all fallen.

MR. SHAPIRO: They've all --

QUESTION: Some people are going to -- 3 years from now are going to develop whip lashes, and others won't --

(Laughter.)

QUESTION: -- and various things will happen.

MR. SHAPIRO: If there was an attempt to settle in one proceeding all the past injury cases and you could really find typical and adequate class representatives for that huge array of injuries, it's not inconceivable, but not many cases really are manageable in the sense that this one is.

This one is truly unique because of the maturity of the litigation. There are only four disease categories here, and people know with a great deal of certainty about what value attaches to them. We're talking about people

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who have been injured in the past through exposure but who haven't filed suit, or people who are actually sick at the moment. We're not talking about injuries that will occur in the future.

Now, we don't generalize and say that this settlement regime would work in all situations. You do have to apply the Rule 23 criteria. You don't just look to the fairness of the settlement, or some abstract --

QUESTION: But isn't the fairness of the settlement swallowing -- isn't this sort of the point of what the Third Circuit was saying, and that is that the fairness inquiry in effect is swallowing all the preceding steps that are normally assumed when the moment comes to look at fairness?

Take this as an example. If I understand what the district court did, and if I understand what you're arguing, you're saying there is no disparity of interest. There is no conflict as within the various subclasses here which should present -- which should prevent a certification, and the reason for that is, here they all are.

They've got the settlement, and they like it, and yet -- and you say there really couldn't be any unfairness -- or, I'm sorry, there really couldn't be any true disparity of interest unless we were dealing with a

limited fund in which whatever A gets, B doesn't get.

MR. SHAPIRO: That's --

QUESTION: And yet it seems to me the reality is that there is, in a way, a kind of limited fund unless you assume that the defendants in these cases are simply standing in court saying, we'll pay anything they want. The sky is the limit.

If the sky is not the limit, then there really is a conflict among these subclasses, and the only way it seems to get around that conflict is to say, well, there isn't one any more, because here they all are, and they like what they're getting.

And isn't that the vise that the Third Circuit was getting at, that your fairness inquiry after the fact of settlement is displacing all of the criteria that normally have to be applied in order to satisfy just judicial standards before you even get to looking at fairness? Isn't that what the Third Circuit was concerned --

MR. SHAPIRO: That's the critical issue, and Professor Tribe has caricatured our position as amounting to that, but it certainly is not our submission.

We don't think that the fairness inquiry wipes out the other inquiries under Rule 23. The adequacy inquiry is still central. The typicality inquiry is

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central. The superiority inquiry is central. But we say that these standards need to be focused on the negotiation history and the actual results --

QUESTION: But the predominance --

MR. SHAPIRO: -- as well as the --

QUESTION: The predominance --

MR. SHAPIRO: -- of the parties.

QUESTION: The predominance inquiry, which is central, I think, in (b)(3), certainly changes, and if you look at this going in you'd say, my goodness, these are people who are suffering from any number of diseases accrued at different times involving different manufacturers. There's no way that, looking at these as discrete claims, one could say that a common question predominates.

You have different State laws involved, California very generous, Maine less generous. You look at it and say, my goodness, this is just a hodge-podge, I think was the word Judge Becker used.

So going in with a case, looking at the complaint, one would conclude no, there's no -- common questions don't predominate, and then you look to the rules, and I guess that's what is bothering me most about this.

You go back to 1966, when we first got (b)(3)

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class actions, and you've got the Rules Advisory Committee telling this Court and also Congress that you couldn't even have mass accident cases under (b)(3). That's not what it was meant for.

And then it suddenly gets changed to be something so much vaster than was ever intended.

MR. SHAPIRO: I was struck by the comment of the Rules Committee current draft of the change in Rule 23 that said that our position is law everywhere in the United States except in the Third Circuit.

Thirty-nine percent of all the cases that are certified today are certified for settlement purposes only. This is really no change. This is --

QUESTION: Well --

QUESTION: Well, but the -- I'm sorry.

QUESTION: As I think most of the parties agree, the Third Circuit spoke too extremely when it said you can't take -- nobody says you can't take settlement into account, you can't have a settlement class.

But what's key in this opinion, as I read it, is that -- just what Justice Souter said, that 23(e) does not swallow up everything that went before.

MR. SHAPIRO: We completely agree with that, Justice Ginsburg, and when you look to these other factors and you consider the settlement, it makes them so much

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more meaningful and -- as opposed to speculating in the abstract, as this Court said --

QUESTION: Well, but let me suggest one change in Judge Becker's opinion that I think would leave us right where we are, but perhaps I'm wrong.

What if Judge Becker had said, look, the vise here is that the settlement is being used as a sufficient basis in and of itself to answer these various preceding inquiries, to satisfy these various preceding conditions for class certification.

If he had put in that word sufficiency, wouldn't everything else in the Third Circuit's opinion basically be just as appropriate, or inappropriate, as the case may be, as it is the way the Third Circuit actually phrased it?

MR. SHAPIRO: I don't think the Third Circuit could have modified the opinion that way, because Judge Reed looked at a host of other things in addition to the settlement. He didn't look just to the settlement.

He looked to the alignment of the representatives; he looked at their incentives; he looked at the negotiation history to see if these conflicts were reality or just fiction, and in that sense the inquiry is really a much-improved inquiry.

If you just look at the complaint, you can't

begin to tell if you're going to get adequate representation, or if you're going to get typicality, if you're going to get superiority.

QUESTION: But you would in fact have a very different inquiry, as you yourself argue, if there were not already a settlement on the table and, in fact, there is a good argument, as Justice Ginsburg just suggested, for coming out quite differently depending on whether you were looking at it before the settlement and after the settlement.

MR. SHAPIRO: Oh, absolutely --

QUESTION: And the question is one of degree, and it seems to me the suggestion in her question and the suggestion in mine is that the degree is so great that the only way to make sense, I think, of the certification which the district court made was by saying, the district court was treating the settlement as sufficient as opposed merely to one source of information.

MR. SHAPIRO: I think that would be a mischaracterization of what Judge Reed did, because he looked at a host of factors pertaining to the alignment and the incentives and the vigor of the negotiation, the changes that were made in this deal, whether or not the AFL-CIO endorsed it -- he was looking to an entire array of relevant facts.

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QUESTION: Well, I'll take that on, Mr. Shapiro. Let's just talk about using the settlement as a significant factor in deciding how broad the class can be.

I am concerned about the incentives that that creates for the class action counsel. We all know that these class actions don't come out of the woods. The plaintiffs don't suddenly collect together. They are put together by counsel, who has something to earn by putting them together.

Now, if he knows that by achieving a settlement he can expand the size of the class on behalf of which he's suing, will he not have an incentive to settle at substantially less than he might otherwise settle?

MR. SHAPIRO: There --

QUESTION: Doesn't it place him in a real conflict with regard to his clients in the class that could get in without a settlement, in the class that would be a certifiable class without the settlement?

MR. SHAPIRO: Well, there are conflicts in cases that have been certified for settlement and in cases that are certified for trial, and the district courts have to use the tools that are given them to examine, to see if what was achieved was a vigorous, adversarial attempt to maximize the amount of money from --

QUESTION: This is a massive incentive to bring

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in other people who really wouldn't be in there if you didn't have a settlement, but then you strike a settlement that gives everybody less than they might get had he just gone in without a settlement.

MR. SHAPIRO: We have lots of indications here, factual indications that that isn't true, and I suggest this is a factual question where deferential review is appropriate.

Recall that it was the Federal judiciary, Judge Weiner, the MDL panel, the Federal Judicial Center that urged these global negotiations for a global resolution.

QUESTION: They have some self-interest, too.

MR. SHAPIRO: Well, and the --

(Laughter.)

MR. SHAPIRO: The lawyers that were --

QUESTION: Mr. Shapiro --

MR. SHAPIRO: -- picked to do this --

QUESTION: Mr. Shapiro -- Mr. Shapiro -- Mr. Shapiro, you mentioned the MDL, and so I'd like you to straighten me out on one thing. I thought when the multidistrict panel sent all of these cases to Judge Weiner to be consolidated he was talking about settling those cases. The multidistrict panel was talking about settling those cases, not creating this vast exposure-only litigation that never existed.

MR. SHAPIRO: Your Honor, the transfer from Mr. Fitzpatrick demonstrates that Judge Weiner asked for a global resolution, wanted the parties to attend to that.

QUESTION: Judge Weiner. But did the multidistrict panel say, when we're sending all these cases to be consolidated for pretrial in the Eastern District of Pennsylvania, that the court was to settle not only those cases but cases that hadn't been instituted yet?

MR. SHAPIRO: They asked specifically that after the transfer that the prospects for global negotiation be considered, and that's just what the Federal Judicial Center had said in two major conferences.

This was done at the instance of the judges who are on the firing line in this litigation, and Judge Reed --

QUESTION: Do you have a reference to where the multidistrict panel said settle other cases than these that were consolidated?

MR. SHAPIRO: The 1991 opinion itself does refer to that as one of the possible outcomes of the transfers, that perhaps a global settlement could be achieved in this litigation, which is what the other judges had been suggesting, too.

They told the lawyers, you've got to do better.

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You cannot simply rely on this system where transaction costs eat up $2 out of $3, where years and years go by and the courts are clogged and flooded, and that's what the lawyers did here.

QUESTION: We have many cases, and it's sometimes a question of the degree of the difference between substance and procedure, but it seems to me that by using the term fairness the district court here imported and made choices between substantive chances of recovery, of liability, of measure of damages, and it seems to me that that's not the intent of the rule, and that it exceeds the authority of the courts under the rule.

MR. SHAPIRO: Well, if this --

QUESTION: Fairness becomes -- fairness, which is an infinitely acceptable concept, is the basis for legislation.

MR. SHAPIRO: If this were a litigated matter I would agree with that, that you couldn't override State law differences, but the parties can settle, and often do settle in a way that varies from a particular body of State law, and here the settlement does incorporate reference to State law, but the amount of money is geared in part to State law standards, but it's the settlement that's critical.

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If an adjudication attempted to override State law standards, then we'd have the substantive law problem that you mentioned, but the parties can settle on any terms that the judge determines to be reasonable --

QUESTION: The parties are then conferring a new regime, a new substantive regime of law upon the court that the court adopts. It's like asking the court to be an arbitrator.

MR. SHAPIRO: Many settlements have such features.

QUESTION: It's like --

MR. SHAPIRO: Many settlements have such features, where the parties will resolve an array of disputes under an ADR system, and there's nothing wrong with that.

QUESTION: I can understand what you're saying, Mr. Shapiro, with respect to one plaintiff and one defendant settling contrary to some principle of State law, but here I get the impression it's the tail wagging the dog, almost. None of these individuals have much to say about what -- the settlements made. It's the attorneys, and their incentives may be different.

MR. SHAPIRO: Well, I think Judge Reed found that there was a very important safeguard here from the AFL-CIO's participation. They negotiated changes in this

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agreement to make it satisfactory to them, substantive and procedural.

QUESTION: How did the AFL-CIO -- was it a party to this?

MR. SHAPIRO: Well, the named plaintiff, Mr. Carlo, and then Mr. Georgine, were both officers in the AFL-CIO. One was a union president, the other was head of the building trades department of the AFL-CIO, so --

QUESTION: Well, what if the Benevolent Protective Order of Elks had participated --

(Laughter.)

QUESTION: -- because they were both Elks?

MR. SHAPIRO: Well, when we talk about adequate representation, this is a group that, of course, has members in every disease category. Most of the people that fall into this class are labor union members, AFL-CIO members, so if there's a problem, this is a group that's in a position to say so.

We also had 14 class representatives --

QUESTION: This seems to me even more of a legislative cast to what the court does. The court said, I've looked at what the National Association of Manufacturers have said, the AFL-CIO, is it, and this is what is fair and good and reasonable.

That is not a standard that has been delegated

to the courts by the legislature. It actually exceeds the bounds of the case or controversy.

MR. SHAPIRO: Well, many settlements, of course, differ from what would happen if the matter were litigated under State law principles, and the settlement here, of course, did that. It departed from what would happen in a piece of litigation, and this is not, of course, unprecedented. The Agent Orange case is quite similar to this. There have been many cases like this where you have people --

QUESTION: Is the Agent Orange the closest one that you can imagine --

MR. SHAPIRO: The Second Circuit's Agent Orange, the Ivy case, and then the Agent Orange case that preceded that, and obviously --

QUESTION: Mr. Shapiro, turning -- I have some problem with the prospect of two parties who are not in disagreement as to what one should pay and what the other should accept coming to a court and saying that there is a case or controversy between them.

I mean, I gather that can happen afterwards, after there's a case or controversy brought before the court, but here are two parties coming before the court, and one says, you know, I think I owe you $200, and I'm willing to pay that, and the other one says, you know, I

think you owe me $200, and I'm willing to accept that, and they bring this to a court, and this is a case or controversy?

MR. SHAPIRO: Well, this is --

QUESTION: I mean, I'm simplifying it, but that -- isn't that what you have here?

MR. SHAPIRO: The 14 class representatives all allege personal injury, and they demanded valuable relief --

QUESTION: Yes.

MR. SHAPIRO: -- and they included in their class people who were in the same situation.

QUESTION: And the defendants say, you're right, you deserve relief, and I'm willing to pay $2 million, and the plaintiffs say, I'm willing to take $2 million. Where's the case or controversy?

MR. SHAPIRO: It's a case or controversy because the court has to approve the settlement and issue an injunction. This case depended on the issuance of an injunction. It's just like an SEC case --

QUESTION: Well, the court has to approve the settlement if it's a justiciable controversy. I mean, you're -- that's circular.

MR. SHAPIRO: Well, this case is indistinguishable from the SEC and antitrust division

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cases where the parties come before the court with a complaint, and an answer, and a settlement, and the answer has always been in these cases that because a judicial act is needed and an injunction is needed there still is a live case or controversy. We rely on that body of cases.

QUESTION: Has that body of cases been here? Has it been in our Court?

MR. SHAPIRO: Oh, yes. In United States v. Swift the Court reached that same conclusion.

QUESTION: They all involve Federal agencies though, don't they?

MR. SHAPIRO: Well, there are private cases where the same concept has been raised. One is In Re Asbestos Litigation from the Fifth Circuit. They're --

QUESTION: Not here, though.

MR. SHAPIRO: Not here. If I may reserve a moment for rebuttal.

QUESTION: Very well, Mr. Shapiro.

Mr. Tribe, we'll hear from you.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE RESPONDENTS

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

I think I might begin with the question of whether the judicial power was being exercised at all in

this case before perhaps turning to Rule 23, because, like Justice Kennedy, I do think that what the district court did, though judicial in form, yes, it was an injunction, yes, it had all the trappings, was legislative in substance, very clearly in violation, I think, of Article III as well as the Rules Enabling Act.

And let me say why this is wholly unlike Swift and the other decree cases. Of course it is permissible under Article III for people who are actually at one another's throats, including an agency that says you better do the following. Unless you agree, I'm going to get an injunction. Well, then one can get an agreement.

But here, what is very clear is that the only reason for going to court was not for one party to force the other to submit. It was for the two parties to take what would otherwise have been a private deal involving, as Justice Scalia suggests, a much smaller class, not all of the exposure-onlys, and transform it into a nationwide revision of tort law binding throughout the country --

QUESTION: Mr. -- how --

MR. TRIBE: -- on anyone who might sue the CCR defendants.

QUESTION: How does it -- I mean, we used to have in Boston very complicated settlements in civil rights cases.

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MR. TRIBE: Mm-hmm.

QUESTION: Running -- the whole fire-fighters, I mean, all kinds of things

MR. TRIBE: Sure.

QUESTION: Enormously complicated provisions, entered through settlement of thousands of people, and those decrees would be there. We would normally administer the settlement, and they appealed, frequently.

MR. TRIBE: Mm-hmm.

QUESTION: And the way this differs from that, you're saying, is that the parties here who are members of the class don't really have a fight with the defendants?

MR. TRIBE: Well, the named representatives here have all testified beyond dispute that --

QUESTION: Right, but I mean, is -- I know the testimony.

MR. TRIBE: Yes.

QUESTION: Is that the distinction, or are there other distinctions? In other words, unlike others, perhaps, on -- I'm not concerned particularly with the fact that it's complicated, that it differs from State tort law, because I've just seen so many consent decrees where that is so growing out of settlements, particularly in the civil rights area, so if that isn't the problem, the complexity, or the fact that a lot of State laws

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rights they're giving up, what exactly is the problem?

MR. TRIBE: Well, there are, Justice Breyer, many different problems.

QUESTION: Yes.

MR. TRIBE: Under the Rules Enabling Act the problem is that there are substantive changes being made in State law in a way that, of course, two private parties agreeing together could do, but that this makes binding on millions of people.

QUESTION: What is one such change?

MR. TRIBE: Oh, in California, for example, an asbestos company cannot make any reference to whether or not the plaintiff smoked. In some other States there can be some --

QUESTION: I know that they are giving up -- each member of the class is giving up a legal right to sue that he might have under the laws of many different States. That's so in any settlement.

MR. TRIBE: Yes, but --

QUESTION: So what's different about this one?

MR. TRIBE: What's different, Justice Breyer, just for example, is that in many States people are not allowed to give up in advance of the illness occurring through a general release the right to sue, like the woman in this morning's decision who didn't know until her

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husband died various of the relevant facts.

QUESTION: But I thought they were bringing Metro-North kinds of actions. A Metro-North kind of action, if it exists --

MR. TRIBE: No, but what's being extinguished --

QUESTION: -- and can win -- yes.

MR. TRIBE: What's being extinguished is not just the Metro-North kinds of actions. That is, the kinds of actions, for example, that the widow in this morning's case involving Ingallls Shipbuilding brought. Her claims, since probably some CCR defendants mae some of the stuff that killed her husband in that shipyard, her claim not just for exposure, but she's the widow of someone who got cancer, is extinguished by this settlement.

QUESTION: I've seen many such actions in civil rights cases again where a person says, I will give up and compromise my present claim for $50,000 and, in addition, I promise never to bring another action growing out of the same incident.

MR. TRIBE: Yes. If --

QUESTION: That is fairly common.

MR. TRIBE: First, some States do not allow people who have not yet experienced something to bind themselves that far into the future.

Second, the most important point is, many members of this class haven't been born yet. Others haven't married into the class yet. Many, as Justice Ginsburg pointed out, have no clue that they were exposed. It's not as though you're having a tete-a-tete with particular individuals.

QUESTION: How do those factors help answer the question put by Justice Breyer as to why this is different from the fire-fighters? Is the difference -- and I'm not sure of how to best articulate it, but --

MR. TRIBE: Right.

QUESTION: -- but is the difference that in the fire-fighters case, civil rights case, there was an imminent litigable dispute --

MR. TRIBE: No question --

QUESTION: -- and here there is not, or does that --

MR. TRIBE: Well --

QUESTION: Is that sufficient?

MR. TRIBE: There was an argument about future alleged misconduct. It was not only imminently litigable, it was, as the Chief Justice referred to it, a contemplated lawsuit. It would have been a lawsuit had there not been this settlement. In this case there would have been, and this is undisputed, no suit on behalf of

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millions of merely exposed individuals --

QUESTION: Yes, but there would have been suits on behalf of some of them.

MR. TRIBE: Well, there had never been --

QUESTION: There's a case or controversy as to some people, wouldn't you agree?

MR. TRIBE: Oh, in some States, as to some of them there might have been a case, but --

QUESTION: Might have been a case? You don't think any of these plaintiffs would be litigating --

MR. TRIBE: Yes.

QUESTION: -- if there weren't this settlement?

MR. TRIBE: Well, I do know --

QUESTION: I think probably hundreds would.

MR. TRIBE: Well, I do know that class counsel had never brought, and this is undisputed, a claim on behalf of someone merely exposed. CCR --

QUESTION: You're talking about the fringes of the class. Maybe the class is too big. I'm not --

MR. TRIBE: It's not --

QUESTION: -- but you're saying there's no case or controversy here, not even as to those who have cancer and wanted to sue for millions of dollars, if I understand --

MR. TRIBE: Justice Stevens, I'm sorry. I

certainly believe that as to those who are dying of cancer and many of the others there's a case or controversy.

QUESTION: Okay.

MR. TRIBE: But this Court's jurisprudence requires in a class action that there be an injury in fact by everyone, and the absence of a case or controversy here arises from the fact that the entire --

QUESTION: It's the absence of a case or controversy as to some members of the class.

MR. TRIBE: Well --

QUESTION: Is that what you're claiming --

MR. TRIBE: No.

QUESTION: -- or entirely no case or controversy?

MR. TRIBE: I'm saying no injury in fact as to some members, but (b), more important, no case or controversy as to the entire phony complaint which was filed, admittedly, solely for the purpose of getting the court to put in place this --

QUESTION: Well, you're saying the class is too big, yes.

QUESTION: Had you --

MR. TRIBE: Could I --

QUESTION: Go ahead. Do you want to finish your --

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MR. TRIBE: I just want to answer --

QUESTION: Sure.

MR. TRIBE: The fact that it's too big, too diverse can't possibly be certified without, as Justice Souter suggested, making the mere settlement somehow the sufficient answer to all of the questions under Rule 23 is a different matter.

The absence of a genuine controversy arises from the fact that the entire case -- and this has never really been denied -- was brought not to obtain the relief the complaint requested, money for monitoring, money for mere exposure, money for increased risk, it was brought solely for the purpose of enabling the court, giving it supposedly jurisdiction to issue a nationwide injunction --

QUESTION: How do you distinguish, then, the cases that Mr. Shapiro cites which we read about in the papers, and probably some are participating, where it is announced that the Justice Department is bringing an action and that X pleads nolo contendere, and that a consent decree has been entered?

MR. TRIBE: Well, the rights of third parties are not sacrificed in those cases, Mr. Chief Justice. What's happening is that the agency, the Department of Justice, is saying that instead of taking you to court

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and, if you insist, we will take you to court, we will agree to desist from that if you will agree to --

QUESTION: But the plaintiffs in the class action are saying if you disagree we'll take you to court just as much, aren't they?

MR. TRIBE: There is this difference. They can only take the defendants to court with the defendants' consent here, because in this case it is recognized that this class could not be certified for litigation so that, unlike litigable matters of the sort to which you referred in which the plaintiff has some leverage, this is in the unusual circumstance where, since absent the defendant's agreement there's no settlement, and since absent a settlement there could be no conceivable finding, even a pretense of a finding that the Rule 23 factors are satisfied, it means that the defendant really holds all the cards.

It is not a case where the plaintiff has some meaningful leverage and then they compromise and the court in enforcing the compromise issues an injunction. Here, the injunction has the effect of replacing a system of tort law that one might find fault with with an administrative scheme.

The court would have had no power whatsoever to do that ordinarily, and what Mr. Shapiro says is, the

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reason it has power to do that here is because this is not an adjudication.

Well, of course, the only power that a Federal Article III court has is the power to adjudicate, and when -- I'm sorry, Justice Breyer.

QUESTION: I didn't want to interrupt you, but maybe I'll -- the -- what's obviously -- what's actually motivating my question partly is the analogy to what I've seen is a lot of settled cases in the civil rights area where it seems to me the power to accept settlement is fairly broad, and to extinguish State law claims, and I grant you you're right that this is in the far -- pushing that. There's no question about that.

But the reason the district judge says that they've gotten into this thing is that they're trying to settle millions of claims, and the reason that they're trying to do that, he says the victims are not receiving speedy and reasonably inexpensive resolution of their claims. These are millions of people who actually do have cancer.

Now, I take it that this is an effort to use Rule 23 in order to get that problem solved. Now, that's what's moving me in part, and that's why I'm interested in whether there isn't the power here to bring about what the district court says he's aiming at.

MR. TRIBE: With subclasses, Justice Breyer, perhaps.

QUESTION: And how does that work, subclasses?

MR. TRIBE: Well, the way -- under the rule, one can identify a subgroup that is more homo -- relatively homogeneous, so that one could get a set of typical representatives who could adequately advance the interests of those, for example, with advanced mesothelioma, or those with pleural thickening.

Those subgroups -- and this was going on before this case happened. Ninety-nine point eight percent of the cases against CCR were being settled by CCR. Various subgroups can be managed.

What causes the problem here is the fact that the understandable desire by these 20 companies to get what they might have gotten from the Congress of the United States, namely protection into the indefinite future -- they don't in fact say the sky's the limit. They don't want to spend an infinite amount. They want to limit their exposure.

That's what creates the inherent tradeoffs within the class. Congress is where those tradeoffs could be resolved. If they went to Congress, one could then imagine a legislative solution. Or if, instead, subgroups formed classes -- that is, there might be a class of

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people with cancer --

QUESTION: Mr. Tribe, this discussion has been certainly quite wide-ranging, and I certainly have contributed. If you look at the question presented in the petition for certiorari, it's whether the district court has to ignore the existence of the settlement in determining whether class certification is appropriate under Rule 23. Now, that's really quite a different question than the ones we've been arguing -- hearing and discussing, I think.

MR. TRIBE: Yes, it is, Mr. Chief Justice. The Third Circuit, of course, did not ignore the existence of the settlement. It went on at some length to show how the settlement shed light on the conflicts involved here.

There was no inflation adjustment, which wouldn't have mattered much to people who had a life expectancy of 5 years from cancer, but would have mattered a great deal to people who might get sick, if at all, only in 25 years.

All of the consortium claims were resolved at zero. That would matter a lot more to the widows than it would to people who lived alone.

So he looked at the settlement, and though perhaps, as Justice Souter and others may have suggested, there's some rhetoric in Judge Becker's opinion that

suggests that the settlement doesn't matter, his own holding makes clear that he looked at it, he paid attention to it.

But what he did say was this, and I think this is clearly right, and very important. The settlement can't in itself suffice because there is no objective test for what the right tradeoff is unless the groups with different interests are adequately represented.

QUESTION: Let me ask you, Mr. --

MR. TRIBE: It doesn't matter whether the settlement looks reasonable.

QUESTION: Mr. Tribe, may I just ask you, do you agree with this sentence out of Judge Becker's opinion:

We held in GM Trucks that, although class actions may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated.

Do you think that's a correct statement of law?

MR. TRIBE: Well, Justice Stevens, I think when he says, as if it were going to be litigated, if I interpreted that to mean what Mr. Shapiro does, namely, we must be blind to the settlement in figuring out whether the criteria of Rule 23 are met, I think it would be wrong, because things like management of a complex case might shed a lot of light on that by looking at the

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settlement, but you don't have to read it that way.

I would interpret that to mean that we must avoid a search -- we must avoid looking at this as though the questions were no longer those of typicality, predominance, superiority, and adequate representation, but merely the fairness of the settlement.

QUESTION: Well, does that mean that --

MR. TRIBE: And I think in that respect he's right.

QUESTION: Is it conceivable that there are class actions that have come to the court in a settlement posture which the trial court could say, well, if this were going to be tried, I really couldn't prove the class certification but, given the settlement, I think I will approve it? is that ever possible, in your view?

MR. TRIBE: Well, Justice Stevens, I wanted to be able to say yes to that because I thought I could come up with managerial examples in which that would be possible, but I think there are three reasons why the answer really ought to be no, and they're very fundamental.

They relate to the text of Rule 23 and whether it can possibly be stretched to confer judicial power to impose a binding order on an entire class where the class representatives could not be deputized to litigate it, and

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with Article III and due process problems. Let me just say a word about each.

As far as the text of the rule is concerned, it talks constantly about circumstances in which people may "sue as representative parties" and, most importantly, there's no language in the rule that confers affirmative power to impose a binding settlement on the class. It's a negative thing.

Rule 23(e) limits. It says that you cannot dismiss or compromise a class action without judicial approval. I think you have to twist those words out of shape to infer from them a power to judicially impose a settlement where you concede that there could not have been a class action.

I also think that there's an intrinsic Article III problem, just apart from the facts of this case, in construing any rule of procedure to create circumstances where an Article III court may bind nonparties, but only so long as the parties who seek such an order have settled all of the disputes between them and have therefore put no controversy before the court.

I mean, that's what it would come down to. It would basically say the one precondition of getting the court to exercise its judicial power is that you guys don't disagree. I think that stands Article III on its

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head.

I think there is a third problem, and it goes to Justice Scalia's question about incentive structures. I mean, apart from the incentive to load up the class with additional people, which may be bad for a number of reasons, I think there's a fundamental point, and that is that representative parties, as the rule calls them, who conceivably cannot carry on adversary class litigation against a defendant -- which is your hypothetical, Justice Stevens, right? -- are necessarily hobbled inherently in negotiating with that defendant and thereby playing the role that due process and rule 23(a)(4) demands, namely, fairly and adequately protecting the interests of the class, because by definition -- by definition, representative parties in that situation need the defendant's cooperation to get the class off the ground at all.

QUESTION: Well, what about -- are you then -- is the implication of what you're saying that imagine a big company, or several of them, that have a history of employment discrimination, and they work out a settlement that is going to cover millions of people into the future, or toxic torts of all kinds -- you know, there are thousands of them, and now it would be impermissible to put anybody in the settlement class, anybody -- anybody

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who might work for this company in the future, unless in the absence of that settlement his position is similar enough to the others in the class that he'd be in it anyway.

That proposition of law seems to have, to me, a lot of implications as to all kinds of decrees all over the place in ways that would inhibit settlements that might be highly desirable.

MR. TRIBE: Justice Breyer, I don't think it's an implication of my position that one apple of the wrong flavor spoils the barrel. The question --

QUESTION: Well, no, but that apple would be out of it.

MR. TRIBE: Well, maybe --

QUESTION: You see, that apple would be out of the class, and that apple being out of the class would mean that the company wouldn't know what was going to happen, and therefore, who knows?

Or, when you get to the point of enforcing the decree, the company claims, oh, that's one of the apples, or the apple says it's the apple.

MR. TRIBE: Well --

QUESTION: You see -- do you see the problem? I mean, that -- and I don't see anything in the rule that requires that result.

MR. TRIBE: Well, I guess I don't see anything in the rule that makes it possible for a nonlitigable case to give rise to a binding decree. Maybe you're saying that the rule should be changed to make that possible. I'm talking about the rule as it is.

But I'm also suggesting that any change in the rule that makes the power of an Article III court to bind millions of people dependent on the complete agreement of those before it is troublesome at a minimum under Article III --

QUESTION: Mr. Tribe, are you saying --

MR. TRIBE: -- and under Rule 82 you wouldn't read the rules that way.

QUESTION: Are you saying, then, that even a back end opt-out would not save this class? I take it that's what you're saying.

MR. TRIBE: I think because a back end opt-out, Justice Ginsburg, would have to have preconditions that the court would set. That is that in the heart valve and other cases a back end opt-out helps a great deal on the issue of notice, on the issue of meaningful choice, so that, for example, the widow in this morning's case might have been in a position to make certain decisions after her husband died that she wasn't before.

But a back end opt-out does not prevent this

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from being a binding exercise of Federal judicial power, otherwise -- I mean, if they didn't need that they would include it in their inventory settlements that they settled on the side at quite a premium, and therefore I think that although the superiority determination under 23(b) might come out differently with a back end opt-out, I don't think the Article III problem or the textual problem would be solved, nor would the leverage problem.

That is, the fundamental problem of any deal, even if it looks good or better because people don't have to make the kinds of impossible choices that this settlement imposes on them 30 years before they come down with a terrible disease, even though it would be improved, if it turns out to be the case that the heterogeneity of class, or the inability of the representative plaintiffs adequately to represent the whole class or anything else brings the situation to the posture Justice Stevens put, namely, but for the settlement I simply could not certify this class, that gives such leverage to the defendant that in effect you are handing to the adversary power over the State law claims of absent members of this class in a way that changes their substance, the substance of those State law rights in violation of the Rules Enabling Act, and also in a way that violates I think both Hansberry v. Lee and Richards v. Jefferson County.

That is, the point about both your opinion, I think, in Richards v. Jefferson County, Justice Stevens, and Hansberry v. Lee many years earlier, was that the people who speak, even in the negotiation process, as you stressed in Matsushita, the people who speak for others have to be in a position in terms of an alignment of interest to fairly represent them.

QUESTION: We've got district court findings that they were.

MR. TRIBE: Well, the findings --

QUESTION: You think -- you don't agree with them, of course.

MR. TRIBE: No, that's -- not quite, Justice Stevens. I think that the court was extremely careful -- at page 49a of the appendix to the cert petition you see how careful Judge Becker was to avoid disturbing findings of historical or empirical fact, so that there were no findings --

QUESTION: Well then, do we take the case as though the representation was adequate or inadequate?

MR. TRIBE: There are two different concepts of representation. The word representation in 23(a) talks about the ability of the representative plaintiffs.

QUESTION: I understand.

MR. TRIBE: And he -- as to that, what did he

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find as to their ability? It was in his conclusions of law section to begin with, and what he said as to adequate representation was --

QUESTION: This was Judge Weiner?

MR. TRIBE: Yes. This is -- No, Judge Reed, I'm sorry.

QUESTION: Judge Reed.

MR. TRIBE: Judge Reed said, and it's at pages 229a to 230a of the certiorari appendix, that so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery, there's adequate representation.

Now, that's a conclusion of law. It's an obviously incorrect conclusion of law. As to predominance he said the only --

QUESTION: He was quoting from a Third Circuit case there -- yes.

MR. TRIBE: Well --

(Laughter.)

MR. TRIBE: But not from a decision of this Court.

(Laughter.)

QUESTION: Which would be right if we had said that, right?

(Laughter.)

MR. TRIBE: If you'd said it recently enough.

(Laughter.)

MR. TRIBE: Take predominance at 226a of the certiorari appendix. The predominant question he identifies is whether the settlement is fair, reasonable, and adequate for the class, and far from caricaturing petitioner's position, as Mr. Shapiro says I'm doing, let me simply just turn to his brief.

He says at, I guess page 42 of the blue brief, says, right in the middle, the legal and factual questions that remain now that we have a proposed settlement therefore relate solely -- solely -- to the fairness of the settlement as the district court concluded, and in their reply brief at page 14 he says, the questions that remain were common to class members. Is the deal fair and reasonable?

This kind of reverse engineering, you know, trying to figure out if the incommensurable and conflicting interests of people who are perfectly well, who won't get sick until perhaps, if ever, the year 2030, and others, an effort to figure out if the incommensurable tradeoffs among them was made in a way that fairly represented their interests, as though you could apply some objective scale backwards, won't work.

That's why giving the kind of weight to this

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fairness inquiry, which is really just a way of looking when the dust has settled at whether the thing looks really gross, giving so much weight to the fairness inquiry and essentially displacing the inquiry that is indispensable if due process is to be protected and the integrity of class action law is to be preserved, is wholly indispensable.

QUESTION: But you do not go so far as to say that a requisite premise is that the case must be capable of being litigated. You do not go that far.

MR. TRIBE: Well --

QUESTION: Because the Chief Justice -- we talked about the question that was presented, and --

MR. TRIBE: I think whichever way the question that was presented is answered, the judgment here would be, I think, affirmed because the basis --

QUESTION: What is your position?

MR. TRIBE: My position is that it would be wrong -- that under Rule 23, the existence of a settlement should not be ignored when it is relevant to answering the questions put in Rule 23.

QUESTION: And --

MR. TRIBE: And it often is.

QUESTION: Can a district court certify a case that clearly could not be certified for litigation for --

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MR. TRIBE: I think not.

QUESTION: Oh?

MR. TRIBE: Mr. Chief Justice, I think the answer to that ought to be no, but that's not --

QUESTION: Don't ignore it, but it doesn't make any difference, right?

(Laughter.)

MR. TRIBE: No, no --

(Laughter.)

QUESTION: I think that's what you're saying. It can't make any difference --

MR. TRIBE: No. It can --

QUESTION: -- but don't ignore it.

MR. TRIBE: It can inform you of a lot of things. That is, it --

QUESTION: But if were smart enough you'd figure them out anyway.

MR. TRIBE: No, because --

(Laughter.)

MR. TRIBE: -- no one has a crystal ball.

The settlement in this case -- for example, I do think that in this case the degree to which Judge Becker looked at the settlement to reveal how the tradeoffs worked might have been unnecessary.

That might have been obvious in the -- to begin

with, no settlement could have cured the intractable problems of the heterogeneity of this class, but it might be the case when you looked at the settlement, no matter how smart you were, that it pointed something out to you that you hadn't realized about the situation that would enable you to see that what appeared to be a divergence in the class really wasn't.

That didn't happen here, but it sure can't be said --

QUESTION: Can I give you a little different -- supposing the trial judge made a finding that really there ought to be 18 subclasses because there's heterogeneity, but if I look at this settlement I think that each one of those 18 subclasses got the best deal it could have gotten if they had 18 separate representatives.

Would it be permissible on those facts to certify the class?

MR. TRIBE: If other -- if the other requirements of the rule were met or were not met?

QUESTION: If they would be met as to each 18 subclass, clearly, but the problem is you've got 18 subclasses, but yet you look through it all and you say, well, I think each of those 18 subclasses got at least as good if not a better deal in the total settlement as if they'd had 18 subclasses.

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MR. TRIBE: I think if they were all separately represented in putting the deal together, I think that sounds like a perfectly reasonable --

QUESTION: And if he finds that they got the same benefit that they would have gotten that way -- because the main difficulty that he foresaw was there wasn't enough money to go around, and that's what creates the major controversy, but here he found there was enough money to go around.

MR. TRIBE: Well, enough money to go around suggests that there's some pie in the sky whose size --

QUESTION: Right.

MR. TRIBE: -- we know. The fact is, if in your hypothetical these 18 subclasses were all represented by the same two guys, and not separately represented, I think no one is smart enough to look at that and say, oh, I can tell that even though their interests are in conflict, they got as good a deal as they would have gotten otherwise, because there isn't any as good a deal out there.

The question is, there are a lot of different ways of carving up this pie. Maybe, as was suggested in the earlier argument, the right thing is to reserve most of the money for the people who get very, very sick, and not to worry so much about medical monitoring, but that's

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not an inevitable view.

Somebody might say, if they really were into preventive medicine, no, you really ought to reserve more money for the medical monitoring so that less of them will get sick in the future.

QUESTION: So you're really saying you can't make an intelligent fairness determination after the fact without knowing the process by which the determination was made, and that's -- I mean, that's your --

MR. TRIBE: That's exactly right, Justice Souter --

QUESTION: Yes.

MR. TRIBE: -- and that no determination about the result will quite do.

I mean, you know, the proof of the pudding is in the eating. Well, in this case proof is unavailable. There is no QED. There's no objective test, and you know, what might please me might poison someone else. There are inherent --

QUESTION: I think your time has expired --

MR. TRIBE: Oh, I'm sorry.

QUESTION: -- Mr. Tribe.

MR. TRIBE: Thank you, Mr. Chief Justice.

QUESTION: Mr. Shapiro, you have 3 minutes remaining.

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REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONERS

MR. SHAPIRO: Thank you, Mr. Chief Justice. I'd like to begin with the point Professor Tribe left, that there's no proof of adequacy here. In fact, there was voluminous evidence on adequacy of representation.

The district court looked in great detail at what these lawyers and what these class representatives had done for each medical category. This is a factual issue, and the district court's determination on these factual points is subject to deferential review.

Now, Professor Tribe's --

QUESTION: I thought he was talking not about adequacy of representation, but rather about the question whether the settlement achieved gave each class the maximum that it could have gotten.

MR. SHAPIRO: And I think his point was you can't just look at the end result.

QUESTION: Right.

MR. SHAPIRO: You have to look at other things. We agree with that. You don't just look at the end result. You have to look at the alignment of interests of the representatives and the vigor of negotiation, the changes that were made, and that's what the district court did. This is a factual issue which the district court was

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best positioned to consider.

QUESTION: Do you think there would be any difference if we were to hold hypothetically that there had to be four lawyers, one for the people who brought suit before, one for the people who have the disease already, one for the people who have the thickening, and one for the people who have nothing?

MR. SHAPIRO: There --

QUESTION: Would that lead to a practical difference in this case?

MR. SHAPIRO: There's be no difference. That's what Judge Reed found, that there would be no -- there's no practical need for these subclasses.

QUESTION: So in other words, if this Court were to say the thing that was wrong with this is that there wasn't those four separate lawyers, and it went back, it would reach the same result, in your view?

MR. SHAPIRO: Well, the same result would be reached at greater expense, because the district court found here that there were no conflicts among these subclasses.

QUESTION: You're willing to leave it to one district judge to decide nationwide what is fairness as to all of these different plaintiffs, some who haven't gotten the disease, some who know that they have it, some -- I

mean, I can understand how a legislature might feel --

MR. SHAPIRO: This is merely an option, Justice Scalia, for people who want the option, and it is found to be a preferable option. Those that don't want it --

QUESTION: Yes, but so many of them --

MR. SHAPIRO: -- can opt out.

QUESTION: So many of them will never see this notice. Many who do won't understand it.

Let me ask you a question similar to the one I asked Ms. Birnbaum in the preceding argument. If her position is right, and it applies not only to FELA but the common law generally, then the huge bulk of these people don't have any current claim at all. They don't have any injury.

And so you're taking people who don't even have any claim now and saying they're giving up nothing because they have no claim to settle some claim that they might have in the future.

MR. SHAPIRO: Well --

QUESTION: If they have no claim, then doesn't -- isn't that another reason why this has to fall apart?

MR. SHAPIRO: They do have a claim. They have Article III standing under this Court's precedents. Our research shows that there are 15 States --

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QUESTION: But if they have no 12(b) -- they couldn't survive a 12(b)(6). They do not have a claim for relief because they haven't been injured yet.

MR. SHAPIRO: Under the legal certainty test, Your Honor, there are 15 States that recognize this cause of action. No State supreme court has rejected it. There are also claims here for intentional misconduct which we heard counsel say would present a different circumstance. There can be no legal certainty --

QUESTION: But then in most States, since we're dealing with a global thing, most of these people wouldn't have any claim if Ms. Birnbaum is right, and if -- you said the number's only 15.

MR. SHAPIRO: Well, there's no State that has rejected this cause of action. There are 15 that have by our count, and so the Court, looking at jurisdiction, could not say with a legal certainty that anyone in this class does not have a valid cause of action.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Shapiro. The case is submitted.

(Whereupon, at 2:17 p.m., the case in the above-entitled matter was submitted.)

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