OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL., Petitioners v. PAUL FELZEN, ET AL.

CASE NO: No. 97-1732 C.2

PLACE: Washington, D.C.

DATE: Monday, January 11, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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CALIFORNIA PUBLIC EMPLOYEES' :

RETIREMENT SYSTEM, ET AL., :

Petitioners :

v. : No. 97-1732

PAUL FELZEN, ET AL. :

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Washington, D.C.

Monday, January 11, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:48 a.m.

APPEARANCES:

MICHAEL KELLOGG, ESQ., Washington, D.C.; on behalf of the Petitioners.

DAVID C. FREDERICK, ESQ., Assistant to the Solicitor General, Washington, D.C.; for the United States, as amicus curiae.

JOHN G. KESTER, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:48 a.m.)

CHIEF JUSTICE REHNQUIST: I think we'll start argument in the third case, No. 97-1732, California Public Employees' Retirement System v. Felzen.

Mr. Kellogg.

ORAL ARGUMENT OF MICHAEL KELLOGG

ON BEHALF OF THE PETITIONERS

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

The question at issue in this case is whether shareholders may appeal without formal intervention when a district court approves a derivative suit settlement over their objections.

We suggest that three characteristics combine in this case to give the objecting shareholders such a right.

The first is that they receive notice pursuant to rule 23.1 in the form of an order to show cause why the settlement should not be approved.

Second, they appeared and litigated their objections.

And third, they are bound by the judgment of the district court; that is, they are subject to claim preclusion.

When all three of those characteristics are

found, this Court's cases indicate that intervention is not required in order to preserve a right to appeal.

QUESTION: They litigated their -- what does litigating their objections consist of? Just presenting their objections to the court. Right?

MR. KELLOGG: That's true. They did so both in writing --

QUESTION: I mean, they weren't subject to discovery or -- or to any of the other procedures that a party is subject to. Right?

MR. KELLOGG: Not in this case, although a district court judge could fashion a settlement hearing in which he would allow some sort of discovery of the objecting parties' experts or -- or some limited -- I would think that -- that the court would have discretion to do that in appropriate circumstances.

QUESTION: But it doesn't follow automatically from the fact that you submit that the other side is entitled to treat you like a party.

MR. KELLOGG: That's correct. That's correct.

But what this Court's cases teach, starting with Johnson v. Manhattan Railway, is that in appropriate circumstances where you do appear and object and you have a right to do so and you are bound by the judgment, that you are entitled to appeal. That was the holding of this

Court shortly before the Federal rules were passed. It was the holding in Cohen v. Young shortly after the Federal rules were passed, and it has been the uniform holding of the courts of appeals until the Seventh Circuit's decision in this case.

Now, the basic impulse behind that is the well-established principle that only parties may be bound by a judgment. Now, obviously there's an exception to that rule for class -- class plaintiffs and derivative suit shareholders. But the only reason there is an exception is because non-named shareholders and absent class members are in a sense quasi parties. They are treated as such under the Federal rules. That is why they get notice. That is why they have a right to appear and object, and that is why in our view they also enjoy the right to appeal.

QUESTION: What does a quasi party mean?

MR. KELLOGG: Well, quasi party means they are not a formal party in the sense of names on the caption or allowed to intervene pursuant to rule 24. But this Court's cases in Blossom v. Milwaukee Railroad and Williams v. Morgan have used the term quasi parties to indicate somebody, in those instances generally a bondholder objecting to a receivership -- to indicate somebody who had a right to appear before the court and

was bound by the judgment, and therefore was -- was viewed as having a right to appeal.

QUESTION: That sounds like --

QUESTION: Is there such a thing as intervening just for the purpose of objecting to the settlement? Could that -- has that happened in 23.1 cases where -- where objectors say, we want to intervene, Your Honor, but not for the purpose of becoming a party to displace the named representative, just to object to the judgment?

MR. KELLOGG: It has happened. It has been allowed in some cases, though it's not clear quite how that meshes with the language of rule 24 because rule 24 does not distinguish between intervening for some purposes and intervening for others.

In fact, rule 24 and rule 23.1 do not mesh particularly well together when they are superimposed upon one another because, for instance, in this case we would be seeking to intervene as of right because our rights are rights are going to be adjudicated in this particular instance. And yet, in order to intervene as of right under 24(a), you must show that you are not adequately represented by existing parties. Yet, under 23.1, the district court has already made a finding that you are adequately represented by the existing derivative suit plaintiff.

QUESTION: But suppose there hadn't been a settlement. Suppose judgment just went the other way. Your client would -- would presumably be as affected by an adverse judgment as -- as -- as by an adverse settlement. Would your client have a right to -- to take an appeal then?

MR. KELLOGG: Not in those circumstances because two of the factors that I've cited would not be present. They did not receive notice pursuant to rule 23.1 and they did not appear and object. It's quite clear from this --

QUESTION: Well, I -- I -- I can fill in one of them. They -- they -- they sought to -- sought to appear and object.

MR. KELLOGG: If they sought to participate --

QUESTION: No. They didn't seek to become a party. They didn't seek to intervene, any more than your client did.

MR. KELLOGG: Well, it's not clear then --

QUESTION: It has to come down to --

MR. KELLOGG: How would they --

QUESTION: -- that -- that one provision allowing them to object that makes the difference, it seems to me.

QUESTION: But how do you object if there's no settlement? I don't quite understand the hypothetical.

MR. KELLOGG: That would -- that would be my point. You can't appear and object if there's a litigated judgment except as a party, except somebody who is -- who is litigating the case. It's only if there's a settlement that you reach the circumstance in which somebody would appear and object to the entry of the settlement, as rule 23.1 specifically provides.

This Court's case in Phillips Petroleum v. Shutts indicated that where you're going to be bound by the judgment, that you do have certain rights in a settlement context to appear, to object, and to appeal.

QUESTION: I don't see the -- the need for those rights in a settlement context any more than the need for those rights in -- in -- in a judgment context.

MR. KELLOGG: Well, in fact, rule --

QUESTION: I mean, you're right. Congress has provided the -- this -- this provision for notice, but whether I should take that provision for notice so that the person can come in and object to the settlement, whether I should take that as amounting to a judgment by Congress that this individual should be able to become a party by doing that, for that purpose I -- I am -- I am struck by the fact that there's no difference between the situation of that person when there's a settlement and the situation of a shareholder when there's been an adverse

judgment, which -- which the -- the other people choose not to take up and he would like to take up.

MR. KELLOGG: Well, in fact, Justice Scalia, I think allowing objecting shareholders to appeal dovetails very nicely with the clear legislative purposes and policies behind rule 23.1. The whole point of allowing objecting shareholders to appear and object to a settlement is to prevent collusive settlements and to provide the district court with adequate information necessary to evaluate the fairness and adequacy of the settlement.

QUESTION: They wouldn't be a party as -- in the terms that Justice Scalia described, though, would they? Because let's say you're right. They get to appeal from the settlement. They're not a party when the case is then reopened in the district court. They're still -- the named representative is still there.

MR. KELLOGG: That would be correct. If they wanted to be a party for all purposes, if they wanted to be able to litigate the case to judgment, they would have to intervene.

But again, I would note that there is -- there is a certain tension between rule 24 and 23.1 because it's not clear what it means if they achieve full party status under rule 24 because ordinarily if you're a party, you

can block a settlement simply by declining to appeal -- by declining to agree to the settlement. But in this context, that's not the case. You cannot have an opt-out provision where some class members, for example, go on to pursue -- the classes split apart and some class members go on to pursue or a separate tortfeasor goes on to pursue his case. There can only be one judgment in a derivative suit settlement, just like in a class action under (b)(1) or (b)(2) where there is no opt-out.

QUESTION: Is it your -- is it your position that -- that what you're urging upon us applies not just in derivative actions but in -- in -- in class action suits?

MR. KELLOGG: I -- I think the same rule would apply in both circumstances. If anything, the derivative suit context is stronger because there is no opt-out provision.

QUESTION: One of the -- I'm sorry. I didn't mean to interrupt you. Go ahead.

MR. KELLOGG: That's --

QUESTION: I was going to say one of the -- one of the -- the points that was made toward the end of -- of your opposing counsel's brief was that if, indeed, the same rule is applied to rule 23, the result is going to be incoherence in class action litigation. Is -- is -- has

there been any experience in -- in the -- in the circuits that up to now have -- have, in fact, allowed appeals, as -- as you -- as you argue for, that suggest that there is going to be incoherence or chaos in -- in --

MR. KELLOGG: A point to the contrary. In the derivative suit context, for example, there have only been 25 appeals in the last 25 years.

QUESTION: What about class actions not derivative?

MR. KELLOGG: In the class action context, one of the amici, Public Citizens, put in information showing that 90 percent of class actions settle without objection, which means you're not going to run into a problem. We have found no case in the court of appeals saying that we need protection from an onslaught of suits in this case.

QUESTION: Were there --

QUESTION: How many courts of appeals have allowed this with respect to class actions as opposed to derivative suits?

MR. KELLOGG: With respect to class actions, we cite the relevant cases in footnote 11 of page 1 of our reply brief.

QUESTION: But in class actions, they're non-named parties, but they are parties. Isn't that so? The -- in a regular class action, there's a representative of

a class, but all the members of the class are parties. They're not named parties, but they're parties, as distinguished from the 23.1 where the objector is not a party.

MR. KELLOGG: Well, no. I would suggest that in the 23.1 context, all the absent shareholders are equally parties in the same sense that absent class members are parties in the crucial sense that they will be bound by the judgment of the court and any future claims they have arising out of the same circumstances will be precluded. If you look at the language of 23 and 23.1, they're quite parallel in terms of the rights afforded to absent shareholders.

QUESTION: Well, they're bound, as a practical matter, in not being able to have a new derivative suit I suppose, but they're not bound in the sense that class action members who do not opt out are bound.

MR. KELLOGG: Well, I think they're bound in precisely -- precisely that sense, Justice Kennedy, in the sense that they are precluded then from bringing a derivative suit claim arising out of the same circumstances, just as a class member would be precluded from bringing a -- a subsequent suit unless the class member elects to opt out.

QUESTION: Anybody a judgment binds can --

QUESTION: We'll recess for lunch and you can ponder your answer to Justice Breyer's question during lunch.

(Whereupon, at 12:00 p.m., oral argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.)

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AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: Will you -- we'll continue with the argument in No. 97-1732, California Public Employees' Retirement System v. Felzen.

Mr. Kellogg?

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

Before lunch, both Justice Ginsburg and Justice Kennedy expressed some concerns about whether a derivative right, the rights of a derivative shareholder, are sufficiently personal, sufficiently significant to fall comfortably within the Court's line of cases allowing non-parties to appeal. And I think that really goes to the crux of our argument, so I wanted to address that briefly.

In Hawes v. Oakland, when the Court first laid down the principles for derivative suit settlements, the Court explained that there are really two suits involved. One, there's a suit by the shareholder against his corporation for essentially having fallen down on the job. And second, there's the suit by the shareholder in the guise of the corporation against a third party who has wronged the corporation.

And in that sense, in that important sense, the right to bring a derivative action in appropriate circumstances is a critical part of the bundle of rights

that a shareholder possesses, and that common law right has been reinforced by the protections provided in rule 23.1, specifically notice and opportunity to appear and object and the claim preclusion principles that have been developed by the Court.

Now, it's also important to recognize that allowing objecting shareholders to appeal serves, as I noted before lunch, the critical purposes underlying rule 23.1 of casting light on potentially collusive settlements. And court after court has emphasized the importance of objecting shareholders to give a sort of adversarial context to what otherwise is a rather cozy deal cut between the nominal plaintiff and their lawyers and the corporation.

And there are enormous practical disincentives that will be created if shareholders have to go through the hoops of intervention in order to bring those objections to the notice of the courts because they'll be subject to mandatory disclosure and discovery obligations which could be used as a weapon to discourage objecting shareholders and increase their costs.

QUESTION: Well, Mr. Kellogg, could they even intervene of right under the conflict or the tension that you mentioned before between rule 24 and 23.1? That is, they have a right to intervene only if their

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representation isn't adequate. On the other hand, you can't have a champion under 23.1 unless he is an adequate representative.

MR. KELLOGG: That's exactly right, and I don't see how those two provisions mesh very well together. If you're going to say that you have to intervene in order to appeal, you essentially have to displace the existing shareholders, and in this case --

QUESTION: And then it could be then -- if -- if you can show that you're not adequately represented, then -- then there should not have been the recognition of the champion as an adequate representative. So, you'd have to dismiss the action.

MR. KELLOGG: Right. In a sense, in order to object to the settlement, we'd have to displace the existing plaintiffs.

QUESTION: You could make the same argument about automatic displacement. In fact, automatic displacement is worse. I don't know why you feel better about saying automatically that the person who has been designated as an adequate representative of -- of the -- of the shareholders is not an adequate representative --

MR. KELLOGG: Well, I think --

QUESTION: -- because we're going to let this -- this new person come in automatically and challenge the

settlement.

MR. KELLOGG: I think my point is that 23.1 gives us an absolute right to come in and object without intervening to a proposed settlement, and there's no reason why we should not have an equivalent right on appeal to object to the settlement if our objections are rejected by the district court. We shouldn't have to go through the burden of showing that the existing plaintiff is inadequate in order to challenge the adequacy of the settlement.

QUESTION: Is it -- is it fair to say that the right that you have under 23.1 assumes that there are going to be some circumstances in -- in which there will be an inadequacy and that, in fact, is the reason why the right to notice and presumably the right to object following notice is given?

MR. KELLOGG: Well, I think you have to distinguish between the inadequacy of the existing plaintiffs and the inadequacy of the proposed settlement. Here we were only challenging the adequacy of the proposed settlement, as rule 23.1 gives us the right to do.

I'd like to reserve --

QUESTION: So, you would not -- you would not infer from the inadequacy of the settlement, the inadequacy of the existing plaintiffs to represent the

shareholders.

MR. KELLOGG: You know, that -- that could in some instances be a pretty fair inference that a collusive settlement indicates --

QUESTION: Yes.

MR. KELLOGG: -- that they're not adequate representatives. But it could also indicate that they've just made a bad deal, and we as shareholders have a right to object to that.

QUESTION: You would allow somebody to appeal who could not have been a representative because, say, they weren't a contemporaneous owner. Would you -- someone, an objector --

MR. KELLOGG: Well, I think that's a -- that's a very interesting question and -- and we're not suggesting that here because we were contemporaneous owners, and therefore, we would have had a right to be original plaintiffs.

I think the third prong of our argument, the claim preclusion prong, doesn't really apply if you were not a contemporaneous owner of the shares because you did not have a right to bring the derivative suit in the first place. But we were contemporaneous owners and we did have such a right.

QUESTION: Where does the right to object -- can

I -- where does the right to object come from?

MR. KELLOGG: The right to object?

QUESTION: Yes.

MR. KELLOGG: Well, we -- rule 23.1 in its terms provides a right to notice.

QUESTION: Yes.

MR. KELLOGG: The right to notice would be meaningless if it did not include a right to show up and be heard on the objections and --

QUESTION: Why not? Why -- why -- why couldn't it foresee intervening? They give you notice so you could intervene.

MR. KELLOGG: Well, the uniform decisions of the courts indicate that we have a right to object to the settlement without intervening, without going through the additional hoops.

QUESTION: I mean, but if that's the issue in the case, that's the issue in this case presumably. So -- so, just coming fresh to the rule, if you read the last sentence, it seems to give you notice, but not a right to object. And -- and so, I -- I wondered, is there some obvious source of the right to --

MR. KELLOGG: I --

QUESTION: If you have a right to object and then you object and your objection is denied, then you

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would seem to have a right to appeal. But if you don't have a right to object, all you have or do is a right to intervene, then you could appeal from the denial. I mean, that seems to be the issue in the case, and you seem to be assuming that -- that this gives a right to object.

MR. KELLOGG: Well, in -- in fact, no one has disputed, not respondents, not the Seventh Circuit, no one has disputed that we have a right to come in and object --

QUESTION: Right.

MR. KELLOGG: -- without intervening, and for the reasons I gave, rule 24 doesn't really fit with rule 23.

QUESTION: Yes, yes, I agree with you. I just wanted to see if there's some obvious source that --

MR. KELLOGG: Thank you. I'll reserve the remainder of my time.

QUESTION: Very well, Mr. Kellogg.

Mr. Frederick, we'll hear from you.

ORAL ARGUMENT OF DAVID C. FREDERICK

FOR THE UNITED STATES, AS AMICUS CURIAE

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

Contrary to the court below, we believe other courts have correctly decided that objecting shareholders may appeal in a derivative action without formally

intervening because they meet three conditions. They have a right to participate in the district court proceedings pursuant to notice under rule 23.1. They actually participate in those proceedings, and the district court's entry of the settlement decree has claim-preclusive consequences on their personal rights.

Those three conditions were present in every one of the quasi party cases that we cite in our brief, and if I could direct the Court's attention to page 22 of respondents' brief, they have cited 10 cases from this Court which state the general rule that only parties or their privies may appeal. In every single one of those cases, one of those three conditions was absent, and the Court explained the general rule in terms of the absence of one of those conditions.

And if I could beg the Court's indulgence for just a moment to go through those cases, six of them, the Court explained that that particular moving entity did not have a right to be in the district court proceedings or that their rights were otherwise circumscribed in a way that they sought to expand on appeal. That explains Karcher, Payne v. Niles, Louisiana v. Jack --

QUESTION: Which respondent's brief are you referring to?

MR. FREDERICK: I'm sorry. ADM's brief, Archer

Daniels Midland, page 22 of their brief.

Karcher, Payne, Jack, Leaf Tobacco, Guien, and Ex parte Carcroft.

A second category of cases, this Court explained that the moving party had not actually participated in the district court proceedings, but nonetheless sought to take an appeal. That explains the holding in Cutting and Connor v. Pughs Lessee.

The third category of cases is where the Court has made clear or was evident from the record that the decision did not have claim-preclusive consequences on the party that sought to take an appeal. That explains the holding in Bayard v. Lombard and in Marino v. Ortiz.

So, it is clear that in this case about 20 cases of this Court have been cited either for the general rule that only a party may appeal or for the well -- well-recognized exception that quasi parties can take an appeal if those three conditions are satisfied. There is not a single case cited by any of the respondents in this case that where a claim preclusion applies to someone not a formal party, that person does not have a right to appeal.

QUESTION: Well, now, what is the claim preclusion here? It's -- it's -- it's simply that these shareholders can't bring the same derivative action. That's all it is. That seems to me quite different from

the class judgment that binds a member to receive a certain amount in settlement of his monetary claims, et cetera.

MR. FREDERICK: In fact, it is the same chosen action. What this Court explained in Phillips Petroleum v. Shutts was that a class member in that context -- also a shareholder, as it turned out, in the case -- had a chosen action which was a personal property right that would be extinguished by the ultimate judgment in the case.

It's no different the fact that the claim is --

QUESTION: Well, what -- what happens here is this corporation can't be sued again, and -- and the right is still a derivative one in this case.

MR. FREDERICK: It's also the directors and officers who are the real defendants in this case, Justice Kennedy, cannot be sued derivatively by other shareholders. And so, it's -- the corporation here is a nominal defendant. In the normal shareholder derivative case, the plaintiff shareholders are bringing the action ostensibly on behalf of the corporation because directors and officers have breached their fiduciary duties or committed other misdeeds that have caused a wrong to the corporation, and so the corporation is simply a nominal defendant.

But what is clear here and what the notice actually provided in the district court proceedings -- and if I could refer the Court to the joint appendix, page 134 makes perfectly clear that the rights of the shareholders who are receiving this notice will have their claims forever precluded. I'm reading from the all-capped provision in the second paragraph, the second sentence which reads: If the court approves the derivative settlement, you will be barred from contesting the fairness, reasonableness or adequacy of the proposed settlement, and from pursuing the settled derivative claims.

QUESTION: So, if -- if I agreed with you here, why wouldn't the same be true -- why wouldn't the people who intervene in Hart-Scott-Rodino antitrust procedures also get a right to appeal?

MR. FREDERICK: Two answers.

First, Congress has made clear that in the antitrust proceedings, there is a different form of procedure for objections and for intervention.

Secondly, this Court's decision in the Sam Fox case makes clear that when -- that case is not cited in the briefs, but it is stated in the advisory committee notes to rule 24 of the Civil Procedure Rules, and it's a 1960 decision. But that case holds that when the

Government brings an antitrust enforcement action, that does not foreclose the rights of a private party to bring a claim based on personal injury for same or similar conduct on the part of the defendant. So, there is a holding from this case which indicates that in the antitrust context, there is no claim preclusion.

And if I could just take another moment to explain that the enforcement decrees, which we have outlined in our brief, are fully suggestive that Congress could change the rules and has changed the rules in the environment, the antitrust and the civil rights contexts, but it has not changed those rules in the shareholder derivative context. And therefore the common law rule, which would allow persons similarly situated to the objecting shareholders in this case a right to appeal, if the district court overrules their objections, should govern here as well.

Now, I would like to address one last point that Justice Scalia raised which was some difference between why settlement would be different from litigating to judgment.

And the answer, Justice Scalia, is that settlement is quite different because there is an absence of an adversarial process when the settlement is brought to the district court for approval. And historically the

courts recognized that there was a potential conflict of interest between the plaintiff shareholders who might or might not represent the views of all of the other shareholders as it turned out for settlement and the directors and officers and the nominal defendant corporation which would seek to settle the claim. And that's why the provision for court approval was put into the rule so that persons could state their objections to the adequacy of the settlement.

That's very different from the adversarial process that, of course, goes when the case and the complaint go all the way through trial where the plaintiff shareholders are contending that there was some action that required jury findings and court rulings that would go all the way to judgment.

QUESTION: Well, what -- what happens -- let's -- let's assume that -- that you allow these shareholders to appeal and they do appeal and the settlement is set aside. All right. Then it goes back down and they come up with another settlement that is perhaps satisfactory to these shareholders, as well as to those who brought the suit. I suppose notice goes out again and yet another group of shareholders can object to the settlement.

MR. FREDERICK: That's correct.

QUESTION: Right, and they can take up -- and

this can go on endlessly.

MR. FREDERICK: Well, in fact, as the empirical experience would strongly suggest, Justice Scalia, in the uniform application of this rule up until the decision below, that was not the experience. And in fact, the rule that -- having objectors appeal and bring continuous and successive appeals is simply not a problem that bears any empirical evidence whatsoever.

QUESTION: I -- I'm -- I'm unaware of any situation where -- where, you know, we have set up a procedural framework that lends itself to -- to -- to -- to turning into a perpetual motion machine.

MR. FREDERICK: Well, in fact --

QUESTION: And -- and -- and this one certainly does.

MR. FREDERICK: No, Justice Scalia, it does not. I mean, the practical incentives for an objector are just simply not present for continuing to repeat objections that go to a settlement. But even if there was some problem like that, that certainly could be addressed by some type of an amendment to the rules if in the future there becomes some problem, and it just simply has not evidenced itself up to now.

QUESTION: Well, isn't present anyway? Even without the appeal, you could always have objections at

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the trial level and they might be sustained, and you have to send out a new notice. And then you might have other objections and a new notice. It could happen even without the appellate problem.

MR. FREDERICK: That's correct, Justice Stevens.

Now, one last point I would like to make, which is that the court of appeals seemed to confuse what the proper standard for approving a settlement is. And if I could direct the Court's attention to page 6a of the petition appendix, the court -- the court stated there that rule 23.1 provides notice to shareholders only in the event of dismissal or settlement so that other investors may contest the faithfulness or honesty of the self-appointed plaintiffs.

Our concern, from the perspective of the Federal Government's interest, is that that error gravely misstated what the standard is for approving a settlement and that if that standard is applied, it really will confuse the distinctions between rule 23.1 and 24 in a way that would make very difficult for the adequacy of settlements that are simply based on their economic terms.

QUESTION: Thank you, Mr. Frederick.

Mr. Kester, we'll hear from you.

ORAL ARGUMENT OF JOHN G. KESTER

ON BEHALF OF THE RESPONDENTS

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

The Government has just completed an oral argument in this case. The Government also filed a motion and a brief in this case. In fact, there is a rule of this Court that allows the Government to file such briefs whenever it chooses to do so. But the Government is not a party in this case, and if this Court were to render a judgment with which the Government was dissatisfied, the Government could not petition for rehearing, nor would it have any responsibility for costs in this case. The Government is not and the Government has never sought to be a party in this case. It's an amicus curiae, someone who is allowed to come in and be heard, but someone who does not bear any of these rights or responsibilities of a party.

QUESTION: It cannot change any of the issues in the case. Is that not true?

MR. KESTER: I'm sorry?

QUESTION: An amicus curiae, at least in our Court --

MR. KESTER: Yes.

QUESTION: -- cannot enlarge any of the issues.

MR. KESTER: That's correct.

QUESTION: And, of course, they're not bound by

the judgment either.

MR. KESTER: They're not bound by the judgment either, and neither in any meaningful sense were CalPERS and FSBA -- I'll just refer to them as CalPERS -- who came into the court of appeals in analytically essentially the same position as the Government here.

QUESTION: Well, I know, but you're not saying they're not bound by the judgment, are you?

MR. KESTER: I'm saying that they have no rights of their own that are affected by that judgment. It's been --

QUESTION: Well, they own stock.

MR. KESTER: They own stock, but they are not suing in their own right. The only action here is brought on behalf of the corporation.

How does a derivative action begin? It begins -- first, the shareholder has to go to the management of the corporation and say, this corporation has a cause of action against X, usually the directors. And then if the corporation says, we don't care to pursue that cause of action, or if it's futile to ask them to do so, then the shareholders can say, all right, we are to that extent going to displace the management of the corporation and we're going to bring --

QUESTION: But only if they show the board isn't

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-- is -- is not independent.

MR. KESTER: They have to -- they have to show they made a demand and that the board refused to act on it. That's all they have to show at that point, and then they -- they have to show that they are fair and adequate representatives to bring that action.

Now, if the action goes along and it's concluded, there is preclusion of the corporation from suing those same defendants again on that cause of action.

And counsel for the Government quoted from the notice here. I have no problem with the quote -- the quote from the notice because it says that they'll be barred from contesting or pursuing the settled derivative claims.

QUESTION: It ends with a derivative claim. There -- there are --

MR. KESTER: That's right.

QUESTION: -- no specific individual rights.

MR. KESTER: That's correct.

And -- and I believe -- I believe it was suggested, Justice Kennedy, that -- that somehow this would keep shareholders, individual shareholders, from suing if they had an injury, but that's not true. Shareholders sometimes bring actions in their own rights, often class actions --

QUESTION: No, but to the extent that the settlement affects the value of the stock -- and often a settlement will. It will make it higher or lower. If there's a multimillion dollar claim that's compromised or multimillion dollars of fees that are paid, that can affect the value of the stock, and its impact on the value of the stock is determined for all of the shareholders once the judgment becomes final. So, in that sense, it's binding on every shareholder. Isn't that true?

MR. KESTER: No, I can't -- I would not agree with that, Justice Stevens. In the first place, we've talked about empirical data in this case, of which -- of which there really isn't any. But what the effect is --

QUESTION: No, but theoretically some settlements do affect the value of stock.

MR. KESTER: But if a -- if a shareholder says, you directors defaulted in your duties, you did bad things, you failed to do the things you were bound to be, then that shareholder -- and he says, as a result, the value of my stock dropped, that's a suit on behalf of the individual shareholder.

QUESTION: No, no, no.

MR. KESTER: That is not a --

QUESTION: It's a suit on behalf of the corporation and the individual shareholder's interest in

the outcome is measured by the value of that person's stock.

MR. KESTER: The interest -- no. The --

QUESTION: Well --

MR. KESTER: I'm -- I'm -- with all respect, in a derivative suit, the only interest being litigated is the interest of the corporation, which may or may not have an effect on the value of --

QUESTION: Well, let me ask you this. What interest does the named plaintiff have? What gives him standing to sue? Isn't it just to protect the value of his stock?

MR. KESTER: It's because he is one of the owners of the corporation.

QUESTION: Right.

MR. KESTER: And -- and presumably the value of his interest in the corporation to that extent gives him, according to rule 23.1, enough basis to come in and say we're going to displace --

QUESTION: And the basis it gives him the standing to sue is precisely the same basis that every other shareholder has except they may have fewer or more shares is the only difference.

MR. KESTER: Right. All the shareholders --

QUESTION: And you admit the plaintiff has

standing because the plaintiff might --

MR. KESTER: -- standing. Sure.

QUESTION: What?

MR. KESTER: Sure.

QUESTION: Because the plaintiff might be hurt because the value of his shares may be affected.

MR. KESTER: I -- I think -- I think that possibility, although it's not a certainty --

QUESTION: Well, it's enough of a certainty to provide standing under article 3.

MR. KESTER: Under article 3, I agree.

QUESTION: And -- and precisely the same interest is -- is controlled for every other shareholder when the case is -- is terminated.

MR. KESTER: That's -- that's -- there's no difference in the rights of the particular shareholders, except as to their pro rata ownership of the corporation. Now, I would agree with that.

But -- but the --

QUESTION: So that the other shareholder is bound by the judgment in precisely the same sense that the plaintiff who brought the suit is.

MR. KESTER: Which is the sense that the corporation no longer can bring that cause of action against whoever is the defendant in that case.

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QUESTION: Well, are you suggesting that the individual could then turn around and bring an individual action not in the name of the corporation?

MR. KESTER: If the -- if he claims an injury, but it would be a different --

QUESTION: But for precisely the same injury that was the subject of the derivative action?

MR. KESTER: As -- as an individual? According to this notice, he could, yes. Yes. If the same -- if the same wrongful acts affected the individual and affected the corporation --

QUESTION: In a capacity other than a shareholder.

MR. KESTER: He -- he would bring -- he would bring the action as -- as someone who was injured by wrongful acts of the directors, yes, as an individual.

QUESTION: But he would be bringing it as a -- I mean, his claim --

MR. KESTER: Yes.

QUESTION: The hypothesis is --

MR. KESTER: Yes, that was --

QUESTION: -- that as a shareholder, he was injured because his stock went down --

MR. KESTER: This happens all the time.

QUESTION: -- or is worth less than it would

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have been --

MR. KESTER: Right. This -- there -- when -- when directors are accused of malfeasance, there often is a derivative suit and there often are individual suits, class action suits, by shareholders.

QUESTION: Yes, but it couldn't be the same claim. Anyone could have been the champion, and the reason they could have been is because they're shareholders.

MR. KESTER: That's right.

QUESTION: That claim is cut out.

And I -- originally, as you know, 23.1 was part of rule 23. Is the argument you're making peculiar to derivative suits, or would you say that a non-named class member equally cannot appeal from a settlement unless that shareholder intervened?

MR. KESTER: I would -- I would say derivative suits are different from class actions. Mr. Kellogg earlier said he thought that the -- if you allowed these sorts of suits to be brought -- if you allowed appeals to be brought in a derivative action, you would also be deciding that -- that unnamed class members could bring them too. And I agree with that.

However, your decision as to derivative suit appeals, if you were to decide, as -- as we urge, that

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there is no right of appeal here, you haven't necessarily precluded --

QUESTION: Why not? The same thing --

MR. KESTER: Because -- excuse me.

QUESTION: They wouldn't be named. All of your arguments about rule 3(c), if they're not named a party, they haven't --

MR. KESTER: Again, they have a somewhat better claim because a class action member has a particular individual claim against that defendant which is being -- which is being precluded.

QUESTION: But textually they are treated just about identically in the two rules.

MR. KESTER: Textually it's essentially the same -- the same words, Justice Souter, in rule 23(e) and in the last sentence of rule 23.1.

And that -- and that brings us to what I think is -- is the important issue in this case which has kind of been glossed over. This suit doesn't arise in a vacuum. This case arises under the Federal rules, and in order for someone to appeal under the Federal rules, there either has to be a rule that converts an objector into a party or a rule that authorizes a non-party objector to appeal. And there is no such rule.

QUESTION: Were we out of order then in the

Amchem case? Was it last year or the year before? I don't remember. But was it not so in that case that non-named class members who were not permitted to intervene, indeed did take that case up to the Third Circuit and then to this Court.

MR. KESTER: Now, actually, Justice Ginsburg, in Amchem the petitioners in this Court had been subjected to an injunction in that case as well as being objectors. So, they would come within the cases where someone is subjected to an order of the court and, of course, has a right to appeal. That's noted in the -- the issue was not addressed in the -- in this Court's opinion, and it wasn't raised. But they were actually subject to an -- an injunction.

Also the Third Circuit, as we know, is the lone circuit essentially out there that takes the position that CalPERS is arguing for here today. The other circuits are very heavily the other direction. And, of course, there's this Court's decision in Marino.

I might give you another example.

QUESTION: But Marino -- that was a case of antagonistic interests.

Let me put it bluntly. It seems to me that this case is not so much about do they have to intervene, but whether there can be an appeal from a derivative action

settlement.

MR. KESTER: Yes.

QUESTION: Because as I read the rule, they have no right to intervene. As I read rule 24, they have no right to intervene.

MR. KESTER: I -- I would believe that probably they do have a right to intervene under rule 24(b) as a permissive intervention.

QUESTION: They -- well, they don't have any right, but then it's within the discretion of the judge. And if it's permissive intervention, one of the reasons for denying permissive intervention is it would delay the adjudication of the rights to the -- of the original parties. And if a judge has just found the settlement fair and reasonable, wouldn't that be exactly the case?

MR. KESTER: Well, look -- look at the Fibreboard case that the Court has before it now. That came out of the Fifth Circuit. You had a number of class members who went to the Fifth Circuit and appealed. Some of them were intervenors and some of them were not intervenors.

QUESTION: But they didn't have the peculiar problem that the -- that the 23.1 objector has; that is, he has to show that he's not adequately represented to intervene of right. That is in certain tension with the

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court's finding already that the representative is adequate. And then when we get down to rule 24(b), permissive intervention, the question for the district court is whether the intervention will unduly delay the adjudication of the rights of the original parties.

Wouldn't it be natural for a judge to say, sure, this is going to cause delay? The settlement is fair and reasonable.

MR. KESTER: It -- it might or might not. I think it would depend on the judge. Some judges, Justice Ginsburg, would say, fine, you -- you want --

QUESTION: But at least we've established that there would be no right -- that this settlement, unless the district judge in his discretion chose to allow intervention, would be immune from appellate review.

MR. KESTER: Rule 24 would allow permissive intervention. If -- and if the district court denied permissive intervention, that's an appealable order. There's no question that you can appeal a denial of a motion --

QUESTION: And that would be abuse of discretion.

MR. KESTER: It would be subject to an abuse of discretion standard, but there would be a record. There would have been compliance. You see, the way you convert

an objector into a party is to intervene. Rule 24 is there.

And I don't see this -- this great supposed tension between rule 23.1 and rule 24. Professor Kaplan said, who was the author, the reporter, when the '66 amendments were adopted -- Professor Kaplan said, the reason that we notify people of things is so that they can decide what to do, whether they want to come in and whether they want to intervene and become parties.

The drafters of the rules -- in 1938, Professor Moore; in 1966, Professor Kaplan -- were absolutely crystal clear that a notice is not a summons. And that's essentially the argument --

QUESTION: But is it not true -- do you dispute the fact that the -- in response to the notice, a shareholder can come in and object without intervening?

MR. KESTER: He could in this case because there was an order, and this was the point Justice Breyer made --

QUESTION: Well, just as a general proposition, would you say that -- that the notice is sufficient to give a shareholder standing to object without intervening?

MR. KESTER: I think perhaps a district judge could -- could say, I will only entertain objections from intervenors because the rule -- I mean, I have to -- I

have to say we are construing the text of the rule --

QUESTION: Is it not the fact, though, that the practice of district judges --

MR. KESTER: Practice.

QUESTION: -- in reviewing has always been to allow those shareholders to respond to a notice to make their objections --

MR. KESTER: Absolutely.

QUESTION: Yes.

MR. KESTER: Absolutely, and essentially like an amicus curiae. That's -- that's what it is.

QUESTION: Why -- why if -- if that's open -- I mean, I'm trying to figure out what this -- what the case -- what turns on this case. I mean, if -- if you say you have to take the rule 24 route, then people who think that it's a bad decision, settlement, will take that route. And the district judge will decide it. Probably if he likes the objections, he'll say intervene and set it aside. Not -- not, if he makes a mistake, they go up on appeal and everybody is going to be looking at the fairness of the settlement.

MR. KESTER: That's correct.

QUESTION: If you don't take the 24 route, it's the same.

Now, I mean, either way, everybody is going to

be looking at the settlement. So -- so, if everybody is going to be looking at the settlement either way, and if you go the rule 24 route, you get into added complications because there will be some cases where they have some special reason for intervening that doesn't go to the settlement or something. I mean, it's just more complicated. And if the courts have gotten along with the simpler route, why not just let sleeping dogs lie?

MR. KESTER: Well, in the first place, the courts have not gotten along with the simpler route. There -- there are about three cases. There's Cohen against Young, a 1942 case, which has been totally disowned by the Sixth Circuit, and that was a case where there was a motion to intervene. There -- there is the Seventh Circuit case that was overruled in this -- in this situation, but that was just a footnote that relied on -- on Cohen v. -- with all -- with all respect, I don't think -- I don't think that was the focus of that opinion. And then there's the Third Circuit in that Bell Atlantic case which reads like -- like a policy discussion.

But to go back to what you said at the beginning, Justice Breyer, the record would not go up to the court of appeals after a motion to intervene in the same way. I mean, rule 24 does not just give rights to would-be intervenors. It gives rights to the parties in a

case too.

QUESTION: That -- that all argues in favor that it's addedly complex. People get into more arguments under that route. There will be even more delay, and the simplest thing is when people who are shareholders really object to the fairness of a settlement, let them come in and say so, and like any other matter, let them appeal it on that, not 14 other issues that could be created out of rule 24.

Now, that's -- that's a very policy oriented argument, and it would only apply if the -- it's sort of a wash in respect to the language and all the normal things. And I'm curious to know --

MR. KESTER: Well, with all respect, it is -- I mean, that sounds like testimony before one of the rules drafting committees.

QUESTION: Fine. It's a -- I'm interested in what your answer is.

MR. KESTER: Right.

QUESTION: One answer might be right or wrong. You don't as a court have that choice.

The second answer might be, well, even if the language permits it either way, et cetera, et cetera, you're wrong as a matter of policy.

That's why I asked the question, and I'm

interested in what your answer is.

MR. KESTER: I'll accept -- I'll accept both of those.

(Laughter.)

MR. KESTER: I -- I would further say it would -- it would come up to the court of appeals with a very different record because, I mean, let's -- let's just look at this case. What were the kinds of objections that were being put forward by CalPERS in this case? Essentially they were we don't like the way this company's board is structured. You know, we -- you restructured it in response to this complaint --

QUESTION: Yes, but you surely have to say that's a minor matter because the lawyers for the plaintiffs are paid several million dollars for doing that restructuring.

MR. KESTER: And -- and -- and --

QUESTION: So, it's a pretty important issue.

MR. KESTER: Yes.

QUESTION: Otherwise, you wouldn't have paid that kind of fees to have it resolved.

MR. KESTER: It was important. No, we -- but -- but the CalPERS -- the CalPERS parties are coming -- or non-parties, I should say, are coming in here and -- and they're saying we would -- we would like it structured

even differently from that, and you -- you get into the perpetual motion machine that Justice Scalia -- you could. You could get into the perpetual motion machine this way because just as people found at some point they could make money off of threatening derivative suits, think of all the money that could be made threatening derivative appeals. And --

QUESTION: Mr. Kester, I think --

QUESTION: The difference is that if you appeal and you don't -- if they don't cave in on the threat, it's a fairly expensive party.

MR. KESTER: Right. But -- but --

QUESTION: The concern here -- I mean, the -- it was that the modifications were they said what the company had already agreed to and then there was a little question about there was no money in this for anybody except for lawyers. And that -- I mean, that -- that is the concern in these cases, that maybe there will be some collusion between the lawyers who are settling and the directors of the company. Maybe that's the reason that we require notice and the notice is understood in both rule 23 and 22.1 to mean notice so you have an opportunity to object.

Now, the -- the argument here is that these people don't want to be full parties. They don't want to litigate the controversy. They don't want to get engaged

in discovery. They just want to object to the settlement.

MR. KESTER: And they want to then stop that settlement from taking effect and hold it up for a year, or whatever it takes, by filing a notice of appeal, and they haven't done the minimal act of going to the district judge and saying, we wish to intervene. We will assume the responsibilities of an intervenor. That's what rule 24 prescribes.

QUESTION: But we've been around that bush because you have conceded that they would not be intervenors of right, and then it's a discretionary matter which the district judge might or might not allow.

MR. KESTER: I'm sorry. I didn't mean to say that -- I did not concede they would not be intervenors of right in all cases. I mean, it depends on the situation. It depends on their claim. If they're saying that the shareholder representatives are inadequate, then -- then they might be able to bring it under rule 24(a). They might more often bring it under 24(b).

QUESTION: But then -- then they would be attacking not the settlement, but the very maintenance of the suit because if the representative is inadequate, he can't maintain the suit.

MR. KESTER: That would -- that would be a different sort of objection. Here they're saying, we have

a better idea --

QUESTION: That would not be an objection to the settlement, which is what they want to object to.

MR. KESTER: Well, they would -- I -- it would probably include an objection to the settlement because they would say it was a settlement that was collusive or whatever.

But here they specifically on the record said, we don't claim that there was any impropriety or collusion here and the district judge made a finding to that. That's 338 and 347 of the appendix. And instead, they're coming and they're saying, we have --

QUESTION: Well, that's why they would not have a right to intervene.

MR. KESTER: They have a right -- Justice Ginsburg, perhaps -- perhaps this is a better way to say it. They have all the rights that 24 -- rule 24 provides. Rule 24 provides in certain situations to intervene as of right. In some situations --

QUESTION: Yes, but Mr. Kester, I'm asking you to be concrete about that because we have an actual case.

MR. KESTER: I understand.

QUESTION: And I put it to Mr. Kellogg and now I'm putting it to you.

MR. KESTER: Okay.

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QUESTION: As I read rule 24, as applied to this case, they have no right to intervene.

MR. KESTER: They -- they waived any such objection. That's absolutely correct. So, they -- they would intervene, if at all, under rule 24(b) permissively, and that happens -- that happens frequently.

QUESTION: Yes, but then -- then we're back where it's up to the district judge who may or may not --

MR. KESTER: Who -- who may -- who is subject to rule 24(c) which provides certain parameters of when you grant these and -- and when you don't and what you look at. And -- and if a district judge abuses his discretion or her discretion, that's an error of law and that can go up on appeal.

And --

QUESTION: Of course, if -- if -- if we find -- if we find for your -- your opponent in this case, unless we accompany our opinion with -- with some statement to the effect that the district judge has to allow objections, the reaction on the part of the district courts, which up to now have been so liberal in -- in allowing objections to be filed, could conceivably be, well, if allowing an objection is going to allow all these people to become parties, we're not going to allow objections.

I mean, if -- if in fact, these -- this is not a point against you.

MR. KESTER: I understand.

QUESTION: I'm just speculating as to whether that -- that isn't a possible reaction. Up to now, it's been cost free. It's just like letting in an amicus, and as a district judge, of course, I'd want to hear every possible objection to this settlement that's -- that's out there. And up to now, it's been cost free. I just come in and I listen to it. If I don't like it, I reject it.

MR. KESTER: There were 24 -- 243,000 notices went out in this case. It's never been explained because the position of CalPERS in this case is -- is sort of outside any text of the Federal rules and outside the history of it. I mean, how do you --

QUESTION: You don't really think that any district judge would say, we're going to spend a million dollars sending out notices to all these shareholders, but we're not going to let them object. You don't -- nobody is going to buy that one.

MR. KESTER: Well, I -- if -- I --

QUESTION: I mean, you don't really think that's going to happen.

MR. KESTER: I -- I -- I -- I imagine that the -- that the district judge would entertain objections. I

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mean --

QUESTION: Sure. They're -- of course, that's the whole purpose of the notice.

QUESTION: We could --

MR. KESTER: But -- but what -- but what happens, Justice Stevens, after the settlement, after the final judgment is entered and then more people say, well, we -- we still object and we're going to --

QUESTION: Well, they'd have to make -- I mean, the conditions, the three conditions, that your opponent has asked for -- they have to make a timely objection. They don't -- they're not suggesting after a settlement has been approved that somebody can come in and make a late objection and then appeal.

MR. KESTER: I see nothing in the -- because they don't tie this to the Federal rules. I don't see anything either way. If you -- once you say the Federal rules allows any shareholder to come in and appeal if he does not like the judgment in the case -- I mean, there are post-judgment interventions that occur all the time.

But what is -- what is being asked here by the other side is a situation where if intervention were denied, it would go up to the court of appeals with no record as to -- as to why this intervention --

QUESTION: Well, and if you had to appeal from a

denial of intervention, the issue on appeal would be whether it was an abuse of discretion to deny intervention, which would be the primary issue, and it wouldn't be -- the primary issue would not be the fairness of the settlement.

And Justice Ginsburg's concern is there should be some or at least the rules contemplate, by sending out a notice, that there will be judicial review of the settlement. If there's judicial review, there would also be appellate review. That doesn't necessarily follow, I agree with you.

And I suppose your best argument is that you may have some hold-up situations where people will threaten an appeal to get bought off. That's -- all sorts of monkeying around in these cases that I'm aware of.

But I think really you really haven't given an effective answer to the point that if you don't allow an appeal, there is -- it is -- there is no sure right of review other than on the abuse of discretion standard.

MR. KESTER: There -- there is no sure right of review if -- if no one intervenes, but if no one cares enough, Justice Stevens, to intervene, why should there be a review? There -- there is no --

QUESTION: Well, the reason I suppose is that you want to -- do you want to make it easy for

shareholders, many of whom are shareholders, to file objections? And if they must intervene in order -- as a predicate for filing an objection, you will get fewer objections because it will become much more costly.

MR. KESTER: And --

QUESTION: Maybe that's a good reason; maybe it isn't. But I'm sure that's the reason.

MR. KESTER: Maybe it is and maybe it isn't, but it's not in the Federal rules. And -- and on the other hand --

QUESTION: Well, provision for notice is in the Federal rules.

MR. KESTER: Provision for notice.

QUESTION: And the purpose of that obviously was to allow shareholders to object to settlements, and the reason for an appeal is that, everybody knows, there often large attorneys' fees in these cases which facilitate the settlement. I've been involved in some of these cases.

MR. KESTER: I'm -- I'm sure you have.

And -- but there are provisions for notice. There are even statutory provisions for notice throughout the code and -- and in the rules, and there are all kinds of situations where people get notice. But notice doesn't turn one into a party with a right to appeal. I mean, you -- you've got the Government's brief. It says, it's all

right here, but don't --

QUESTION: It doesn't turn one into a party with a right to appeal. But I don't think you even take the position, even though I recited the rule -- I don't think you take the position that no one can ever appeal unless he or she is a formal party.

MR. KESTER: I --

QUESTION: You don't take that position.

MR. KESTER: I take the position that they may not unless authorized by the Federal rules, and --

QUESTION: Well, what about the example Justice Ginsburg gave?

MR. KESTER: Which one?

QUESTION: You said the -- the last class shareholder case, and you answered by saying, well, they were bound by the injunction.

MR. KESTER: Yes, and --

QUESTION: Well, there's no provision in the rules that says everybody who's bound by an injunction may appeal, is there?

MR. KESTER: Rule 71 of the Federal rules. There are special rules on sureties, on summary proceedings against sureties, rule 65.1. Rule 71 says if -- if an order gives you a right or binds you, that can be enforced, it says, as if you were a party. That's

essentially a codification of these cases from the 19th century that the Government calls quasi party cases. It's -- those are -- those are collateral issues, and those are -- those are treated like separate lawsuits.

But the rule said in Marino -- it's been said for 150 years. It's been enforced -- is that you have to be a party to appeal or you have to have, as rule 71 does, a -- an authorization to appeal as if you were a party. All of those cases, which they say are exceptions, are not really exceptions.

It's a clear principle, and it's been -- it's not as if -- it's not as if we were suggesting some kind of dramatic change. We're asking to continue to follow the rule that most courts of appeals already follow in both class actions and derivative suits in well-reasoned opinions. There -- that really only the Third Circuit --

QUESTION: And Moore and Wright and Miller just, you say, well, without any reasoning or whatever, but here are the two leading treatises on procedure who say, as a matter of course, an objector can appeal only as to the objection, not the whole case, but can appeal from the approval of the settlement. Period. Now, those are learned treatises and they both agree on that position.

MR. KESTER: And -- and I would say that this was a learned panel, and that -- those learned

treatises --

QUESTION: Well, remember what the Seventh Circuit did. The Seventh Circuit was the other way. Then they said, oh, the Supreme Court decided this case called Marino against Ortiz, and that changes everything. But it didn't really, did it, because Marino v. Ortiz involved quite a different situation, people who were not shareholders -- all shareholders, but people who were genuinely antagonistic? White -- was it fire fighters? I don't -- police officers who wanted to object to the settlement. They were certainly not represented by the black plaintiffs who were suing. That's a very different kind of case.

MR. KESTER: But they were allowed -- they were allowed to come in and -- and object, but they were not allowed to appeal.

QUESTION: They were outside the class.

MR. KESTER: They were not -- they were not members of the class.

QUESTION: Yes, right.

MR. KESTER: No.

QUESTION: So, they had to intervene. They were not class members, so they had to intervene if they wanted to be in the show.

But for the Seventh Circuit to say it follows

like the night, the day, it didn't. Whatever -- whatever the answer may be, it doesn't come out of that decision.

MR. KESTER: But I -- and I would respectfully say it doesn't come out of the treatises either because they simply relied on the Bell Atlantic case, and Professor Moore originally took our position.

QUESTION: Thank you, Mr. Kester.

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

QUESTION: Mr. Kellogg, you have 1 minute remaining.

REBUTTAL ARGUMENT OF MICHAEL KELLOGG

ON BEHALF OF THE PETITIONERS

MR. KELLOGG: Mr. Kester cited rule 71 of the Federal Rules of Civil Procedure. I think it's quite instructive because it particularly refers to the rights of persons not parties to the case. It makes no mention of appeal, and yet this Court's cases make clear that such parties bound by an injunction do have a right to appeal, just like witnesses held in contempt, just like persons who are denied a right to intervene are allowed --

QUESTION: His point is that the rules recognize that one, and that they don't recognize this one.

MR. KELLOGG: But they do recognize explicitly the rights of derivative shareholders, and I'd like to quote from rule 23.1. It's -- it's at 8a of the addendum

to our brief. It specifically says that the plaintiff in such an action must fairly and adequately represent the interests of the shareholders. It doesn't refer to the interests of the corporation. It say the interests of the shareholders.

And when a derivative suit is settled, particularly in a bogus way as this one was where most of the money ends up going to the lawyers, our rights as shareholders are bound. We are forever stuck with that settlement, with the bogus corporate reforms that they implemented and with the large award of attorneys' fees. Our rights are extinguished when that settlement is entered, and that fact and the fact that we appealed to object puts us within a long line of well-recognized exceptions to the general rule that only parties may appeal.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kellogg.

The case is submitted.

(Whereupon, at 1:48 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL., Petitioners
PAUL FELZEN, ET AL.
CASE NO: 97-1732

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

BY: Ilona M. May
(REPORTER)