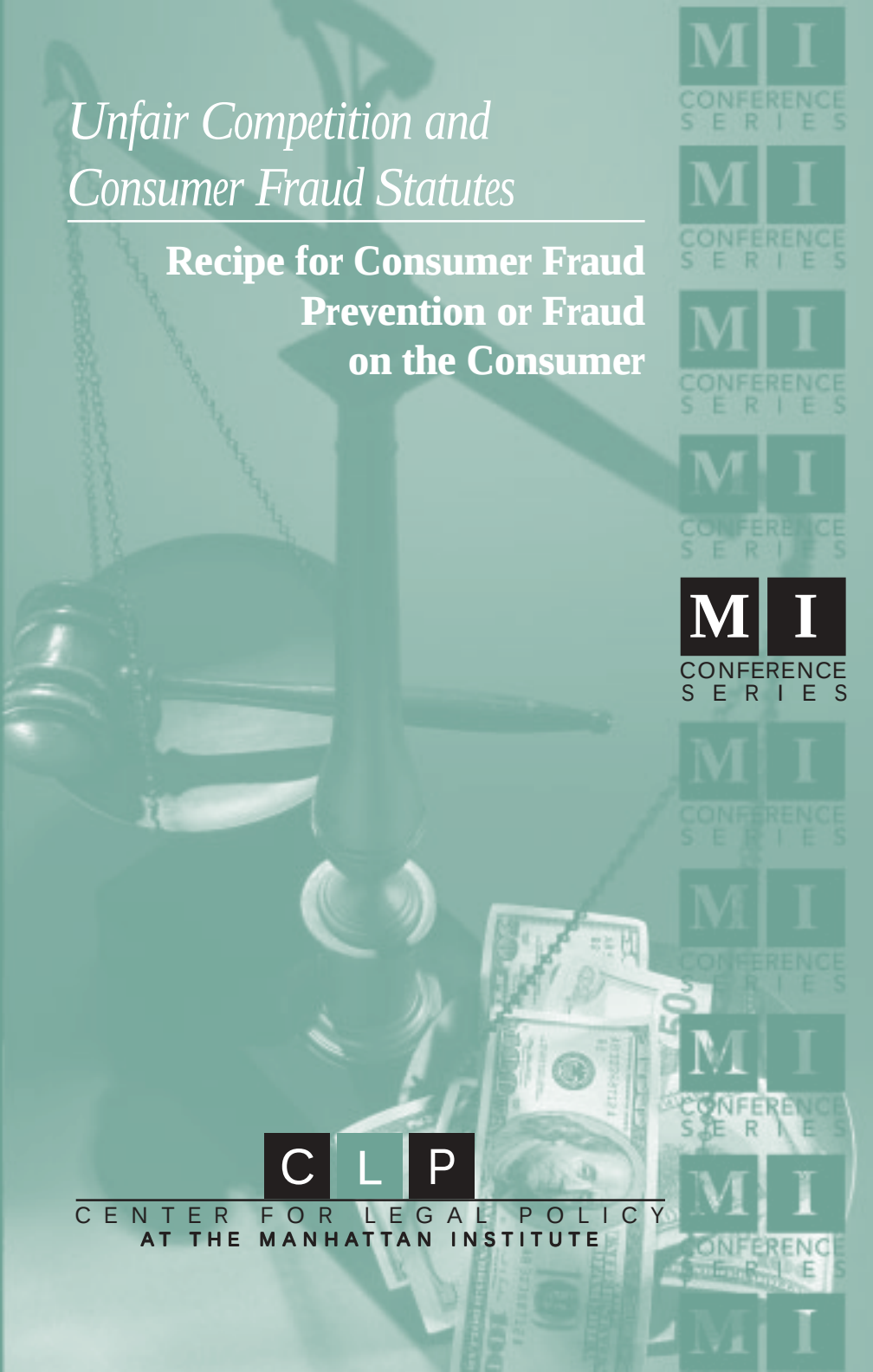

Unfair Competition and Consumer Fraud Statutes

Recipe for Consumer Fraud Prevention or Fraud on the Consumer

MI CONFERENCE SERIES

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CENTER FOR LEGAL POLICY
AT THE MANHATTAN INSTITUTE

Unfair Competition and Consumer Fraud Statutes

Recipe for Consumer Fraud Prevention or Fraud on the Consumer

October 24, 2002

Sponsored by:

Center for Legal Policy
at The Manhattan Institute

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Introduction

Welcoming Remarks

Robert V. Dewey, Jr.
President, Federation of Defense and Corporate Counsel

Judyth Pendell
Director, Center for Legal Policy, Manhattan Institute

MR. ROBERT DEWEY: On behalf of the Federation of Defense and Corporate Counsel, I'd like to welcome you to our program this afternoon dealing with the use and, we think, the abuse of state consumer fraud statutes.

I'm Bob Dewey, president of the Federation. I'm going to tell you a bit about our organization as well as Lawyers for Civil Justice, and why we are partnering with the Manhattan Institute to put on this program. Then I will turn the microphone over to Judy Pendell of the Manhattan Institute.

It is truly an honor for the Federation to participate in this program. Our organization was founded in 1936 and consists of defense lawyers in private practice, in-house counsel, and risk management professionals. Membership is by invitation only and involves a thorough peer-review investigation similar to that conducted for candidates for the American College of Trial Lawyers. We have about 1,300 members, of which slightly fewer than 1,000 are lawyers in private practice; the limit is 1,000. We have about 300 risk management professionals who have regional or national responsibility for their corporate employers.

Like the Manhattan Institute, the Federation focuses on education. We publish a journal, *The Quarterly*, which features scholarly

as well as practical how-to articles. We have 24 substantive law sections plus a Corporate Members' Forum, each of which provides focus for continuing legal education. We meet twice a year, always in nice places: this year, we were in Boca Raton in February and Sun Valley in July.

Our organization has sponsored a number of special projects in recent years, such as a Defense of Nursing Homes Litigation Task Force, in which we partnered with DecisionQuest to do original jury research at various locations across the country in an effort to assist our members in defending those cases.

We hold a Litigation Management College annually at the Kellogg School of Business at Northwestern University to assist our corporate members in their risk management. We held a Risk Analysis Symposium in Atlanta this spring, which dealt with cutting-edge terrorism issues in the corporate environment.

The Federation has been very active on the civil justice reform front, together with other prominent defense organizations: the Defense Research Institute, or DRI, and the International Association of Defense Counsel, or IADC, both of which have representatives here this afternoon.

The Federation was a founding member of Lawyers for Civil Justice. For over 15 years, LCJ, as a national organization of defense and corporate counsel, has been very involved in providing policymakers and opinion leaders with the defense perspective on a variety of legal reforms and procedural rule-making issues.

For example, LCJ was instrumental in persuading the rules committees of the Judicial Conference last year to adopt recommendations calling for congressional action on fundamental class action reform. In addition to monitoring and responding to legislative and rule-making initiatives, LCJ has engaged opinion leaders in dialogue to engender a better understanding of the American legal system and how it might be improved.

The genesis for this program, at least in part, came from Barry Bowman, executive director of LCJ. The Federation was particularly interested in participating in this program because the manner in which the state consumer fraud statutes are being used and

interpreted is creating significant burdens for our corporate members and other businesses.

Many of these businesses—for example, insurance carriers such as State Farm—are already subject to significant regulation by state agencies. I come from Illinois, which is one of the jurisdictions recently identified by the Manhattan Institute as a "friendly forum" for plaintiff attorneys filing class actions. Thus I am acutely aware of how these consumer fraud statutes are being used and, in some cases, abused.

You will hear more about that this afternoon in the presentations by Jeff Jackson of State Farm and Barney Shultz, who was lead trial counsel for State Farm in the *Avery* replacement parts trial, *see Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269 (2001), as well as in the remarks of Jack Trigg, a former president of the Federation who has been fighting these battles all over the country.

Let me now introduce my very distinguished colleague Judy Pendell, who is well known nationally for her leadership in the area of civil justice reform.

MS. JUDYTH PENDELL: I'd like first to express my appreciation for the support and the expertise of the Federation of Defense and Corporate Counsel, which made this conference not only possible but of exceptional quality.

Some of you are here today because of your affiliation with FDCC or with Lawyers for Civil Justice, and you may not be familiar with the Center for Legal Policy at the Manhattan Institute, so I'd like to explain our work.

The Manhattan Institute is a New York–based think tank with a national focus. The Center for Legal Policy, or CLP, focuses on key issues of concern in the civil justice system—class actions and mass torts, issues surrounding contingency-fee lawyering (such as fee abuses and the inappropriate use of private lawyers for government litigation), judicial selection and integrity, the erosion of personal responsibility and its impact on the courts, workplace liability, and scientific evidence.

We host conferences and other events that bring important issues and speakers before a diverse audience of lawyers and judges, policymakers, business people, and the media. We then produce

edited versions of our conferences, which are made available on our website at www.manhattan-institute.org. They're often also published in hard copy and disseminated to a wide audience.

Often our conference transcripts provide a valuable ongoing resource in which we address cutting-edge issues in the civil law and convene the most knowledgeable practitioners on all sides of the issue to debate and challenge one another. We're proud of the fact that our transcripts are often cited.

In addition to holding conferences, we participate in the Manhattan Institute's luncheon forum series here in New York, often at the Harvard Club. Recent speakers have included Judge David Levy, chair of the Federal Civil Rules Advisory Committee, who discussed class actions and the federal rules.

Finally, we support the publication of books, and we publish numerous papers. Walter Olson, senior fellow at the Manhattan Institute and the Center for Legal Policy (and founder of that organization), is here with us today to moderate the first panel. He has recently finished his new book, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (Truman Talley Books, 2003), which will be released in January. It is a searing account of how plaintiff lawyers have turned lawyering into a ruthless business, one that is undermining the rule of law and the integrity of our courts.

Wally is also the editor of a wonderful website, Overlawyered.com, which has become a staple in the lives of those who follow important developments in civil litigation, and I recommend that to you.

Last, I want to note that we're holding another conference here at the Harvard Club on October 30, where the subject will be the new class action targets. We will examine whether class actions are undermining regulation in the fields of financial services, high technology, and telecommunications. The Federalist Society will cosponsor that conference.

We have two very distinguished luncheon speakers today. I'm going to introduce them both. Each will speak, and then they will take your questions jointly.

Sheila Birnbaum is head of the products liability department at Skadden, Arps, Slate, Meagher & Flom. She practices primarily in the areas of products liability, toxic torts, and insurance coverage. She's a prolific writer and was previously professor and associate dean at the New York University School of Law. She serves on a long list of committees and honorary organizations. For example, she is a member of the American Law Institute's advisory committee, and was a member of the ALI's advisory committee to the restatement of law of product liability. She is currently a member of the Judicial Conference Advisory Committee on the Rules of Civil Procedure.

She has so many honors that if I read them all, I would take up the time allocated for her remarks, so I'll tell you just a few. She received the Florence Allen Award for distinguished achievement in the law firm from NYU School of Law and the New York Women's Bar. She received the NYU Alumni Award for outstanding achievement in the legal profession and the Louis Brandeis Award from the American Jewish Congress. She was elected to the Hunter College of Fame and was selected by *Fortune* as one of the 50 most powerful women in American business, by the *National Law Journal* as one of the 100 most outstanding members of the legal profession, and by *Crain's New York Business* as one of the 75 most influential women in business.

Professor Francis McGovern, from Duke University Law School, has the unusual ability of integrating practical experience, abstract thinking, and teaching. He has been a court-appointed special master or neutral expert in many cases and has developed solutions to some of the most significant mass tort claims in the United States, including DDT, toxic-exposure litigation in Alabama, the Dalkon Shield litigation, and breast-implant litigation.

He's a prolific author on topics of mass tort litigation, civil procedure, and ADR. He has coauthored two books, *Successful Litigation Techniques* and *The Preparation of a Product Liability Case*, and has two books in progress, *Toxic Substance Litigation* and *Alternative Dispute Resolution*.

He is an engaging speaker in great demand. He has spoken before 50 audiences in addition to teaching a full course load at Duke Law School in the last two years. He has an international reputation, and countries outside the United States are now recognizing his abilities. He is working with the United Nations Compensation Commission, which was set up to ensure that Iraq compensates citizens, businesses, and government agencies for losses suffered in the Persian Gulf War.

It is with great pleasure that I bring you our two speakers. Thank you.

Luncheon Speakers

Deceptive Trade Practices Litigation: Context and Procedural Standards

Sheila L. Birnbaum
Skadden, Arps, Slate, Meagher & Flom LLP

Prof. Francis McGovern
Duke Law School

MS. SHEILA BIRNBAUM: My job is to set the stage for the rest of the day by giving you a broad outline of how these consumer fraud statutes reached us, how they're being applied, and what effect they're having on litigation. Then Francis is going to talk about them from a procedural point of view, and then we'll be happy to take your questions.

When I received my first complaint that said, "unfair competition," I thought that I'd better call an antitrust partner, because I had never taken antitrust law. And, of course, it wasn't antitrust law that we were dealing with. It is rare today that I see a complaint that doesn't contain a deceptive trade practice and unfair competition count.

Deceptive trade allegations are a huge motivating force in litigation today, in the products liability area, in the insurance claims practice area, in almost any kind of business transaction area. As we reflect on the addition of so-called "consumer protection statutes" to the traditional common law, a transformation is occurring away from breach of contract and fraud, which are hard to prove, and toward deceptive trade practice litigation, which is easy to prove.

Although you usually see a contract cause of action and a fraud cause of action in a complaint, you now will almost always get a

deceptive trade practice cause of action at the same time.

Why has this occurred? Why has the common law been replaced in large part by consumer fraud statutes? I'd like to take us through the evolution of this phenomenon, to try to understand how we got to where we are today, and to explore how these statues are going to be used in the future and what impact they are going to have, especially in the area of class actions.

We all know that to prove a fraud, there are all kinds of elements that must be demonstrated. We learned that in Torts 101. You have to show that there is: (1) a misrepresentation of a material fact, (2) scienter (that the speaker knew or believed the statement was false), (3) intent (the speaker intended to induce the listener to act or not act in reliance on the misrepresentation), (4) causation (the listener actually detrimentally relied on the misrepresentation), (5) justifiable reliance (generally reliance is justifiable only as to statements of fact, not opinions), and (6) damages. And, of course, there are numerous defenses that are available in a fraud case.

All of these elements and defenses are usually difficult to prove in a fraud case. In many jurisdictions, including most federal jurisdictions, you have to plead with specificity all of the elements of the fraud claim.

The breach of contract theory, in contrast, does not have all of the elements required in a fraud theory. Thus, it may be easier in some instances to prove a breach of contract than it is to prove fraud. Still, you have to show there was a breach. More important, in almost every jurisdiction, you can't be awarded punitive damages in a breach of contract lawsuit. So you are limited to your contract damages.

That's the state of the common law. For fraud, you can get punitive damages, but it's very difficult to plead and to prove. For breach of contract, it may be a little easier to plead and prove, but you can't get punitive damages.

So how did we get to where we are today with the proliferation of "deceptive trade practices" claims? The history begins with the federal government, not the states. First, Congress passed the Federal Trade Commission Act, which was meant to give the FTC the

ability to proscribe "deceptive" or "unfair" trade practices. It is a very broadly worded statute. In the FTCA, Congress gave the federal courts and the FTC the discretion and ability to expound on what the words "deceptive and unfair trade practices" really means.

This was not, however, an unbounded license. Congress understood that the FTC did not have limitless resources; nevertheless, Congress did not include in the FTCA a mechanism for private individuals to enforce the Act. Only the FTC can bring an action under the Act. The FTC, of course, is not going to be indiscriminate, and it usually will resort to formal action only after having first given a party an opportunity to remedy what the agency considers an unfair or deceptive trade practice. Some of us may not like what an agency may do in an individual case, but the agency has scarce resources and is going to use its discretion to make the best use of the FTCA and try to stop real problems of deceptive trade practices.

In the late 1950s and into the 1960s, states began adopting statutes creating little FTCs (and that's what they're called, "little FTCs"). These statutes borrowed from the FTCA the same broad language prohibiting "deceptive and unfair trade practices." That was fine, in the beginning, because only the state agency could bring enforcement actions under these statutes. The same factors that limited indiscriminate use of the FTCA also limited indiscriminate use of these statutes.

But very soon, all of the states began to adopt legislation that allowed for private causes of action under these very broadly worded—and vague—statutes. Suddenly, there were no more brakes on the types of actions that could be brought under these statutes. The lawyers and private individuals bringing these actions did not have the same incentives as the agencies charged with enforcing these statutes, but now they had the same enforcement power.

So now we have a combination of two things. First, private individuals have the ability and the economic incentive to bring deceptive trade practices claims under very broadly worded statutes that do not, for the most part, adequately define what conduct the statute is meant to proscribe. Second, some states, such as

California, have extended the individual's ability to bring consumer fraud claims on behalf of all consumers, rather than just on his own behalf. Everyone, I am sure, is familiar with section 17200 of the California Business and Professions Code, which has become notorious. There, the legislature and the courts separated standing in such a way that you don't even have to be an injured party in order to bring a suit. An individual may sue under the section 17200 provisions as a private attorney general even though he has never been injured and never relied on the misrepresentation. California has perhaps gone the furthest and has the broadest statute. I'm sure that there is going to be much more discussion this afternoon about the California provisions and their impact.

Let's talk about these state deceptive trade practices statutes. Why are they so powerful, from the point of view of plaintiffs' lawyers, public interest lawyers, public interest groups, and some consumers?

Well, they eliminate many issues that arise under the common law. Many of these statutes eliminate the common law fraud requirements of reliance, or materiality, or that you have to prove that you suffered damages. In addition, many of the defenses that would be available either in a fraud action or in a breach of contract action—such as contractual disclaimers or the parol evidence rule—have been eliminated by virtue of the fact that these are statutory causes of action and thus common law defenses are not available.

They also allow for very broad interpretation of what is an unfair or unlawful practice. In California, for example, an "unlawful practice" can be a violation of a statute that does not itself grant a private right of action. Section 17200 thus has become a sort of transitive tool for private citizens to bring "enforcement" actions for statutes they otherwise could not sue to enforce. Moreover, under section 17200, you can also sue over "unfair" practices. There is, of course, a crucial difference between what is "unlawful" and what is "unfair." What exactly is an "unfair" practice?

There was an action brought in California under section 17200 where it was alleged that the manufacturers of sweet cereals should have advertised their products not as cereals, but

as candy. *See Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197 (1983). This decision had real world consequences for product advertising.

So not only does section 17200 bring plaintiffs' lawyers, who are going to use this, to the fore; as we're going to see it also brings to the fore public interest groups who have a social agenda to use 17200 (which is the broadest of the statutes) in a way to make changes that they think will meet their agenda.

What is the most perverse use of these consumer statutes? Most of these statutes provide for treble damages in many instances. Many of them provide for punitive damages. Many also provide a statutory minimum amount of damages, and almost all award attorneys' fees to the winner.

So you can see that this is a major change in how the common law operates.

If you're the plaintiff's lawyer and you add one of these counts, it gives you enormous leverage to get the case settled, even if you never get to try the count. Because in the end, the ability to get treble damages, punitive damages, and attorneys' fees changes the complexion of the case for the defendant from a settlement point of view. These are very powerful kinds of weapons that are available merely by pleading one of these actions, much less from the point of view of what the result at trial can be.

These state deceptive trade practices statutes are powerful weapons in the hands of a plaintiff's lawyer. They eliminate common law elements and defenses, broadly (and vaguely) define what conduct is proscribed, and they permit the claimant (and his lawyers) to get extra-contractual damages and possibly attorneys' fees.

What we have seen happening in the last few years is an even worse situation in which these state deceptive trade practices statutes are used to bring these claims as class actions where class actions would not otherwise be available on traditional common law theories. When you combine the coercive power of these statutes with the coercive power of class actions, you can see that this becomes an extraordinarily powerful weapon to use to coerce defendants to settle.

Just how have deceptive trade practices class actions changed the landscape? Well, there are a number of jurisdictions—especially federal jurisdictions—that deny certification of nationwide class actions where the laws to be applied differ substantially. Of course, the consumer fraud statutes vary from state to state. Some require reliance, some don't. Some require materiality, some don't. Some grant treble damages, some don't. There are many differences among these different statutes.

Recently, however, plaintiffs have been asserting that a nationwide class action can be certified on deceptive trade practices claims by applying only one state's law: the consumer fraud statute of the particular state where the defendant has its corporate headquarters. They try to convince the court that it does not have to apply the statute of each of the 50 states, but merely the statute from the state where the defendant resides. That is what has gone on in some of the state courts. *But see Schein, Inc. v. Stromboe*, 46 Tex. Sup. Ct. J. 103, 2002 WL 31426407 (Oct. 31, 2002) (rejecting a "manufacturer's residence" rule that would facilitate the certification of nationwide class actions).

To give you an example and to set the tone for the discussion this afternoon, I cite the *Avery v. State Farm* case, 321 Ill. App. 3d 269. That was a case brought in Madison County, and you have all the literature on Madison County outside.

In that case, the plaintiff brought a class action alleging breach of contract, and asserted that the Illinois Consumer Fraud Act applied to a nationwide class because the defendant was headquartered in Illinois. The case was based on the allegation that State Farm was supplying non-original equipment for the repair of cars around the country instead of original equipment.

I'm not going to talk any more about the case, because you're going to hear a great deal about it. You have both lawyers here who were involved in the case. But the court granted a class action on the grounds that the Illinois statute applied to all members of the class in all 48 states. (Two states were left out of the class.)

I think Francis is going to speak about the federalism implications of such an approach, so I won't go into that here. I will,

however, point you to the decision of the United States Court of Appeals for the Seventh Circuit—which includes Illinois—in the *Bridgestone/Firestone* case. *See In re Bridgestone/Firestone Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002), *cert. denied*, 71 U.S.L.W. 3283 (2003). There the plaintiff argued that there were no conflicts of law problems inherent in the putative national class action because the court could apply the consumer fraud statute of the defendant's headquarters to the claims of residents of any state. The Seventh Circuit squarely rejected this argument and reversed the lower court's certification of a national class.

As an aside, one change in federal law that has been very helpful to defendants is the ability to take an appeal from a class action decision if the appellate court will accept the appeal. *See* Fed. R. Civ. P. 23(f). The Seventh Circuit accepted the appeal in *Bridgestone/Firestone*, reversing class certification because state consumer fraud statutes vary considerably and courts must respect these differences, rather than apply one state's law to 49 other states. The court rejected a "manufacturer's residence" rule and held that the class therefore was unmanageable.

We have a similar difference of opinion in Texas between the Texas state intermediate appellate courts (which have allowed class certification by applying the law of the manufacturer's residence, Texas, to a nationwide class) and the federal Fifth Circuit, *see Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), which has held that class certification was inappropriate, in part because consumer fraud statutes vary from jurisdiction to jurisdiction. The Texas Supreme Court's decision in *Schein*, rendered one week after this presentation, resolved this conflict by bringing Texas into line with the federal authorities. *See Schein*, 46 Tex. Sup. Ct. J. 103.

So with respect to the *Avery* decision in Illinois, if there is no reversal—and the Illinois Supreme Court has Avery before it and is confronted with these issues—then the plaintiffs' bar will be emboldened to continue trying to use a single state's consumer fraud statute to create a nationwide class action.

When such nationwide class actions are created and there is a real possibility of a classwide judgment that the consumer fraud

statute has been violated, you can see how this changes the stakes dramatically for the defendant. It gives rise to the specter of punitive damages, treble damages, and attorneys fees on a classwide basis. This has an enormous impact on the defendant's decision regarding whether to fight or settle.

As a result, the plaintiff's bar is trying to transform almost every case into a deceptive trade practices action, whether it is a products liability case, a breach of warranty case, or an insurance sales practices case. This kind of litigation is dramatically changing the litigation landscape, and will continue to do so unless the state courts begin to do what the federal courts have done. In places like California, you don't even need a class action to almost achieve the same result because under the statute you can get disgorgement or perhaps restitution for all of the people who have been affected without ever actually certifying a class action.

In closing, these vaguely worded consumer fraud statutes are being used by private litigants in ways that no one could have anticipated originally. Legislative initiatives in California and other states to change the statutes—to make them more specific and to do away with treble or punitive damages—have failed so far, although these attempts continue. But you can be sure that these types of consumer fraud statutes are going to continue to be used to bludgeon defendants into settling cases that they believe are illegitimate and might not otherwise want to settle. And for those few cases that actually reach trial, these statutes risk creating large verdicts and punitive damages if they are not modified either through statutory amendment or state supreme court interpretation.

PROFESSOR FRANCIS McGOVERN: When I went to law school in the Sixties, I took a course called Law and Poverty, from Jerry Mashaw, who now teaches at Yale. In that course, we discussed an economic analysis of the distribution of wealth and all kinds of fancy concepts. When the time came for me to apply to a law firm, the managing partner at Vinson & Elkins called up a friend of mine who is a professor at the University of Virginia and said, "I don't know. I mean, this guy took something called Law and Poverty. What's that?"

He replied, "That's landlord-tenant law."

Now—and I am a law professor—there isn't even a course on consumer protection. Those courses were everywhere in the Sixties, and now they don't even exist in the curriculum. I'm now teaching a course periodically for which we haven't gotten the name down pat, but it's business law, business torts or economic harms, or something that encompasses consumer protection, all the tort-like and economic non-personal kinds of harms that are out there. There's no such course in the curriculum at all, but I'm trying to make those courses fashionable again. This field is a topic of major concern. But consumer protection isn't even taught in law schools. What's been going on since the Sixties that has led to this situation?

Let me propose two theories, both procedural and strategic. And that's the world that I live in right now. I'm trying to figure out the strategic moves of both plaintiffs and defendants, because what I do is mediate cases. And I can't mediate cases very well unless I anticipate where everyone's going.

Today, I'd like to focus on the strategy of the plaintiffs' bar. And I work for judges. I get appointed by judges to mediate. What's the strategy of the judiciary?

It's in those two areas- the plaintiffs' bar and the judiciary- with the procedural devices of class actions where we can learn a lot about how we got to where we are right now. Maybe that will inform us a bit of where we might want to go from here.

There's a term, "social issue torts," that a number of us have done some fascinating work on. When I started practicing law, you had one plaintiff and one defendant, and when it was Joe Gimaio that I had a case against, I'd write him a big check for whatever it was that he wanted. It was at the very early stages of products liability, and we had a consumer protection/deceptive trade practices act on the books in Texas, but no one used it.

That leads me to point out the major time lag that is typically associated with the evolution of lawyers in understanding, appreciating, and utilizing new substantive and procedural devices. Every time a new statute comes on the books, it takes a while.

Take, for example, class actions. If, as they were originally designed, anyone had thought we'd have class actions in the personal injury context, he would have been in la la land.

So at the beginning, these statutes were not used for the purposes for which they're used now.

What has happened? The one-plaintiff/one defendant product liability world has morphed into a very different world from the perspective of the plaintiffs' bar. The plaintiffs' bar learned—and I'll put most of this at the feet of mass torts, specifically asbestos—that product liability law, Section 402A of the Restatement of Torts, the council that Elizabeth and Sheila are on, was written out of whole cloth. There was no legal precedent for it whatsoever. It was policy-driven. So we have an entire generation of plaintiffs' lawyers in the product liability context that didn't pay much attention to the black-letter law. It didn't bother them a lot because product liability law at the beginning stages was all policy.

So you've got this whole generation of lawyers that aren't bothered by the fact that there may be some bad policy. If you have the right policy, you'll be able to move a case through the system.

At the same time, as you found mass torts emerging, if you didn't file a class action or aggregate your torts, someone else would do so and take them away from you. I know that some of you have been in Jefferson County, Alabama; I remember Jerry Beasley and some of the cases he had. He was doing one-off cases in this area, and was very, very successful. Once, when he came to the University of Alabama, I asked, "Well, Jerry, why don't you do a class action?"

He replied, "Oh, I don't know anything about class action."

I said, "If you don't do a class action, Lanny Vines or someone else is going to do a class action." And, lo and behold, he started doing class actions.

So you've got this generation of lawyers that learned about public policy as being the driving force, that learned about class actions as a way of maintaining the litigation. Then Elizabeth Cabraser, Mel Weiss, and others who had historically been in the class action arena and really knew class actions saw that there was

a different application for class actions. So they started coming in, and the plaintiffs' personal injury lawyers would use the expertise of the class action lawyers, and you had this very innovative group of folks who were ready to pursue litigation. Most of them were, let's say, slightly left of center, and most of them were interested in pursuing certain kinds of social issues.

At the same time, it's possible to do well by doing good, from their parlance. You found with asbestos, where there is no question that it was a defective product and that it caused harm, that the issues relate to how far back you're going to carry it and what the amount of the damages should be. Aggregating the personal injury cases and the toxic substances cases—the first case that Sheila and I were in was a DDT case in Alabama—became sort of common.

Then the plaintiffs' bar learned a major strategic move that I don't think—correct me if I'm wrong, Elizabeth—was one that, at least in the personal injury context, folks had dealt with. That is, if you can somehow get enough chips on the table, it becomes real risky to draw the next card or roll the dice.

From a procedural perspective, if you can develop a strategy by which there are lots of chips on the table, there's going to be tremendous risk aversion to having a trial. There's a tendency to settle.

This strategy of putting the chips on the table, which didn't find its origin in the context of the consumer protection, deceptive trade practices, became a strategy that has been very prominent and very successful for the plaintiffs' bar.

As the plaintiffs' bar got the funding to go into other areas, you were able to bring cases that put huge numbers of chips on the table. The asbestos money, the tobacco money was able to fund further actions that you wouldn't have seen. Even the amount of money that I paid Joe Gimaio on behalf of General Motors, over the years when I was working for a living, was not enough to fund this kind of litigation.

So the funding, the evolution of plaintiffs' personal injury lawyers into class action lawyers with substantial resources able to put the chips on the table, developed a new format that we had never seen.

The best way to do this was in the context of a federal class action. If it were possible to have a national case in front of a federal judge with lots of chips on the table, inevitably it would settle.

Now let me go over to the judicial side and look at what's happening. Then we'll hit the confluence, and I'll give you an example of an interesting case where a state class action may actually be beneficial.

What's happening on the judicial side? When most of us went to law school, the judge was viewed as an umpire, calling the balls and strikes. As far as the lawyers, the adversarial system—it wasn't very inquisitorial.

Then with the judicial management school, the Federal Judicial Center, and its baby judges' conferences, we saw the role of the judge shift from umpire to manager. The job of the judge is to manage litigation. Some of us have made the argument that it's morphed even further, into the judge as player. When a judge aggregates huge numbers of cases in one particular forum to leverage a settlement, he is just as much a player as the attorneys.

In Multi-District Litigation, or MDL , judges originally were umpires. Their job was just to decide the pretrial discovery and to send the cases back for trial. In the *Dalkon Shield* case, that's what happened.

When Jack Weinstein resolved Agent Orange, and as the managerial judging movement progressed, what we saw was a different model in the eyes of the federal MDL judges. Their role was to resolve the entire litigation without having to send it back. So we saw Judge Bechtel resolving any number of cases, most recently Fen-Phen, for example; that was the role of the federal judge.

There's some uncertainty among federal judges as to what their role is. If you look at Judge Easterbrook's opinion that Sheila made reference to in the *Bridgestone/Firestone* cases, the role of the judge is to say, "We're not going to ceritify a class action. We're not going to allow you to put all these chips on the table. We're just not going to do it." It's the wrong policy model that Posner had.

In a pejorative sense, you could say that they're abdicating their role. One could say the same thing in the context of asbestos, where all the asbestos cases went to one federal judge in

Philadelphia, and they've been sitting there for, what, 15 years, 12 years? Something like that. So all the action is in state court.

And then a third theory goes back to the old umpire role of judicial devolution. You do the pretrial, and you send the cases back for trial.

So there's a little disarray, I would argue, in the judicial strategy of the federal judges.

Now let me back up to the plaintiffs' lawyers. The plaintiffs' lawyers developed an unbelievable ability in the MDL cases to put the chips on the table and resolve the cases. Then *AmChem* and *Ortiz* hit. Everyone put the brakes on for a while.

It was typically the same group of plaintiffs' lawyers that were leading the charge in those cases. Other plaintiffs' lawyers knew that if they filed a case or sought MDL, any kind of judicial involvement from the federal judges would never be forthcoming. They saw some of the federal courts rejecting the use of class actions in federal court, and they said, "Okay, we can file in state court."

At the same time, some of the MDL class action lawyers who were not getting their cases certified in federal court said, "Well, we can file in state court."

What we're seeing is a major strategic move to the state courts. Here is a concrete example: the *Cooper Tire* case. I was the mediator in it, it's over, and it's not being appealed, so I can talk about it. And this is a positive view of a class action in state courts.

Here's what happened. Some plaintiffs' lawyers knew some facts that they thought would provide the basis for a lawsuit against Cooper Tire. I don't know whether you know Cooper Tires, which are all over the South. They make great tires. There happened to be a video taken in Biloxi or—I'm sure it was in one of the Virginia presidents' counties—Mississippi, at a plant that made Cooper Tires.

Have you ever watched tires being made? They do layers of rubber and steel or whatever it is. And if you get any air underneath, little bubbles of air pop up.

Well, there was a video of folks with what they call an awl, or a knife, popping and sticking the knife into the tire, and then the tire would move along the line and be sold. Not exactly the kind of

video, if you're gas general counsel for Cooper Tire, that you'd like a jury to see.

So the plaintiffs' lawyers thought they had a case. If they filed in federal court, they knew that they would not be selected as the MDL counsel. They just weren't big-time enough. So they got together as a group and filed in 23 states. Not personal injury, but straight consumer protection across the board.

There were also some federal cases sent to an MDL judge. The claim was for $600. The last time I looked, the jurisdictional amount in federal courts was $75,000.

These cases were being remanded, and probably the MDL would have been sent back to state court, too. That is, they purposely wanted to fly under the jurisdictional map.

Cooper Tire was faced with class actions in 20 some-odd states in a coordinated effort. The idea was to put the chips on the table not in a single class action, but by multiple class actions around the country. Cooper Tire and the plaintiffs eventually agreed. I was appointed as a special master to coordinate the discovery among the judges. So I had a judge in New Jersey, Pennsylvania, Maine, and North Dakota—don't ask me why—and three or four other states. We coordinated the discovery.

The time came when we actually did reach a settlement. The question is, if you want a settlement, how do you get it? So the decision was made with the acquiescence of the MDL judge to have the settlement in New Jersey with one state judge under the New Jersey consumer protection statutes that was national in scope, that flew under the jurisdictional amount for single plaintiffs, no fluid recovery. *See Talalai v. Cooper Tire & Rubber Co.*, No. L-008830-00 (N.J. Superior Ct. Nov. 1, 2001), *available at* <http://neptune.spacebears.com/cars/legal/cooper.html>. That way, Cooper Tire, with no appeal, was extremely pleased that it was able to resolve this litigation.

I know you're going to talk about *Avery* and some of the problems associated with class actions. But remember that sometimes it is helpful to have a device to end the day in such a way that the resolution can reach some form of fruition.

What was the reaction of the MDL judge? The MDL judge, the federal MDL judge, was extremely pleased.

What was the reaction of the state judges? Well, these were not judges who were out to be magnets per se. They basically wanted to resolve the litigation and were willing to work together to do so.

The difficulty you run into by having multiple filings is a lowest common denominator. I suspect you'll talk about this more. Once that one judge decides that a document is discoverable, it's out there in the public domain, and that's it. Once that one judge has a confidentiality order that's not particularly broad, that's it. That information is out there.

When you start trying cases, you find that over time the degrees of freedom of the defendant go down. Plaintiffs can tell—if a trial time is storytelling time, which fundamentally it is, each side telling a story to a jury and the jury buying into the story—a different story for each new case. They're not bound by history. But a defendant can't do that. A defendant is bound by the deposition that was taken three years ago, by the trial testimony that was given in Minnesota.

When you're trying cases in the bank in Los Angeles, you find that you are bound by what you've done in the past, and your flexibility is greatly reduced.

That leads us to federalism, one of the beauties and the good news as well as the bad news about our system. If we are going to have a federal system, we're going to find these kinds of conflicts, particularly if the federal government decides or the federal judges decide or the U.S. Supreme Court decides that it's not going to play. I would argue that the spirit of some of the federalism decisions from the U.S. Supreme Court that have been lauded by lots of folks creates a sea change for a large part of the federal judiciary. What we're seeing that I've never seen before is a level of passivity in federal judges when it comes to these kinds of actions.

You didn't see the Supreme Court taking West Virginia. You will find any number of circumstances where this Supreme Court's approach is going to increase the power of the states substantially.

When looking at this, the Congress or the federal courts are

appropriate forums to look to. But at the same time, focusing energy on the states, on the magnets where there are problems, is just as worthwhile in terms of an overall approach.

AUDIENCE QUESTION: Professor McGovern, what happened in the tire case? Are they still awling the tires? What kind of remedy was there, and what happened to the consumers in the other 30 states where there weren't suits?

PROFESSOR McGOVERN: No, they're not awling tires. There was a settlement, which consisted of an extended warranty, a change in practices, and an education program. So if someone came in with a separation in a tire, which was the manifestation of the awling, they could get a brand-new free tire, which was, in effect, a warranty that no one else would give. Now there's a monitoring program in the plants to ensure that there are no similar kinds of problems in the operation of the plants. The education program teaches people about tire pressure.

This was a settlement agreed to by the lawyers in all the class actions. There were, I think, four objectors, one of which was Public Citizen that eventually agreed to the settlement. The settlement would apply to Cooper Tire consumers all over the United States. If it were attacked, then there's an issue, as we all know. But, given the dollar amount per claim, I think most people felt as though the attack would not materialize.

MS. BIRNBAUM: What's interesting is that there have been very few state class action settlements that have resolved national litigation. Most of the national settlements have occurred in federal courts. There are advantages to being in federal courts because the federal courts have injunctive power once a judgment is entered and the settlement is approved that state courts do not have. In state courts, you must simply rely on full faith and credit, which is not as secure a posture to have.

But in this case, there were good reasons for them to do it through a state court proceeding rather than federal court, and we may see more of these.

AUDIENCE QUESTION: Was the CPSC involved in your *Cooper Tire* case?

PROFESSOR McGOVERN: No.

MS. BIRNBAUM: It would have been National Highway Traffic Safety Administration, anyway.

PROFESSOR McGOVERN: NTSA had some standing; this was beyond the NTSA approach.

AUDIENCE QUESTION: I don't understand your complaint about lawyers. That's what they do: they find precedents and old laws, and they try to fashion a case for their cause. Their cause may be making money, and preferably making money for protecting justice, or what they consider to be justice.

So that's lawyering. But you also mentioned public policy; when you talk about public policy, you're talking about public ideas and attitudes toward business. I don't understand where you're headed in terms of remedy or relief that you're seeking. Because if you're talking about the courts, you're talking about state legislatures changing statutes, which they're not going to do because the public is antibusiness, particularly in terms of Enron and WorldCom and everything else like that. The attorneys general across the states are suing companies left and right in terms of injuries to people. So the public is really antibusiness. I don't know where you think this relief is going to come from.

PROFESSOR McGOVERN: Let me respond. If I've confused you as to where I'm going, I did a good job. I'm a neutral, a mediator, and it's not up to me to be prescriptive or normative. I try to be descriptive as to what's going on. So I purposely am not heading anywhere in terms of what one should do. Instead, I'm trying to describe what I think is going on.

For those of you who do want to head somewhere, you might be able to apply an approach that would be helpful.

MS. BIRNBAUM: I'll respond to that. There is a perception in many jurisdictions that there are a lot of runaway verdicts and prices to pay for what is going on, especially if people aren't truly injured and there is a lot of money changing hands.

In asbestos litigation, when you have 50 to 60 companies in bankruptcy, that's not good for shareholders, employees, and people who have pensions. So if you shift a lot of money to people who

don't deserve it, and if the RAND study is correct and a large percentage of asbestos claimants have no impairment—no injury as we know it—and we are shifting huge resources to them, that has significant public policy implications, too.

There are public policy issues on all sides. I agree with you that we are in a very antibusiness climate. A recent study in *The New York Law Journal*, *see* Tamara Loomis, *Business Scandals Rock Juror Attitudes*, NYLJ 1 (Oct. 16, 2002), said that about 85 percent of the people polled don't trust corporations, think they're lying, and think they're putting out terrible products. So this is a very good time for plaintiffs' lawyers to take advantage of those issues, because there has been an enormous public opinion shift against corporations.

That is going to continue for some time, until the pendulum swings back. The ability to get legislative reform is very remote because of these kinds of public opinion implications, and we are going to be seeing a great deal of this for a very long time.

AUDIENCE QUESTION: There were three points that were interesting, Professor McGovern, in your comments. First is the motivation of the individual lawyer to maintain control over his client, his case. Second, the motivation of the lawyer to aggregate as many chips as he can—notice, they're not his chips, they're the chips of someone else that are going to be put on the table. They're just trying to aggregate a high risk for one player, not for all the players in the poker game.

Third is the race to the bottom, i.e., let's go to the least qualified jurisdiction to determine whether this is appropriate for aggregation or class action.

What struck me about those three points was how high-minded you made them sound. What would you feel about minimal diversity jurisdiction where you could click all these into the most qualified courts with the best developed law, rules, and complex case matters, so that the most qualified courts in the country could be the gatekeeper for what should or should not be aggregated?

PROFESSOR McGOVERN: The problem that I personally—I will be normative here for a second—have is that I have a

distrust of aggregating too much power anywhere. I remember doing a program at the University of Chicago on juries. My colleague Paul Carrington talked about an outrageous case of punitive damages in which the jury was just out to lunch. It involved a spermicide, and the case was tried in Atlanta.

The damn verdict, okay, was given by the judge. It was tried to the judge. It wasn't tried to a jury in that particular case.

My solution would be a panel of judges, if you were going to do it. I've seen so much variation in the MDL judges that I am skeptical about giving anything to one judge. In fact, I can give you the names of some judges for whom you'd just as soon be in Madison County, or anywhere other than in front of them.

AUDIENCE QUESTION: Sheila, could you comment on the difference between procedural aggregation and gatekeeping, as we do for expert witnesses and evidence, and the substantive aggregation that Professor McGovern was just talking about? That is, the judge comes out with a one-person ultimate result. We might have a difference there that is worth exploring.

MS. BIRNBAUM: That's a very interesting issue. Procedurally, it's the issue of aggregation. Aggregation is what makes the difference and is what has changed everything. I am old enough to remember one plaintiff, one defendant, and one judge. It was usually downtown. I don't practice in New York State any more; all of us who do this on a regular basis practice nationally, because it has all changed. Now, there are thousands of plaintiffs and dozens, if not hundreds, of defendants in a single case.

And it's 200 lawyers at a status conference.

When we were doing breast implant litigation, we changed the entire economy of Birmingham, Alabama. When the lawyers came into town, every restaurant was jammed, and the two hotels were packed. In Cheyenne, Wyoming, where we did the *Copley* albuterol trial, *see In re Copley Pharmaceutical, Inc., "Albuterol" Products Liability Litigation*, MDL Docket No. 94-140-1013 (D. Wyo.), there were two hotels. The plaintiffs had one, and the defendants had the other. We changed the entire economy of Cheyenne for two years, until the case was resolved.

From a procedural point of view, aggregation is the big nut to crack. What we have is what Francis noted: the doctrine of unintended consequences.

The federal courts got rid of asbestos cases. They put them in the MDL, where they got stuck. There was no solution, really, that the MDL created. So everyone left for the state courts. There are no new federal asbestos cases any more.

They were very happy, I think, to get rid of that. But now the defendants are all in state courts.

Still, I think that overlapping class actions is the real issue. The minimal diversity bill, if it got through, would be very helpful in changing some of the worst parts of aggregation procedures in state courts.

The issue of overlapping class actions in various jurisdictions is overwhelming for defendants. There is no collateral estoppel that's foolproof that you can use. If we do not do something about that issue, all the problems that the industry has are going to be accelerated and aggregated.

PROFESSOR McGOVERN: Let me add one thought on the procedural side. I've got a case now for which I'm special master that involves a drug, and I've been coordinating between the MDL judge and the state judges over a *Daubert* hearing. *See Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993). How do you do a *Daubert* hearing in the MDL?

It's absolutely fascinating, far beyond the amount of time that we have today to discuss it. But one could make an argument that it's worthwhile distinguishing between pretrial and trial. That is, I can make a very strong argument for aggregating pretrial, then sending cases out for a marketplace of litigation with the capacity for an overall settlement. I would argue in favor of a Rule 23 to have a relaxed standard for settlement classes—not for trial classes, but for settlement classes. Because my problem is—and this is speaking as a mediator—when I get these cases, how do I wrap them up? There's no procedural vehicle out there that's real nice to wrap them up with.

So I would disaggregate minimal diversity provisions, depending upon the state.

MS. BIRNBAUM: I agree with Francis that there are times when a defendant wants aggregation at the end of the road if they're going to get a global resolution. Defendants, in certain types of cases, also want one pretrial discovery so that they're not being hounded to death. On the other hand, they don't want to try the one "bet-your-company" case.

So I think Francis and I have approached it from the same way and have tried to get others to look at this not as a single issue but one with pretrial, trial, and settlement components.

AUDIENCE QUESTION: Francis, I'd like to hear about the distinguishing characteristics between the *Cooper Tire* case and other competing class actions in the state courts that haven't resolved favorably.

My impression is that it's all about the judges. I'd be interested to know your thoughts about that and if there are other factors.

PROFESSOR McGOVERN: I've spent an enormous amount of time academically and professionally coordinating between federal judges and state judges, and coordinating among state judges. Under our system of federalism, Arthur Miller in the ALI and Mary Kane had an idea that was the complex litigation program. And they wanted top-down reform. I was on one of the advisories on it and thought it was a great idea. I just didn't see it going anywhere.

MS. BIRNBAUM: And it didn't.

PROFESSOR McGOVERN: And it didn't. But mine was bottom-up reform. So is the work I've been trying to do with the National Center for State Courts. In fact, Elizabeth, Sheila, and I are going to Washington tomorrow for a program to work on that.

Bottom-up reform uses peer pressure to try to get the judges to work together. It's not perfect and it's not a silver bullet. It's idiosyncratic. In silicone gel breast implants, as you remember, reform wasn't perfect, but it was almost perfect in terms of getting it done. I was appointed by Judge Pointer, who is the MDL judge, to work for the state judges to keep Madison County from having these outrageous verdicts. And we kept a lid on it.

The same thing happened in the *Cooper Tire* cases. We got all

the relevant judges to work together because it was in the interest of the plaintiffs' lawyers not to have enormously expensive redundant discovery.

So it is possible to get folks to work together. Then what you find is really interesting. Peer pressure is just phenomenal. Then you don't go to the lowest common denominator; you tend to go to the highest common denominator, the best common denominator. And the judges will work together with the smartest, the best, and the ones that are willing to go through everything.

But it's not perfect. It's just the best idea I've got right now, other than some type of change in 1407 or minimal diversity.

AUDIENCE QUESTION: I had a question about the role of the MDL procedures and whether you all think that that's the perfect combination of aggregation and disaggregation from the perspective of the defendants.

My perspective is in the context of unfair competition claims, that the cases will always end up going back to the state court in order to have the trial there, and that if you are able to aggregate the cases by removing them to federal court and then MDL'ing them someplace, you can have the choice of trying to settle it all in one package or not. Of course, the risk that the plaintiffs face in that context is something that you can use in the context of trying to negotiate something.

I also wanted to know what you all thought the state of the law was on this whole issue of the jurisdictional amount and supplemental jurisdiction and how that factors into the strategies that defendants have to try to get out of state court, get out of the Madison Counties, and at least get in federal court someplace.

MS. BIRNBAUM: Unfortunately, I thought we were going to get some guidance from the Supreme Court in *Ford Motor Co. v. McCauley* [123 S. Ct. 584 (2002), *appealed from In re Ford Motor Co./ Citibank*, 264 F.3d 952 (9th Cir. 2001).], which was argued on the question of whether you can count injunctive relief and punitive damages and toward the jurisdictional amount. Do you look at it from the plaintiffs' point of view (i.e., individually), or the defendants' point of view (aggregate)?

The Court, after argument, decided that it didn't have jurisdiction, so we will have to wait a while to get some answers. This is a very difficult and important issue that's going to have to be resolved with regard to whether you can keep the cases in the federal court in the MDL court.

Multi-districting cases does one thing: it gives you relief as the defendant from multiple discovery. Francis has done such a good job with the state court judges and the multi-district judges that they cooperate. Right away, you go in and ask them to begin dialogue and cooperate.

But once you get in there as a defendant, you are never going to get out. You are going to have to settle those cases or you're dead meat. There are very few cases that go back for trials, and you have now increased the stakes as to settlement. You have made settlement possible, but you have increased the stakes.

I have fought the creation of multi-district litigations on behalf of certain defendants when we could have done that to get rid of it, but we thought it would be too expensive to do it that way, and we could handle litigation better by litigating it jurisdiction by jurisdiction. Because some of these judges get envious and what I call "MDL-itis," and they don't want to let go. They will not dismiss cases when they should have, such as in the *Dow Corning* case.

Initially, Dow Corning (and defendants like G.E.), which made component parts, should have been out of the litigation, but the court kept them in right to the end, hoping that they would put in money for settlement. When it finally became clear that they wouldn't, and the case was being settled, summary judgment was finally granted. But no one gets out. It's only a strong judge who will do that; otherwise you're in for the duration.

PROFESSOR McGOVERN: Of course, one can make the argument that the judicial panel on multi-district litigation is pulling the trigger too quickly. If you think about the repetitive stress cases and the IBM's—those cases were not MDL'ed and never went anywhere.

I would argue maturity. You shouldn't aggregate these cases until you know that there's some viability to them. If there is some

viability, typically a defendant wants to aggregate them, because it wants to go ahead and move on down the line. But conceptually, you want a fair shot to be able to win your cases. If there are too many chips on the table, you can't take a chance.

So what kind of system could be set up? If you had the cases aggregated for pretrial and you then farmed them out to statistically significant representative jurisdictions, give the litigation a try, see what's there and then you're able to extrapolate from those decisions—that's why I'm trying to disaggregate the pretrial from the trial and the settlement.

AUDIENCE QUESTION: Could you talk about the unfair deceptive trade practice cases and the nebulous standards, the amorphous nature of the actions, and talk about how class actions specifically affect that and the interplay among class actions and the unfair trade statutes and deceptive trade statutes?

MS. BIRNBAUM: There are very few cases that have gone to trial as a class action in an unfair trade practice case. *Avery*, which is going to be talked about in the panel, is one of those cases that went to trial in which the court certified a 48-state class, applying the Illinois Unfair Trade Practices Act to everyone in the entire country, and applied Illinois's breach of contract law to everyone in the entire country.

In that case, the overall verdict, with punitive damages, was over $1 billion. So you can see that when you aggregate large numbers of people, even with potentially very small claims, you can quickly get to very large numbers through this kind of a statute.

This leads back again to juries and judges. It was actually the judge in that particular case who handed out a $600 million punitive damage award. So the proofs are very different from a fraud case.

PROFESSOR McGOVERN: Here's a concept: elasticity. What you're trying to do as plaintiffs' lawyers is find a cause of action that applies to a very large number of people. If you're talking about personal injury cases, where there has to be blood on the floor, you're not going to find so many people. But a concept such as medical monitoring allows you to deal with huge numbers of

people, and that's what the consumer protection deceptive trade statutes do. They provide you with a cause of action that applies to a huge number of people.

The class action device provides you a procedural vehicle by which, with minimal kinds of notice, you can contact those people and provide peace to a defendant. That is, the class action is elastic as well. Procedurally, you don't have to try each case one at a time.

So what you're doing conceptually is marrying two very elastic substantive and procedural approaches that lead to the potential for great good or great harm, depending upon how they're used.

Panel One

Striking a More Balanced Public Policy

Walter Olson
(*Moderator), Senior Fellow, Manhattan Institute*

Robert "Barney" Shultz, Jr.
Heyl, Royster, Voelker & Allen

Elizabeth Cabraser
Lieff, Cabraser, Heimann & Bernstein

Jeffrey Jackson
Vice President and Counsel, State Farm

MR. DEWEY: We're going to have two very interesting panel discussions, and we have two very distinguished moderators whom I'd like to introduce.

The first panel will be "Striking a More Balanced Public Policy," and Walter Olson will moderate it.

Wally is a senior fellow at the Manhattan Institute's Center for Legal Policy, where he writes on a variety of economic, political, and legal topics. He also founded what is now the Institute's Center for Legal Policy in 1985. Previously, he spent five years with the American Enterprise Institute in Washington, D.C., and before that he worked on Capitol Hill.

Wally has been referred to as an intellectual guru of tort reform and as America's leading authority on over-litigation. His books include *The Excuse Factory* and *Litigation Explosion: What Happened When America Unleashed the Lawsuit*, and he has another book coming out at the end of the year, published by St. Martin's Press,

entitled *The Rule of Lawyers: How the New Litigation Elite Threatens the Rule of Law.*

He continues to write for publications such as the *New York Times* and the *Wall Street Journal*. His current professional activities include acting as an advisor to the Federalist Society. He still maintains his website, Overlawyered.com, and regularly speaks before professional, business, and student audiences.

Wally is a graduate of Yale University.

The second panel is entitled "Successful Defense Litigation Strategies." Our moderator for that panel will be John H. Turner, Jr. John is vice president at the Environmental Law Institute, or ELI, in Washington, D.C., where he is responsible for the Institute's treaties, textbook, and environmental reporting offerings. Those include *ELR*, the *Environmental Law Reporter*, and the *National Wetlands Newsletter*.

He also serves as editor in chief of the *Environmental Law Reporter*.

Previously, John served as divisional vice president of Browning-Ferris Industries, as counsel to a trade association, and as an attorney in private practice, where much of his work involved product liability, toxic tort, and related individual and class action claims. In other words, John has been in the trenches as well as in academia.

He has authored over 40 articles in law reviews and other legal publications on environmental, constitutional, tort, and land-use issues and is a frequent speaker at legal conferences.

John graduated from the University of Alabama and from Vanderbilt University's law school.

MR. WALTER OLSON: Our first panel this afternoon can be thought of as reporting from a war zone. In particular, all three of our panelists were involved in one of the most fascinating class actions of our time, *Avery v. State Farm*. *See* 321 Ill. App. 3d 269. This is the lawsuit over the insurer's use of replacement parts not from original manufacturers after auto crashes.

It's a fascinating case; first, as Sheila Birnbaum pointed out, because, even though it was a very high stakes national class action it was tried to a verdict rather than settling before that point. I

could scarcely believe my eyes at the news that a case of this sort had actually gone all the way through trial. I thought such cases were required to settle as a matter of procedure. But it went to trial and would be fascinating if only for that.

But there is much more of interest to the *Avery* case than that. It illuminates the kind of consumer protection statutes that are the theme of today's conference. It raises questions of how state courts handle nationwide class actions. It illuminates the conflict or interplay between regulation by agencies and regulation by legal action in an industry whose operations came under heavy state regulation.

It would be easy for us to spend the next hour and a half getting into *Avery*'s intricacies. But you will notice that the title of our panel is somewhat different: "Striking a More Balanced Public Policy." Since *Avery v. State Farm* is still in progress, some of our panelists may not be able to say everything they know or think about it; but I'll bet all of them can shed light on its implications for other cases, other defendants who might get sued, and other uses of these state consumer protection statutes, which is sure to be of interest to almost everyone in the room.

Our panel will begin with Robert Shultz, who certainly has earned his war stripes. He is a class action specialist defense lawyer in Madison County, Illinois. You can't get more warlike than that. He has been, I believe, for his entire career with the law firm of Heyl, Royster—first in its Peoria office and then opening its Edwardsville, Illinois, office, which he runs today. He is active in such professional associations as the Illinois Association of Defense Trial Counsel, the Defense Research Institute, and the Illinois Institute for Continuing Legal Education.

He also practices in St. Clair County—which, I understand, is a close runner-up to Madison County in terms of class action lawsuits—and in Cook County, which seems almost like an easy place to practice, by comparison.

He will be followed by one of the nation's premier plaintiffs' lawyers, Elizabeth Cabraser, whom we're honored to have with us. She is with the San Francisco–based law firm of Lieff, Cabraser, one of the leading class action law firms in the nation. She has

participated in many of the best-known class action and mass torts of recent years.

Her honors include 100 Most Influential Lawyers in America, named by the *National Law Journal* in both 1997 and 2000. She has been influential in procedural debates as a participant in panels considering changes in procedure, and is the author of articles on the appropriate uses of aggregation published in law reviews and elsewhere.

Our final panelist will be Jeffrey Jackson, of the State Farm Mutual Automobile Insurance Company, the defendant in *Avery*, who will give you an inside look at how it has affected the company and the way it has to plan for its future. He has overall responsibility for the corporate counseling and litigation division for corporate law at State Farm. He joined the company in 1988, after nine years in private practice. He is also active in professional organizations, including Lawyers for Civil Justice, of which he is on the board of directors, and the Illinois Equal Justice Foundation.

We will start with Bob, otherwise known as Barney Schultz.

MR. BARNEY SHULTZ: I keep looking at the program title "Unfair Competition and Consumer Fraud Statutes," and it strikes me that if that were really the only topic that were to be discussed today, none of us would be here and we wouldn't have a program.

If we look a little deeper, the reason we have this program is because we're talking about consumer fraud statutes in the context of class actions. If you look even further, what you're going to find as the reason we're gathered here is that we're talking about consumer fraud statutes prosecuted as class actions in the state courts of our country rather than in the federal courts. That, I think, is the real reason that we're here. And it's probably the only thing that I'm qualified to speak about.

But if the question that's being posed is, "Does a better balance need to be struck as far as the matter of public policy?" I can strongly state that a better balance needs to be struck in those instances where consumer fraud actions are prosecuted as class actions, and especially when those are prosecuted in the state courts of the country.

That has particular application for those businesses that are regulated. I'm talking about insurance carriers, pharmaceutical companies, and telecommunications companies. Those industries that have traditionally done business in a regulated environment are the ones that are particularly at risk here and in need of a better-balanced approach from the nation's civil justice system.

If these cases are tried in the state courts and if they are tried as class actions and if they are tried on consumer fraud allegations, you will be facing the prospect of a single judge or a single jury in a county court of one of the states of this country imposing or superimposing, and in turn regulating, these businesses that have traditionally operated within a well-known and well-established regulatory environment, be it legislative or administrative.

That's the real peril. There are many arguments that can be made that the consumer fraud statutes and litigation can complement each other and that they're not exclusive. But they are also contradictory. I hesitate to go through the details of the *Avery* case. We'll get into it somewhat, I imagine; but it is on appeal, so I really don't want to talk a lot about it.

The *Avery* case concerned State Farm's practice of sometimes specifying non-original equipment parts in the repair estimates for its own policyholders. That is a practice that by regulation was allowed in 40 states, regulations that in many instances had come about following hearings. In none of the states were there any regulations that prohibited the practice of specifying non-OAM parts. Yet by virtue of the loss, the adverse result of the trial in *Avery*, there was a sea change in the way that State Farm did business. They declared a moratorium when the verdict was returned on the use of the specification of non-OAM parts. If you're looking for examples of contradictions, a contradiction between the state court litigation and the regulatory process, that act of declaring a moratorium in specification of the parts is, in fact, directly at odds with what the Massachusetts Department of Insurance says you should do.

Instead, you have situation where there are contradictory regulatory environments, one being the circuit courts of different states

and the other being the traditional legislative and administrative bodies of those states.

As Sheila said earlier, the consumer fraud acts of many of these states vary in their elements and in their requirements. But I think it's a safe and fair statement to say that none of them encompasses all the traditional elements of fraud.

In that sense, I always tend to think of these statutes as being "lite" fraud, sort of like the old "lite beer" commercials. It only has half the elements, but it has all the penalties. That's what we're really talking about.

If we're talking about traditional cases, using a single plaintiff and a single defendant, the consumer fraud statute certainly will not require intent and may or may not require reliance and deception. The standards of proximate causation vary from state to state. Under some states' laws, you don't even need cause in fact. Then you can talk about the burdens of proof varying from state to state.

But if you take these "lite" fraud statutes and combine them with the class action device, you are putting together a situation in which you need to strike a better public policy. Because once you combine the consumer fraud statutes and the limited elements that are required of them with the class action device, you're upsetting what was the traditional public policy behind the consumer fraud statutes in the first place.

The consumer fraud statute is a reaction to the doctrine of *caveat emptor*. One commentator—fairly, I think—characterized the combination of the consumer fraud statutes and the class action device as the ultimate reaction to *caveat emptor*.

Have we taken this so far now that we're being counterproductive? I think a very good case can be made around that.

If you think in terms of the class action device, at the core all you need is a common question of law or fact. Bright, imaginative lawyers like Elizabeth Cabraser will always be able to come up with a common question of law or fact; that's not hard. It's actually pretty easy if you look at suing a regulated industry. Because the very nature of regulation means that there is some uniformity to your business practice, and that uniformity lends

itself to the creation, or at least the statement of, a common question of law or fact.

I don't want to suggest that the common question of law or fact is the only criterion in order to certify a class. It is not. We'll talk about that in a moment. But it certainly is, in my experience, the driving force; that is, it is the ability to frame that common question of law or fact in the end drives the decision making of state court judges in deciding whether the class should be certified.

There are other elements that have to be met. There has to be proof that the common question predominates over individual questions that apply, over questions that apply to the individual class members. That is a point of hesitancy and a point of concern for many trial judges who have to hear these cases. But it certainly is also my experience that those judges who are presented with these questions and who have that concern as to whether we really have predominance of this common question are comforted more often than not with the argument of, "Judge, if it works out that we really don't have predominance here, you can always decertify the class at a later time. Right now, we're just asking you to certify the class. If you get it wrong, you can undo it before the case goes to trial; you can modify a class certification order. If you get it wrong in defining or identifying the class members, you can always modify it."

So the result is that once you identify this common question, and if you can address the concern that the trial court has over predominance, from the plaintiffs' perspective, you're almost all the way there.

Having then certified the class, the defendant has to face the prospect in state courts, or at least the state courts where these actions are filed, that you have no right to appeal. Because unlike the federal rules—and I can speak more about Illinois than any other state—there is no automatic or immediate right to appeal an order that either grants or denies class certification, such as we have with Federal Rule 23F. It's just not there.

You can try to take your appeals or your interlocutory appeals. But they're discretionary. They may or may not be successful. But

the only sure way that you're going to get appellate review of that order certifying the class is if you take the case to trial and a judgment. That's a daunting prospect indeed for defendants.

If you want to combine the class device and the common question and the predominance issue, there also has to be recognition that many states don't have the superiority requirement that the federal rules have. By that, I mean that under the federal rules, you at least have to demonstrate that the class action device is a superior method of adjudicating the controversy in question. In many of the state courts, or at least the state courts where these lawsuits are being filed, there is no superiority requirement. Usually, there is a requirement that there has to be a fair and efficient method of adjudicating the controversy. But it doesn't have to be the best; it simply has to be fair and efficient. Unfortunately, far too often the fairness is sacrificed for the sake of the efficiency once that class certification order is entered.

If you make the decision that you're going to go to trial, this is a class action that has been brought by representative plaintiffs. Representative, the theory being that if the representative plaintiff proves his claim, the claims of all the class members are established. Conversely, if the claims of the representative plaintiff are defeated, the claims of the entire class are defeated.

But you don't end up trying the representative plaintiff's claims. That's particularly true in the context of a consumer fraud action because what really happens is that the case is presented by way of global proof or aggregate damage theories or statistical damage models. I'm not here to say that there isn't a basis in the law for those; clearly, there is. But I am saying that when those devices of aggregate or global proof or damage models are used in prosecuting the consumer fraud action, they're particularly ill suited. I'll get to that in a few minutes.

The transformation—I think that Professor McGovern used the word "morphed"—is that you really see a morphing of the plaintiff from being an individual into the aggregate plaintiff. Or, in our case, the *Avery* case, when the case was presented to the jury, the instruction was simply, "Is it probably more true than not true that

State Farm breached its contract with the class?" So you end up trying it against this mythical entity, to some extent, this aggregation of the composite plaintiff, and you end up defending the case against a plaintiff that has all the best attributes of the plaintiff's claims and none of its weaknesses. That's a dramatic transformation.

It's a transformation that, as I said earlier, is ill suited for consumer fraud actions. Because if you look at the consumer fraud statutes, they require in some form or another a representation. It may or may not require reliance, and may or may not require proof of actual deception that the plaintiff was deceived. If causation is an element, that's an element.

From the plaintiff's perspective, it's a wise tactic to transform representative plaintiff into the aggregate plaintiff. Because in consumer fraud actions, proof of the representative plaintiffs' claims doesn't prove the rest of the class members' claims.

If the representative plaintiff says, "I was deceived," what does that tell you about the other class members? It doesn't tell you anything as far as whether the other class members were deceived. If the representative plaintiff says, "I was harmed," what does that say about the other class members? It doesn't say anything.

As I said, if you disprove that, it doesn't give you the defense verdict for the rest of the class.

So from that perspective, it's a wise move, and Elizabeth and her colleagues are very smart in undertaking this transformation of the representative plaintiff into the aggregate plaintiff.

But in the end, if you look at the consumer fraud statutes of the states, in order to establish liability you need precision in the fact-finding. You need to establish: Was it a misrepresentation or mere puffery? Was the element of reliance or deception met? What was the element of causation?

When you combine the prosecution of these consumer fraud actions in the context of a class action, you don't get the precise fact-finding that's required. At the very basis of what we do as lawyers, we go into the courtroom with the belief that each side is going to go at the other as hard and as well as they can, and that, having presented each side, the fact finder will have that ability to

render a precise finding of fact. From that, you can end up with a just result.

But when you take this kind of consumer fraud action, which has specific elements, and you morph it into an aggregate plaintiff with classwide damage theories and statistical damage models, you cannot get that precise finding. So if you take it to trial, you run the risk of an unjust result—or worse, I would say, is that as you approach trial you have to weigh the consideration as to whether you really can get a fair trial, recognizing that you're trying a consumer fraud action in the context of a class action and the representative plaintiff's claims are really not the ones at issue.

MS. ELIZABETH CABRASER: We could talk all day about specific cases, such as *Avery v. State Farm*, 321 Ill. App. 3d 269. I may mention that a bit, but I'm going to try not to delve too much into that because, as Barney mentioned, it is on appeal. I think that so much of that case, in terms of how it was litigated and tried and what the issues will now be before the Illinois Supreme Court, has to do with the particular facts of that case. It is an unusual case for class actions, in that it was tried.

By the way, that doesn't make it unique. One thing that most people forget is that class actions need to be designed in such a way so that they can be fairly tried. That's where many class actions are defeated, in terms of a judicial attempt to translate common concepts into something that can be fairly tried.

There have been a number of class actions that have gone to trial—for some reason, mine tend to go to trial more than most people's, perhaps because I don't put enough chips on the table and don't create enough irresistible pressure to settle them. But cases like the *Exxon Valdez*, for example, a class action that went to trial, went on appeal, and will now be re-determined at the district court level or be retried to get just the right amount of punitive damages. *See In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

In terms of the public policy issues that are raised by the convergence of the class action procedure and statutory consumer protection statutes or deceptive practices statutes, and how federal and state courts react to these, it's good to remember a few

complicating factors. These aren't clarifying factors; they're complicating factors.

For example, in California, where I do at least some of my practice, where the conventional wisdom is that 17200 is a Goliath of a consumer statute, the truth is that that statute, though it dispenses with standing requirements, doesn't provide for damages. You can get injunctive relief, and you can get declaratory relief if you're a private plaintiff. Conceptually, you can get restitution disgorgement. In practice, it's very difficult to get any of those remedies without being certified as a class action. In fact, the California Supreme Court said a year or so ago that if you don't have a certified class action in the 17200 cases, you cannot get an injunctive remedy or complete disgorgement.

There was an appellate case this year, *Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002); it's a fascinating case for anyone who cares to become enmeshed in the esoterica of 17200. The issue, which a very clever defense counsel posited to the California Court of Appeal, was: Are the class action procedure and 17200 incompatible? Can you even have both in one action?

Interestingly, the appellate panel split two to one on that issue, and both the majority opinion and the dissent are *tours de force* on the history and policy of 17200. So for anyone who is a 17200 fan from any perspective, I would highly recommend that decision, *Corbett v. Superior Court*. I believe that it's on petition for review by the California Supreme Court. I don't know if it will be accepted. But there is an attempt to unbundle the notion of combining a class action and a consumer statute. The question is, can you even have both in the same case?

I would say yes; I don't think they're incompatible. I think they're complementary. But it's a very interesting argument on the other side.

One thing that defense counsel fear about these statutes, and somewhat unnecessarily, is that while the statute and the jurisprudence interpreting them point out that they differ from common law fraud and that in some circumstances elements such as causation or damages need not be proven, the truth is that in order to

implement any remedies under these statutes, in order to get damages, whether it's actual damages or penalties or punitive damages in those states that allow them, the courts have held that you need to prove causation. You typically need to prove intent on the part of the defendants, so it can't be an innocent act if you're going to generate penalties or damages. While the courts in most states that don't have an express reliance provision in the statute have indeed held that reliance is not required, they nonetheless require a determination of causation or proximate cause, as the court did in *Avery*.

So on the plaintiff side, we still have a case to prove if we want to translate a consumer statute that might be very powerful in the hands of an attorney general seeking injunctive relief to a weapon on our arsenal to actually obtain damages for plaintiffs.

One thing that frustrates us on the plaintiff side as well is that notwithstanding what we think is the clear statutory language in most states with respect to what is and is not an element of a consumer claim, judges, who have been schooled in the common law, repeatedly—and intuitively, to some extent—reimport requirements of reliance, for example, into the consumer statutes.

This happened to us just the other day in southern California in a court that in other contexts is called "the Bank". We had a judge basically say that you can't have a UCL or a 17200 class action because you haven't shown reliance.

That makes us want to knock our heads against the wall because there's plenty of jurisprudence that says otherwise. But it is a reflection of the fact that we all are trained in common law, and, whether it's expressed in an error-free way or not, what you've got is a judicial reaction to a claim that might be easy to bring but not all that easy to prove. Judges want to see something that actually was a bad practice, something that actually caused damages to real people, and something that the law ought to be involved in redressing.

A few years ago, in reaction to a 17200 case that was brought as a class action in the California courts, the appellate court was moved to talk about junk litigation. The court could see no social utility in the claim at all.

I think that's a good bottom line. If we step back from our own cases and controversies, that ought to be a touchstone for both plaintiffs and defendants.

The damages on a per-consumer level might be small; that doesn't mean that they're non-meritorious, insignificant, or not worth the bother of the courts. But there is an inherent concept that something ought to be worthwhile or the courts ought not to trouble themselves with it. That's what good plaintiffs' lawyers struggle with when they decide whether to bring a case. It's not just about, "Let's see if we can remember the names of the founding fathers and find a county that matches and file it there because the judge will be good." But a judge and perhaps a jury are going to have to pass on the worthwhileness of a claim. Judges who don't think a case is worthwhile, even if it's brought under a consumer statute, are going to find ways not to certify it and throw it out of court.

So there is a policy that inheres in these statutes that can't be unbundled.

We have to remember that these statutes, which arose during the Thirties and again during the Sixties, not only arose as creatures of their economic and sociological times, but also resonate in these times. Basically, what happens on a policy level in terms of bringing all the factors together that make a compelling consumer claim that will survive summary judgment, that may win at trial, that may justify a substantial settlement, and so on, is that it involves conduct that departs from respect for the individual.

My reaction to Barney's remark about morphing from an individual into a class is, that's simply what we do in response to what a defendant has done to us. If consumers have not been treated as individuals, if they haven't been respected, if they've been subjected to misleading advertising campaigns, if they've been treated as an undifferentiated mass, then there is some sense and some justice to returning the favor.

Can wholesale conduct only be redressed through retail justice? I would say that it's procedurally unjust to consign consumers to the sole option of individualized suits, particularly when the

individual claims are small and expensive to bring, and we have limits on the number of courtrooms and judges in our country.

The federal/state controversy is fascinating, and I feel very strongly both ways. If I were ever to write a book about my own practice, I probably wouldn't call it anything like "overlawyering." But I might call it "A Bleeding-Heart Liberal in the Confederate Army."

Plaintiffs' lawyers find themselves on interesting sides of the federalism debate. We find ourselves agreeing for practical purposes with recent Supreme Court decisions much more frequently than we would like. We labor under a system in which most consumer claims, much as we would love to do so, cannot be brought in the federal courts because we simply cannot meet the amount in controversy requirements under diversity jurisdiction, and the Supreme Court seems almost intentionally disinclined to help anyone out on this.

So it's a messy situation, and it's going to continue to be messy. Every time that I try to file a claim in federal court and make a good argument for aggregation of the jurisdictional minimum, it's shot down by brilliant defense lawyers. Every time that I file a case in state court, recognizing that I can't make that argument, I hear complaints such as "There they go off in some state court again when they should be in a real court, in the federal court."

Another aspect of that is that these are creatures of state law. The question as to whether a state court has any business adjudicating claims under its state consumer law for claimants from out of state is fascinating. In many instances, it is fully appropriate, if the proper choice of law doctrine is applied.

In the *Avery* case, for example, our position is that it was fully appropriate for the court to do so on the breach of contract claim, because no true conflict was found. That's what the Supreme Court said in *Phillips v. Shutz*. On the consumer claim, there are many cases in which it would not be appropriate for one court to adjudicate consumer claims under its own state law against or with respect to a nationwide class.

But in some cases, where the defendant is not only incorporated in the state, but the conduct—or a substantial or significant

part of it—at issue occurred there, so that if any one state's law had to be determined and selected, which under interest analysis is the case, that would be the most appropriate law to apply. It simplifies the proceedings. The alternative is simply to subclass to address variations among state laws.

On the consumer fraud level, there are variations among state laws. But they tend to be at the remedy stage. In other words, you've got two types of consumer statutes: a broad prohibition against unfair or deceptive conduct; and laundry-list statutes that specify examples of particular activity that will violate the statute.

In a typical case, if a particular course of conduct or act would violate any of those statutes, it would probably violate all those statutes. So you don't have a conflict at the liability level.

In the remedies level, there are variations among the states. Many states do not allow punitive damages or multiple damages. Some do. California doesn't allow any damages under 17200. The state has another statute, a much narrower statute called the Consumer Legal Remedies Act, which provides actual and punitive damages. But not every 17200 claim meets those criteria.

At the remedy stage, though, a court could, through subclassing, apportion the appropriate remedy to the citizens of a particular state.

While some state statutes seem scary in terms of the per-violation penalty—and if you total up the number of class members in that state or even nationwide, you come up with a huge number as a penalty award—I don't know of any courts that have actually gone so far as to impose those per-violation penalties on a classwide basis by aggregating. Courts, probably understandably in a situation like that, shy away from the inexorable logic of the calculator.

So courts are doing what courts can do to moderate the unreasonable impact or reach of these statutes. But it's unreasonable to expect state by state aggregating and unreasonable to expect jurisprudentially that courts will evolve or devolve to a point where every court everywhere says that if you have conduct that affected people in multiple states or nationwide, you cannot under any circumstances bring a nationwide class, but instead you have to go into every state and do it individually.

I would say never say "never," and I would be right. I think that the *Bridgestone/Firestone* decision by Judge Easterbrook comes very close to doing that. If you look at the two extremes of the spectrum—and I don't mean that disparagingly, with respect to the response of judicial ideology, philosophy, and interpretation of procedures to the same problem—you can compare and contrast Judge Easterbrook's decision in *Bridgestone/Firestone* with Judge Weinstein's recent decision in the *Simon 2* tobacco legislation, which just came out on Lexis, a 200-page memorandum explaining why it is appropriate to select New York law to apply to nationwide common law fraud claims of a very specifically defined smokers' class against tobacco companies for purposes of reaching a classwide punitive damages determination. That's on Lexis at 202 U.S. District Lexis 19773.

So there you have two federal judges, two brilliant minds, two divergent judicial philosophies, two divergent views of how law and economics do and ought to interact. The promise and the frustration that all of us face in advocating for our respective clients' positions in this environment is that we have a wide divergence of judicial thought and response by independent jurists. There is a wide array of jurisdictions available. There is a limited ability on both sides and only a limited ability to select those forums. In more cases than not, the attempt to predict or control the outcome by selecting the forum will be frustrated. Because laws change, judges are independent, and these cases do get decided, when they get decided, on the facts.

The other phenomenon that I hear every time I listen to defense counsel talk about policy is the magnet jurisdiction. I think that this year, it's—well, probably last year, it was Madison County. Maybe this year, it's Jefferson County. That's a phenomenon that's short-lived and transitory. If you try to make permanent policy based on predictions of where you think cases are going to go and on reactions to where cases have been, we're all going to founder and end up with laws that are short-lived and cases that don't fit.

Avery, for example, was not brought in Madison County. It's perceived as a poster child for the phenomenon, but it was a

different county entirely and was presided over by a judge who was selected, at least in part, by defense counsel. This was a judge who was not perceived by either side as being particularly favorable to anyone, and who made a series of very thoughtful rulings.

The ability to know where to go and when, in order to maximize recovery, has eluded me. I forgot to file any cases in Jefferson County, Alabama, and it's probably too late. I probably am counsel of record on a couple of cases in Madison or perhaps St. Clair. Good cases despite the fact that they were filed there. That's the reaction that I have to this whole debate. There are appropriate jurisdictions for cases. There may be a choice among appropriate jurisdictions. What is appropriate when one is trying to apply a single state's law nationwide is either to bring the case in the forum of the state where the defendant resides, does business, conducted the allegedly illegal activity, has a reason to be and a reason to expect and predict that that state's law will be applied, or where the choice of law doctrine that the forum court is bound to apply will result in the choice of a law that lends itself to multistate adjudication.

Alabama, for example, is not one of those states. It has a *lex locus* choice of law.

So there are principled, as well as unprincipled, ways of attempting to design predictability and uniformity into cases through forum selection and choice of law. I think there will be a lot of disagreement as to whether that's appropriate in a given case. But that's something that defendants do as well, and that they should do.

The debate over state versus federal courts, for example: my life would be a lot easier if there were a statute on the books that gave federal courts minimal diversity jurisdiction and enabled me to know with certainty whether I had to file a case in federal court, could file a case in federal court, or could not file a case in federal court. I wouldn't have to get up at 4 A.M. and wonder what was happening in all the other state courts where I wasn't on file.

But that debate involves these fundamental issues of federalism, which cut both ways, and involves a fundamental messiness in

the system that we have. Because we rely on the courts, many courts, for private enforcement, as well as relying on the government for regulation.

I run a small law firm. We have about 250 employees in several offices. I don't like government regulation very much. If I had to be a bleeding-heart anything, it probably would be a bleeding-heart libertarian. I don't like to be told what to do. So I am a big fan of private enforcement after the fact, if I've actually done something that someone doesn't like or done something that someone thinks is wrong. I don't want to be told beforehand what I can do and can't do, and I don't want to be told that by a bunch of federal or state governments.

If we want to have the liberty to do business and conduct our lives, we're going to have to recognize that the tradeoff for freedom from prior restraint through government regulation is going to be a certain amount of private enforcement. Even private enforcement when we may have done something that no government agency seems particularly upset about. If our clients are upset about it and have a claim and think there was something wrong about it, they have the right to go directly to court and seek redress. That is risky, unpredictable, and messy. But it's the price that we all ought to be willing to pay, and we ought to concentrate not on relying on government or statutory reform to immunize us from that, but recognize that we have choices, responsibilities, the liberty to make them, and, yes, accountability for the consequences.

MR. JEFFREY JACKSON: I'm glad that Elizabeth's here because she has some good comments and I have some things I would like to visit with her about later. I have followed her on other occasions. She won't remember it, but one was in front of the Federal Advisory Board Committee when they were talking about changes in the federal rules.

I'm not here to bash consumer fraud acts. I'm not even here to bash class actions. I'm not a regulatory lawyer. What I want to do today is to leave some questions with the defense lawyers in the room, any plaintiffs' lawyers who are here, and ask where we are going.

We are talking today about businesses being regulated by regulators, by lawyers, through fraud acts and class actions together. It would be one thing if all we had to deal with was Elizabeth. We could probably make peace and work out something. But we have thousands of Elizabeths, each with her own interpretation of what the rules and the practices of my fine company should be.

We'll play by any rules. Just tell us what they are. That's my message this afternoon.

I have a few comments about State Farm and a few on our Illinois Consumer Fraud Act. Then I'll leave you with a few examples of what we're facing today.

In 1922, there was another resident of the soybean and cornfields of central Illinois. He was employed by an insurance company and was always wondering why the farmers in central Illinois were paying the same insurance rates as the people did who lived in Chicago. He couldn't understand it. They didn't drive much; they weren't in many accidents. But they paid the same premiums.

The story has it that his supervisor told him, "If you don't like the way we run our insurance company, go start your own." So G. J. Mecherle walked across the street, opened up a little shop, and started his own company. He started it as a mutual company for a reason: he wanted farmers collectively to be a part of his company. That was in 1922.

Today, State Farm is the largest writer of auto and homeowners' insurance in the United States. We are in 27 million households. We have about 72 million policyholders. I mentioned that we're organized as a mutual company. We conduct millions of transactions a year. I'm told by our claims' department that it's 14 to 15 million a year. We have about 78,000 employees and 16,000 independent-contractor agents. We're in all states of the union and three provinces of Canada. And, as Barney alluded to earlier, we are operating in a sphere of heavy, heavy regulation. Each state has its own department of insurance. In some states, we can't file a policy form without state approval. Our rates in many instances have to be approved, as well.

We can't discuss consumer fraud, class actions, or any of these other things without recognizing the environment that we are in. It's very difficult when you have bonding requirements in some of these states for judgments and defendants can't even look to try a class action to judgment with the idea that if there is mistake on certification it can be resolved on appeal, particularly in those states where you don't have an interlocutory right of appeal. You can't lose sight of that. It's a bigger piece of the puzzle we're dealing with.

One thing that I want to spend a few minutes on is the Illinois Consumer Fraud Act. I know that Mr. Trigg and Mr. Howard, following our panel, are going to spend a little more time talking about California and the other states.

State Farm today has *nine* purported national class actions pending in Illinois—even though our statute says it's to apply, or is limited in scope, to Illinois residents.

The statute defines trade or commerce as any trade or commerce directly affecting the people of this state, a limitation that was added in 1973 when our little FTC act was amended to allow for a private cause of action. Legislatively, there was discussion by a sponsoring senator, who was quoted at the time as saying, "We're talking about trade or commerce that is not included within the interstate concept." That would suggest that this is to apply to Illinois only.

Fortunately, our *Avery* case was taken by our Illinois Supreme Court. We are very hopeful that the court will take the opportunity to set the record straight on the scope of the Illinois Consumer Fraud Act. I say, "set the record straight" because there is an interesting case out of our Illinois Supreme Court from 1987. It was a class action, and there was a contract involved. It was a national class action, if I recall correctly. But the terms of the contract said that all those involved would be governed by the state of Illinois. So when the case percolated up, it was decided that because of that language, the court would rule that it had application beyond the borders of Illinois. So we're hopeful that we'll get some direction there.

I'm also encouraged by our Illinois Supreme Court. It has always been known as—I don't want to say "middle of the road," because

that suggests I know where that middle is—fairly reasonable. It has recently taken another case involving State Farm on the question of *forum non-conveniens*. The case is going to involve both interstate and intrastate *forum non-conveniens*. The case is *Gridley v. State Farm*. Briefing will be completed November 6. Your guess is as good as mine as to when it will be argued.

We also had a decision issued on June 20 by our high court, *Olivera v. Amoco Oil Co.* (Docket Nos. 89497, 89511 cons.). I believe ATLA filed an amicus brief. I know that Lawyers for Civil Justice did, too. That case suggests to us that the Illinois Supreme Court is concerned about the application of our consumer fraud act. They did talk about what elements are required: that the plaintiff needed to show that there was actual deception; and that you needed to show proximate causation. So we are optimistic that they will give us a good hearing in our *Avery* case, whenever that is argued.

Let me mention a few cases in various statutes across the country. One of them is in California. It was filed last month by an Illinois lawyer seeking national certification in California. My guess is that he would have filed in Illinois, but perhaps he read *Olivera* as we did. Possibly there's some room for optimism. Maybe he saw that *Avery* was accepted. I don't know, but he's filed this national class action in California.

The plaintiff—it's not Elizabeth's case, by the way—was driving a 1972 Chevy Nova, a classic car, as it's described in the complaint. The wheel fell off, the Nova ran into another vehicle, and there was damage. The car was towed to a State Farm facility. One of our employees estimated the damage to the fender, and it had to be replaced. We were given a towing bill, which we paid. We were given other bills to repair the car, which we paid. That was three years ago.

Now we've been sued for fraud. We've been sued under 17200 because we didn't find hidden damage to this vehicle. I just mention that. It's a national class action. We have to defend it, and that's going to be argued eventually in California.

We have an Oklahoma case, which is one of those states that I mentioned earlier, in which they have to approve our policy and

our policy language before we can actually use them. In that state, if you have an automobile, it's usually insured by a policy. If you have two automobiles, you're going to get two policies. That's the way things work in Oklahoma.

But we've been sued there because someone doesn't like that rule and has accused us of capricious, improper behavior, even though we've gone through the department of insurance to have the approval of these forms issued. It's a class action.

In Missouri and Georgia, we have two different cases, two different sets of lawyers. Both involve cases in which our policyholders' automobiles were wrecked, total losses. Those facts, I think, will eventually be agreed upon.

In Missouri, our employees, in trying to assess the actual cash value of that vehicle—because that's what our obligation would be to do, and then pay it—followed the National Automobile Dealers Association guide, or NADA. You may have heard of blue book, black book. That's what they did. The allegation there is that we somehow defrauded the plaintiff because we used NADA.

In Georgia, we used a different valuation service. There are other services you can use. And we're being sued for—you guessed it—not using NADA.

These cases also sue for injunctive relief. Say that you're a businessperson. You've got numerous class action lawyers telling you how to run your business. What do you do?

What intrigues me most is a case that was filed in Illinois—and it's still pending, so I want to be somewhat circumspect about this one, too, which started as a 48-state class consumer fraud claim. It's national in scope and the trial judge in Illinois certified it. But it was originally certified in 33 states and the District of Columbia, with another 12 states in a flux class. So the reason that there were two classes is apparently because—Elizabeth can enlighten me on this one because I'm getting this through a couple of different hands here—in the 12-state "flux" subclass, the law is uncertain. So we're going to put those cases over here. But we think that the law is certain in 33 states, and that's going to be the certification: a 33 state class action.

That case involves a coverage dispute as to whether our insurance policy requires us to pay for certain elements to a damaged vehicle that's been repaired. That same dispute is being played out across the United States in other forums in other states.

As this case is pending, the class keeps changing. The definition of the class keeps changing. The named plaintiff keeps changing. I think we're on our third one now.

Some states that were in that 33-state group have ruled that the coverage is how we see it, i.e. that there isn't any coverage for these damages.

Here's my point. There's a shifting definition of the class. And we're talking about practices. We're not talking about a product or one occurrence; we're talking about national business practices that a lot of different lawyers want to tell us how to conduct.

We're in a quandary. We need some policy here. We'll play by the rules; just tell us what they are. I'm afraid that American business is going to die by a thousand cuts if we don't get this right.

And what's right? I don't know. But we've got to figure out how we as a country want to be run. Are we going to be a market-based economy? Are we going to be some other kind of planned economy? Let's make some decisions. But the way we're doing it today is causing all kinds of problems.

Some time ago, a Nobel Prize–winning economist, George Steigler, was teaching his MBA students at the University of Chicago that it was the nondelegable duty for every generation of Americans to leave insoluble problems for the next generation. Because that's what creates genius.

This may be an insoluble problem. But if we look at how long it's taken the federal folks to look at class action reform—I think we're in, what, 30 years now of class action studies, if we look at what's going on in America with asbestos now, how much longer is it going to take for some kind of resolution? I don't know what the fallout is going to be.

It's my view—and these are all my views, not State Farm's—that at the margin, we're going to see transaction costs that are going to force consumers to pay more for whatever they're buying—

services and products. It's inevitable. This litigation is very, very expensive.

At the other extreme, we'll see fewer companies. They'll go out of business. They'll go into bankruptcy.

The question is, how much longer will it take before we reach these two extremes? I don't know, but one thing is clear to me. We don't have one group that will determine that. We're fighting a war on a many, many fronts and we don't know where we're going to end up.

MR. OLSON: We have asked Elizabeth Cabraser to add a few more comments, if she has any reaction to what Jeffrey was saying.

MS. CABRASER: I'm not about to waste anyone's valuable time with State Farm bashing, because I don't think that's appropriate.

I think the *Avery* case—I can't really comment on the other cases—is about a fundamental issue on which the two sides differ fundamentally, and about which they both feel very strongly.

State Farm says, "We're regulated in every state. We have insurance commissioners. They tell us what our policies can say. No one told us that we couldn't use non-original parts, and you've got a lawsuit telling us that we can't."

We agree. No one told State Farm that it couldn't use non-original parts. Our case is about a contractual provision, a sentence that's the same in all the policies across the country, which promises a particular level of quality. Our case is that quality was not delivered because the parts that State Farm selected, non-OEM parts, did not live up to that contractual promise. That's something that was not regulated. That's something for which the states had not preempted the field. That was a contractual beef between the policyholders and State Farm. It also fell under the consumer fraud statute because we alleged and demonstrated at the trial level that that quality differential was known and that we met the elements of the consumer—it wasn't accidental. It wasn't a strict liability situation.

Obviously, those are fighting words, and we fought over them and will continue to fight. But that illustrates a classic case in which

you have a regulatory system in place that does not cover the conduct at issue in the lawsuit and in which a written contract between the plaintiffs and the defendants gives rise to a direct cause of action. That's not always going to be true in a consumer case, even a case that could be brought under a breach of warranty theory.

Sometimes you don't have a contract. Sometimes you don't have a sentence that's the same or means the same for all class members. So you can have some complicated and vexing issues in terms of the overlap of governmental regulation, statutes, the common law, and private enforcement. State Farm is probably not the correct poster child for that debate, at least not in our view.

I also want to make a marketplace comment. Francis McGovern mentioned the concept of using the marketplace to decide the value of a claim over time in many courts, to avoid the all-or-nothing situation.

The conundrum there is (and I think it's been eloquently stated by Jeff): Does a company want to be exposed in many states at many times from many directions with the same or similar claims involving the same conduct, the same product, or the same contract, and watch the courts go back and forth over what that means and be faced with multiple defense and conflicting rulings? Or does the company want to face that claim in one place at one time? Or would the company prefer not to ever face it at all?

If you had the three choices, you'd prefer not to have to face it at all, but often that's not a realistic choice.

If there were a way to construct a fair procedure to allow a marketplace of trials or adjudication that could play out before the company was bankrupt or all the plaintiffs died, we'd all love to see that. There's a lot of debate and discussion about that and a lot of struggle toward that.

If you look at Judge Easterbrook's ruling in *Bridgestone/Firestone*, which drives me bananas, at least what he was saying is, I may not like these claims very much, but they may be worth something; let's let the marketplace decide what they're worth.

The problem with that opinion in a consumer context is that there's no marketplace. The cases aren't worth enough individually

to justify the expense of prosecution and individual defense. There aren't enough courts in the country. That marketplace will never happen. The claims will go unprosecuted and, at least from the plaintiffs' perspective, you have a failure of justice.

In other cases, such as asbestos, those claims are worth bringing individually, and there are lots of them. But you have a situation in which you can't conduct an efficient marketplace because the court system is clogged and stalled, and company after company goes bankrupt.

So if we want to create a balance between accountability, predictability, efficiency, economy, and fairness, so that companies and consumers alike can live with a complementary system of government regulation (minimal, one would hope), private enforcement (fair, one would hope), and litigation whose costs don't exceed its benefits, we're going to have to come up with that mechanism. It's a completely new mechanism.

We don't have a model for that. We've got a framework for it in the federal rules, but no one has filled in the gap.

Say that someone came to me and said, "You may think this is a wonderful claim, but here is how you're going to have to prove it. This is how many trials you're going to have to go through, and here's where the court is that's going to decide that claim. This is the law that's going to govern, and here are your choices. You're going to have to convince the court which way, and this is how long it's going to take." That would enable me to figure out if it's worthwhile. It also would enable any company to decide whether that is a risk or gamble that it wants to take and see played out, whether it wants to resist the claim, or whether it wants to settle the claim without betting the company.

There are "bet-the-company" cases out there, deservedly so. We'll differ about which ones those are. But they're rare. The usual case is not a bet-the-company case. The usual company makes lots of products, one of which may be defective. The usual company issues lots of insurance policies, one of which I may think is misleading.

That's not a situation in which we ought to be betting the company. It's not a situation on my side where I ought to be betting the

lives or interests of my clients on a system that we're all frustrated with and that none of us can predict.

So it's a huge task. Maybe we're better off leaving it to the next generation, saying that we can't solve it, and we'll just keep whining. But I don't like to whine, and I don't think anyone in this room does, either. I know that we'd all like to go ahead with the business of doing what we do, knowing what the risks are, what's at stake, and what's going to govern our conduct.

In this country, you can't count on legislatures; you can spend a lot of money lobbying, and ATLA can spend a lot of money lobbying. We can go through election cycles. We can do all that. The existence of the consumer fraud statutes today shows that, at least to some of you, that is beyond our ultimate control.

But we, as lawyers, in-house counsel, litigators, academics, and judges, have a common law system of interpreting and enforcing statutes. We can create the framework to do this. We can experiment and come up with systems that are fair.

MR. OLSON: I wanted to pursue something that Elizabeth Cabraser mentioned, and it also came up at lunch. Namely, the statutes provide for statutory damages, say $500 each, and then you get an enormous aggregation effect. On paper, at least, there is an *in terrorem* threat of whether the defendant is going to have to pay billions of dollars.

I thought of one counterexample to the generalization that these are never actually used as stated, namely, the junk-fax cases that have been filed in several cities, where, say, a Mexican restaurant has been told to pay $25 million because the court did a simple mathematical calculation on the basis of the statute.

There is, of course, a widespread sense of unease, not just among defendants as to whether that is going to be a precedent for other cases, perhaps telecom companies with spam, and so forth; a different kind of unease comes up with the explanation that you offered, which is that judges find ways not to expose defendants to the harshness of that, so they find ways to get around it or find some intermediate sanction that wasn't actually on paper as part of the law.

That should make us worry about different problem with arbitrariness and randomness, given that in a regime of judicial evasion it makes a huge difference as to which judge you draw and it becomes less predictable as to what the courts will do.

Is there a way out of this?

MS. CABRASER: One way out—and I'll break my own rule about not trying to amend the statutes, but I'm not sure from a policy standpoint whether this is correct, is obviously to have caps on a particular course of conduct. For example, it's X per violation, but in no event greater than Y. Some state statutes do this. So if you have a single course of conduct such as the mass fax that goes out at 3 A.M., you're going to be stung for that if it violates a law. But there's going to be a limit.

The Supreme Court may be showing us the way on this by coming at it from the punitive damages perspective in the *Cooper Industries v. Leatherman Tool Group* case, 121 S.Ct.1678 (2001), which came out last year. The Supreme Court for the first time—it had been working up to this—said flat out that there are constitutional limits on the punishment that can be imposed on any defendant for punitive damages arising from any course of conduct. That's a matter of substantive due process. In fact, *de novo* review of a jury award of punitive damages is mandated. Many states do that already. But all states and federal courts must do it now to make sure that a court, which is a better judge than a jury of proportionality and whatever else the defendant might be facing in other places, can come into play.

If courts are going to be required to do that—and they are, in punitive damages cases, to avoid repetitious or disproportionate punitive damages—it makes sense for legislators to consider or courts to impose other limitations.

You can best do that, though, if you've aggregated the claims in one court. Or at least you should have a system so that the courts know where the claims are, how many of them there are, and what the level of exposure it is that the defendant faces versus the level of reprehensibility or the clearness of the violation, to make that proportional determination.

But I'm amazed that defense counsels haven't made more of the *Cooper* case than they have.

AUDIENCE QUESTION: Regarding your point about letting the marketplace decide: my understanding of Judge Easterbrook's statement—that the market should decide in a consumer product situation—is that people can decide whether to buy the product. It sounded as though you were referring to the marketplace as the courts. Could you clarify your understanding?

MS. CABRASER: Yes. I just finished filing a petition for a cert to the Supreme Court from the Easterbrook decision, so I've certainly got a bias in terms of how I view that decision. I think that he was talking specifically about a marketplace of different courts and different juries evaluating the consumer claim at issue in that case. He wasn't talking about people making choices as consumers, because the claim in that case was that consumers weren't told something that was material or would have been material either to their decision to buy the product or to pay a particular price for it. It's the classic consumer claim in which something is concealed or misrepresented about the qualities or characteristics of a product and people are not exercising informed choice about it.

So it's an after-the-fact-marketplace for the litigation, not a before-the-fact-marketplace for the product.

Our claim was that the marketplace would have decided if the consumers had been told what they should have been told about the product up front. Because the manufacturer decided not to make those disclosures and misrepresentations, consumers were misled.

So our marketplace concept in terms of our claim was that a marketplace would decide between competing products when the qualities and characteristics of the products are clearly and accurately disclosed. Then people can decide what they want to buy and how much they want to pay. The conduct disrupted that process.

Judge Easterbrook is saying that you have a consumer claim, so we're now going to let the marketplace of the judicial system decide whether you have a valid claim and, if so, what that claim is worth. In the end, you can settle your case with the defendants for the right amount because you'll have the information.

Our problem with that is that we'll have spent much more time and money than the claims are worth by then. Judge Easterbrook would probably say, "Exactly. Don't bother me." The defendants, though they love the outcome, have the ironic situation in which they may be spending much more to defend a claim.

The *Firestone* cases, by the way, are now pending in 12 states. It's become the *Cooper Tire* case. It all started out in one MDL as a federal case. We laughed at *Cooper Tire* because it was so diffuse and wasteful. The last laugh—or the intermediate laugh—goes to *Cooper*, because that case settled consensually for what both sides thought was the right price. And the *Firestone* case, which started out in a single court aggregation, is now a diffuse case in 12 states. So who knows who will have the last laugh? It's a case study in something, although I'm not sure what.

MR. JACKSON: Elizabeth, you said that the old way was: if there was an issue on a coverage matter, declaratory judgments were often filed and then worked their way through courts. The new way seems not new any more. It's gone on for too long. Now attorneys file a class action, look for the declaratory judgment action, layer on top of that a fraud claim, layer on top of that whatever else you want to lay.

Panel Two

Successful Defense Litigation Strategies

John Turner
(Moderator), Editor in Chief, Environmental Law Reporter

H. Joseph Escher, III
Howard Rice Law Firm

Jack Trigg
Wheeler, Trigg and Kennedy

MR. JOHN TURNER: The last panel for today is entitled "Successful Defense Litigation Strategies," which suggests that there are indeed some strategies. We'll find that out soon enough. We have two speakers who, if there were such creatures, would certainly know about those strategies and perhaps have used them in their own practices.

I want to say something in particular about the California experience and about some of the expansive use of class action, representative actions, and so on.

Most of you probably know what a representative action is. That has, at least in California, significantly reduced the odds that litigation be used as a tool for "enforcing" consumer protection statutes. Federal decisions hold that if an attorney representing a class is a member of the class, it's generally impermissible, because the attorney's interest in taking the fee from the litigation is different from that of the members of the class. But in California, at least, the state courts often take the position that if the attorney is a valid member of the class, the fact that he or she is appearing for

the class doesn't disqualify that attorney from being a class representative.

So you have situations in which you not only have that kind of phenomenon; you have broad interpretations of the phrase "unlawful, unfair, and fraudulent." You have the possibility of treble or punitive damages. You may have a provision or stipulation in which there is no requirement of individual proof that the practice was unfair or fraudulent to each of the affected consumers in a class action. Courts may permit restitution of any money or property that "may have been" acquired by means of any impermissible practice.

So this all asks the question, what can be done, if anything, with regard to defense strategies, short of changes in the wording of the state statutes? We've already discussed the fact that that may be very difficult to accomplish.

We have two speakers today who are noted authorities in this kind of litigation and in defense litigation in general.

Joe Escher is a partner with the Howard Rice law firm in San Francisco. He has been director of that firm since 1982 and serves as chair of its litigation department. His business litigation practice focuses at both the trial and appellate levels. He has extensive experience with consumer class actions, breach of contract, unfair competition, antitrust, and intellectual-property claims.

He has served as law clerk to the Fifth Circuit Court of Appeals. He received his law degree from the University of Chicago and undergraduate degree from Stanford.

Jack Trigg is an attorney in Denver with the Wheeler, Trigg and Kennedy law firm, where he's a director. He has a national litigation practice that focuses on complex business litigation, product liability, and class actions. He has represented major corporate defendants as national trial counsel and has tried cases to juries in many state and federal courts throughout the country.

He has also focused on risk management and design and analysis of document retention and control programs. He frequently handles large claims that arise out of recurrent design or manufacturing defects or recall problems.

He's active in numerous bar organizations. I'm sure many of you know that he's a past president of LCJ and past president of the Federation, as well as a former board member of the DRI.

He is a fellow of the American College of Trial Lawyers.

MR. JOSEPH ESCHER: I'm here to talk about a statute that's been mentioned on a number of occasions today. It's California's Unfair Competition Law, also known as Business and Professions Code, Section 17200—or just 17200, for short.

This is an example of saving the worst for the last in subject presentation, because California's statute is truly dangerous, truly unpredictable, and a serious threat to businesses in California.

It's a statute that has been applied from situations as diverse as Cap'n Crunch and Lucky Charms Leprechaun advertisements to the bribery of Korean bureaucrats, to a political speech regarding working conditions in factories in East Asia. This is all in the context of a state that views itself as being almost a sovereign in many ways.

The text of the statute is not so extraordinary. People talk about how broad it is, but it actually says very little. Section 17200 says, "Unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice."

That seems clear. Section 17203 talks about what sorts of remedies you can get. It says, "The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of unfair competition."

That doesn't seem very clear. What we've got is a long series of common law decisions that have given contours to this statute, which in some way seems to threaten to swallow the common law almost entirely.

It's not much of an exaggeration to say that the California Unfair Business Practice Act gives everyone standing to sue anyone for anything that no one could sue anyone for.

The statute is very broad, and the case authorities on it are still developing. There are a large number of unanswered questions about what Section 17200 really means. I can only give you a brief introduction on this, and I'm going to focus on the private enforcement litigation rather than government enforcement litigation.

You should know, if you don't already, that this is a claim that is routinely included in most California commercial or consumer litigation. I would say that in my own practice, I don't have a single case in which this claim isn't included.

The first thing that's notable about this statute is the part about the standing of all persons, the notion that anyone has standing to sue any business for any unfair business practice regardless of whether you've been hurt: that's obviously a very dangerous thing in and of itself.

But even in that context, you've got to make distinctions. There's a distinction between what you would think of as a purely private attorney general action in which someone who has no injury and no involvement with respect to a particular practice can nonetheless sue as a private attorney general. On the other hand, you may have someone who has an injury or has an interest in an unfair business practice or an alleged unfair business practice that can bring an action in his representative capacity. But both the private attorney general and the individual who actually has a claim for unfair competition can sue on behalf of everyone. That, in addition to this vague notion of how broad the statute is, is what makes it so dangerous.

For example, in a private attorney general action, the plaintiff's attorney himself can be the plaintiff. Or the plaintiff's attorney's legal secretary could be the plaintiff. Or a shell corporation with an attractive name like Stop Youth Addiction could be the plaintiff. Anyone can be the plaintiff, including the plaintiff's attorney himself or herself.

Essentially what this creates is an opportunity for something that's quite similar to a class action without any of the due process limitations and without any of the limits—although obviously, in some jurisdictions those limits are more theoretical than real—about

superiority, the predominance of common questions, or the like.

You can get attorneys' fees in 17200 cases if you prove you've done something to aid the public weal. But there are no damages, no punitive damages, and no treble damages. So although the California statute is a Goliath of sorts, it's a Goliath with vulnerabilities, and one of them is this business about there not being any possibility of getting damages.

What you can get is an injunction or an order for restitution or disgorgement, but the notions of restitution and disgorgement can be tricky. Restitution can either be more or less than damages. You can get restitution in the context in which you have no damages. Of course, you might be able to get restitution in the context in which the restitutionary remedy would be much less than damages because it wouldn't include any consequential damages. You'd only get your money back.

So to turn again to the substance: the first prong is whether the business practice is "unfair" And you know as well as I do what "unfair" means. You can just hope that the judge feels the same way you do.

Unfairness can be established either by expert testimony, as it did in the context of the *Committee on Children's Television Inc. v. General Foods Corp.* case, 35 Cal. 3d 197 (1983), which involved those fiends, Cap'n Crunch and the Lucky Charms Leprechaun. It can be established by the use of surveys. I think that it's possible to allege that an act or a practice is unfair even if it's solely a breach of contract. So if your client has breached a contract, it's conceivable that that in itself could be considered unfair.

The second prong is "unlawful " Well, you think, that's easy. But there are lots of laws and regulations. In California, it is unlawful to ask someone for his telephone number when completing a credit-card transaction. The Song Beverly Act. Under Section 17200, you can bring an action against a company that asks for phone numbers when it does credit-card transactions and can sue on behalf of everyone in California to try to get a restitutionary remedy, an injunction, or disgorgement of profits unlawfully obtained on those transactions.

Another example would be the antitrust laws. There are situations in which Section 17200 can be used even if there is no antitrust injury. For example, there are reported decisions, even by the California Supreme Court, allowing someone to sue under Section 17200 on an allegation of a group boycott when, in a parallel federal action, there has already been a determination that there's no antitrust injury and that the case needs to be dismissed.

So Section 17200 can be used in ways that are very dangerous, because the existing limitations that you have on unlawful and unfair allegations can be circumvented. For example, you could have a law where there's no private right of action. Basically, 17200 gives you that private right of action because you can borrow the breach of a law or regulation as a basis for the 17200 action.

The third prong is "fraudulent," and everyone knows exactly what that means—except that this is fraudulent without any actual deception. You don't need to prove that anyone has actually been deceived, only that there's a likelihood of deception. My guess is that that can be proved with expert testimony as well.

When you take those three prongs of Section 17200—unfair, unlawful, and fraudulent—you see how difficult it is to prevail on any kind of dispositive motion in a 17200 case. It's very difficult to prevail on summary judgment or on a demurrer or any other kind of attack on the pleadings. Essentially, anyone has the ability to pile up quite a few chips by bringing a 17200 claim on behalf of the general public, and your ability to get rid of that case without a trial is quite limited.

We've talked about Lucky Charms. Another example would be the illegal sale of cigarettes to minors, the *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* case, 17 Cal. 41 553 (1998), in which they just went through the yellow pages and sued every mom-and-pop store in the San Francisco Bay Area on the basis that they had sold cigarettes unlawfully to minors. No kind of individualized proof. They can put all the chips on the table and create a huge amount of risk and transaction costs for all the defendants, many of whom really couldn't afford to defend the case at all.

Other examples are insurance or other financial-product disclosures. That's a very routine use of Section 17200. Once again, because of the vagueness of the standards, it's difficult to get rid of one of those cases on a dispositive motion.

It's been applied to foreign bribery. We're talking about the *Korea Supply v. Lockheed Martin Corp.* case, 90 Cal. App. 4th 902 (2001), in which the complaint sought the disgorgement of all profits from a major defense contract based on the unlawful act of bribery of a Korean government official.

Another example would be labor conditions in certain locations in the Pacific Rim: people brought actions for the conditions of textile workers in Saipan under Section 17200. Or even public statements regarding overseas factory conditions: Nike's statements about the working conditions in its subcontractors' factories in east Asia were considered to be a violation or at least would have to go to trial on the issue of whether they were a violation of Section 17200. Even the nonpayment of overtime wages has been considered to be a proper subject of restitution and a subject of a 17200 claim on unlawful, unfair, or fraudulent.

The plaintiff's ability to create risk for the defendant corresponds to the ability to impose discovery costs on the defendant, because you can bring an action on behalf of everyone as a private attorney general in a representative capacity. What that means is that the scope of discovery can be very broad, just as it would be in a class action, but, of course, without the protections of a class action and the procedures in place to get a determination up front, whether or not some sort of aggregated proceeding was appropriate.

We're supposed to talk about possible defense strategies, and there are some. It isn't as if there are no chances of success and that you have to settle every section 17200 claim that comes your way.

Of course, one strategy for defendants is removal. Getting yourself into federal court is generally considered a good idea for defendants. But in the 17200 context, that's a problem because in a private attorney general's Section 17200 case, the case law indicates

that there is no case or controversy. Because the individual plaintiff has no injury, it doesn't meet the cases or controversies requirements of Article 3 of the U.S. Constitution, which has no counterpart in California. So this really is a case of everyone being able to sue anyone for everything that no one could sue anyone for. In fact, it wouldn't even be a case or controversy under federal law. Because of that, you can't remove, even if there's a federal question or if there is complete diversity.

There are exceptions. In a context in which the plaintiff is bringing not just a private attorney general action but rather has its own claims for relief, and without the 17200 claim, the case would be removable. There's an argument that it's an example of procedural misjoinder to add the private attorney general action on to the existing case or controversy that the plaintiff actually has, that the underlying injury would constitute a case or controversy, and the addition of the 17200 claim wouldn't make it not a case or controversy.

But there are problems with removal of a straightforward private attorney general action. Lots of cases involve people who do have injuries or alleged injuries, so they're bringing it in a representative capacity, not purely as private attorneys general.

Another thing to focus on is the lack of damages. Damages are not a remedy under Section 17200. The *Bank of the West v. Superior Court* case, 2 Cal. 4th 1254 (1992), and numerous other decisions, have established that absolutely. So you can't get damages. But you can get disgorgement of profits if you are also a class action. The law on this has started to become tricky. I'll explain that when I get to the subject of class actions.

Another argument is that the conduct itself isn't prohibited. For example, if you're bringing an unfair competition claim based on essentially borrowing some FTC regulation, and it turns out that you're wrong and that the FTC allows the particular conduct in question, there's a very good argument that under the *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* decision, 20 Cal. 4th 163 (1999), you can't proceed on at least that prong of Section 17200. You would be able to win on the basis that essentially

the government has told you that you can do that. If the government has told you that you can, 17200 can't tell you that you can't.

Although there are limits on that and although that seems like a reasonable proposition, it's not at all clear that that's the general rule. It's possible that the *Cel-Tech* decision will be interpreted as applying only to competitor cases and not consumer cases.

Another issue is the extraterritorial effect of California law. You'd be amazed to know that California courts don't seem that modest; they seem to think that extending California's laws to companies that have their operations elsewhere is a perfectly reasonable thing to do.

There are some limits on the extraterritorial effect of Section 17200. If the plaintiff isn't a California resident and the actions didn't take place in California, they can't use 17200. But if the plaintiff is a California resident, you're in trouble in terms of avoiding the extraterritorial effect of Section 17200.

Another possible defense focused on what I would call primary or exclusive jurisdiction issues. This is particularly appropriate in the context of heavily regulated businesses such as insurance.

The *Farmers Insurance Exchange v. Superior Court* case, 2 Cal. 4th 377 (1992), establishes the proposition that there will be situations in which you can't bring a 17200 claim, or at least that it needs to be stayed while the regulator deals with the particular issue in question, and that there are certain sorts of regulatory matters for which you can't simply borrow 17200 and replace the single regulator with the 35 million regulators of the citizens of the state of California.

There's also the filed rate doctrine in the context of insurance. That's the *Day v. AT&T Corp.* case, 63 Cal. App. 4th 325 (1998), which gives insurers in particular and other businesses that have regulated rates the ability to argue that you at least can't challenge the approved rate under Section 17200 as being unfair, unlawful, or fraudulent.

But there have been severe limits on the usefulness of these sorts of defenses. For example, the attorney general and law

enforcement are tasked with enforcing the rules against the illegal sales of cigarettes to minors.

Of course, there are federalism concerns. There are still preemption defenses that are available as a matter of substantive law. And there are some constitutional limits, though those seem to be few and far between.

The California Supreme Court had a very negative ruling on the First Amendment protections in the context of the *Kasky v. Nike, Inc.* case, 27 Cal. 4th 939 (2002), where Nike was making public statements about its position vis-à-vis the labor practices in East Asia. But that case is currently the subject of a cert petition to the United States Supreme Court.

Another useful defense is the statute of limitations, which is generally four years. But the tricky part is that Section 17200 focuses on conduct, not on the injury to the plaintiff. Remember, you can't get any damages. There's a good argument that the accrual of the claim would be focused on when the conduct took place, rather than on when the plaintiff had an injury. So if you're talking about something you did over four years ago, that the plaintiff has only recently discovered that they have some sort of injury about, there's a very good argument that the four-year statute would be a bar to that. That's a very useful defense in the context in which, under California law generally, it wouldn't be nearly so useful because of our discovery rule for the accrual of claims.

Another good point is the issue of standing. You can raise the adequacy of representation issue; an area that I don't think has been completely foreclosed yet. But it's tough, and right now it seems as though anyone can bring an action for restitution for what would be a class if it were a class action, and that the burden will be on the defendant to identify these crypto-class members and provide some sort of restitutionary relief to them.

There are also arguments that you can make about manageability, but that's an issue that is not yet well developed. Maybe we'll get more clarity out of the California Supreme Court in coming years on that issue.

You're probably asking yourself, if I've got 35 million potential

plaintiffs and I want to settle the case, how do I get *res judicata* protection? The answer is, you probably can't.

There was a case involving an approval of a settlement under Section 17200 by the attorney general, and the court of appeals found that that would constitute a *res judicata* as to anyone else who sued you. But that case was de-published and you can't cite to it. It's not at all clear that there's any conceivable way to get *res judicata* protection. You are subject to being sued over and over. Of course, you'd have a setoff against anyone to whom you'd already paid money in some sort of restitutionary basis.

In terms of trying to limit the recovery, the *Kraus v. Trinity Management Services* decision, 23 Cal. 4th 116 (2000), by the California Supreme Court, recently has found that you can't get fluid recovery in the context of a representative action without getting class certification. So that sort of remedy isn't available unless you have a class action. But it looks as though you can get a restitutionary remedy on behalf of the entire group of individuals who are affected by the unfair practice.

As far as disgorgement, it looks as though you can only get that in the context of a class action, but that could be a draconian remedy to disgorge all profits that are related to an alleged unfair practice, especially in the context in which you may have done something that injured no one, and no one could prove any damages.

This whole issue of the interaction between Section 17200 and the class action rules is a live one. The *Corbett v. Superior Court* case, 101 Cal. App. 4th 649, to which Elizabeth Cabraser referred, is currently being sought to get a petition for review to the California Supreme Court to see whether you really can get class actions in a 17200 context. There are a number of reported cases that do allow class actions under 17200. For those of you who practice in the class action area, it's a scary prospect, because under 17200 you don't have to show actual deception, reliance, or causation. Which means that the central argument you have in class action fraud–type cases—the notion that it's necessarily going to degenerate into a very large number of mini-trials—has been gravely compromised by the rule that says you don't have to prove actual deception.

So this combination of Section 17200 and the class action procedure is extremely potent. It means that not only can anyone sue, including someone who doesn't have an injury, but that you can get the remedy of disgorgement and restitution in a fluid recovery. So you have the worst of all worlds, and it's in a context in which the central defense of no actual reliance and a need to make an individualized determination is gone.

They can't get damages, but one shouldn't think that the fertile minds of the plaintiffs' attorneys couldn't think of how to cast a restitutionary remedy or a disgorgement remedy in ways that might be even worse. There are a number of cases on this recently, in the vanishing premiums context for life insurance and in a number of other contexts.

You're probably wondering: With all these difficulties, what actually happens to the 17200 cases? You guessed it: they get settled. The reason is that the plaintiff can put a lot of chips on the table, and there is no judge and no real plaintiff to say no.

The 17200 cases are often in practice, believe it or not, about the plaintiffs' attorneys' fees. Many of these cases are settled on the basis of paying the plaintiffs' attorneys' fees and entering into a relatively innocuous stipulated injunction, or less. Or just the plaintiffs' attorneys' fees. You're not buying *res judicata*. There is no judge to approve the settlement.

You may think that that sounds like a shakedown. But there are times when, depending on the price, the shakedown is the best of all possible worlds.

So that's the basic story. A very scary statute. There are lots of unanswered questions about it and lots of peculiar rules. We don't know how the law is going to turn out for sure in many of these contexts. But I can tell you that just about anyone can sue you for anything in California, and your best hope is that that person will go away for not very much money.

MR. TURNER: Before we move on to Jack's presentation, which is not so much about California, I want to ask Joseph a few questions about this very interesting statute.

One of its most interesting aspects is that it borrows violations

of other statutes and treats them as violations whenever they are part of something that's being conducted pursuant to business activity as unlawful practices independently actionable under 17200.

I remember one case that dealt with, I think, the Mobile Home Act or something to that effect, where you had a mobile-home-park owner who had dumped refuse or something on the park grounds, had not maintained some underwater or underground cable, and so on. The statute in question specifically said that violations were to be heard by the regulatory commission. But the court bootstrapped the "violation" of that act and heard it under 17200 and went ahead and ruled that it was actionable.

Are there any instances that you're familiar with in which the court has dealt with a so-called controlling statute that specifically prohibits recovery for certain activity, but the court has, in bootstrapping that statute into 17200, nonetheless held that an actionable claim could be held under the statute?

MR. ESCHER: I certainly have dealt with that issue, and the answer is complicated.

The *Manufacturers Life v. Superior Court* case, 10 Cal. 4th 257 (1995), which was decided by the California Supreme Court, dealt with this issue in the context of an alleged group boycott that would have violated both the state antitrust statute and the state insurance code. Because there was no private right of action under that provision under the state insurance code, the court said that if it were simply a borrowing of the California insurance code, we would say that you couldn't use 17200 to contravene the public policy against the private right of action. But because it would also be a violation of another statute that doesn't have that public policy, you could proceed under Section 17200 because it would violate the state antitrust law, so you could use 17200 to remedy that.

MR. TURNER: You also mentioned the potential defense of the extraterritorial effect of application of a judgment. In your view, is this defense strictly looking at the wording of the statute and its applicability to consumers in California, for example? Or is there a constitutional defense that may be applicable?

MR. ESCHER: I think that it's a constitutional defense. I don't think there's anything in the statute to put those sorts of limits on it.

MR. TURNER: You also mentioned preemption. I gather that those decisions are few and far between. Maybe a few with regard to the federal securities statute, maybe one or two with regard to the tobacco cases?

MR. ESCHER: That's right. I think there was a recent one in which the state trial court determined that the federal Cigarette Labeling and Advertising Act would have preemptive effect with respect to 17200, although there was a California Supreme Court case going the opposite direction. But that was decided before a recent decision of the U.S. Supreme Court construing the labeling act's preemption scope.

MR. TURNER: Have there been any serious efforts in the last few years to revise 17200 through the California legislature?

MR. ESCHER: I think there's a person in the audience who's better placed to answer that than I am. The answer is yes, and it hasn't been successful. Believe it or not, the plaintiffs' bar is politically powerful in California, and they kind of like the statute.

MR. TURNER: Well said.

AUDIENCE QUESTION: Has anyone ever challenged the constitutionality of 17200 for vagueness? Because you keep talking about it being vague.

MR. ESCHER: I don't think that has happened at the appellate level. I have seen references to people making that argument, but there's no reported decision that has dealt with that issue.

MR. JACK TRIGG: I've been listening to this debate all day, and frankly, when Sheila made her comments at noon, I was tempted to stand up and say there aren't any defenses, and then sit down and save everyone a great deal of time. But that's not true.

But, I have to respond to several questions that were asked earlier. Now that I have the pulpit, these points need further clarification.

One gentleman asked, and I'm sorry that he's not here now, what is it that we hope to achieve. I have learned since I have been

involved in defending these actions, including participating in a trial on the California Civil Legal Remedies Act and the Uniform Commercial Law, 17200, is that you cannot advise a client as to whether a particular practice is prohibited or not prohibited. You cannot answer a businessman's question, "If I do this, am I staying within the law?"

A lawyer should be in a position to advise his client as to the appropriateness of the client's activities. That seems to me to be a fundamental basis of law, that you should be able to tell your client that this is an acceptable and appropriate procedure.

One reason that businessmen dislike lawyers is because they never get a straight answer; they always get waffling. If there is anyone in this room who believes that under your individual state statute that you can tell your client that this activity is appropriate, you are a braver person than I am. Because you cannot do it.

The other reaction that I have is a historical one. We heard today that the majority of these statutes were passed in the late Fifties and early Sixties, when a wave of consumerism swept this country. Recently, I—as I'm sure many of you have—read the book by Tom Brokaw called *The Greatest Generation*. Brokaw discusses hundreds of interviews of World War II veterans who came back from that war with the horrible experience of knowing that many of their compatriots were killed. In one unit, only seven were left out of 250.

It didn't matter whether they were of a particular race or what their religious background was, and it didn't make any difference how they had been raised, whether economically oppressed or in a silver-spoon situation. The majority came back and shared three characteristics: they were deeply religious; they were deeply involved in the activities of their community and were committed to make things better; and, most relevant to us, they had a deep commitment to individual responsibility.

I have been sitting here all day, pondering how it can be that those individuals—who, after all, in the late Fifties and early Sixties were populating the legislatures of the individual states of this great country—passed so many of these consumer protection laws. And

are the statutes really that bad, or have they now been taken to limits that were never envisioned at the time that they were initially passed?

Considering that background, I don't think it was ever envisioned that the consumer protection laws could be coupled with class actions. I don't think it was ever envisioned that plaintiffs would be entitled to bring actions in which the plaintiff or the consumer bringing the action, did not have the burden of proving actual confusion by the deceptive practice, of proving reliance on the particular activity, of proving that they were damaged, and of proving that there was intent by the company to deceive by the activity being challenged.

I don't think it was ever envisioned that these claims would be stretched to the limits to which it is now been. Finally, I don't think it was ever envisioned, such as in the *State Farm* case, that you would try a case with the perfect plaintiff. The aggregate plaintiff is a defense lawyer's nightmare.

In many of the cases that each of us has historically won, we have an individual who we can challenge as to his individual proclivities, what he did, what he looked at, and how he reacted in a given commercial transaction.

If you remove all those factors so that you create the perfect plaintiff, mold him out of many plaintiffs, the thing that is created is a perfect plaintiff without any warts. The defense lawyer can't question such a plaintiff about his individual reaction to the alleged deceptive practice, and the defendant will have lost many defense tactics.

I would like to mention one case, *Broussard*. *See Broussard v. Meineke Discount Muffler Shops, Inc*., 155 F.3d 331 (4th Cir. 1998). The court there refused to permit the case to proceed with an aggregate plaintiff. But Midas is a very dim light in a sea of very bad decisions.

I am always amazed when reviewing decisions on this subject that people forget that these particular actions are statutory creations. First, I would advise you to read the statute—and not cursorily, to see whether your particular prohibited practice is listed.

Read it with the consumers in mind. No one seems to challenge the fact that, under the statute, the plaintiff—whoever he is—was, in fact, a consumer. That is the absolute first line of defense that should be raised.

Second, what was the business practice, and is it in fact something covered by the statute?

There are two types of consumer fraud statutes. The first type consists of about 30 states that modeled their statutes after the Uniform Consumer Protection Act, Uniform Deceptive Trade Practices Act, and the Uniform Consumer Sales Practices Act. But the problem is that not one of those states passed the statute in a uniform manner. They all found it necessary to further define exactly what is prohibited. In particular states, such as Colorado, they have listed 43 potential consumer deceptive practices. Mississippi has 11. But every state then has a catchall provision such as, "If you don't fall within any of the specific provisions of the statute then here is a catchall provision that may apply." I believe that the next challenge, and the one that should always be there, is that these statutes are unconstitutional.

Somehow it doesn't seem right, when your client is going to be subjected to punitive damages and multiple penalties. If you have $1,000 per violation, and you have 2 million consumers, soon you're in some real money. I think you're entitled to know what activities are prohibited ahead of time and not to have a court, after the fact say, "Well, we think it fell within the terms and provisions of the statute." There should always be a void for vagueness challenge under the Constitution, unless you have a practice that is absolutely listed in one of these categories under the statute. I would submit that most of them are not.

Finally, I have to mention my favorite California case, even though I was supposed to do the other 49 states. You don't have to do anything in California because in my favorite case, the *Lucky Stores* case, *see* 17 Cal.4th 553, the plaintiff had never been to the Lucky Stores. She was the plaintiff's attorney's mother, and admitted that she had no idea what the whole thing was about, but the court said that was good enough to give her standing to sue.

The other type of statutes is the baby FTC acts; there are about 11 states that have those. You have many more defenses in the baby FTC cases because there's a significant body of law under those statutes that is much better developed. It is more business-oriented because the FTC is supposed to assist business and to regulate only truly deceptive practices. So don't forget to look at whether you have a baby FTC act. In fact, even when under the other statutes, I would look at the FTC precedents, because there are some reasonable decisions as to what is and is not appropriate business practice.

MR. TURNER: Before we open up for questions, I've got a couple of follow-ups.

Joseph, we had talked about bootstrapping violations of other statutes onto the California legislation. If you have a situation that an attorney is attempting to bootstrap onto 17200, and the statute says that the claim is cognizable but first must be heard by an administrative agency, what about an exhaustion of administrative remedies defense before the 17200 claim can be adjudicated?

MR. ESCHER: That's what I refer to as "primary jurisdiction." So I think the answer would be yes. You'd have a good argument for that.

MR. TURNER: Let's see if anyone has any thoughts on this due process void for vagueness and ambiguity claim with regard to the wording of these statutes.

AUDIENCE QUESTION: I believe that the little FTC acts have been litigated for a long time. Their constitutionality has been upheld. Isn't that right, Jack?

MR. TRIGG: Yes. I still would put it in there.

MR. TURNER: I've never seen any scholarly analysis on this issue with regard to state consumer protection statutes. It seems to be an area that's worth examining, at a minimum.

Closing Remarks

Rex Linder
Lawyers for Civil Justice

John Sullivan
Civil Justice Association of California

MR. REX LINDER: I had the privilege this year of serving as president of Lawyers for Civil Justice, and I have a few closing comments. Then I'm going to introduce John Sullivan, who has a few comments.

This afternoon's program is particularly important for a number of reasons. I've listened to some outstanding speakers, academic as well as practicing lawyers who have had personal experience with the operation of consumer fraud statutes. I've heard Jeffrey Jackson express the problems that consumer fraud statutes cause for American business, and have heard Barney Shultz discuss the "morphed" plaintiff, the perfect plaintiff. I've listened to Jack Trigg and his observation, which is quite valid, that the "greatest generation" didn't pass these statutes as they've been interpreted and have come to be applied.

Professor McGovern made the same comment. If you recall, he said that these acts didn't operate "as originally designed." He also said that these acts were the result of policy, not precedent.

Should it be the American policy of our judicial and legal system that a judge in a small rural county in southern Illinois can make national policy on insurance matters? Should it be our policy that a jury can overrule state legislative and regulatory policies for

regulated business? Should American business be forced to bear the burden of entrepreneurial litigation? Should a state court judge have the power to jeopardize the financial stability of American business by doubling and trebling actual damages?

American business competes in an international arena. Other countries don't put the burden on American business that our civil justice system places upon ours. Should we continue to labor under such a disadvantage?

Lawyers for Civil Justice says no: we should not do that. We need to get that message across to the American public. That's why I want to give special thanks to the Federation of Defense and Corporate Counsel and to Bob Dewey – and also to Judyth Pendell, at the Center for Legal Policy at the Manhattan Institute. Thank you for your efforts.

The more we can put the spotlight on this problem, the more we're going to be able to deal with it.

If you talk with some corporate counsel, they're going to say that even their own companies don't recognize the magnitude of the problem or the risk it poses for them. We need to keep this issue in the forefront of discussion about the American civil justice system. We've got to make the American public aware of the risk that it poses.

At this time, it gives me great privilege to introduce John Sullivan. John is president of the Civil Justice Association of California and has held that position since 1995. The Civil Justice Association is a coalition of businesses, local governments, manufacturers, insurers, and medical organizations that was founded in 1979. It's the only association in California dedicated solely to improving the civil justice system.

John is a graduate of the University of California at Berkeley and the University of the Pacific McGeorge School of Law, and is on the board of the American Tort Reform Association.

John is going to discuss California's situation with regards to consumer protection litigation and class actions.

MR. JOHN SULLIVAN: Walter Olson and I were just talking about one of his favorite subjects: loser pays. I think all of you

can conclude—before even hearing me, based on what has been said this afternoon—that California already has loser pays under its Business and Professions Code Section 17200. Almost everyone loses, and everyone is paying.

Our association represents all kinds of businesses and individual practitioners, e.g., architects and engineers. Since 1995, we've been involved with the "17200" issue in the courts, filing amicus briefs, as well as in the legislature, attempting to fix this law.

There's a handout that I left out there in the front that chronicles in detail the few things that I'm going to mention now in wrapping up.

We heard the phrase, the statutory definition in 17200, "unfair, unlawful, or fraudulent." Remember that the words are separated by "or," not "and," which is critical when someone is accusing you or your clients of doing something unfair.

I want to talk about three snapshot real-time cases. One of them is the *Nike, Inc. v. Kasky* case, 27 Cal. 4th 939 (2002), *cert. granted*, U.S. No. 02-575 (Jan. 10, 2003), *cert. dismissed (June 26, 2003)*, in which the allegation is that it's an unfair business practice to talk about your business practices, in this instance about overseas manufacturing. On that one, the cert was filed a week ago, and we hope to get it to the United States Supreme Court. Our association is filing an amicus brief on the issue of 17200 itself. But for the main brief, Nike has hired Lawrence Tribe and Walter Dellinger, and their brief has a couple of sentences that I want to read.

The suit is brought by a person named Mark Kasky against Nike. He lives in San Francisco. As the brief explains:

"Respondent Mark Kasky, identifying himself only as a California resident, brought this suit against Nike and a number of its employees who had spoken about globalization on the company's behalf, alleging that their statements amounted to representations. Respondent pointedly alleges no harm or damages whatsoever regarding himself individually, such as that he had read a single one of the statements at issue, much less that he had been induced to purchase any Nike product or was injured in any way as a result.

"Respondent Kasky also disclaims any personal knowledge of the facts underlying his own cause, other than that he lives in

California, which is his sole qualification to bring suit."

That, amazingly, is what's going on here. There are many other variations of 17200's use related to defendants' statements. The dental association is being sued for not discussing the fact that amalgam contains mercury. This is a leapfrog over the whole junk-science issue—and that case is alive in the courts in California—without the necessity of getting to the point of whether the mercury causes any harm.

Snapshot number two has to do with a case called *Consumer Enforcement Watch Corporation v. Seven Day Auto Muffler Repair*, Orange County Superior Ct. Case No. 02CC05533, and about 140 other repair shops and 30,000 Does. It's a scam—a legal shakedown—and the complaint was filed against these shops by merely reciting the definitions of, in the Bureau of Automotive Repair regulations, what a shop is supposed to do—have a license, give people copies of estimates, and so on. The complaint did not say a thing about which of these shops violated which of these regulations and when and who was involved.

So the shakedown began with phone calls to the shop owners, saying that if they sent in a check for $2,000 and promised never to do it again—a sort of do-it-yourself injunction—they would be dropped from the suit.

One defendant's name included the initials "BF". The plaintiffs, a Beverly Hills law firm, were disturbed to learn that the initials stood for Bridgestone Firestone. They went trapping muskrat and accidentally got a bear.

It did go to court in the Superior Court in Orange County, and amazingly, the judge said that it seemed as though, on the surface, there was enough to validate going forward with a 17200 claim. However, he said the complaint could be more fact-specific, and he gave them 30 days to get more fact-specific.

I duplicated exactly what these lawyers did after I found out about it, which was to log on to a website and locate the Bureau of Automotive Repair and go to the names of firms that are licensed. There you see a little list of investigations and settlements or citations. They don't describe exactly what they are. It just says

something like, two years ago a shop failed to get the license renewed on time, or three years ago a shop failed to give a customer a copy of a signed estimate. Click, copy, and revise complaint. And those cases are alive.

The number of named defendants has now expanded to 1,600. We're getting calls every few days from shop owners asking, "What can we do?" They don't want to hire a lawyer. They can get out of it for $2,000. We tell them to call their legislators. In the meantime, these people, many of whom are new Californians, are probably wondering how it is that they suffered oppression in whatever countries they came from before they moved to California, and now they're undergoing oppression that's being tacitly supported by the legislature and the courts and carried out by officers of the courts.

I've been tempted, if the Supreme Court doesn't take the *Kasky* case, to sit down in some Internet bar, have a beer, and cruise down the corporate responsibility statements of 50 or so corporations and see what I could come up with there for the same kind of lawsuit.

The third case I want to mention is the class action nexus that has already been mentioned, the *Corbett v. Bank of America* case. *See* 101 Cal. App. 4th 649. Again, the key is that the courts have said that under the 17200 filings, unless you have a real plaintiff or plaintiffs who can receive restitution when the defendant disgorges the money, unless they can actually be identified and receive restitution, no money is going to change hands. You can't ship the money into a fluid recovery fund to run your consumer protection agency and fund your law office or whatever else.

So that's how it blends in with this class action. If you can base the class action on an unfair competition allegation, you have the ability to get money into a fluid recovery fund and figure out how much notice you have to provide to defendants and plaintiffs in this case.

The issue is complex because there is a benefit with having something certified as a class action, because at least you finally get the *res judicata* that you can't get under any kind of a normal 17200 case.

Also, under a 17200 case, you do not get a jury trial. But going to a class action you probably do, and that obviously has its pluses and minuses for defendants. The one thing that I recommend that you

read is the *Corbett v. Bank of America* decision. I like to quote things from the dissent. That's what we usually quote from in California on these cases. Justice Paul Haerle wrote that if this class action based on strict liability under 17200 becomes the law, then future class action plaintiffs rather could be, "literally, anyone [whom] class [action] counsel dragoons off the street." *See Corbett*, 101 Cal. App. 4th at ___ (Haerle, J., dissenting). That's where we're headed.

We have sponsored bills that have dealt with virtually every one of these issues, including trying to stick an "and" where the "or" is in the definition. The only bill that has ever been enacted is one that prevented future filings of cases based on alleging that retail software boxes made by software companies were "too large," the idea being that someone could be deceived into thinking that there are 12 disks in there instead of one or two. But never in any of the cases that were brought was there ever a real live person who came forward and said that he didn't get his money's worth or was fooled or confused. Neither did the trial lawyers present anyone in that category when this bill was in the legislature

So that was a case that clearly fit Elizabeth Cabraser's junk-litigation definition. We got a change not to 17200, but to packaging law, saying that when it comes to packaging perfume, toys, and software the box can be bigger than it otherwise would need to be.

The reason that we haven't enacted these laws—and I would differ with some of the earlier comments on this—is not that people don't like businesses or that they're upset with business. The reason is much simpler: the plaintiffs' bar, over the period of our attempts to reform this statute, has contributed about $25 million to state legislative and statewide election races in California. That's why the legislature is not acting. It's pure and simple. The plaintiff's bar association has a real stake in protecting this law. They had a session at their annual Hawaii conference, on how Business and Professions Code 17200 can be a "value-added component" of your litigation. For those who aren't the legal shakedown artists, at that end of the spectrum, the people who are using this as an incredible discovery-leveraging tool are doing very well on that score. That's been documented by the Law Revision Commission.

Our board decided to explore an initiative on the statewide ballot in California for the 2004 election. We're doing research on that right now. We're finding, surprisingly, that people don't like the idea of private attorneys going out and bringing lawsuits when there's no damage and no real client. They want the law to protect them. They understand that we're not trying to change district attorneys' ability to use the law. They're amazingly sympathetic. Even when we bring up the names "Enron" and "WorldCom", they say that that's different. There are criminal laws to use against these people. We're talking about an abuse of a specific section of law.

It will be a tough campaign, but we've got to go ahead with it.

An initiative in the planning stage gets the attention of legislators, the trial bar, and the governor, and we're focusing right now on the state attorney general. He has been immensely sympathetic to the trial lawyers. A greater percentage of his campaign funds over the past few years have come from the plaintiffs' bar, compared with any other statewide officer. But he has aspirations to the governor's office and knows that he needs to work with business on this. He used the term "legal shakedowns" to talk about cases going on under the state's Proposition 65 law. So we've challenged him, in a friendly way, to make an investigation and work on this law as well, and he's responded. He brings up the 17200 problem in most of his speeches now. We have a meeting set with him in the later part of November to lay the foundation for what we can do to fix this law. He doesn't have a conference room in the attorney general's offices large enough to seat all the people whom we're going to bring to the meeting for our initial presentation.

The *Kasky* case demonstrates that the implications of this California law are national, if not international, even without it spreading to other states' codes in its completely virulent form.

Solving the 17200 problem is something that I urge you all to get engaged in. I appreciate the help that we've gotten from the associations represented here today in putting on this conference, and the help in California we've received on many other civil justice issues. We look forward to working with you all.

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