OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ESTEBAN ORTIZ, ET AL., Petitioners v. FIBREBOARD CORPORATION, ET AL.

CASE NO: No. 97-1704 C-2

PLACE: Washington, D.C.

DATE: Tuesday, December 8, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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ESTEBAN ORTIZ, ET AL., :

Petitioners :

v. : No. 97-1704

FIBREBOARD CORPORATION, ET AL. :

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Washington, D.C.

Tuesday, December 8, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

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

ELIHU INSELBUCH, ESQ., New York, New York; on behalf of the Respondents.

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PROCEEDINGS

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in N umber 97-1704, Esteban Ortiz v. The Fibreboard Corporation.

Mr. Tribe.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE PETITIONERS

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

The Fifth Circuit does not deny that this class is just as noncohesive and riven with conflict as the one in Amchem, and it even admits, in its words, that a class action -- I'm reading from footnote 8 of the opinion -- class action requesting individual damages for a global class of asbestos claimants would not satisfy the typicality requirements.

Now, since that is this case, the first mystery, I think, to be addressed is how the Fifth Circuit and the respondents imagine that they can get past Rule 23(a) here.

I think a fair version of their answer is that one should focus on how the settlements would operate and not on what the complaints sought, and if you do that, you're told you will see that the settlement in Amchem

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would have ended up, in their words, awarding damages to class members based on the severity of their injuries, while this settlement, according to them, just sets up an equitable distribution process that leaves intact each claimants, and I now quote them again, absolute right to exit into the tort system to litigate his claims in court.

Now, that answer is fallacious from top to bottom. Amchem held, among other things, that one cannot rely entirely on the operation of the settlement to dissolve divisions that preclude class certification, and their description, both of the settlement in Amchem and of the settlement in this case, are flatly wrong.

The Amchem settlement, as this Court noted, did not preordain the amounts to be awarded to each claimant, just as this settlement doesn't, and this settlement certainly does not simply add a fund from which damages can be paid to plaintiffs.

It does not preserve the absolute right to exit, as I'll explain in just a moment.

It extinguishes individual rights to sue and substitutes access to a trust distribution process rather akin to Worker's Compensation.

The reason I say that it does not preserve a right to exit is that first of all no exit is possible till one has exhausted mediation, arbitration, and other

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ADR mechanisms, and even then the plaintiff who does exit remains subject to all of the settlement's strict limits, $1/2 million as a cap on compensatory damages, no punitive damages, no prejudgment interest, no post judgment interest, no joint and several liability.

And finally, anyone who does exit is penalized for exercising the right recognized I guess most recently in Wright v. Universal Maritime Service Corporation, right of going to court, penalized because payments can then be deferred for up to 10 years without interest as compared with 3 years if someone opts not to exit and remains within the trust system. Now --

QUESTION: Mr. Tribe, I thought that the Fifth Circuit on remand said the big difference was that Amchem was certified under (b)(3), and this was a nonopt-out (b)(1)(B).

MR. TRIBE: Yes, Justice Ginsburg, they certainly did, and what I would like to show in a moment is that, if that's the difference, it cuts very much against class certification here. It cuts against class certification partly because, as I'll try to show, it's impossible to squeeze this into that category of a mandatory class, but in any event, that can't solve the problems under (a), the problems of cohesion and of the absence of conflict.

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And in particular, if you focus on the absence of conflict, what's crucial to note is that the equitable distribution process in this case embodies allocational decisions, decisions to limit damage payments from the trust.

QUESTION: Well, Mr. Tribe, you talk about how badly these people are going to fare under the -- but how well are they going to fare if they just keep fighting their individual lawsuits?

MR. TRIBE: Well, Mr. Chief Justice, I'm not talking about how good or bad in terms of ultimate fairness the settlement is, only the question of whether it was proper to certify it in the first instance.

QUESTION: Well, but you pointed out that the people are left -- even when they finally go to court it's a cap on damages and that sort of thing, but don't you have to compare that with what their fate would be if they simply keep suing Fiberboard and it ends up in bankruptcy?

MR. TRIBE: Well, Mr. Chief Justice, if we were talking about whether it's a good settlement, if that's the reason I was mentioning the caps, I guess we would.

I'm mentioning them only to make clear that as in Amchem this is not simply a favor that they are doing to the people who have been victimized by asbestos. It is a substitution of their old rights with a set of equitable

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rights, and it's a substitution that makes some allocational decisions with respect to which there's a deep division, a conflict.

Those who are presently injured have, as in Amchem, an interest in maximizing payments early. Those who are merely exposed have an interest in preserving money for the future, and there was no attempt to create subclasses here.

If subclasses with separate representation had been created, no one can really guess exactly how the ultimate settlement would look. There's no reason to suppose that it couldn't have been done, and no reason, therefore, to suppose that the only alternative is an endless stream of individual lawsuits. In fact, 99 percent of asbestos litigation settles in any event.

QUESTION: Mr. Tribe, would you help me out on one thing? I couldn't tell from your brief whom you actually represent. Who are your clients, and where do they fit in the whole picture?

MR. TRIBE: They are objectors --

QUESTION: And how many of them are there?

MR. TRIBE: They are individual objectors who were exposed to asbestos, and who do not want to be members of this class, and who were allowed --

QUESTION: They are all people who were exposed?

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MR. TRIBE: Yes.

QUESTION: So they're not members of those who are not exposed --

MR. TRIBE: That's correct. They were exposed, and they were allowed to intervene for purposes of expressing objection both to the nonopt-out nature of the class, and to the certification as a unitary class.

QUESTION: How many of them are there? How many intervened?

MR. TRIBE: I think there are five.

QUESTION: Five intervenors, and are they people who question the jurisdiction, also, or are they --

MR. TRIBE: Well, three of them do. The ones that are not from Texas also under Shutts question personal jurisdiction.

QUESTION: Where are they from?

MR. TRIBE: I believe Alabama -- I guess they're all from Alabama. I thought one had been from Missouri. The others are from Alabama.

QUESTION: Mr. Tribe, you indicated that assuming there was adequate representation you thought that a class action might well be possible here.

MR. TRIBE: Well -- no. I think ultimately, because of the justiciability problems and the notice problems, it would have to be cut down to a manageable

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size.

Those who are merely exposed, some of whom don't even exist yet, who haven't been born, who are future spouses of people exposed, we think couldn't possibly be included in a class, but at least it's not inconceivable that a somewhat more modest effort could work, as long as there were subclasses so that subgroups with distinct interests were separately represented.

QUESTION: Under (b)(1)(B), then I'm confused, because I thought it was your position, no matter how fair the settlement, no matter how good it is for the greatest number, (b)(1)(B) simply is not available for a mass tort action which consolidates or, in your words, collectivizes many injured and potentially injured people.

I thought your position was that's not the office of (b)(1)(B).

MR. TRIBE: That's right. Justice Ginsburg, we think that if this could have been certified at all, it would have been under (b)(3) with subclasses and with a more modest scope. Maybe I should turn to why I think (b)(1)(B) is of really no help.

QUESTION: I want to ask you on the first question, you're basically saying that the lawyers shouldn't have represented their own existing clients and also the class of futures.

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MR. TRIBE: That's separate, Justice Breyer. There are two huge conflicts. One is, as you say, that they represented their own 45,000, but they opted out en masse from this nonopt-out class.

The other is that within the class itself, the gerrymandered class, within that class they should not simultaneously have represented the presently injured and the merely exposed, and also the pre and post --

QUESTION: So in respect to both, I take it Judge Parker, who's a pretty experienced trial judge, looked at it and said, we have to act fairly quickly. These lawyers are very experienced. We have to get this particular group of lawyers or we won't be able to do the job, and I look at both sides of this and I make a balance here, and my balance is that they ought to go ahead with this.

MR. TRIBE: Well --

QUESTION: Now, what are we supposed to do?

MR. TRIBE: Justice Breyer --

QUESTION: Are we supposed to go and read the whole record in this and --

MR. TRIBE: I don't -- I don't think --

QUESTION: -- say Judge Parker was wrong, or what?

MR. TRIBE: As a matter of law, I think he was

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wrong. It's not that we're asking you to review some factual determination about how capable and ethical these lawyers are, but with respect to the idea that because there was so little time between August 9, 1993 and August 27, 18 days, that it therefore follows that, since subclassing might, in his view, throw a monkey wrench into a well-oiled machine, that therefore he had no choice, that's wrong as a matter of law.

For one thing, the relevant time is not August 1993. It's 1990, when Fiberboard approached counsel to arrive at a global settlement. That's when these various conflicts were --

QUESTION: My problem is, not having read your briefs on this and the other side, I don't see how I could make a judgment as to whether Judge Parker was right or wrong in his weighing of several factors to come to the conclusion that the representation was okay, without familiarizing myself in great depth with the details of this case.

MR. TRIBE: Well --

QUESTION: If you see an easier way -- maybe I'm supposed to do that.

MR. TRIBE: I do. I --

QUESTION: Yes. Maybe I'm supposed --

MR. TRIBE: If one takes Amchem as binding

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precedent, then the fact that one might have regarded the whole thing as a much more nuanced balance is no longer on the table. It seems to me that the principle of Amchem is that unconflicted representation as a matter of law can be judged de novo by this Court.

QUESTION: Are you talking about representation in terms of attorneys, or in terms of class members?

MR. TRIBE: Both, primarily --

QUESTION: The rule --

MR. TRIBE: We know that --

QUESTION: Rule 23 says nothing about attorneys.

MR. TRIBE: Well, it -- the focus on adequacy of representation has been interpreted by this Court to mean that not only must the class representatives meaningfully speak for the groups in question, but that the attorneys must have the ability meaningfully to represent them, since, as this Court knows, it's the attorneys that are making this deal.

Here, the class representatives were added as an afterthought, after the deal was structured.

QUESTION: Mr. Tribe, I would, because your time is running, like you to get to the point of --

MR. TRIBE: (b)(1)(B).

QUESTION: Yes, because --

MR. TRIBE: I'd love to.

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QUESTION: -- if you can't certify under (b)(1)(B), all the rest of it is beside the point.

MR. TRIBE: It seems to me that the reason you can't certify under (b)(1)(B) is primarily that there is nothing in this case that remotely resembles a limited fund. That is, a preexisting, finite asset or res that would be more than exhausted by competing claims. The limit here of --

QUESTION: Well, what if the corporate assets, the bulk of them were put into the mix, and there it is. That's all there is, folks.

MR. TRIBE: Well, here --

QUESTION: Could that not meet the rather loose language of (b)(1)(B)?

MR. TRIBE: Several points, Justice O'Connor. First of all, in this case 2/10ths of 1 percent of the corporate assets were put in, not quite the whole thing.

QUESTION: I know. I'm just asking you whether you can envision a situation where substantially all the assets of the company are put into it and here it is. That's all there is.

MR. TRIBE: Well, if it's in bankruptcy, and then you have a res --

QUESTION: Not yet in bankruptcy.

QUESTION: No.

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MR. TRIBE: Right.

QUESTION: Maybe there's --

MR. TRIBE: Well, no court --

QUESTION: -- the will that remains so that the company could somehow string it out and stay in business.

MR. TRIBE: Well, if there were not, as there is in this case, a potentially unlimited insurance fund, which I do want to turn to, and if, therefore, when we're in that category of cases where you can predict insolvency from a stream of liability judgments arising from a mass tort, then, if you look at the position that the author of the rule, Benjamin Kaplan, took, and we quote him in the brief, and the advisory committee, it appears -- and no court has yet disagreed with this -- that that is not the office of this rule.

That is, it is not the purpose of this rule to provide a kind of jump start on bankruptcy without all of the protections of bankruptcy for treating creditors equally.

QUESTION: But the language of the rule doesn't seem to foreclose that notion.

MR. TRIBE: Well, the language in fact is broader than anything about a limited fund. It talks about the question of whether separate adjudic -- separate lawsuits would create a risk.

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QUESTION: Do you think that --

MR. TRIBE: But you can't squeeze that within this language, because in this case what creates the risk is the chance of a lawsuit involving insurers in California coming out the wrong way, not separate suits by individuals.

Given Parklane Hosiery, those suits are not a threat.

QUESTION: Would you recognize the possibility that in personam rights could be determined under a (b)(1)(B) settlement?

MR. TRIBE: Well, I'm dubious. It seems to me that unless -- unless you have something which is already essentially reduced to equitable rights in an in rem situation, using (b)(1)(B) is already dubious, but the most important point I want to make about (b)(1)(B) --

QUESTION: You could use it for beneficiaries of a trust fund, I take it.

MR. TRIBE: Yes. But the most important point of (b)(1)(B) is the question of causality and the direction of timed error, basically. Keep in mind how, in this case, when you put in some part of the assets of the corporation and put in also the money from the insurance companies, you get to this limit of $1.53 billion.

That limit did not come from some pre-existing

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exogenous variable. The testimony in this case, when Mr. Inselbuch, for example, specifically asked counsel for the insurance company, Continental, whether there was any limit, the counsel responded, no, it is not -- it is not a capped amount of money. That's at page 281a of the joint appendix -- and the ethics expert on their side, Professor Hazard, said that for practical purposes this amount is without limit.

The limit is the amount they were willing to pay in order to move class counsel from a (b)(3) class, which was their initial preference, with opt-outs, to a (b)(1)(B) class, and it would be the height of inversion and irony to say that an amount of money that grew in order for it to squeeze into (b)(1)(B) is now somehow limited.

QUESTION: Mr. Tribe, may I --

MR. TRIBE: That is, the limit has to come --

QUESTION: May I -- do I understand correctly that your position on (b)(1)(B) is that you simply cannot have in any case where the stand-alone claim would be for tort damages, you cannot have a (b)(1)(B) action, maybe (b)(3), but are there any circumstances in which tortfeasors -- a tortfeasor could gather together injured and potentially injured people whose stand-alone claims would be for tort damages and place them in a (b)(1)(B)?

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Is there any such claim?

MR. TRIBE: Prior to bankruptcy or receivership I can think of no such case, because the rule that bothers them, first come, first served, is part and parcel of the legal right that these individuals claim when they want to sue.

QUESTION: Suppose an insurance company paid the full amounts of its policy and say, we're paying the full amount in, we'll walk away, could that be subject to a (b)(1)(B)?

MR. TRIBE: I'm sorry, Justice Kennedy, I don't see how --

QUESTION: The insurance company pays the full limits of the policy. They say, we want out of this, and we paid into a fund, and subject to class action disposition under (b)(1)(B).

MR. TRIBE: Well, I can imagine a different kind of suit, the one that they would like to think this is, against the insurance companies in which one seeks --

QUESTION: No, I'm just testing the limits of (b)(1)(B). Could -- suppose the insurance company pays the full limits. That's all there is. The money's there.

MR. TRIBE: But the insurance company isn't the defendant.

QUESTION: But in my hypothetical that's all the

money there is.

MR. TRIBE: And they're perhaps interpleaded?

QUESTION: Yes.

MR. TRIBE: It still seems to me that making a (b)(1)(B) class out of is problematic.

QUESTION: Because there are individual tort rights that are in personam, not in rem?

MR. TRIBE: That's right, and because of the Rules Enabling Act, which in effect says that you can't take one of these rules like (b)(1)(B) and use it to create a limit that was not independently there.

QUESTION: We wouldn't have to go that far for you to win, though --

MR. TRIBE: No, that's right.

QUESTION: -- I take it, in this case.

MR. TRIBE: That's right. That is, in this case one needn't go that far, but I thought that Justice Ginsburg wanted to press the theory, and --

QUESTION: You pointed out that it's not against the insurance company. Fibreboard is the defendant. Well, suppose there should be a bankruptcy. How do these claims play out in bankruptcy. You said that there's legislation on -- what would happen to these future claims that don't yet exist, or --

MR. TRIBE: Well, under the 1994 amendments to

the bankruptcy law which codified a preexisting practice, a trust would be set up, and its details would be negotiated, and that trust would be used to distribute over time the remaining proceeds, whatever they were, among all creditor classes, including the asbestos plaintiffs for whom the amendments were particularly designed, and --

QUESTION: Is that like the Johns-Manville --

MR. TRIBE: Very much like that, and in particular the national commission which looked at all of this concluded that the protection in that context for plaintiffs who have been exposed but not yet injured is greater than what they imagined would exist in class actions.

Here, notice what happens when you allow the circumvention of the Federal bankruptcy procedure. By telling Fibreboard that if it prefers not to put its assets on the line and go into bankruptcy, and can just put really pennies on the line, $1/2 million to get rid of billions of dollars of liability, it's not only that Fibreboard is getting away with a great deal.

It's also that all of the other creditors, real prop -- people who were injured in real property terms with respect to asbestos, and trade creditors, none of them are crammed down in the way that this one group of

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victims is, and to allow that where the bankruptcy laws would be far more equitable as a kind of home-made version of bankruptcy --

QUESTION: Why equitable? I mean, from that perspective you have -- if you have thousands and thousands of people who are hurt, and the only apparent way to get those people compensated is to have a system where you get a fund so that it's equitably distributed across everyone who's hurt, rather than a few people running off with most of it, why do you have to force a company into bankruptcy in order to get that result?

MR. TRIBE: Well, for one thing it's not clear to me that you have to force them into bankruptcy.

QUESTION: Well, you're saying the only way that could happen is bankruptcy, but in fact, it wouldn't have to happen in bankruptcy if what we were going against was a trust, or what we were going against was a ship, and so why, if we can go against a ship and we can go against a trust and get this equitable result, why can't we go against this fund as long as it complies with the literal words of the rule?

MR. TRIBE: But it's not a fund. The fund was created. It's not as though you had a fund, and people are now fighting over it. It would not comply with the literal words of the rule. It turns it upside down to say

that in the settlement you can create a fund.

It could have been $3 billion or $4 billion, but because the bargaining posture caps it at $1.5 billion, that is all that people can fight over.

In a situation of this sort, if I'm right that (b)(1)(B) is unavailable, (b)(3), with opt-outs, is an option if you have subclasses.

QUESTION: I agree with you that this is not your normal situation. It's an unusual one. I agree with you about that. But is there some basic or fundamental principle of fairness or underlying law that this violates because of its unusual nature when it complies with the words?

MR. TRIBE: I think the fundamental principle that it violates is that the parties who are at the bargaining table ought not to be able, by mutual contrivance, to create a situation in which others who are not represented, some of whom are sick and others who will get sick, are simply told, fait accompli, because they weren't willing to put more money on the table you'll have to take a pro rata share as though you were a kind of equity stakeholder when the State law under which you claim gives you a legal right.

QUESTION: Mr. Tribe --

QUESTION: Assume --

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QUESTION: I thought the fundamental principle of fairness it violated was first come, first served. Why do you accept that that's not fair? That's the general rule we've always applied in the common law.

MR. TRIBE: Right.

QUESTION: Whoever sues first and gets his judgment first gets his money, and someone who sues later doesn't get money, and you accept that that is unfair?

MR. TRIBE: No. I think it's a function of the State law, and I agree with you, under the way the States define these rights --

QUESTION: It's the way we've always done things, and unless these rules allow us to do it differently I don't know that we can --

MR. TRIBE: Right. I think --

QUESTION: -- pronounce that that is unfair and can therefore be avoided.

MR. TRIBE: I think, though, without having some metatheory of fairness, one looks at the State law. The State law defines that as part and parcel of the right. One can't use these rules to simply transmogrify by some alchemy the content of these rights, and so I very much --

QUESTION: But there's one part of it that you seem to agree can be done, and I believe that Justice Breyer wrote an opinion in Metro North sometime ago that

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said that people who are merely exposed do not have a claim under the FELA, and cited in support of that the common law of many States.

Well, if that's right, then these future people who have been exposed but not yet afflicted in any way, simply don't have any claim yet.

MR. TRIBE: And maybe not even an Article III case or controversy yet.

QUESTION: But you didn't object, then -- yes, well --

MR. TRIBE: We do maintain that, but the Court needn't reach that.

QUESTION: I thought they do have a claim under California law. First they may have a claim that they could sue the insurance company directly because of their exposure --

MR. TRIBE: No --

QUESTION: -- and, second, they may have a claim because of their exposure alone under California law.

MR. TRIBE: Justice Breyer, under California law, and we point this out in our a footnote in our reply brief, they do not have the ability to bring the kind of imaginary suit that they're now talking about, because it is only those who are already injured under California law who can sue to establish status as third party

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beneficiaries of an insurance contract.

So what they're really asking, they're really, I think -- when push comes to shove they're saying, well, this doesn't really, if you look at the formalities, look like a lawsuit that could fit (b)(1)(B) or that can comply with 23(a), but let's rewrite it. Let's do what this Court didn't let the Sierra Club do when it came to hiking and biking.

Rewrite the complaint. Imagine that we sued not Fibreboard, but the insurance companies. Imagine that we claimed, not asbestos torts, but insurance coverage. Imagine that this were a different kind of case. Imagine that we have the right set of plaintiffs, including the 45,000 who would logically be included if that were the lawsuit.

If you can imagine all of that, including the inclusion of these nonripe claims that don't satisfy California law or Article III, then maybe we can prevail.

But it seems to me that that is not even remotely this case, and that to try to sort of transform this class action into a suit about insurance coverage, because that's the big disaster that they face, that the insurance coverage is gone. Everyone recognizes there's a problem.

In effect, they accuse us of worrying about

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arranging the deck chairs on the Titanic. They say that the ship is going to hit an iceberg, and you guys are playing around worrying about what they call trivial sideshows, special interests, like I guess the people who are very, very sick.

Well, the fact is, it's when you're about to hit an iceberg that you should worry about who gets access to the lifeboats, and the fact that you've got to have various safeguards to try to prevent a collision doesn't mean that you can forget safeguards for the separate subclasses of passengers that are affected.

I'd like to save the balance of my time.

QUESTION: Very well, Mr. Tribe.

Mr. Inselbuch, we'll hear from you.

ORAL ARGUMENT OF ELIHU INSELBUCH

ON BEHALF OF THE RESPONDENT

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

No matter how he protests, this is not the Amchem case. Though he says all of the facts are imaginary, they're not imaginary. The principle issue, the one common issue that needed to be resolved here, was whether or not there would be any insurance proceeds at all.

QUESTION: I can understand, Mr. Inselbuch,

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Fibreboard being very concerned about having insurance coverage. But I'd first like you to help me over my first part where, at least according to this Court's decision, there are many States that say people who are merely exposed, having suffered any physical, any affliction yet, simply do not have a claim.

MR. INSELBUCH: They certainly would have standing to find out whether or not there would be coverage if, but for their presence, the coverage issue would be decided without them. That's the teaching of the Shapiro case in California.

Now, it would be ironic, I submit, that if the very trigger issue --

QUESTION: You mean if I say I may some day be ill and it may be caused by X, so I can sue X's insurer to say that if I should become ill I would be covered?

MR. INSELBUCH: I think that if you are a potential claimant against an insurance company and if there is an ongoing issue about whether or not there will be coverage and if but for that coverage there is on other alternative for your recovery, and if that issue is going to be decided in any event, with you or without you, it would turn standing on its head and it would turn due process on its head to say, you cannot come here and participate in that resolution.

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QUESTION: Mr. Inselbuch, maybe -- and I don't know of any case of that allows somebody who is not yet but may be and maybe not be to do what you say. But even --

QUESTION: I think that the way we normally handle the problem -- it is a problem -- is simply to say you cannot affect the rights of such a person. You're absolutely right, it would be terribly unfair. But the normal way we've handled it is not to allow a person to come in when he hasn't been injured at all, you don't know he's ever going to be a claimant at all. We've simply said such a person's rights cannot now be affected.

MR. INSELBUCH: But that's why you have Rule 23(b)(1)(B) when there is a risk as a practical matter that they will be or their interests will no longer be available to them to protect. Think of the Duke Power case, where all you had at Duke Power was exposure to radiation, but you let people still challenge, challenge whether or not their rights to collect if they got sick later would be available.

QUESTION: Mr. Inselbuch, when you say that's why we have it, it's true that there are many people who today will take words and say, oh, this fits the words. But if we go back to when Rule 23 was on the books and we go back to the '66 amendments, which is when all this came

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in, nobody had even the wildest dream that you could bring a mass tort action even under (b)(3), no less (b)(1). And then Kaplan was very clear to calm the people who were worried. He said, no, you can't use this statute that way. This thing is, he said, "redolent of a preexisting fund."

So it wasn't what (b)(1)(B) was meant to be. I think the best you can say is, well, maybe it wasn't meant to be that, but the words fit it.

MR. INSELBUCH: With all due respect, this is not a mass tort case. It is a resolution of the issue of whether or not these people will ever get paid under one policy, with one set of facts and one body of law applicable equally to all of them. And that's what the rule is there designed, because sooner or later that issue would be litigated by -- either in the insurance case in part in California or by individual members of this class who would test whether or not there was coverage notwithstanding the claim by the insurance company that the assignment program Fibreboard entered into vitiated coverage. Sooner or later.

QUESTION: I thought the insurance litigation was in California and this is -- these are personal injury claims against Fibreboard in Texas.

MR. INSELBUCH: The class members all had

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claims, potential claims for personal injuries against Fibreboard. Fibreboard and its insurance company were in a death struggle over whether there was coverage. If there was no coverage, these class members would recover nothing at all.

QUESTION: Are these class members suing the insurance company?

MR. INSELBUCH: The class members' pleading was against Fibreboard. Simultaneous with the filing of that pleading, the insurers intervened on the coverage issues, so that all the pleadings presented all of the issues. My learned opponent --

QUESTION: I thought there were no coverage issues in Texas; the coverage issues were in California. What was presented to the court in Texas was, this is what we're willing to do. But there was no litigation over coverage in Texas, was there?

MR. INSELBUCH: There was pending litigation over coverage in the same district court between Fibreboard and a group of prior settled asbestos claimants and its insurance companies. There were two cases pending that were testing both whether there was ability by Fibreboard to assign coverage and whether or not it could obtain coverage from one of the insurance companies and free another insurer from a claim over for equitable

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contribution.

But all of those coverage cases did not really plead yet, did not really bring the last issue before any court, which some class member would sooner or later bring when it brought a judgment, as Justice Scalia says, to the insurer, of whether or not the conduct engaged in by Fibreboard vitiated the coverage. Sooner or later, sooner or later, one or another of these cases would have decided all of these insurance coverage issues, and if the class members weren't there they would have been at some risk that as a practical matter, as the rule says, the issues would be decided, they would not be able to protect their interests.

That's what this case is about. This is not a mass tort case, this is not an end run around Amchem, and it has nothing to do with Amchem. That's what this case is about. Now, to get there --

QUESTION: If this case had been brought as a (b)(3) action, then it would have been out the window under Amchem.

MR. INSELBUCH: This case could not have been brought as a (b)(3) action. There was a common issue that required a unitary resolution, the very reason why (b)(1)(A), (b)(2), (b)(1)(B), and (b)(2) came out of the common law, out of equity pleading.

QUESTION: So a defendant could always in this situation, facing massive tort liability, it's really a defendant's option to say: I want to get this cleaned up under (b)(1)(B), I don't want to give anybody an opportunity to opt out. Is there any mass toxic tort that could not be handled this way at the option of defendant and defendant's insurers?

MR. INSELBUCH: It has nothing to do with the defendant's desires or the insurer's desires. It has to do with the position the class was in. If you have a situation as unique as this is, where without coverage, there is no opportunity for coverage and there is a real --

QUESTION: But you must reconstruct it for me, because I thought that the driving force for this litigation was Fibreboard and its insurers, and not some preexisting -- there were the plaintiffs who had what they called the inventory claims, but didn't this all get started, this idea of a global settlement -- wasn't the global settlement the idea of the insurers and Fibreboard, and then we had the plaintiffs?

MR. INSELBUCH: Fibreboard was in litigation since 1979 over this insurance issue with its insurers. Until approximately 1989 or 1990, that dispute didn't reach the radar screen of the plaintiffs because

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Fibreboard had other insurance and was paying its claims. Once that issue reached the radar screen, the discussions began of how to get this matter resolved.

QUESTION: And of the live plaintiffs at that time, all of their claims were settled outside this.

MR. INSELBUCH: Plaintiffs' claims in asbestos are like an unrolling carpet. At any moment in time some are filed, some are resolved, and some are yet to come. It's an accident of history where you happen to be when you make a resolution.

In fact, when you got to August 27th of 1993, when this settlement was reached, the prior claims had already been settled as between Fibreboard and the insurer and the plaintiffs on the basis where they would be paid, they were paid 50 percent in advance, and they would get the rest if there was a coverage case success, if there was a bilateral resolution between Fibreboard and its insurers, or if there was a global like this.

That was gone. But there is no artificial way you can talk about the past and the present and the future plaintiffs. There is no fine line to divide that. As Judge Higginbotham advised the counsel who were trying to negotiate this: Do the best you can. You're trying to resolve too difficult a problem. Carve it up into pieces. Settle the present ones first because they involve present

people with existing lawyers in existing tort cases.

QUESTION: Suppose I'm an asbestos person who didn't file suit before the cutoff and I say: Well, I have a claim for tort damages against Fibreboard. I thought that the common law, the State tort law, gave me this claim. Why don't I have it?

MR. INSELBUCH: The reason why the settlement was entered into was to resolve the insurance dispute. No matter how many times Mr. Tribe will tell you that this is the Amchem case and no matter how many times I am asked about it --

QUESTION: I don't think that's answering my question. I'm talking about --

MR. INSELBUCH: I beg your pardon. Then I don't understand the question..

QUESTION: -- I have a plain -- all these claims are in their essential nature personal injury damage claims. They get -- they become something else in the course of this global settlement. So I am trying to understand how what is an ordinary garden variety tort claim in an individual's hand becomes this fair, equitable -- and I'll accept that all this was a wonderful settlement.

How does that happen under the heading of a Federal rule, not even an act of Congress? That's what

I --

MR. INSELBUCH: Let me try it this way. But for this settlement, but for any settlement here, each one of these class members as his case or her case unfolded would bring a tort case, a tort case for personal injuries against Fibreboard. And if they were successful in that case, then they would be entitled under the theories presented to pursue the insurance litigation individually to see whether or not there would be any payment for the tort judgment that they received.

Now, yes, they would have a right to do that. But sooner or later that insurance case would be decided one way or the other. Now, if they were successful that would be fine. Then there would be effectively, within the limits of the policy itself, coverage over the years for all of these tort victims.

But if it were decided against them and that decision ultimately were decided by the Supreme Court of California, the rest of these tort victims, while they might still have retained their entitlement to bring these individual tort cases in the system, would have had a futile act to bring. Because there would have had no coverage, that interest they would have had in securing coverage in the insurance dispute would have been taken from them. That would have been decided. Their interest

would be gone.

And that's what this case is about. This case is about whether or not a class of people facing a common risk, a common interest in an insurance dispute, can bind together in order to assert their interests in the resolution of that dispute.

QUESTION: But this is including people who are as yet unborn and people who have not yet been injured, as others have pointed out, and who may well not have been represented or represented adequately within the meaning of the rule. And it also appears that the whole effort to create the class, the mandatory class, was an effort made by Fibreboard and the insurance companies rather than by the class itself. It was Fibreboard that went out and got some lawyers together to bring them in and say: Gee, let's solve this problem.

And maybe it's ultimately a good solution, but it's hard to shoehorn it in under Rule 23, isn't it?

MR. INSELBUCH: I think you've asked me several questions.

QUESTION: Yes.

MR. INSELBUCH: Let me try them one at a time. First, yes, members of this class may yet be unborn, but if I am correct, if I am correct that there was a need to resolve a common issue on a unitary basis, that doesn't

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preclude the inclusion in the class and binding through the class action mechanism of futures. This Court has on a number of occasions approved such certifications. The Murray case in 1989, the class was all present and future Virginia death row inmates who cannot afford lawyers. Well, some of those inmates haven't even committed their crimes yet. Yet they were going to be included in the class and bound.

QUESTION: Was that a class for monetary relief? Sure there's all kinds of injunction relief where the court says, defendant, you do this, and the defendant has to act the same way to everybody in the class, like the warden has to act the same way. Those injunctive relief claims are a horse of an entirely different color.

MR. INSELBUCH: I submit that they come from the same evolution of the Bill of Peace. And if you want to think of tort damage claims resolved unilaterally against the whole class, although it doesn't meet Justice O'Connor's point of unborns or futures, think of the Mullane case. The Mullane case was a case, was a classic Bill of Peace, where a bank that ran common trust funds sought in one court to stay or stop or cut off any claims for negligence, fraud, waste, against all beneficiaries of these trusts based on the same set of facts and the same operative law.

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In Mullane there were no opt-outs.

QUESTION: Mullane was a common trust fund. It was a kind of an animal that all these small investors could come together. Of necessity there had to be periodic accounting so the trustee could get a clean bill of health.

MR. INSELBUCH: Yes.

QUESTION: I think Justice Jackson made it perfectly plain that there was in that case kind of a jurisdiction by necessity, plus that most of these people were going to get at least mail notice, they all had the same kind of small little claims, and there would be a few that were left out.

But here most of the people who will be affected don't even know that they're going to be affected and may not yet be persons in being.

MR. INSELBUCH: Well, first of all, the issue in Mullane was not whether I have an interest in collecting a small amount from a common fund. It was a test of whether or not the people who managed the fund had committed negligent torts.

QUESTION: Yes, and there had to be periodic accountings.

MR. INSELBUCH: Yes.

QUESTION: And if you didn't have periodic

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accountings, you couldn't have this.

MR. INSELBUCH: Right. And if you don't have a decision under one insurance policy about whether there's coverage, you won't have any payment for any of these claims. Now, how can that be any different? Surely when there are common claims involved there has to be some nexus for there to be common claims.

QUESTION: Mr. Inselbuch, what is your response to the remainder of Justice O'Connor's question, particularly her asking you about the fact that the case was generated from the defense side rather than the plaintiff side?

MR. INSELBUCH: Well, I was there and I think, as the record reflects, surely Fibreboard had an interest in getting the case resolved. The genesis of the discussions were here in Washington at the Dolly Madison House, as the record reflects, where were gathered plaintiffs' lawyers, defendants' lawyers, insurance company lawyers, to discuss what to do about asbestos litigation.

Those lawyers met together and out of that discussion the lawyers for Fibreboard picked up the phone and called some of the plaintiffs' lawyers that they had talked to at that meeting and said: Let's talk about this problem. Does it really matter who made the first phone

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call? We struggled with this problem on behalf of the victims on the one side, Fibreboard's lawyers on the other side, the insurance companies' lawyers finally on the third side.

I'd like to respond to what I regard to be an unfair comment that Mr. Tribe has made about how the plaintiffs' lawyers were willing to go to a (b)(1)(B) class when there was more money on the table. When we were negotiating with just Fibreboard, with just Fibreboard and before Amchem had been decided, what we contemplated was a settlement, a mass tort settlement on an assignment basis, with just Fibreboard.

QUESTION: Who is the "we" now, the insurers for Fibreboard?

MR. INSELBUCH: The plaintiffs, the plaintiffs -- no, the plaintiffs and Fibreboard. The two years of negotiations before the insurance companies came to the table were all premised on the notion that we would have a mass tort (b)(3) settlement assigning Fibreboard's interest in the policy from the insurance company.

The insurance company wasn't at the table. There was no unitary issue to resolve. We weren't resolving or discussing resolving the insurance issues. But once the insurance company came to the table, as my colleague Mr. Kazan said, and brought their checkbook,

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yes. Now we were there to resolve a unitary issue, whether or not there was coverage, whether we could settle that question.

QUESTION: But that wasn't the only issue in the case. I mean, you describe the case as involving only that. If it involved only that, it'd be, yes, a classic case for a class action. But that's not the only issue that all of these claims involve. It may have been the most crucial issue financially to your clients, but to say that each of these cases centers around that issue it seems to me is to misdescribe it.

MR. INSELBUCH: Well, getting paid seems to be the most important overriding issue to any plaintiff.

QUESTION: Sure it is. But each plaintiff is going to have to make a separate showing about exposure and about the amount of injury, and to lump them all together in one class just because they're all interested in getting money from the insurance company seems to me to go beyond what the rule provides.

MR. INSELBUCH: The rule, the language of the rule, the text of the rule, talks about a common interest where you're going to put at risk as a practical matter the individuals' ability to protect their interests. I submit, Justice Scalia, that the most important interest that these class members had was whether or not they would

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get paid.

QUESTION: That's not how the rule reads. If the most important question is in common.

MR. INSELBUCH: It doesn't even -- the rule doesn't even require that, you're quite correct. It just says where there is a risk as a practical matter that the prosecution of separate actions will be dispositive of the interests of the class members or substantially impair or impede their ability to protect their interests. That's what the rule says, and that certainly was the fact here, because if the litigation had continued and the insurance issues were decided then the remainder of the class members would not have been able to protect what had to have been their most important interest, their interest in getting paid.

Surely there were differences among, among their claims, and we did our best once we resolved the insurance issue in crafting a settlement that left each of the individual class members with the ability to resolve those on an individual basis.

QUESTION: Is there authority -- if we think of a classic limited fund, not this case but say a trust which for some reason says it has allegedly engaged in some kind of securities fraud and generated hundreds of millions of dollars of claims and they only have 10

million left in the trust. The claims differ a little bit among different plaintiffs. Or a ship sinks or has toxic fumes and tens of thousands of different plaintiffs, or thousands from different States. They have somewhat similar, somewhat different claims, but a classic limited fund.

Is there authority that you can proceed under this rule and cut off claims by those plaintiffs, say, all your claims, even though you're from different States and even though some of you don't know yet that you'll actually suffer injury, still in the classic limited fund you must be --

MR. INSELBUCH: Yes. Yes, the Manville case for example, in the Second Circuit. You wouldn't be cutting off the claims.

QUESTION: No, no.

MR. INSELBUCH: You would require that they all take an equal hair cut.

QUESTION: In other words, you can compel a person who's from California to come to New York and assert his claim in this single proceeding against a single trust, even though he may just be an exposure person or he may just have a slightly different claim?

MR. INSELBUCH: I think where you have a true limited fund you have in rem jurisdiction and you have a

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res to deal with, I don't think these issues would arise. I think -- but this is -- of course, we don't argue that this is a limited fund. We argue that we are quite within the rule because of the risk of the individual litigations or the risk that they would bring to bear to the rest of the class.

QUESTION: So your exact response to the claim, since this isn't quite the same thing, that in bringing the person from California and saying you have to assert the claim, let's say, in New York and that you overcome the due process objection and the fact that that person doesn't want to bring her claim yet, you overcome it by --

MR. INSELBUCH: Well, the history of the Bill of Peace, of the representative lawsuits that grew out of the Bill of Peace, was that you have to balance, that the courts have to balance different interests. Certainly at common law and in the jurisprudence of this country, there is an interest that only those before the court and properly before the court, where the court has jurisdiction over them, can be bound by the decree of the court.

But what we learned in the eighteenth century and what Justice Story reports in his treatise and what Professor Chaffee recounts is that where there was the

fact that either through numerocity or because people were not subject to the jurisdiction of the court, you couldn't bring all the parties before the court, but yet if you didn't resolve the issue you would create difficulties or burdens or problems or penalties or unfairness, then in a proper case where a court would balance those issues, then you would have a class action or what they called a Bill of Peace or a common action or whatever the names were for it then, and in fact if you had adequate representatives they would bind all of the members of the class irrespective of where they were.

QUESTION: Mr. Inselbuch, Chaffee, who you quote, said: "It is a cardinal principle of such class suits that the omitted members must be interested in the subject matter of the controversy in the same way as their representatives. If the unjoined persons have special claims or liabilities, their rights are personal and cannot be concluded in their absence."

So I'm still left with the question of how a personal right without one's consent, no matter how good a deal it may be, gets taken away.

MR. INSELBUCH: It's not a question of how good the deal is. It's a question of whether or not -- which is the dog and which is the tail. The dog here was the issue of whether or not there was insurance coverage.

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Now, in any -- even in the common fund case, the individual shares may differ or the rights to individual shares might differ. But the need to create the haircut in the common fund case for every claimant is needed.

Here there was a need to resolve whether or not there would be any money for these people, and they were all interested in having that resolved.

QUESTION: As far as the insurance, do I understand the fact background that the Fibreboard had won in the first instance in California, it was on appeal when they decided that they would settle it, Fibreboard and the insurance company -- companies --

MR. INSELBUCH: No, they did not. They did not settle it. It was only when the class stepped and there was a three-way settlement that any settlement ever eventuated, this settlement. There was never a settlement first between Fibreboard and its insurers.

QUESTION: No, that's not what I meant to say. I meant to say, wasn't it Fibreboard had won against its insurer that case without any plaintiffs in it, injured, was going to the Court of Appeals. It got stayed when Fibreboard, the insurers, and I don't know who --

MR. INSELBUCH: The class.

QUESTION: -- sat down at the Dolly Madison, right?

MR. INSELBUCH: No. That litigation wasn't stayed as with respect to the Fibreboard issues until this settlement was reached and was spread on the record in the district court in Texas, at which point the parties wrote to the court in California.

QUESTION: Do I understand that with the other insurers who were in the same, that Fibreboard -- that most of the rulings, final rulings, were in favor of Fibreboard in the insurance litigation?

MR. INSELBUCH: Ultimately, the decisions on trigger and scope, which we were terrified would be reversed by the Supreme Court of California, were affirmed by the California appellate court.

QUESTION: So if everything had played out with the insurance company, then Fibreboard would have had its coverage against the insurers?

MR. INSELBUCH: No, not necessarily, because there was still a very important question that the insurance companies raise about whether Fibreboard's practice of settling cases with plaintiffs, billions of dollars worth of settlements with plaintiffs, on an assignment basis under the policy was in breach of the policy, which an intermediate court in California, incidentally, after the settlement was reached, held that it was.

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What were the consequences of that? The insurer would argue next that vitiated the very coverage that the Court of Appeals approved. And those issues were yet to be litigated and were percolating along, and if all of these insurance issues had not been resolved in this unitary way sooner or later they would have been resolved in one case or another on a litigated basis.

An that litigated basis, as the testimony showed in the district court, put these people at an enormous risk that it would be resolved against them in some substantive way and the result then would have been that, yes, they would have had their individual tort claims, but they never would have been able to recover any damages.

In my remaining minutes, let me talk just a bit about the common law, because Professor Tribe suggests that under the old cases you had to have an in rem, a res of some kind, and that is not what those cases stand for. If you go back and look at cases like Lee against Thomas in 1751, Chancey against May in 1722, where there was a Bill of Peace, a representative Bill of Peace to recover for embezzlement damages, the Adair case, whether a rent charge on the profits would bear an assessment or would not bear an assessment, these were not cases where the litigants were seeking an interest in a res or in a common property.

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What developed in equity was not just related to equitable claims, but people came to the court in equity and said: We have all of these cases, some of them may be at law, some of them may be in equity, but we don't need to proliferate all of these cases. We're being buried by them. Let's resolve them all in one place.

The Bill of Peace started not on a representative basis, but to bind all the members of the so-called, according to Professor Chaffee, the multitude.

QUESTION: Well, in order to do that in the eighteenth century cases was there any finding necessary that in effect the fund that was created was the best possible deal? Was there a kind of fairness hearing, if you will?

MR. INSELBUCH: In our case?

QUESTION: No, no. In the eighteenth century cases that you're relying on. In other words, I am guessing that those cases did not proceed on the premise that the individuals who wanted peace could simply come up with any figure and say, let's settle, as it were, everything on this figure and bind everybody else.

I presume, I'm guessing, and I want to know if my guess is right, that there was some kind of a finding that the fund created, the settlement amount, if you will, was the best deal for the global class. Is that so?

MR. INSELBUCH: In the older cases --

QUESTION: Yes.

MR. INSELBUCH: -- that I've read, I don't see descriptions of settlements. They're litigated solutions and reported in the law books. I have not -- I don't recall anyone that discusses a settlement.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Inselbuch.

Mr. Tribe, you have five minutes remaining.

REBUTTAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE PETITIONERS

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

When Mr. Inselbuch says that they do not argue that this is a limited fund, I understand that's now their position. But just to get the history straight, throughout the history of this case and in the Fifth Circuit that was apparently the theory on which (b)(1)(B) was applicable.

I do want to say a word about bills of peace because I think that has caused some confusion here. They did not bind absent class members. We discussed that in footnote 20 of our reply brief. They were really like permissive joinders and they don't provide any precedent for what's happening here.

I think if you ask what is happening here, it's

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most dramatically put in a question that I think both in one way or another Justice Ginsburg and Justice O'Connor were asking, and that is just take the ordinary garden variety tort claim by somebody who in fact has been injured, not just exposed but is experiencing injury, who didn't happen to file by the magic turn into a pumpkin date of August 27, 1993.

By what alchemy is it, by what edict of Congress, or by what inherent judicial authority without Congress, is it that that ordinary claim gets transmuted into not a first come, first served right to be paid, but some intangible chunk of a fund whose limits are established from the defense side. I mean, I don't think there has really been an answer to that question. This is not, after all, a case where, for example, the insurance policies have relevant ceilings on coverage.

Here the aggregate is unlimited, which is why there was no limit to the fund. But if there were a ceiling on coverage of the relevant policy, I can imagine that creating a preexisting limited fund, so that under (b)(1)(B) you might have direct claims against the insurance company, but it wouldn't discharge the defendant.

QUESTION: Well, you still wouldn't know how much money the company is going to have, would you?

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MR. TRIBE: No.

QUESTION: Unless and until the company is bankrupt and goes out of business, you have no idea how much money the company's going to have when these later suits are brought.

QUESTION: That's right.

MR. TRIBE: It may discover a gold mine or something.

QUESTION: And certainly the company would not be discharged.

QUESTION: But didn't they hire an expert in this case to figure out how much money was available from the company?

MR. TRIBE: I'm sorry?

QUESTION: Didn't they hire an expert in this case to make the very calculation that Justice Scalia says could not have been made?

MR. TRIBE: But they may not have been right. They were bought for over half a billion dollars by OCS.

QUESTION: But they were calculating what the company was worth today. But some of these cases were going to come up years from now, people who are not yet even born. You have know idea how much, how rich the company was going to be at that point.

MR. TRIBE: The crystal ball is clouded..

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QUESTION: But do you really challenge the fact that they would have gone bankrupt if this whole thing had fallen apart?

MR. TRIBE: If there had been no insurance money available, I think that it would be unrealistic of me to say they wouldn't have gone into Chapter 11. I think they would have gone.

QUESTION: But suppose it was limited. Suppose all those objections are gone. Suppose we knew for sure it's absolutely limited. Are you still saying still you couldn't settle, still you couldn't do it, because there's a woman in Massachusetts or California or someplace whose personal claim would be determined by this settlement, who doesn't want to join?

MR. TRIBE: Well, still you couldn't do a mandatory class that resolves it against the company, as opposed to a specific --

QUESTION: No, no. I'm just taking you back where you just were a second ago in your argument. You kept saying but it's unlimited, you know. Suppose it was limited. I'm thinking of the --

MR. TRIBE: Suppose the insurance had an aggregate limit --

QUESTION: Yes, suppose --

MR. TRIBE: -- of $10 million.

QUESTION: Whatever it is, total no more than.

MR. TRIBE: You still would have to -- you could not in my view --

QUESTION: So your argument basically is that you can't bring any of these classes period if there's one person who objects?

MR. TRIBE: Well, but that overstates it. You can't bring a (b)(1)(B) class when normal legal rights are at stake. And I don't think that the Respondents are really disagreeing. If you listen to what Mr. Inselbuch says, he says that this case is unique, which I doubt because there are others around the country waiting in the wings, I know about a number of them, to see if this limited fund theory will fly.

What makes it, he says, unique is that it had to be done. There was a death struggle over insurance. It had to be done this way in order to resolve insurance coverage. That is demonstrably false. What he has simply forgotten about, I guess, is the trilateral agreement which was negotiated between the two insurers and Fibreboard, putting $3.35 billion on the table, and it's there right now without taking any rights away from any of the plaintiffs.

QUESTION: What I'm driving at, though, is taking those special features out of it, is your argument

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that if we have an insurance fund that's absolutely limited, no trilateral agreement, but we're trying to set up a process to bring in everyone who has similar claims, if there is even one person from a different state who objects it's no good?

MR. TRIBE: Well, you have to go from the Dolly Madison to Congress to get a solution to that one, it seems to me.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.

The case is submitted.

(Whereupon, at 11:05 a.m., the case in the above-entitled matter was submitted.)

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ESTEBAN ORTIZ, ET AL., Petitioners v. FIBREBOARD CORPORATION, ET AL.
CASE NO: 97-1704

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

BY Ann Marie Fedrick

(REPORTER)