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Dinner Speaker
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A Touch of Class: Latest Developments in Antitrust Class Actions

MS. GOTTS: We are now going to start with the afternoon panel. In planning this year's session, I attempted to cover the areas that my own practice doesn't cover, thinking that would be a good way to learn.

This morning's topic, as far as the title went, took the award of being the longest topic, this one is the—no pun intended, the classiest of the topics, has a nice little ring to it.

The session is called "A Touch of Class: Latest Developments in Antitrust Class Actions." The panel chair for this is someone that many of you know, having been a prior chair of this committee, this Section, Steve Edwards. Steve is a partner in the New York office of Hogan & Hartson, where he focuses on complex litigation of all types. He is a graduate of the University of Iowa and the University of Virginia Law School. Among other things, he has litigated many antitrust class actions and has been involved in a number of arbitrations. I am going to ask him to introduce his panel. Thank you.

MR. EDWARDS: Let me start out first of all by saying that I've had some sort of respiratory problem lately, so occasionally I break out into coughing spasms, and I'll apologize for that in advance. It means I won't be able to talk very much, but perhaps that is a good thing.

We are going to present this program in three courses. The first course, the appetizer course, is on the issue of predominance. To discuss that issue we have two well-known economists. Immediately to my left is Dr. John Beyer, who has appeared frequently on the plaintiff's side. And if you look through the course materials, which include many of the leading antitrust class action cases that have been decided in the last four or five years, you'll see that John's name pops up in almost every one of them.

Next to him is Dr. Brian Palmer, who is also an economist, and he is with Charles River Associates. He appears frequently for defendants, so he is going to take the defendant's side of the discussion.

Our second course, or our main course, is going to be on class action arbitrations. For that discussion we are very fortunate to have Bob Davidson, who is head of the arbitration practice at JAMS/Endispute. He is also Chair of the Arbitration Committee of the City Bar Association. Before he was with JAMS he was a partner at Baker, McKenzie and did many, many arbitrations all over the world.

On the other side of the podium we have Bernie Persky of the Labaton, Sucharow & Rudoff firm, and

Bernie is a well-known plaintiff's class action lawyer who has litigated class actions all over the country and is currently involved in an antitrust class action arbitration with the person immediately to his left, Steve Cherry.

Steve Cherry, of Wilmer, Cutler, Pickering, Hale & Dorr, is also a well-known antitrust litigator who practices primarily on the defense side, and they are going to have some interesting things to say about the particular class action arbitration that they are involved in.

Then for our dessert we are going to be talking about the Class Action and Fairness Act or CAFA. For that discussion we have Hollis Salzman, also of the Labaton Sucharow firm. She has spoken and written about the Class Action Fairness Act, and again has litigated many, many class actions generally on the plaintiff's side.

And finally, originally Saul Morgenstern was supposed to be on this panel, but he couldn't make it, so Andy Schau of Patterson Belknap is our very able substitute. Andy is a litigator; he is head of the technology practice at Patterson Belknap. And Andy and I are actually involved right now in a series of—depending on how you count them, pre MDL, approximately 50 class actions all over the country.

So we'll start with the predominance issue: As many of you may know, if you do class action litigation, there are a number of criteria that plaintiffs have to satisfy in order to persuade a court to certify a class. There is numerosity; there is typicality; there is adequacy, commonality. Those issues are generally pretty easy. The real battleground is predominance. In order to certify a class, a court has to conclude that common issues predominate over individual issues, and this becomes very interesting in the context of your typical antitrust class action.

Let's say it is a price-fixing case, and let's say it's the kind of industry where there is a lot of individual negotiation. So you have individual negotiation; you have prices varying all over the place, and yet the plaintiffs claim that they can demonstrate impact through common evidence. How do they do that? Well, they retain Dr. John Beyer, who does it for them. Perhaps John can explain the secrets of the trade.

DR. BEYER: I am not sure I will do that, but if it were only a matter of retaining John Beyer and Nathan Associates to have a class certified, I'd go into retirement. We would be very wealthy, and there would be a lot of classes certified. It's a lot more difficult than that.

The reality is that in every industry that I am aware of, with one exception I have had familiarity with, other than the classical agricultural markets of wheat and corn and that, prices vary tremendously depending on who purchased those items at the same point in time for exactly the same commodity, same product, same service. That is due to a lot of what I call market realities. Some are big, some are small, some are continuous purchasers, some are intermittent. Some spend a lot of time being purchasers, being in a better position to negotiate and evaluate. Other purchasers simply take it on face value, and don't bother spending that time. And as a result, in most products and services if you look at one point in time, the variation can be very large.

Now, how can all of them have been affected or impacted by a common course of anticompetitive behavior? In my judgment, if there are several criteria that are present and where price becomes the end instrument that purchasers use to make share decisions, then the likelihood is that all purchasers, the largest purchaser at the very bottom, the purchaser at the very high end who only buys a little bit occasionally will have been affected.

Economists use two terms. Lawyers have used other words to describe this. One is called undifferentiated products or services; that means there is no brand loyalty. If you think of most intermediate goods, it is very difficult to think of purchasers who continue to buy from one supplier compared to another because they think that supplier has something unique, has a brand. It is able to differentiate its product and charge a premium for it. If there is no differentiation, then purchasers compete on the basis of price. Again, regardless of the level at which they are buying.

The other principle is what I call and economists call substitution, supply substitution, which means that most of the suppliers in an industry are able to make the most, if not all of the products that are actually sold in the marketplace. So for example I use cardboard boxes, because I've done a lot of corrugated containers. Every box plant in North America can make every type of corrugated container; the kind that they ship refrigerators in and the kind that I am really interested in, those they ship beer in. But the plants don't always make everything because they decide they want to specialize. But the same raw materials go in, and if the right competitive opportunity comes along, every box plant can make every other container. So there is a supply substitution. A lot of alternatives for purchasers. And again, price becomes the principal consideration.

When those two considerations are present, the likelihood—not that it will be guaranteed, but the likelihood is that predominance will prevail. That all purchasers, again regardless of whether it is a negotiated price or a list price—very few industries sell entirely off a list price anyway, again with one exception that

I am aware of, and as a result, the price is affected by the alleged anticompetitive behavior. There are other considerations, but those two seem to have been predominant in most of the cases that I have dealt with over the last fifteen, twenty years.

What that means for me is that most consumer products, which aren't often the object of an anticompetitive cartel, probably (1) is going to have a more difficult time certifying a class. So most of the antitrust level action really is at the federal level. All of this is focused on federal, not the end purchaser, as with intermediate profits. Corrugated containers, chemicals, rough diamonds, various products that are used, that are manufactured that are intermediaries to some other process, production or final consumption.

MR. EDWARDS: Well, one of the things that defendants often say in reaction to what John just said is, wait a second, if you've got an industry in which every deal is negotiated individually, why shouldn't it follow from that that individual issues predominate? I suppose one response to that is economists deal with individual issues on a global basis all the time. For example, economists take every transaction in the economy and attempt to determine the gross national product. So why isn't that the case, Brian, with respect to individual issues in connection with price-fixing cases?

DR. PALMER: Well, I think you really need to look at what is the industry structure and also the data generating process. Obviously plaintiffs wouldn't bring a class action unless they thought there was a class. From the defendant's view point you really need to look at it and say is there something here?

A lot of times it seems that plaintiffs say, well, we can't really tell what it is, but we'll take an average. We see things moving around, let's take an average of everything and go with that. Well, the average doesn't really describe what is occurring and why things happen. So it's the big why. It is important to not just look at the output and say we see prices or we see movement, but to examine why do things happen. You need to know the foundation, the underpinnings of it.

For example, an industry with inflation adjusted long-term contracts, you may see a group of people moving up and down together in terms of their pricing, and you may see a lot of variation in individual prices, depending upon quantities purchased and other things. You may say, well, look, here's a common price movement. But it could be that the alleged class period occurred all within a long-term contract period. So those on long-term contracts who look like prices were moving together may be completely insulated from any price fixing. Whereas the individual transaction, the spot transactions, may be the ones affected. So you really have to dig into the industry and not take a broad brush and

say, well, we see what average prices are doing or we see something, and we are going to take that as a given.

MR. EDWARDS: John, why don't you give us a little thumbnail sketch of the econometric tools you use to try to demonstrate impact through common proof.

DR. BEYER: There is a predecessor to that question, which is usually the predecessor doing any serious analysis of the impact on purchasers, which means the impact of alleged behavior on prices. This is all about price behavior during the period of the alleged cartel or anticompetitive behavior. And that is easier said than done. Because in most industries there may be millions of transactions that are affected or that are to be examined. And often this means understanding and using that data, which is really historical records that companies have kept about their invoices, their transactions that they have with their purchasers over time. From my experience it is quite varied, and it depends a lot on the firms in an industry, what type of data they decide to keep to reflect what they think is important about their transactions.

Once that is done, before I even get to looking at a way of trying to set aside looking at the effect of the cartel as distinct from other economic factors, is answer this question: Have prices, regardless of whether they are high to the small purchaser or very low to the large purchaser, and regardless of the categories or types of product, have they tended to move over time similarly? If they have not, then there is a real question, because then the issue of negotiation and factors that both suppliers and purchasers take into account do affect on an individual basis the final outcome, which is the price.

I have found in several cases where we have been able to examine—and this is an empirical question, it is not preordained; it is a demanding empirical condition made easier in this current day because in this day most of the data is being kept electronically. Although I have to say there are a few firms that like paper, and it gets very expensive to use.

One can look at the behavior of prices by mining, by looking at this rich empirical basis of how suppliers have related to their purchasers, to their customers. Econometrics is a tool, a statistical tool that economists use to measure the effect of various parameters on price, on income, on savings, on other esoteric considerations. It takes into account the various factors that likely are to explain price changes in a given economy. More often than not, if there is a pattern where prices tend to move together, then the change will be similar, even though the absolute levels are miles apart. And therefore, something that Brian talked about just a moment ago, the averaging can take place, because suppliers all react to the same cost changes in an industry. They tend to have the same cost structure and use the same raw materials. The demand for the product by purchasers will generally be affected

whether it be a small purchaser or a large one by how the industry as a whole is doing in the economy.

There are various measures by which those changes can be reflected and can be incorporated and will enable an economist to distinguish whether an alleged cartel has had an effect on prices, in a decision to the general economic factors of changes in cost and changes in demand.

However, it is not always possible to do that because it's a demanding empirical test. And like many analytical tools that economists and other social scientists use, it is a tool that can be abused. So it has to be used with care by both the lawyers who are retaining the specialists or the experts as well as by the experts.

MR. EDWARDS: Brian, it seems to me what John is saying is I can deal with individual issues simply by averaging, because averaging by definition eliminates individual issues. Is that an appropriate economic approach?

DR. PALMER: Well, it depends. I mean it's almost setting the conditional first. So if you say, well, there is a common impact and there is something that exists, so I can tease that out. But a lot of times what is used is a regression analysis, which is basically just a sophisticated averaging technique—it is a conditional mean. What the person using the regression analysis is looking for is to see if they can control for a couple of different factors. To examine the alleged behavior, again as I said before, is a need to go back to what it is that generates the observed differences or what is the theory behind how the alleged damage occurred. So it's not just, well, there is a common impact. But the question is: How did it occur? Because then that will help to guide the analysis as to what to look for.

A lot of times the regression analysis may include variables that, while they may be interesting, but they may not be the descriptive ones. So what happens is that you may throw in a couple of regressors and they may be correlated with something else and you say, oh, look, here is a common impact. But if some things are excluded and the included regressors are correlated with some of the things that are excluded, then you get screwy (i.e., erroneous) results.

So a lot of times the claims can be made, again by only looking at the empirical results, but without having a good motivation behind it.

MR. EDWARDS: John, have you ever looked at a class and concluded that you couldn't determine impact through common proof? And if so, what were the characteristics of that class that made that so?

DR. BEYER: I have, and the common dimension in each case that has run through it is that the product

involved or the service involved was—you can use the economist's horrible phrase—a differentiated product. In other words, brand loyalty. As a result of brand loyalty, there could be—not always—but there could be price premiums that are charged to some customers, and therefore the prices don't move together.

The example was—I have to be careful how I say this because I am involved in a case now involving Mercedes Benz. But there was a case some years ago where a class action was being proposed for owners of Mercedes Benz who were buying or could have bought Mercedes-like spare parts from non-Mercedes dealers. And it became clear to me that we are really dealing with something in a purchaser's mind, and probably as well in suppliers, that is clearly a differentiated product. So the prices today could be something and tomorrow something very different for the exact same part. There have been several examples like that, and not only products, but also services. And when you think about it in terms of particularly end products where consumers are involved, I go through the supermarket, and it amazes me the amount of money that companies spend to differentiate their products. I use often the example of salt. Now, salt, if we had a blind test here, I don't think anybody could pick out Morton salt. But Morton sells for more than any other salt, because they have managed to differentiate their product through advertising. So what do I do? Now, I am dumb, I pick up Morton quality because I think it is better, yet I know it's the same bloody salt that I get from somebody else. Now that is why consumer products are more difficult to deal with.

An example, disposable diapers, a big industry these days. I haven't bought them recently. But when I was looking in the supermarket, a young mother looked at me and kept looking at me and wondering what am I doing looking at disposable diapers. But Huggies and Pampers are able to garner a substantial price difference, because they have managed to convey to consumers as a whole that they produce a lot better product, compared to the generic store brand disposable diapers, which—I don't know—I haven't tried them, but I think that they are probably just as good and they sell for a lot less. So I have found when dealing with consumer products and consumer services it tends to be a more complex issue.

MR. EDWARDS: So let me pose the same question to Brian. Brian, have you ever analyzed a class and concluded that, notwithstanding individual negotiation, this class should be certified because impact can be demonstrated through common proof? And if so, what were the characteristics of that class that made that so?

DR. PALMER: Well, I think looking at things—I am trying to think back—and the thing that would be common is that a factor would be the same, some cross factors or some input factors or because there was a list price change; if there is a finding of liability or something.

Part of the problem in looking at these is that the class is often defined as all the people who were damaged. So you may be in an industry and there may be a subgroup or part of a group that may be different. So you say well, not everyone is the same. But then the class is defined, who is damaged, but we can't find out who is damaged until after the trial is adjudicated, yet we still have to define the class.

One of the big problems it seems is that the courts are often willing to certify classes and then you have this huge thousand-pound gorilla on the back of the defendants. It takes a very small probability of anything going awry, and there is a huge damage award so defendants most often settle. So it is a real problem, even if there may be a subgroup or something like that, the class is often defined very broad. Plaintiffs can point to some similarities in a small group, but say "well, everyone is like this," and the potential liabilities are so huge, the Court says we can always examine it

MR. EDWARDS: John, in looking through the materials, one of the cases that you lost or I should say the Court decided not to certify a class, notwithstanding your report, was the Agricultural Chemicals case down in Florida. I think one of the things the Court focused on in that case was market power. Basically, the Court concluded that because the alleged price fixers did not have market power as a group you could not show impact through common proof. What do you think of that? Was that decision correct?

DR. BEYER: I disagree. Actually the decision was correct, but the reasons offered were wrong.

It turned out this was a complex case where AstraZeneca was a supplier of astro chemicals to its three or four large distributors. It turned out that the prices that the distributors gave back to AstraZeneca were not the true prices, because they got rebates based on no reselling below a certain price. However, the reality was there were prices below that rebate price. And it's that information that came out just before trial that I found particularly troublesome.

The judge in that case—and I am not a lawyer, but from what I understand from the case law put the cart before the horse. He was looking at merits issues, and the question here is—and I didn't want to revisit it, did AstraZeneca through its brand name chemicals have sufficient market power to persuade farmers to buy its product versus others. And that would have been a tough issue.

Now, the judge at that point, he and I had a long discussion—less of a discussion than it was a heated argument. And I lost of course. But the real compelling issue for me in that case was the fact that the brokers, the distributors who really sold the product to the farmers had negotiated in some cases prices that were very

different than the prices they told AstraZeneca that they sold for. So that in fact, contrary to what we thought, there wasn't a similar price that was pervading among the purchasers who were farmers, but rather a wide variety of prices that didn't appear to behave in a logical, cohesive manner.

Now again, this is a differentiated product. AstraZeneca was able to sell some of its chemicals because of its brand name, and distinguish its product from Monsanto's or Dow chemical or whoever else is selling out to the farmer.

MR. EDWARDS: Brian, it seems to me what happens in most of these cases is you have individual negotiation. The plaintiff says well, I can deal with that on a common basis because my economist is going to do a multiple regression analysis. The defendant hires CRA. CRA does its own multiple regression analysis, purporting to demonstrate that there are many, many individual issues. The judge's eyes glass over. The judge says, well, I don't really understand all of this multiple regression stuff anyhow, so the judge ends up assuming impact, even though as a technical matter you're not supposed to assume impact in a private treble damage suit, even though it's a per se violation.

Do you think that is what's really going on here, the judges just can't figure it out and they just make a presumption one way or the other?

DR. PALMER: Well, I think the judges are probably concerned that if they don't certify the class, the case will go away; yet, if they do certify the class, well, it may or may not go away. It often does go away, because, as I talked about earlier, the defendants don't want the exposure. So the judges always think, well, if I certify I have an option down the road of decertifying the class. Chances are that doesn't happen, and it seems that it is very rare, if it ever happens. But it often seems that the plaintiff's brief says, well, you're supposed to assume certain things for the sake of class certification arguments, so essentially we are going to assume the class and go through a bunch of stuff, and lo and behold they get the class they assumed. So I think judges often do not understand. That is why I think it probably behooves the experts to say what it is that is causing the commonality or the lack of commonality and not just looking at the regression analysis, which examines the data that results from what is alleged as being common. And so sometimes, you know, it almost seems that the class certification phase should be after the merits phase, so we should figure out what it is that is actually at issue.

MR. EDWARDS: And there was a very interesting case that John and I were involved in, and Steve Tugander was involved in as aspect of this case, an antitrust case against Mercedes Benz. There were very, very good thorough reports by the economists from both sides. At the end of the day Judge Wallen wrote an opinion in

which he said: I understand that I am not supposed to assume impact. But under the Bogosian case in the Third Circuit there is something called the Bogosian shortcut which essentially enables me to assume impact. My own personal view is that is what a lot of courts around the country are doing, because they don't fully understand all of the things that our economic colleagues are telling us.

That being said, I want to move on to the second course here, which is antitrust arbitrations, actually antitrust class action arbitrations. And I want to start off by asking Bob Davidson, who is our arbitration expert: What is the authority for having a class action arbitration, and how frequently do they actually occur?

MR. DAVIDSON: Thanks. The Supreme Court put arbitrators in the business of arbitrating class actions. It did that in a case in 2003 called *Green Tree Financial v. Bazzle*. I'll get into *Bazzle* in a minute, because we should all understand what it says in order to appreciate what arbitrators can do and what they cannot do. The Supreme Court has only opined once on the issue of class arbitration.

First, is class arbitration common? As far as class actions go the two major providers are the AAA and JAMS. On the AAA web site I counted today 92 class arbitrations on its docket. Now, that is overstated a bit, because many of the defendants in the listed cases are the same, and the list sometimes duplicates cases, but you can see it's quite a number. I would say probably upwards of 80 different cases. JAMS, which does not publicize its cases—that is one of the main differences in this area between the two providers—has about 15 active class arbitrators. Of those listed with the AAA, there are one or two that I know are antitrust oriented, have antitrust issues. JAMS has one antitrust class arbitration that is active now. None of these class arbitrators has gone to a final award. Several of them, however, have gone to a clause construction award.

Let me just briefly tell you what *Bazzle* said, because it's a complex case. The Supreme Court has nine justices. There are four opinions. A majority was formed when Justice Stevens sided with four other justices in order to provide the fifth vote in order to create a controlling decision.

There is a big debate about what *Bazzle* really decided. Essentially what *Bazzle* determined was that an arbitrator and not a judge was the appropriate person to decide whether or not an arbitration clause, which is silent on the issue of class arbitration, permits the case to go forward as a class arbitration. The four Justices who formed the plurality decided that the Supreme Court of South Carolina acted improperly when it determined as an initial matter that the underlying dispute could go forward as a class arbitration. Instead, these four Justices held that the South Carolina Supreme Court was not the

correct decision-maker. The correct decision-maker was the arbitrator.

That is all those four Justices said. Stevens, who concurred, concurred on a different basis. He thought that the four Justices who came to the conclusion that the arbitrator was the correct decision-maker made a gratuitous ruling because no one asked for a ruling on that basis. The parties simply said they wanted the decision that had been affirmed by the South Carolina Supreme Court to be affirmed by the Supreme Court. Stevens reasoned that because the case should have gone forward as a class arbitration, the South Carolina Supreme Court got it right, and the judgment below should have simply been affirmed.

So as a technical legal issue, only four of nine justices said that an arbitrator is the correct decision-maker in this area. The decision, however, has had broader implications. Two things have happened. One, since 2003, many class actions have now been thrust into an arbitration forum. Second, there has been considerable uncertainty as to how these class arbitrations are to be conducted. *Bazzle* dealt only with clause construction. It didn't say anything about what should happen after that. And, as you know, a lot of things happen in class arbitrations beyond construing whether an arbitration agreement permits an arbitration to go forward as a class arbitration.

The courts have indicated and have stated, in certain cases, that an arbitrator has the power to run with the ball, that is, not only determine whether an arbitration can proceed as a class (the issue of clause construction) but perform all the other functions of a judge in a class context. This includes the certification of a class and all of the other attendant issues that go with the process.

So all of a sudden these provider organizations (like JAMS and the AAA) were put in the business of administering class action arbitrations. And it is interesting because no one asked for it, neither the AAA nor JAMS nor any of the provider organizations filed any amicus briefs or expressed any opinions on it. All of a sudden we woke up one morning and, to our surprise, the Supreme Court all of a sudden put us in the class action arbitration business. That is really what started the movement.

MR. EDWARDS: Let me pose a question to Bernie. Bernie, you're a plaintiff's lawyer. Let's say your client has a contract. The defendant has violated the antitrust laws in your view. You want to sue the defendant. You decide to invoke the arbitration clause. An arbitration clause is a creature of contract, right, so on what basis can you turn that into a class action? The other members of the putative class are not parties to your contract; how does it become a class action?

MR. PERSKY: Well, normally in the first instance we wouldn't as a matter of choice go into arbitration seeking a class. Normally we would go to court, assert our claims on a class action basis. But if we are compelled to go to arbitration, the question would arise what does that arbitration clause encompass? It's really a misnomer to say the absent class members have no contract. The absent class members by definition in any proposed class would have a contract similar to my clients' contract. And the question arises, what does that contract encompass? What does that contract mean? What kinds of arbitration claims can be brought? And how far does it go? If the contract says you can't have a class, that answers the question, we won't be able to seek a class. If the contract is silent and there has been no agreement not to have a class, so my client and the action class members are in a contract where there has been no agreement not to have a class. But what kinds of disputes would be encompassed by this arbitration clause? If it's a broad clause, as many clauses are, it would say any normal disputes of any kind in any way shape or form affecting the contract. Well, that is the kind of clause that the Supreme Court was interpreting in *Bazzle*. And the Supreme Court held that every arbitration panel faced with this question since that time has also held that if it is a broad clause and the clause is silent in not prohibiting a class, the clause can include a class claim. Every single AAA clause construction award decision has so held with respect to their clause construction awards. There are 30 such decisions I believe and at least 23 or 24 of them have so held. The others punted on the issue.

One of the things that Bob didn't mention is that after *Bazzle* the AAA and later JAMS adopted supplementary rules, class arbitration rules. And they do set out a rather detailed procedure as to how the panel should operate and how the parties should proceed.

MR. EDWARDS: Steve Cherry, why don't you give us the defendant's perspective on this. Is this a good thing from a defendant's point of view, that a plaintiff can commence an arbitration not only based on its own contract but it can draw in a class of plaintiffs with similar contracts?

MR. CHERRY: I think we would not view it as a good thing particularly. I think the key from our perspective is that all of this is about consent, and it really is construing the contract. We view *Green Tree* as not being such a change in the law, but simply it is changing who makes the decision. That rather than having the courts construe the contract and make that decision, now that they have said this is not a gateway issue, you have an agreement to arbitrate, so why are you reading the contract and making that decision. That is a decision for the arbitrator.

Prior to *Green Tree-Bazzle*, virtually all the federal courts that had previously been construing these contracts had all held that where there is silence there

is no agreement to arbitrate, and so you can't have a class action arbitration, you can't have a consolidated arbitration. So we don't see this as a sea change in the law. It is simply who makes the decision. The arbitrator now construing the contracts is making that decision and ought to be looking at the contracts to determine if the parties actually agreed to have a class action arbitration or not.

We disagree with Bernie's position, that if it's silent somehow the parties have not agreed not to have a class, and therefore they can get one. Particularly I think that is so today, but I think it's particularly the case for parties who contracted prior to *Bazzle*, who certainly had a right to rely on all the federal cases which were telling them if you want a class action arbitration, you'd better put it in your contract, because if it's not there, you're not going to get one.

MR. EDWARDS: Well, let me follow up on this, and this is a question for Bob. It seems to me you have three possibilities here: The contract may be silent whether there should be an arbitration; the contract may affirmatively say not only should there be an arbitration, but it can be a class arbitration. Then again, the contract could say you can have an arbitration, but no class arbitrations. I guess one question I have for you, Bob, is where the contract is silent, where it has an arbitration clause but it is silent on whether there can be a class action arbitration, is it the case that so long as all the class members have similar contracts, an arbitrator is likely to go ahead and find that the case can proceed as a class action? And I guess a second question is: Are there people who are putting in their contracts a clause that yes, there is an arbitration clause but no class actions?

MR. DAVIDSON: Several parts to that question. First, if the clause is silent, truly silent—but you have to understand something about *Bazzle*. The Justices characterized the arbitration clause there as a clause that was silent on the issue of class arbitration. But it really wasn't that silent. The contract in *Bazzle* was a contract between one lender and one borrower. It said that if "you," the borrower, have a problem with "me," the lender, "I" the lender, will select an arbitrator and then you, the borrower, can either say "okay" or "no" to my selection. If you say "no," "I," the lender will select another name and so on until we get a mutually acceptable arbitrator. The arbitration clause in *Bazzle* always spoke in the singular as if it was a contract between only two entities. So it's not quite right that it was "silent," even though it was characterized as being silent in the opinion.

To my knowledge, an arbitrator will generally construe a "silent" clause ("silent" in the *Bazzle* sense), as maintainable as a class arbitration.

That being said, one of the antitrust class arbitration cases in your material is *Direct TV v. Cable Connection*. We have a news flash here. The Superior Court of California, County of Los Angeles has vacated the arbitrators' order in that case that permitted that arbitration to proceed as a class arbitration. The arbitrators' award in that case was 2-1. The underlying arbitration clause was silent (like in *Bazzle*), and the majority of the panel held that a class arbitration could be maintained. (Actually, the one dissenting arbitrator was a JAMS arbitrator who was appointed to sit in this AAA case.) The reviewing Court agreed with the dissent and said that, notwithstanding "silence" in the arbitration clause, the case could not go forward as a class action.

However, the majority of cases that go through a clause construction exercise do find a class arbitration permissible when the applicable arbitration clause is silent on the issue.

The big issue presently is the validity of class preclusion clauses. After all my years of being a practicing lawyer and doing this now as an arbitrator full time, I've never seen a clause that says "In the event there is a dispute, the plaintiff can proceed as a class." I've never seen that.

MR. EDWARDS: Have you ever seen the opposite though?

MR. DAVIDSON: Often. It's gotten to be in vogue now, and all of you with credit cards which includes a hundred percent of you I am sure, if you read your card agreement will find new arbitration clauses in the card agreements recently sent out to you. The agreements all have now what are known as "class action preclusion clauses." These clauses say that, if there is a dispute, you, the cardholder, cannot be a member of a class. Those clauses, called class action preclusion clauses, were first met with hostility, but are now on a roll. Just about all courts, except those in the Ninth Circuit most notably in the State of California, will in fact generally honor those clauses. So people are getting smarter, putative defendants, and they are putting class action preclusion clauses in their arbitration agreements. You'll find this especially so in credit card and other consumer areas. The courts will generally enforce those preclusion clauses.

Now, there is a paper that should be in your materials that I wrote about a year ago, that actually lists all the states, at least as of that date, that had decided the issue of the validity of class action preclusion clauses. The vast majority of courts will honor class action preclusion clauses.

MR. EDWARDS: There is a recent significant Second Circuit decision in this area, the JLM decision, which is in your materials. Doug Richards, who is in the audience I think argued that case on behalf of the plaintiffs. And Steve Cherry argued that case on behalf of the

defendants. And Bernie Persky is also involved in either that case or a related case.

Bernie, can you tell the audience a little about the JLM case?

MR. PERSKY: Sure, but before doing that I wanted to correct one thing. It is not just an arbitration clause that is silent that has been interpreted to permit a class. It is silence plus language which encompasses a very broad reference to the types of disputes that could be arbitrable. So silence plus the notion that all kinds of disputes in any way related to the parties' issues can go to arbitration. And that has been held to permit the possibility of a class.

MR. EDWARDS: So it is a little bit like price fixing, conscious parallelism plus.

MR. PERSKY: Silence plus broadens.

In addition, one other thing, the AAA has a large number of clause construction award decisions generally consistent. Actually there have been some certification decisions; I think two went against certification. I think three have gone forward with certification, and at least one of them has provided for class notice in the arbitration context.

MR. EDWARDS: Tell us about the JLM case.

MR. PERSKY: Getting to the JLM case, it followed on indictments of certain parcel tanker shipping companies, companies which owned specialized ships, parcel tankers which transport over the oceans liquid chemicals. And after these companies were indicted, and some of which were guilty and paid fines, class actions, as is usually the case, followed on the publication of those indictments and pleas. And class actions were filed in the Districts of Connecticut and in Pennsylvania and in Texas. Our case, brought by a company whose name has about 26 letters in it, was brought in Houston, Texas; other cases were brought in Connecticut. Our case was faced with a motion to compel our arbitration—our case of course was a class action of direct purchasers of parcel tanker shipping services. We lost that motion and were directed to go to arbitration, which we commenced.

In the meantime, a similar motion made by the same defendants was made in the District of Connecticut and again, in the meantime, an MDL petition was filed in all the cases filed around the country were concentrated before Judge Sofrito in the District of Connecticut. And the plaintiffs in the District of Connecticut actually won the motion. They defeated the motion to compel arbitration. The defendants then took that up to the Second Circuit Court of Appeals, which ultimately resulted in the JLM decision, which held that the contracts at issue, these tank charter party contracts, contracts for the shipment of liquid chemicals and parcel tankers, literally standard form contracts that had standard form arbitration clauses provided for arbitration generally in

either London or New York. The Supreme Court rejected the contentions of the plaintiffs and held that the price fixing and market allocation disputes, which plaintiffs contend really had not that much to do with the charter party contracts, were in fact arbitrable, citing *Mitsubishi* and a bunch of other cases, and then sent the matter back down to the district court. And then cases were referred to arbitration.

MR. EDWARDS: Steve, as I recall, the Second Circuit also said something about the ability of nonsignatories to compel arbitration. Can you talk about that a little bit?

MR. CHERRY: Yes. First, two seconds about this threshold issue again, and I just respond to Bernie. I just would emphasize to people who are particularly on the defense side of this, that the vast majority of these AAA decisions to me seem to turn on the fact that they are contracts of adhesion and construing any ambiguity, and inevitably the company is the draftsman and that is what happens. I just want to make that distinction. But also, in terms of rules, anybody seeing any rules that allow class actions, there are actually industry specific arbitration rules out there that do allow consolidated arbitration. There may be arguments that support a class action, but you do have that.

On the JLM case, there is what you're alluding to. In that case one of the issues was whether the plaintiffs were trying to avoid arbitration by taking the position that they were—by not suing the people with whom they had contracts. So instead of suing say the subsidiary that was providing the service, they sued the parent or an affiliate. And then even beyond that they said besides that, we have claims against said company X for being a coconspirator and affecting the price of company Y's contracts. We don't have an arbitration agreement with them covering that, so that was their approach to avoid arbitration.

What the Second Circuit held in a footnote, footnote seven which has become very significant now, is that non-signatories under those circumstances can compel the signatory to the agreement to arbitrate these types of claims. That under those circumstances the claims are intertwined enough that the claims against everybody turn upon a contract that contemplates arbitration.

MR. EDWARDS: Bob, maybe you can tell us a little bit about what actually happens in one of these class action arbitrations. Do they differ at all from litigations in court? Are there any unique issues that come up?

MR. DAVIDSON: Yes, they do differ. The goal of arbitration, to make things faster and less expensive, has proved illusory perhaps in some complex commercial settings. However, in these class action cases, which are very expensive cases to prosecute and to defend, arbitrators and the arbitral institutions are seeking to do a better job. The AAA, which has the most class actions

pending, provides in its rules for two stages in the proceedings. The first stage is when the arbitrator engages in clause construction. The second is when the arbitrator deals with class certification. The AAA rules provide that the arbitrators' award regarding clause construction must be embodied in a partial final award. The arbitrator must then wait 30 days to allow the party who lost to go to court and seek to overturn the clause construction award. Similarly, there is a 30-day waiting period after the class certification award. By the way, that is one way the JAMS class action procedures differ from those of the AAA. JAMS has an optional procedure. It is not mandatory that the arbitrator write a partial final award on these issues and then wait for 30 days after his award.

But the things that happen thereafter in arbitration are similar to the way a court proceeding is handled. The institutions are very careful to appoint people as arbitrators or to send out lists of only people qualified to handle these cases. These lists include only people who have been in practice for many years, people who had experience, or former judges who have had experience with these cases. One of the worst things that can happen in this area is that someone that doesn't understand the process winds up sitting in one of these cases.

The other thing is an arbitration proceeding is faster and a little more efficient, because, for example, the arbitrator is also the magistrate for discovery and other purposes. It's the same person. So if you have a problem with discovery, if you want discovery in a class certification context, for example, you can get it. But you'll be before the same person who is going to decide the entire case. Things go a lot faster I think and the rulings are a lot more consistent in that way. The big issue of course in arbitration is you generally get to select the person who is going to be deciding and administering the case, so you don't have to worry about someone without the expertise.

Just as an aside, I'll mention one of the big issues not yet decided is what the scope of review of these awards will be. The *Direct TV* opinion in California did not go into an explanation that it was dealing with an arbitration award that should be subject to great deference under the Federal Arbitration Act. It just went ahead and decided to vacate the award as if it came from a referee, for example. It is still an open question as to whether or not greater scrutiny will be given to arbitration awards in a class action context.

MR. EDWARDS: Can you bind absent class members just as effectively in a class action arbitration as you can in a class action litigation?

MR. DAVIDSON: Why not? If the arbitrators are supposed to do what the courts do, if the courts can do it, now the arbitrator presumably can do it. Sometimes it gets a little complicated. What if you've got some members of the class that have silent arbitration clauses

(if I can call them that) and some members of the class that have arbitration clauses with class preclusion clauses contained in them. Query: Can you bind class members who signed arbitration agreements with class action preclusion clauses? It gets more complicated if you want to look closely because some states hold these preclusion clauses valid and others do not. Maybe a claimant in California can be a member of the class and maybe one in Ohio cannot. So you get into these issues as well.

MR. EDWARDS: Well, let's go back to Bernie. Bernie, in the JLM case or the CPT litigation, you were resisting class arbitration. Why is that? Was it the availability of discovery? Why don't you like to arbitrate?

MR. PERSKY: Well, as plaintiffs in an antitrust case we would prefer to be in federal court under Rule 23. Arbitration is not our choice of forum, as to whether or not we were pursuing it in arbitration, I think I've been asked not to discuss the details of pending proceedings. But just to pick up on some—

MR. EDWARDS: Yes, you don't have to tell us the details. We just want to know why didn't you want to be in arbitration to begin with?

MR. PERSKY: Well, normally defendants are the ones that pick arbitration as a forum. The industry normally does that, and their customers are normally subjected to it. It's not the most customer or plaintiff-friendly forum, but it can be pursued effectively. The AAA's rules set up procedures for it. And I believe absent class members can appropriately be bound with the supplementary rules the AAA provides for in essence a triple judicial review. That is first, you need to succeed in persuading the panel that it's a class arbitration. That goes before a judge. Assuming you win that, you then go forward with a class certification award before the panel. You win that, that goes before the judge. And go back to the panel after having won that and you get an actual class arbitration award. Go back to court and you get a judgment on your award. You have three chances for judicial review. People who don't like the procedure may object upon the attempt to confirm the award; presumably before the award was issued notice went out to the class. And the class notice would probably have to be the best notice trackable as it would be under Rule 23.

Just as a personal view, I would suggest maybe publication notice, and conceivably in an arbitration context maybe slightly less defensible. But you have tripartite judicial review; and you have a judgment in a federal court which may be enforced internationally.

MR. EDWARDS: Steve, it seems to me there is a little bit of a role reversal in the JLM case where Bernie was resisting class action arbitration, you were embracing it. Is there something about arbitrations that make class actions more palatable from the defendant's standpoint? And do you think perhaps some defendants or potential

defendants would be well advised to include in their arbitration clauses a clause that says that the arbitration can proceed as a class action on the theory that if you're going to have a class action, you might as well do it in the context of an arbitration as opposed to as part of a court proceeding? What do you think?

MR. CHERRY: Yes, I think there are a number of issues. These threshold issues we have talked about. I think there are concerns that I am sure Bernie had that led him to want to litigate. I think he probably mentioned there are concerns about you're going to get the discovery you need. Some of the other things I think where there is an alleged cartel with multiple defendants, there may be a concern we talked about whether one defendant in the case can have a class action with all the plaintiffs. But can a plaintiff rope in all the defendants in one class action without their consent? I don't know that there is any authority to support that. I don't know that that is the case.

And I think there is concern about enforcement, particularly if there are international parties involved. Is a foreign court going to enforce this type of award? We'll see.

But I think once you pass that I think there is no reason where you wouldn't necessarily prefer to do this in arbitration. I think particularly if you're talking about claims among commercial entities that have a relationship, particularly if they're customers or something like that where you would rather be in a private forum, tailor it to your needs, protect private information maybe in a way that you're more comfortable with than in court. You can choose arbitrators that you feel have the expertise you need. I don't know if there is any reason you couldn't do it and make it work.

MR. EDWARDS: It seems to me that the big disadvantage of class action arbitrations is the availability of third-party discovery, particularly third-party depositions.

What do you think about that Bob; do you agree with that?

MR. DAVIDSON: I did before a recent Second Circuit case. There is a little trick arbitrators had been using for years that was finally challenged, and the Second Circuit said that this procedure was all right. Basically, the weight of authority says arbitration under the Federal Arbitration Act does not permit discovery depositions. However, the way you legitimately get around that restriction is that you say, okay, we can't take a discovery deposition, but we can hold a hearing. Either arbitrators or lawyers in New York of course can issue subpoenas to appear and give testimony at a hearing. There is no doubt about that. So an arbitrator, who is sympathetic to this and realizes there has to be some discovery if the parties cannot get voluntary compliance

can say "Look. Let's have a hearing. Mr. Witness is going to show up and we'll take his testimony. I will attend, so it will technically be considered a hearing and not a discovery deposition." There is an additional expense with this procedure in that you have to have an arbitrator sitting there but the testimony is taken prior to the main hearing. Against the objection that this procedure is really a sham, it's not really a hearing; it is really a way to circumvent the rule that you cannot have deposition discovery, the Second Circuit recently said "So what. Have a hearing." Thus, the courts are sympathetic with the fact that arbitrators are handling more complex cases now.

If you're outside the U.S. of course you've got 28 U.S.C 1782. Because of a fairly recent Supreme Court decision you may well have a possibility to invoke Section 1782 in the context of an international arbitration.

So to sum it up, if the place of arbitration is, for example, in New York, but you need to take the testimony of a third-party witness in California, you can now (with the arbitrator's cooperation) travel to California and hold a hearing. Local counsel, whoever it is in California, will issue a subpoena and compel the third party to appear. Presumably, arbitrators who hear these cases understand there is often a need for this type of discovery.

MR. EDWARDS: So Bernie, why don't you comment on the same question. Do you think the difficulty of getting third-party discovery is a big disadvantage of class action arbitrations?

MR. PERSKY: Yes. I think that though it's not clear that you can't get under the Federal Arbitration Act deposition discovery from nonparties. So most cases say no, but according to the Second Circuit's decision it is split on the point. But I think it would be more difficult certainly than in litigation to take the deposition of a nonparty witness, particularly outside, more than 100 miles from where the arbitrators are sitting and where the Courthouse is. There is the 100-mile bulge with respect to the issuance of court subpoenas, and the Federal Arbitration Act permits the enforcement of an arbitration subpoena. What do you do with a witness in some other locality beyond that? Bob mentioned reconvening the arbitration in California somewhere and having that done. Yes, if everybody is in agreement then you can do that; that is nice. But it's not so easy.

MR. EDWARDS: So Steve, what are the disadvantages of a class action arbitration, or would you take a class action arbitration over a class action litigation any time?

MR. CHERRY: I think there is the concern, and granted there are some creative ways to get around a lot of this, but it becomes a little unwieldy. I think the real concern in terms of whether I would take one at the outset is whether I believe it's what my client

consented to. I mean because the real difference is all of this wrangling at the beginning about whether this is something you even contemplated or not, which slows things down considerably, as it should. Because you may be about to embark on something that you didn't agree on and that is outside the arbitrator's jurisdiction, so you have to deal with that. If you're in court you wouldn't have to deal with that. And that causes some delay. Under the AAA rules you have immediate judicial review, so hopefully you get some certainty.

The way I read the JAMS's rules there is the availability of that but it isn't certain. So you could have a situation where you have clause construction that goes against the defendant, you're proceeding with class discovery, briefing class cert, and having invested quite a bit into this and not have a definitive ruling on whether you should have been doing any of that to begin with and be vacated by the district court and maybe the court holds you're not required to have the class action anyway.

MR. EDWARDS: Bob wants a brief rejoinder here.

MR. DAVIDSON: Yes, that is correct. Under JAMS' procedure, a partial final award on clause construction is not mandatory. But all of the class certification awards that have come out of JAMS have always been in the form of partial final awards.

MR. CHERRY: On that issue though, maybe you mentioned this, there is a split among the courts as to whether they will review that type of award. It appears that most of the courts have taken them up, but I think there is at least one decision I've seen where a court has said, you know, it is premature. The AAA can have whatever rules it has, that doesn't give it access to the courts. So come back when you have a real final award.

MR. PERSKY: Yes, that is an issue that has come up. The supplementary AAA rules that structured what the arbitrators do in calling a clause construction award a partial final award. The Federal Arbitration Act provides for review of arbitration awards. And a couple of courts have refused the jurisdiction to entertain that, saying the FAA doesn't grant subject matter jurisdiction. Most courts to my knowledge have actually permitted the review, and whereas there is this one I think state court opinion which vacated that antitrust clause construction award. The vast majority of decisions so far that have reviewed clause construction awards have granted jurisdiction and have used the review standards of the Federal Arbitration Act which provides for extreme deference to the arbitrator's decisions. Yet the AAA has sections on what you need to show to vacate an arbitration award.

MR. EDWARDS: Let's go ahead and turn to the dessert, which is the Class Action Fairness Act, which Hollis Salzman is going to tell us all about.

MS. SALZMAN: Well, as many of you probably know, the Class Action Fairness Act, or CAFA as it's

known, was signed into law February last year, so it hasn't quite made its first birthday. The primary purpose of the law was to federalize class action litigation, and I think that is what is actually happening. Except in very few circumstances, which have the criteria that are set forth for federal courts denying federal jurisdiction, almost all class actions now can be heard in federal court. There are other elements to the CAFA, that is the primary element.

The other way that CAFA has affected class action litigation involves the settlement of class action litigation where the settlement for class members is basically a coupon settlement. It also provides additional notice requirements for the defendant of settlement of a class action litigation in that they need to notify certain government officials.

MR. EDWARDS: Andy, is this good for defendants or bad for defendants?

MR. SCHAU: The short answer is it's good, and there are a couple of buts to that short answer. But the way I look at it, there are essentially four real benefits. The obvious one is efficiency. The case that Steve and I have, he describes there are multiple state cases in one MDL. I think Steve and I would like nothing better than to have all of those state cases brought and consolidated in front of one single judge so we could have one round of depositions, one round of briefing on the principal issues in the case, one set of discovery requests, etcetera, etcetera. I mean it's very hard I think to overstate the value of efficiency.

I think the second benefit, and I don't mean to malign the state courts in saying this, but I think that typically you can expect a more rigorous analysis of all sorts of issues from the federal courts. You can expect more rigorous Rule 23 analysis. I think you can expect more rigorous analysis on the merits, and I think you can expect more rigorous analysis across the board.

MR. EDWARDS: Federal courts are going to give Dr. Beyer a harder time.

MR. SCHAU: Perhaps. And I don't think that rigor stems from any lack of intelligence in state courts. I think we all know that state courts are under-staffed and under-resourced. Frequently they don't even have a law clerk. And I think it is just more difficult for state courts to give the kind of scrutiny that federal courts can give to any issue.

Consistent with that of course is that in federal court you have the benefit of the Dalbert decision which scrutinizes expert opinion and may or may not have an opinion on the acceptance of Dr. Beyer. But probably would not.

Lastly, in federal court you have the opportunity to at least ask for interlocutory appeal under Rule 23(f) of the

class certification decision. In state courts typically you have to seek interlocutory appeal; it is more common to receive interlocutory review in federal court rather than state court.

I think overwhelmingly the answer: Is it good for defendants? Yes.

A couple of buts. Number one, I think with all the indirect purchaser cases that are now going to be heard in federal court, you will see a lot more discussion about the desirability of overruling *Illinois Brick*, since the federal courts are now going to be hearing those cases. I think that defendants frankly can expect to see a more sophisticated and perhaps better funded group of plaintiff's counsel in Federal Court than they might see in a state court of similar action.

MR. EDWARDS: I think John was about to say something in defense of state court judges?

DR. BEYER: No, no. The indirect purchaser decision or the implication of the state courts is really a tough issue. And unless *Illinois Brick* is dealt with, it gets very complicated.

It's interesting, Canada, which is now experiencing class action, and we have some experience there, does not have *Illinois Brick*. And they are very proud of the fact it is an anti-American stand among the lawyers. We don't have *Illinois Brick*, and you have to show to the courts some reasonable empirical analytical tool for deciding how much of the elevation in price has been worn by the different layers, and that is a demanding set of issues.

MR. EDWARDS: Let me turn it back to Hollis and ask her from a plaintiff lawyer's perspective: Has Class Action Fairness Act had any real impact?

MS. SALZMAN: Well, speaking from my own practice as counsel for plaintiffs or indirect purchasers, we have always been trying to be in federal court. So in many respects we like the CAFA law. When we filed the brand name prescription drug cases, and those were cases filed in various state courts, it required a lot of parallel litigation going from state to state to defend motions to dismiss, to seek class certification. And even when the case ultimately settled we then had to make applications for preliminary approval and then final approval in eleven jurisdictions. As time went on, in the early 2000 period, the case of Coumadin was one of the first cases that was filed in federal court on behalf of indirect purchasers. What we did there was file for federal injunctive relief and used the court's supplemental jurisdiction to seek state law remedies, still in federal court. That was a successful model for cases to come.

So as far as it impacting my particular practice, I think it is a good thing and we prefer to be in federal court. Direct purchaser litigation is going forward in federal

court and we think it is a better model to be coordinated with direct purchasers. There are plaintiff lawyers that do prefer state court, and I would believe that they are probably unhappy with the fact that they for the most part do not have that option available to them anymore.

The class certification process for indirect purchasers in federal court has been a complex matter, and some courts have actually taken the time to go state by state and really analyze the various state laws. At least I am hopeful that CAFA will promote the idea, that federal courts take the time to really look at the various causes of action and the various states' law. Because if they deny class certification post-CAFA, indirect purchaser plaintiffs will not have the state forum to seek remedy.

MR. EDWARDS: Now Andy, as I understand it, the way this is supposed to work is all these cases that are brought in state courts, Marion County, Illinois, Beaumont Texas, Mississippi, Alabama, they all get removed to federal court under CAFA; they all get consolidated in an MDL. Then when the MDL court addresses class certification, the defendants will inevitably argue well, judge, you can't certify a class under the laws of multiple states.

Is that argument now sort of contrary to public policy as articulated by Congress when it passed CAFA to begin with?

MR. SCHAU: Well, there are plaintiffs lawyers who are making that argument eloquently in the press, and I think there is some logic to it.

A couple of things that I would respond. Number one, I don't think Congress had indirect purchaser cases in mind when it enacted CAFA. So the effect that CAFA has had on antitrust cases is unintentional, but real.

Secondly, CAFA by design was not meant to change the substance of the law but was merely designed to change procedure. Now, that may be a distinction that sophisticated attorneys understand is fluid. But the idea that CAFA enacted a policy that now favors indirect purchaser cases is I think incorrect by reason of the fact that it wasn't intended to affect substance at all. That said, the federal courts will now have indirect purchaser cases before them. They are going to be there anyway. You can fairly ask the question of why should the citizens of one state not get the benefit of the *Illinois Brick* or the problems of *Illinois Brick* when other citizens do. It's a fair question. If Congress is thinking about addressing that, I would only hope that they would also recall *Hanover*.

MR. EDWARDS: Hollis, when CAFA was passed a number of commentators suggested that plaintiffs would try to take advantage I think of what people call the Home State Exception. And that would actually result in more class actions rather than fewer class actions. Can you explain a little bit what the home state exception is,

and tell us whether in fact that has resulted in more class actions?

MS. SALZMAN: I think you're referring to home state exception to the diversity—

MR. EDWARDS: Yes.

MS. SALZMAN: There is an exception, one of the very narrow exceptions that I was referring to in the beginning which is referred to as Home State Exception, which allows class actions to remain in state court if basically two-thirds of the class are residents of a particular state and the defendants are primary defendants, either the defendants reside in that state or the injury occurred in that state. I think that is a pretty narrow carveout, and I am not sure it is possible. I don't know any cases that have used that Home State Exception. To me it just seems like such a narrow carveout that except in very limited situations, where you maybe have something that is just occurring in one particular state and nowhere else and that is the only place you can capture it because that is where the defendants reside, that it is not going to impact class action.

MR. EDWARDS: Andy, maybe we can talk a little bit about whether CAFA has any *Erie* implications. What if you have a state, a situation where a state procedure makes it easier for a plaintiff to prove a claim, and then that case ends up in federal court under CAFA. Is that federal court obligated under *Erie* to apply the state procedure because it has a substantive impact?

MR. SCHAU: That is a very difficult question. Obviously, *Erie* requires the federal courts to apply their procedures and apply state substantive law. That said, there are some instances where, like we said earlier, the line between procedure and substance isn't entirely clear. I'll give you an example of that. Chief Judge Young up in Massachusetts was confronted with a multistate claim. He had to apply in his judgment state law to determine whether or not to certify classes, and he was therefore required in each instance to consider whether or not the state class certification rules were substantive or procedural. I think the most interesting example that he looked at is New York law. New York law I think it is 901(b) of the CPLR says there are no class actions in cases where the plaintiff is seeking a penalty unless the law that authorizes the penalty specifically provides for class actions. The Donnelly Act, which is our state court antitrust law, obviously or at least from the conclusion of Judge Young, and I agree with this, allows a penalty in as far as it allows for enhanced damages. And so he concluded that he would not allow in Massachusetts pursuit under New York law of a class claim. The plaintiffs argued vigorously however that 901(b) was merely a procedure, not substance, and that as a consequence Rule 23 applied under *Erie*. It came out in favor of what I would expect, which is the denial of class

by a federal judge out of state as applied to the citizens of the state that don't have class action remedies.

MR. EDWARDS: Yes, I think actually there was also a recent decision by Judge Bear in the Southern District that I believe came out pretty much the same way.

Let me turn it back to Hollis and ask her to comment a little bit about the settlement provisions of CAFA. No more coupons?

MS. SALZMAN: That is a good question. I don't know if there will be no more coupons, but I think that plaintiff lawyers who pursue coupon settlements may be less likely to do so because of the application of review of attorneys' fees.

Just to back up for a minute. There are about six different ways that CAFA regulates. One is that it imposes standards for judicial review of coupon settlements, and it permits unclaimed benefits to be distributed to charities. These two parts of CAFA are really what's common practice now. Because the courts generally have written findings when you have a class action settlement approval, and courts have permitted class counsel to provide some kind of *cy pres* distribution either with remainder funds or with a bulk of the class action settlement funds. Some additional requirement, one that I alluded to earlier, was that federal and state agencies now have to be notified of proposed class action settlements. That obligation is on the defendants, and if notification is not properly served and given, class member will not be bound by the final judgment. There are very specific requirements for what the notice has to provide. It's almost in the same type of notice that you would see going out to class members, but now it is going out to state and federal government officials. If that notice is not properly drafted and served, it can be grounds for a class member that otherwise would be bound by a settlement to not be bound by the settlement.

It also provides for judicial review of attorney's fee awards and coupon settlements. It no longer allows an attorney's fee award to be premised on the full amount of the settlement fund, but will actually look at the amount of coupons that are redeemed. So if only 50 percent of the coupons are actually redeemed by class members, the attorney's fee award will only be based on that part of the fund.

In addition, the courts, instead of looking at the percentage of the fund, they will be looking at the actual hours that the lawyers spend on the case. I think this in many ways may be a disincentive for early settlement for plaintiffs lawyers, because if they have to show that they worked the case enough to merit an award of a percentage of the fund, that they may have to work further on into the case, rather than settle early.

MR. EDWARDS: You said that attorney's fee awards will be based on the percentage of coupons actually redeemed. Does the same thing hold true for cash settlements? If you have a reversionary fund, is the attorney's fee going to be based on the amount of the fund that class members actually claim?

MS. SALZMAN: CAFA does not speak to non-coupon, the review of attorney fee awards in non-coupon settlements.

MR. EDWARDS: So Andy, are these developments good or bad for defendants? I mean it sounds to me like defendants are going to have to pay more cash to get rid of these cases.

MR. SCHAU: I think that is right. I think that Congress intended through this provision to benefit the citizens who have had antitrust injury. I think everyone, plaintiffs and defendants, agree that should be the first priority, and it does do that for them.

To answer your more parochial question, I think it's probably bad for defendants, and I think it's probably bad for plaintiff lawyers who represent plaintiffs who don't have good cases. The reason for that is obvious. Defendants and plaintiffs have always managed to use coupons in an unseemly way, perhaps to bridge a gap between perceptions of a case. The plaintiff lawyers are happy because they get reimbursed on the full value of coupons, even if they are unredeemed. The defendants are happy because not all the coupons are redeemed. So I think it takes away that kind of cheap and easy settlement for the defendants. I think it also encourages plaintiffs and now plaintiff counsel, we now realize they have to be compensated on a lodestar basis to pursue their cases longer and spend more money on them, and I don't think that is particularly helpful for defendants, regardless of the merits of the case.

So that is a long-winded way of saying I think it is bad for defendants but good for the right people.

MR. EDWARDS: I am going to open it up to the audience right now, if there are any questions from the audience for any of our panelists. Yes.

AUDIENCE MEMBER: Yes, I wonder if Mr. Davidson could address settlements of class actions within the context of ADR or arbitration, and how does that work? Are there any lockout rights for example?

MR. DAVIDSON: Yes, if you look at both the JAMS and the AAA procedures, any settlement is supposed to be vetted before the arbitrator. It is the same basic standard as would prevail in court. While the differences between Rule 23, and at least the JAMS rules (and I think the AAA's as well), there is nothing explicit about appointing counsel or setting a fee. But that would be done in the usual course of these events.

One of the things that is not written into these rules is that—and I can speak to JAMS about this—is the mediation possibilities, not with the arbitrator, who may just arbitrate the case, but when you're sitting in the middle of a place well-known to mediate and resolve cases, many of the arbitrations, whether they be class actions or not, do not go the route because people decide to mediate them mid-stream. But the answer to your specific question is that settlements will be done in the same way, that is, under the same basic standards set forth in Rule 23.

* Let me commend you to a publication which is going to come out soon, the end of next month. The College of Commercial Arbitrators is putting out a book entitled *Best Practices in Commercial Arbitration*. There is an excellent chapter in that book on class actions, which we all think will probably be the best guide for arbitrators who are faced with this and do not have the requisite experience with Rule 23.

MR. EDWARDS: Other questions? Yes.

AUDIENCE MEMBER: I am curious whether any of our panelists have thought about the applicability of CAFA to these things called class arbitrations?

MR. DAVIDSON: Not me.

MR. PERSKY: Speaking for myself, I certainly haven't, and I'd be hard pressed to understand how it would work. You're in arbitration.

AUDIENCE MEMBER: I am hard pressed how arbitration itself works, so it's not much of a stretch here.

MR. PERSKY: The supplementary rules of the AAS for example track Rule 23 very closely, and presumably settlements and things like that would be somewhat similar, so to pick up on the prior questioner's query—

AUDIENCE MEMBER: That is cool, but what if the contract is done by state law. Why would it make sense to have private rules of procedure on this strange device which may indeed differ completely from state laws because they have to be modeled on federal rules?

MR. PERSKY: If the parties have agreed that the applicability of certain rules, substantive or procedural, that is what's going to bind the situation. If they haven't specified the rules or the substantive law, then perhaps the arbitrators would themselves look to CAFA for guidance. But I really have no idea what the answer to that question is.

MR. CHERRY: Yes, I think I have the same answer. It is really a matter of consent as to what rules you incorporate. The awkward situation would be I think people are running into where the agreements have no rules. It is a blanket ad hoc arbitration provision, and you see something brought as a class action, how do you deal with that. I think what people tend to do is, even

though they didn't incorporate some rules, they go out and agree to incorporate at that point. Because they need some structure to deal with that situation, even though it wasn't contemplated, the manner and the country.

MR. EDWARDS: We have time for one more.

AUDIENCE MEMBER: I have a question for the experts. I was wondering if you could picture an industry where on a price-fixing allegation an expert would not be required to certify a class to prove common impact, and conversely, where the industry is so complex that plaintiffs would require an expert to certify the class. What would be the features of those industries, if you have any thoughts on that?

DR. BEYER: I shouldn't say this because it affects my living, and that part of my firm, Nathan & Associates. But in fact, many industries have characteristics that I described before that don't need an expert. It's just a question of somebody articulating what these are. One that comes to mind, although the experts were involved, I was involved, was infant formula. I mean it is, every can of infant formula, whether it's made by Mead or Ross, two or three of the pharmaceuticals out there, Abbott, are exactly the same. Why is it exactly the same? Because the FDA specifies what goes into it. You can't make infant formula without having the FDA recipe. And also the one exception that I referred to earlier is infant formula, there is no negotiation. The suppliers simply say this is a price. You want it? You get it. You don't pay it, yes, too bad, go somewhere else. There is nowhere else to go. So even

Wal-Mart, we think as a great giant, it says please, give us enough of the infant formula at the price you demand that we pay. And it's the same for everybody, mom and pop, Wal-Mart.

DR. PALMER: I think in addition, you wouldn't need an expert if there was something clearly that defined how something happened, and you could lay that out very clearly. Often the experts get involved because there is not really a theory of what goes on or there is some common impact and you can't identify it. If there were some other criminal proceeding or something that clearly laid out something ahead of time, where you have something very clearly identified of how it happened and it wasn't subject to negotiation or adjudication or there weren't issues involved, then I think you wouldn't need an expert in that case. But often it is not clear if there is a theory of how prices move or something like that, where you do need an expert to examine it and put forward how it actually happened

MR. EDWARDS: You know, I was hoping I could provoke a fist fight between John and Brian, but I guess I wasn't successful. Perhaps, that is because they both have been affiliated with the Fletcher school and they have that in common. In any event, that concludes our panel. It is 3:00 o'clock, and I thank our panelists very much.

MS. GOTTS: Our next session is on the Antitrust Modernization Commission and we'll shift to what ought to be.