NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 11 SPECIAL ISSUE 2015 NUMBER 4

PANEL 1: THE CURRENT STATE OF THE CONSUMER CLASS ACTION

2014 CONFERENCE:
THE FUTURE OF CLASS ACTION LITIGATION:
A VIEW FROM THE CONSUMER CLASS
NEW YORK UNIVERSITY SCHOOL OF LAW
NOVEMBER 7, 2014

MODERATOR: *Samuel Issacharoff*
PANELISTS: *Myriam Gilles, Andrew J. Pincus, D. Theodore Rave*

PROFESSOR SAMUEL ISSACHAROFF: Thank you. Our first panel is on *The Current State of the Consumer Class Action*. We have a great panel, and let me just do a little bit of agenda setting for what we hope to do in the next hour or so. There are certain things, which are generally accepted at this point, which have had a great deal of judicial attention in the last few years, and which we can, sort of, accept as the premise for the discussion that follows.

First and foremost, there is a recognition in the courts that one of the main justifications for the class action is what's called the negative value of individuals being able to prosecute legal claims, which are viable as a matter of formal law, and unviable as a matter of practical realities. The question is what do you do about that? The courts have in the past couple of years, with at least the tacit acquiescence of the Supreme Court, begun to recognize that there is more room for experimentation in the consumer setting.

We've had several circuits accept the idea that there should be issue classes. We had a quite significant development a couple of weeks ago in Ohio, where the largest issue class to date actually went to trial in the *Whirlpool* litigation in-

volving the so-called smelly washing machines. I was counsel in the Supreme Court on those cases, so I am fully of the view that they do smell, but apparently an Ohio jury disagreed, and that was an important moment.

It was an important moment when a jury heard a full several-week trial on a consumer issue class, and rendered a defendant's verdict. So it takes out some of the considerations that it's impossible to get a defense verdict in these cases. It takes out some of the considerations that these cases can never be tried, so we're seeing in the courts right now, and it's led by a couple of courts.

The Sixth Circuit has been quite important on this. There is a running battle in the Seventh Circuit among former members of the University of Chicago Law School faculty over who would write the boldest opinions. So you have, depending on the day, either Diane Wood is in front or Frank Easterbrook, and then Posner is never far behind in this competition.

These are important developments. Where we're going to start is at the next step. If you assume that this is the backdrop—that there is the possibility of consumer class actions that recognizes a negative value of these cases—what do you do from that?

One of the things that we know from hundreds of years of legal experience is that even if a case is realizable, and we overcome the economic hurdles to get this case to a triable fashion, they're not all going to go to trial. Now, it used to be that about 5% of cases in the civil justice system went to trial. Right now, the statistics are somewhat shocking: it's down in the 1% and below level in the federal system. So they're not all going to go to trial, but they could. Which means all of a sudden they have value. When things have value, they get exchanged in a market society. So the question is what is an appropriate exchange? I think that's what unifies the three presentations.

I'm going to introduce the three speakers with an idea of the work that they've done in this area and where their comments today fit in. First we're going to hear from Myriam Gilles, who has been, I think, the strongest proponent of the position that when you have inferior individual bargaining capacities in the consumer cases, any trade that does not preserve the collective capacity is necessarily inferior, and necessarily a detriment to the individual. She has written quite critically of compelled individual arbitrations. She is going to speak

today on some of the other procedural mechanisms that achieve the same ends in her view, and that compromise the gains that could be had from collective prosecution. I think that's the strong "anti" position that, absent the consumer class actions, these cases have no other viable mechanism.

Next to me is Teddy Rave, and there's some joy in this. We created this Center to take advantage of faculty resources here, but it's also great that Teddy's a former student of mine. David Noll, who is in the audience, is a former student of mine. So it's nice to see the next generation coming forward from within this Law School. Teddy, who is a professor at University of Houston Law Center, has a somewhat different take on these cases. What he has written about is what the Third Circuit has referred to as the "peace premium," and that is that there are intelligent trades to be made from the collective position, and that the class may gain more than it could in the litigation posture through various kinds of exchange. He's going to speak today about not just the complete peace that, for example, former Chief Judge Scirica of the Third Circuit addressed, but also other kinds of trades in cases where there really is no viability for trial even on an aggregated basis. I would consider that the middle position.

The position on the other side is, we're very fortunate to have Andy Pincus with us from Mayer Brown, and Andy has represented many companies in creating alternative mechanisms. Most famously he is known for the *Concepcion* case in the Supreme Court. Andy has been, I think, the most forceful proponent of the view that alternative mechanisms such as individual arbitration can sufficiently lower the cost to individuals, [and] that they can be an effective mechanism to provide an alternative remedy.

That's the spectrum, and we're going to start from one pole, move to the center, and then go to the other pole. So Myriam, you're first.

PROFESSOR MYRIAM GILLES: Thank you. And thank you all for having me. This is an exciting new Center, and I'm so excited to be part of its inaugural venture. I hope to see a lot more from the Center, so congratulations again.

I'm here to talk about the current state of consumer class actions. As Sam just said, mine is the strong view that we're in deep, deep trouble. Mine is a gloomy forecast. I typically don't get to go first. Usually when I'm at these conferences, I go last

when the room has cleared, and so my lead balloon of a talk doesn't fall on too many ears. So it's exciting to go first.

First off, I've written a lot about the existential threat to class actions posed by class action bans and arbitration clauses, as Sam noted. That's actually no longer a threat. It's actually becoming more and more of a reality as we speak, thanks to Andy and his ilk.

In the wake of cases like *Concepcion* and *Italian Colors*, consumer-facing companies are rushing to add class action bans to their standard-form contracts, to their terms and conditions. I think every time you get a new terms and conditions setting on your computer, on whatever device you're using, there's an arbitration clause in there and you're signing onto it.

We're seeing this happening right now. That threat is already here, and of course given the certainty that consumers are not going to individually arbitrate their small-value claims, nor will they be able to attract competent counsel to do so on their behalf on a contingency fee basis, I think we're just looking at the end of consumer class actions at least insofar as they're based on a contract.

But today I want to talk about even gloomier stuff because I think that's already so depressing. Let's talk today about what I perceive to be three looming threats to class actions, all of which have a pretty substantial possibility of getting before this Supreme Court—one of which could get before the Court this term. Again I have to look at Andy because all of this is his doing. Given this Court's track record on class actions, I think any one of these would be the final nail in the Rule 23 coffin insofar as we're talking about consumer class actions. I'll briefly discuss the ascertainability requirements, talk a little bit about Rule 68, and then move on to Article 3 standing issues.

For purposes of theoretical unity, the theme that percolates up through all three of these, I just want to suggest that underlying these challenges is a deep conservative conception of justice that is offended by liberal notions of representational standing—liberal notions of representational standing that have always been the foundation of class action law that nobody has ever doubted until fairly recently.

This conservative view is far less concerned with deterrence, with the disgorgement of ill-gotten gains, [and] with all this stuff that we all learned about in law school as significant

justifications for class actions. Instead the concern for this version, this view of justice, is that a single injured plaintiff pursues compensation for past proven harms. That's the sort of one-on-one that this view of justice requires. Of course, small-value consumer class actions—where so many injured people are unlikely to reap any compensation—are inherently suspect on this view, and have become more so as the years have progressed.

So first, ascertainability. I already mentioned class action bans. Of course for a class action ban to work there has to be a contractual nexus between the consumer and the seller sufficient to hold that arbitration clause, and tucked into that arbitration clause is the class action ban. Where that contractual nexus is absent, where consumers transact, but do not contract with sellers, the class action ban is not going to get rid of consumer class actions. We're here talking about probably the bread and butter of what we think about when we think about consumer class actions: the sales of ordinary small-value goods and services that many of us engage in all the time.

For lots of reasons, companies are just finding it difficult to slap a dispute resolution clause on labels or on receipts. That's for now. I'm sure there are creative minds out there, somewhere right now, thinking about how to get that language onto labels, but at least for now it's not working. We would say that the non-contractual nature of these ordinary sales protects ordinary consumer class actions from the clutches of mandatory arbitration. But there's another and bigger, I think, challenge here, and that's the ascertainability requirement, which is a judge-made rule. It's not in the text of Rule 23. It's completely made up by judges.

This is a rule that demands that plaintiffs, in order to certify class, prove that the identities of specific class members can be ascertained. This means concrete proof of purchase, which can be the actual packaging, a receipt—stuff like that, which none of us keep, obviously, unless you're a hoarder. You don't keep that stuff. I don't judge you if you are, but very few people do. If you don't have those things, courts require that you actually be able to give them a method in which you will be able to show that at least some portion of the class is ascertainable, that there's some objective method to determine this.

It's not enough, courts are saying, to do what class counsel have done for generations, which is to hire a claims facility,

which will send out notice, and then subsequently distribute damages to purportedly injured class members. It's not enough because these claims facilities for the class action lawyers in the room, as you know, what they do is they require an affidavit, some oath. The problem with this oath, this naked oath, is that a defendant has the right—according to courts that adopt ascertainability analysis—defendants have a right to cross examine every single claimant on the oath, on the injury, on the purchase.

Of course if I can, as a defendant, cross-examine every single consumer on their injury, on their purchase, well at that point the class action is not certifiable on either—pick a prong: manageability, superiority, commonality—any one of those falls on the shoals of the certification analysis.

That's where we are in ascertainability. It's interesting to step back and ask why courts have suddenly, fairly recently, required an ascertainability requirement, [and] added this to the already difficult certification gauntlet.

Adopting courts give us lots and lots of reasons. They tell us, for example, if they're worried about how damages will be distributed down the line. So better to know who's in the class now so we can figure out who to get damages to later on. Or they worry about how notice will be provided, and that of course raises due process questions. Or they're worried that absent class members' claims will be diluted by fraudulent claims. Or they worry for defendants. The defendants need finality, and therefore the defendants need to know who is bound by the class settlement so they can know the extent of the release.

Frankly none of these rationales really hold up, I think, to close examination. All that matters to achieve these various ends is a clear class definition. We have to demarcate the outer boundaries of the class in order to ensure that opt-outs, for example, know whether to opt out or not. We have to figure out the outer boundaries of the class to figure out who is released and who is not. It doesn't matter who's in the class, it matters what the outer boundaries of the class are. I don't think that ascertaining class members at the front end, at the class certification end, helps us at all.

Now ascertainability does help, no doubt about it. Ascertainability does help us figure out how and to whom to distribute damages down the line. I concede that. But, if apply-

ing ascertainability analysis basically makes the class uncertifiable, and therefore there are no damages to distribute, then the logic just falls apart. It just doesn't make any sense.

Now I think that there is a sort of looming circuit split. It's not perfect, but there is sort of a looming circuit split, and the issue could be presented to the Supreme Court in the near term. The Third Circuit, in an opinion by Judge Scirica ruled last spring in *Carrera v. Bayer* that a class was uncertifiable where individual members could not be ascertained.

The *Bayer* court found the class of purchases of vitamins in Florida were insufficiently ascertainable from records from say loyalty programs (CVS, Walgreens, etc.), from online receipts, and where necessary, affidavits. It gave a number of reasons, again none of which I think would stand much scrutiny.

The panel's main rationale appears to have been a fear that the monetary recoveries by people, who were actually injured who purchased the WeightSmart, would be diluted by claimants who hadn't purchased the WeightSmart.

That was the main fear: this fear of compensating the uninjured. I think this ignores the reality. Again for the class action lawyers in the room, in practice only a tiny, tiny fraction of eligible claimants ever put in for recovery, so denying class certification because that tiny fraction that their claims are going to be diluted just doesn't seem to really make much sense. Frankly, since class certification in a case like *Bayer* is the only way to get compensation because who, after all, is going to file a claim for $14? I think in effect we're just depriving potential claimants of all recovery, which again just doesn't make much sense.

I was on a brief along with Arthur Miller, who just walked in as if on command, and Adam Zimmerman who I don't see. We were on a brief trying to urge en banc review in *Bayer*. We didn't get it, but we did split the Court. We got an interesting dissent from denial of rehearing written by Judge Ambro who'd written another important ascertainability decision, *Marcus v. BMW*, joined by the Chief Judge and Judges Rendell and Fuentes.

In trying to figure out why this Scirica panel was so harsh in its application of the ascertainability requirement, the dissenting judges said, we think what's bothering them is that they realize that this is consumer class action law, and in modern consumer class action law, the actual consumers are not

going to get much. The lawyers are going to get a bunch, and then the rest is going to go to cy pres. And they're worried about the cy pres aspects of all this.

In other words, I think these dissenting judges glimpsed the reality, but there's this ascendant private law view about class actions that views class actions as a collective of individual actions—individual one-on-one actions—and is therefore offended by any sort of non-alignment between the plaintiff and the defendant: if someone else is going to get any of this money that is somehow a problem.

I think that's an interesting case. We'll sort of see if that creates a circuit split. The contrast, of course, if there is a circuit split, is with Judge Posner's deterrence-is-key argument in *Hughes v. Kore of Indiana*, where he chides a district court for denying certification in a case where the court was worried about distribution of damages, worried about identifying class members. Posner here goes, as Sam says, as far as you can go, saying, what's the problem with cy pres? In fact, cy pres should be on the table at the class certification moment so we're all clear that it's going to happen anyway. We should be focused on cy pres at the very get-go.

So possibly there's a circuit split to be engineered there, though I don't think it's really mature. I think what's likely to happen is there's a district split in the Northern District of California, which is here in all of these food cases—all these, "You said it was organic, but it's not organic." "You said it was no-GMO and natural, and it's not." "You said it was yummy, it's not."

All those food cases are being brought in the Northern District of California, and in those food cases we have clear ascertainability issues that arise. Some of these judges are saying, non-certifiable. Others are saying it is certifiable. I think what will likely happen is, my guess, that the Ninth Circuit will resolve the dispute in the Northern District. My guess would be, and of course this depends on the panel, that the Ninth Circuit will not adopt the *Bayer* approach, and then we'll have a circuit split that's worthy of the Justices. And what happens at the Supreme Court, I think, well I guess it is anyone's guess. Although I think the guess, to me, it's pretty clear how the majority would come out there.

That's ascertainability. The second thing I want to talk about just briefly is Rule 68 offers. In 2013, the Supreme Court

decided *Genesis v. Symczyk*, a putative collective action under the Fair Labor Standards Act where the defendant made a $7,500 offer to the lead plaintiff, and after she failed to respond filed a motion to dismiss on standing grounds: the offer made you whole, you no longer have standing to bring this claim. Furthermore, you no longer have any interest in the collective action. You can no longer represent all the other employees that you were purporting to represent.

In a five–four decision written by Justice Thomas, the Court found that where no one else had opted in to the collective action (so the FLSA regime is an opt-in, not an opt-out), and the $7,500 did indeed make the plaintiff whole, the case was moot. She lacked any personal interest in her own claim, which was made whole, or in representing others.

I'm going to set aside for purposes of this discussion the hot issue between Thomas and Kagan on whether an unaccepted Rule 68 offer is indeed sufficient to moot the claim. There's a serious bone of contention between these two, as well as in the lower federal courts. But for these purposes, I think it's a side issue.

What does all this have to do with consumer class actions, you ask? After all, the *Genesis* majority was very careful to say, "Hey, we're only talking about FLSA consumer collective actions. We're not talking about Rule 23. Rule 23 is different." They recognized that the FLSA conditional certification process borrowed from Rule 23 doesn't create a legal entity with the same juridical value as a class action, and at least ten post-*Genesis* courts have agreed *Genesis* doesn't bind us in the Rule 23 context. And yet, I don't think it's too speculative to imagine that we could see some important spillover effects here because there's little reason why a pre-certification Rule 68 offer to a class representative wouldn't operate in exactly the same way it operated in the FLSA context.

Importantly, the *Genesis* court made very clear that the "picking off the plaintiff" strategy that it was so concerned about in cases like *Roper* and *Garrity* and *Sosna*. But that was all dicta. It's not that concerned about that policy—really sort of doing a Heisman to that—creating some distance between it and those prior cases.

I think there's some cause to worry here. Indeed, the types of cases with fixed statutory maximums—the kinds of cases where defendants can make Rule 68 motions, offers that

make a plaintiff whole—well these are again the bread and butter of lots of consumer class actions. We're talking the FCRA, the Telephone Consumer Protection Act, the FDCPA. These are exactly the sorts of cases where we see fixed minimums and maximums that allow for a Rule 68 offer of judgment to be made.

So I expect the defendants will push the Rule 68 envelope. Here is how I think they will do it in the brave, aggressive world that we now live in.

Let's say counsel brings a class action claim under, say, the FCRA or any of these statutory regimes with a fixed-damage term. The case proceeds through motion practice, some early discovery, possibly summary judgment motions get filed. Let's assume during the course of all that pre-trial activity, the statute of limitations on the claim runs.

At some point counsel makes a motion to certify. But instead of filing a responsive motion, defendants at that point make Rule 68 offers to all class reps, making them whole. This should result in improved judgment, not against the class reps, but also against the class. Just note under *American Pipe v. Utah*, the pendency of a class action tolls a statute of limitations for all individual claims, but not as for the class claim. There's been no tolling during the pendency of all this pre-trial litigation, nor does the relation back doctrine help us much here. Despite the fact that this shouldn't work, that ten years ago I don't think any of us in this room would have thought this could work, I think it could work. I think if it came up again to the Supreme Court, this particular court would find that it's perfectly plausible strategy. I think if defendants try this sort of thing, it's just going to make class counsel much more apprehensive about even taking on consumer class actions.

I have two minutes, or did two minutes ago. I will be brief. I want to talk about something I think Andy will finish up with later on in ways both literal and figurative.

There's a battle royale currently brewing over Article III standing that could really spell the end of lots and lots of consumer class actions. Pending before the Supreme Court is a cert. petition and case called *Spokeo v. Robins*, alleging violations of the Fair Credit Reporting Act.

Spokeo operates a website where they aggregate all sorts of data for employers about prospective employees. They can tell you about marital status, and occupation, and age, and

wealth. The plaintiff alleges that the Spokeo site contained false information about him, in violation of the FCRA. Note the plaintiff actually alleges in this case that the misinformation hurt him, caused him harm, but let's set that aside. Again it's a bit of a sideshow because the really interesting question posed by Andy's cert. petition to the Court is this question—which I had never pondered before—may Congress enact a statute, which creates rights, the violation of which in and of itself confers standing?

Andy says, "No way." The Ninth Circuit of course said, "Yes. Yes. The violation of a statute is all you need to create standing. Of course Congress has that authority." This is going to be huge, and I think chances are, the court's going to take it. They've asked the [Solicitor General (SG)] to opine. The SG is coming in on the other side. The SG has not had a great track record before this court, and so maybe that's actually a bad thing.

There are tons of cert. petitions, tons of amicus briefs, lots of them written by companies who are scared about class actions, and particularly scared about class actions under these sorts of statutes where the statutory damages can get up pretty high, where we're talking about many, many millions of dollars. And also the concern that if you have to show actual harm, that might create some real problems for certification. But if actual harm is off the table and no longer an issue, plaintiffs are halfway home to certification, which again creates more and more opportunities for litigation, makes these cases more attractive, etc.

I think it's fairly good odds the courts will grant this. I think if they don't grant this, I think Andy's never going to do this again because this will be the third time he's tried and failed. The second time you have, right. Moreover there's not—despite Andy's protestations in his petition—there is no circuit split here. Andy has engineered one. The ERISA cases are very different.

I think if they do grant cert., we're in for a fascinating ride. This is a paradigm-upending kind of argument. I think a lot of people, especially a lot of planners—class action lawyers have never thought about this issue—shake their heads that this is even plausible, is even on the table. Nonetheless, the fact that this is on the table, I think, is a pretty clear indication

that this conservative view of justice is truly ascendant. Thank you.

PROFESSOR ISSACHAROFF: Thanks. That was great, and notice what Myriam has done, which is to take all the parts of the Rules and Article III that we never get to when we teach either Federal Courts or Civil Procedure, and show how they're coming to the front. Ascertainability, I suppose is a variant of 23(a)(1), numerosity, and whoever thought that that was a significant issue.

Rule 68 is something that economists like to model, but never existed in the real world before. And Article III standing, basically everybody has it except people who like to look at pretty birds and say that Indian feather gathering is impermissible. But who thought? So it's interesting.

We are now moving from whether there should be a class action to all the issues raised by consumer class actions, and that's where we really want to go. Teddy, it's up to you. Let me read one line from Teddy's paper, "What do substantive legal rights get you?" That's good. What do they get you?

PROFESSOR D. THEODORE RAVE: Now Sam set me up to have to answer that question, and I think I protest later in the paper that I'm not going to try to answer that question.

PROFESSOR ISSACHAROFF: Oh yes you will. I can call on you still.

PROFESSOR RAVE: Sam has assigned me the role of being in the middle, so I'm going to stay out of the fight that Myriam set up, and let Andy handle that one.

As Sam mentioned, I've written in the past about situations where settlement can create value for the parties through the mechanism of providing peace or finality for the defendant, which the defendant can find valuable. Today I want to talk about when peace is not the goal of a class action settlement.

We tend to think of peace as the whole point of a class action settlement. On the conventional account, a class settlement is a transaction for class-wide preclusion; the defendant agrees to hand out compensation, and in exchange, the class members are precluded from bringing individual claims against the defendant in the future.

There are a lot of reasons why defendants value peace in mass litigation. So settling all the claims in a single transaction instead of piecemeal reduces transaction costs—it's cheaper.

It avoids the potential for adverse selection where the defendant might end up over-paying to settle a collection of weak claims only to be left facing the strongest in continued litigation. It puts an end to the negative publicity and potential drag on a company's stock price, and lets the defendants get back to focusing on their core business activities instead of worrying about litigation.

Sometimes defendants are even willing to pay a premium for a settlement that will put the whole litigation behind them. So peace can be good for plaintiffs, too, if they can package up all of their claims for sale to the defendant in a single transaction.

The beauty of a class action settlement and the advantage that it has over other ways of resolving mass litigation is that it lets plaintiffs deliver peace to the defendant. Instead of having to secure the agreement of each individual claimant, all the class members who don't affirmatively opt out are precluded from bringing future suits.

The conventional story goes: the defendant's desire for peace and the premium that the class action lawyer can demand for delivering it will drive the negotiating parties to try to maximize closure through an expansive class action settlement. And they'll do their best to structure the settlement in ways that deter opt-outs, and try to wrap up as many claims as possible in a single transaction.

But as I said at the outset, peace is not always the goal. So in what I think is a really fascinating case, the *Trans Union Privacy Litigation*, the parties entered a class settlement that wasn't designed for peace. The defendants paid about $75 million in cash plus in-kind relief for a settlement that only precluded class members from litigating on a class action or aggregate basis. Class members did not release their individual claims. They were free to turn right back around, go right back into court, and sue for statutory damages and attorney's fees under the Fair Credit Reporting Act, as long as they did so on an individual basis.

Why would a defendant shell out tens of millions of dollars in a class action settlement without getting peace? And why would the class give up its biggest stick, the threat of classwide liability at trial, without securing compensation for all of the class members' claims? It's worth noting in the *Trans Union* case, that stick was pretty big. The class included more than

190 million consumers with claims for statutory damages between $100 and $1,000. These are the sorts of statutory damages cases that Myriam was talking about. Trans Union faced up to $190 billion of liability should it lose at trial. This was many, many times its net worth.

My basic hypothesis is this: what the parties essentially did in the *Trans Union* case was to craft a sort of ex post version of the class action waivers that are becoming ubiquitous in consumer arbitration clauses after cases like *Concepcion* and *Italian Colors*. Defendants like this sort of settlement structure for the same reasons that they like arbitration clauses with class action waivers. Defendants don't value peace for its own sake; they just want to minimize the cost of resolving the litigation.

Sometimes, peace is the cheapest option. Think about a mass tort claim where individual claim values can be high and can vary greatly from claim to claim, meaning that lots of people will sue individually, and there's a real risk of adverse selection—that an incomplete settlement will just clear out the weak claims leaving the defendants facing the strongest ones in litigation.

The best current example of this would probably be the NFL concussion litigation. The NFL is not too eager to settle on a class action basis if it's going to face a lot of opt-outs and have to go through individual litigation where claim values could be quite high. But buying off the right to aggregate can be cheaper than buying peace in certain types of cases, particularly where individual claim values are modest and fairly uniform, so there's not really much chance of adverse selection.

There are probably two mechanisms for this. The first is that eliminating aggregation lowers the rate of claiming. Without a class action where participation is the default, lots of people just aren't going to bother to bring these sorts of modest value claims. Even though these claims are clearly positive value—the Fair Credit Reporting Act provides for statutory damages and attorney's fees, so it's quite possible to litigate these claims on an individual basis—Trans Union in this kind of settlement is betting that most class members won't bother to press their rights individually, just like AT&T bet that most people would not take advantage of its very consumer-friendly arbitration process.

The second mechanism, I think, is that eliminating aggregation can lower the amount that the defendant pays per

claim. So when a class is very large, a risk-averse defendant can face an intense pressure to settle rather than bet the company on the outcome of a single class action trial—even if the defendant thinks it has a pretty good shot of winning on the merits. This is the concern that Judge Posner raises In re *Rhone-Poulenc*. This *in terrorem* effect can translate into higher settlement values, and eliminating it will reduce the amount that the defendant pays per claim. If buying off the right to aggregate can reduce the *in terrorem* effect and lower the rate of claiming enough to offset the increased cost of handling claims on a retail basis, it starts to look like a pretty good deal for the defendant.

Why then would class counsel go along? Again I have two theories here. First, settling the right to aggregate without settling the underlying claims lets class counsel liquidate that very *in terrorem* value of a large class at low risk. That way class counsel can cash out this value without having to convince a court to actually certify a class for litigation.

Second and relatedly, settling the right to aggregate might be a way to unlock some value in proposed classes where practical obstacles make them tough to manage. So the sheer size of the *Trans Union* class, 190 million people, for example, would make sending out adequate individualized notice that would be required for a (b)(3) opt-out class very, very expensive. This strategy can also, I think, help unlock value in classes where choice of law or even some of the ascertainability problems that Myriam was talking about might make certification hard. Settling the certification question might give plaintiffs an opportunity to unlock some value.

What should we think about this kind of settlement without peace? I want to give a couple of preliminary thoughts before turning this over to the rest of the panel.

On the compensation side, there is of course the risk that this is just all a sellout, that class counsel is maximizing its own return on investment by delivering a low rate of claiming to the defendant instead of maximizing the value of the class's claims. But I'm not sure that this hurts class members in the same way as the classic sellout because of course they're not precluded from bringing their individual claims. They're free to run right back into court, at least in cases like *Trans Union* where individual litigation is a realistic option.

There's reason to believe, I think, that class members will come out better under this sort of ex post class action waiver than they would under the sorts of ex ante class action waivers that we allow in arbitration clauses. Because the class has an empowered agent negotiating on its behalf in the ex post scenario, class members are likely to get more in exchange for giving up their rights to aggregate than they would in the ex ante scenario where no one's bargaining on their behalf, and they have no way to coordinate their activities with one another. Consumers who are purchasing consumer goods or services that are governed by arbitration clauses have no way to coordinate in advance and bargain.

On the deterrence side, allowing the defendant to reduce the number of claims brought by buying off the right to aggregate will, of course, reduce the deterrent effect of class actions. Defendants won't internalize all the costs of their conduct. But that might not be such a bad thing when we're talking about class actions that aggregate claims for statutory damages that aren't tied to any actual harm suffered by the plaintiffs.

I think this highlights just how hard it can be to use procedure to try to calibrate deterrence. It's hard to believe that we really wanted Trans Union to take $190 billion worth of precautions just to make sure that consumers don't receive junk mail. The settlement in this case might actually have gotten closer to optimal deterrence than a more traditional global settlement would have.

And just sort of an optimistic note on that point, the District Court in this case found that the settlement amount, which was a rough approximation of a disgorgement of Trans Union's profits from this sort of junk mail marketing, was sufficient when combined with FTC enforcement—because the FTC has regulatory authority under the Fair Credit Reporting Act—to deter Trans Union from going forward in the future with unlawful conduct like this.

Now the balance on both compensation and deterrence might come out very differently for true negative value claims where the alternative to aggregation is not individual litigation, but no litigation. In that scenario, the only rights that are worth anything at all are the rights to aggregate. But unlike ex ante waivers in arbitration clauses, like *Italian Colors*, in the ex post scenario, we have a lawyer that's negotiating on the class's behalf. The deal reached to settle just the aggregation rights—

again, the only rights that have any value—might not look all that different from the more traditional class action settlement that would release the claims.

If it did look different, I think that would be a pretty good sign that it really was a sellout, and in that case, a court could and should reject certification and approval under Rule 23.

With that, I'll turn it over to Andy.

PROFESSOR ISSACHAROFF: So this is further complication of the story because we have an easy model of the consumer class action, and the easy model is, "I got ripped off for $20, and what do I do about it?" There's a lot of complexity in that, in just trying to figure out how to get a handle on that.

Now we have Myriam introducing the procedural hurdles that then come once that gets more or less rooted in our legal system, and Teddy says, "Well it also depends on what the substantive rights are, because some consumer rights are derived from common law premises of contract and tort, and so forth, but a lot of them are statutory and regulatory at this point."

This is an issue, which has bedeviled the court in a lot of contexts. For example, in *Taylor v. Sturgell*, which is the major Supreme Court case on preclusion, the Court doesn't know what to do with the fact that these are not individual rights in the conventional sense that are at stake, but rather FOIA rights. So why do we need fifty, one hundred, one thousand, ten thousand people challenging the same FOIA request issue over and over again?

These are not individual rights in the conventional sense, and so this is yet another area of complication in this story. I don't know if that leaves Andy anything to opine on, but why don't you take a chance anyway?

MR. ANDREW J. PINCUS: I'll try. I guess before I assume the Prince of Darkness role that Myriam has assigned to me, I want to start by talking a little more broadly, then focusing in on some of her comments.

First of all, I really want to join her in saying what a great innovation this Center is because, I think, one of the problems for far too long about civil litigation has been that it has basically been a war of anecdotes on both sides, with little or no data, as Peter said, and little or no serious thought about whether rules make sense or whether they don't. I think the promise of having more rigorous analysis of these issues is really terrific.

Both of my co-panelists, I think, have started from the place where an assumption that all of these consumer class actions necessarily have value, necessarily are legitimate. The idea that we are saying that it may be harder to litigate them is a problem. I guess my starting point is to ask whether Rule 23 is creating value, where there shouldn't be any, and effectively saying creating a world where regardless of the underlying merits—and even in situations where there is no underlying merit—the class claim has value for some of the reasons that Teddy said, and that that is sort of perverting the way our justice system deals with these cases.

For me there's a sort of antecedent question before we get to the procedural rules, which is nearly fifty years on seems like a good time to say, does Rule 23 make sense? Is this really the best way to accomplish these goals of compensation or deterrence? Is it working well? Should there be some fundamental changes or not?

To me that's sort of the first question that has to be asked before we get to the question of how these rules work, because, I think, the fundamental issue is, does adding this broad ability to aggregate or at least threaten to aggregate claims deliver justice to two categories of people, plaintiffs with legitimate claims and innocent defendants, at an acceptable cost?

I think there are real questions about whether that's so, partially because you can't look at Rule 23 by itself. You have to look at it in the context of other attributes of the U.S. justice system: discovery, no loser pays rule. Again, I'm not challenging them, but it seems to me they're highly relevant in assessing the real world effects of adding on top of them an aggregation right.

I think in the Rule 23 context, you have to deal with the agency problem that Teddy talks about in his paper and that I think everyone recognizes, which is: there's a fundamental difference between the oversight of class counsel by putative clients and the oversight of a counsel representing an individual or set of individuals by his or her clients. I think there's a serious question, again, in light of all these other things whether the rule and the way it's been implemented sufficiently deals with what is a quite fundamental problem.

Then I would add a third category of issues into the mix, which is in the fifty years since Rule 23 was enacted, and in particular in the last few years, we've had a technology revolu-

tion that impacts a lot of questions that Rule 23 was meant to deal with in terms of the actual practical ability of people to aggregate their individual claims and to pool them. I think it was very interesting that in Teddy's paper one of the things he says about the people who chose to pursue individual claims is one enterprising law firm gathered, I think you said, 100,000 claims, and managed to pursue them through the system. We've certainly seen, and I'll talk about it in more detail later, in the AT&T arbitration system and in arbitrations under the FLSA and other wage-and-hour situations, the ability of law firms to gather many, many thousands of claims together, and effectively obtain relief for those clients through arbitration. So lots of new developments.

I think we have to really take a look at the big picture before we zero in on these particular issues. The problem is, again and this is why the Center is so great, is there's almost no data—really no data, on consumer class actions and what's happening.

In the CLE packages is one attempt that we undertook to look at a random sample of class actions, and just see what happens with them. And I'm not going to drill down into the study, but I'll say, of the cases that were decided from our sample, one-third were voluntarily dismissed by the plaintiff, either because that plaintiff settled or they were just voluntarily dismissed for whatever; another third were dismissed on the merits; and of the third that were settled, as Peter said, very hard to know exactly what real people get in these cases. To the extent we could find through public, available data what the real people were getting, they really weren't getting very much.

In the six cases for which we could get data, the percentages of the class that got any recovery were truly minuscule, ranging from 0.000006% to 12%. But it was 0.00006, 0.33, 1.5 and then 9 and 12. So pretty low percentage, and of course we don't know what happened in the rest of them. I think, at least that little data slice, and I don't really know of any comparable data, although I think it would be great to get some, indicates there seems to be some real problem here in terms of a lot of cases being brought without getting any real benefits to real people.

I think the phenomena that my co-panelists are talking about is really a reaction to that. I think people realize there's a flaw here. Unfortunately, I think, instead of a reconsidera-

tion and looking at this process with a fresh piece of paper to figure out what makes sense, we have a lot of tinkering around the edges where people can try and address what they see as a problem of lots of cases being filed, and lots of litigation costs being incurred, without any real benefit being delivered to real people.

I would also say in terms of deterrence, although I think this is something else that would warrant a study, in the real world not very much deterrence because the numbers that I gave you in terms of resolutions indicates if you're a defendant who gets sued by a class action, it doesn't really brand you a wrongdoer since two-thirds of them are going to be dismissed without any recovery, or resolved without any recovery. The rest are going to be settled. They will almost never be tried, and the settlements won't be very much. The idea that that lawsuit is going to change your behavior in some way seems quite remote.

We have this tinkering around the edges problem, and I think it's very dissatisfying. It's dissatisfying to people who were focused on legitimately injured plaintiffs because they see increased barriers to pursuing those claims. There are those who are worried about innocent defendants—say the system is still incredibly costly, it's still plagued by illegitimate claims. Yes, we have all these processes, but in some ways the processes may make it more costly, although it may be able at the end of the day to prevent the *in terrorem* effect from being exercised.

So, to me, there are fundamental flaws. We really have a system that says that its elaborate processes will lead to just results in every case, really not delivering on that in any realistic sense. It delivers rough justice, and I'd argue sort of random rough justice. I think, on the plaintiff side, I've been on many panels with Myriam and Arthur talking about *Iqbal* and *Twombly*, and the problems that those pleading requirements can cause in cases where information is uniquely in the hands of defendants.

On the other hand, people on the defendant's side will say, "Once we're past the motion to dismiss and past class certification, we're going to settle," almost always, as these statistics indicate, *Whirlpool* notwithstanding. I think one thing Whirlpool would say is, "Yes. We're very happy we won, it's cost us millions and millions of dollars to do that, and we're not getting that back even if we win all the cases."

I'm sure Sam will say this was an oddball and they're not going to win any of the other cases, but we have a system where the cost of doing that is very, very high, and the risk of doing it is high, because there's always a risk that even though you think you're right, the jury may disagree, so the settlement pressure is quite, quite high.

My big-picture comment is maybe we have to think of a system in which, in the class action context at least, we have to acknowledge that maybe rough justice is all that we can achieve. And think about a rule structure that promotes the best rough justice we can get by creating good incentives on the plaintiff side for bringing legitimate claims and for plaintiffs' lawyers, using their ability to filter out or to focus on claims that really, really seem legitimate. And that on the defense side provide real incentives for fighting illegitimate claims. And on the other hand, for settling and paying a lot of money in claims that are legitimate.

Even if those procedures don't meet the platonic ideal of our system, which is if for the very, very, very small number of cases that are litigated through, we can say, "Aren't we proud? We had this great procedural structure where everyone had to bare rules, and combat." That's great, except it never happens. If the price of having those rules for that very, very rare situation is an incentive structure that doesn't work for 99.9% of the situations—that seems a pretty foolish system.

I'm happy to talk about these procedural changes, but to me there are a lot of other bigger-picture things we could think of in terms of maybe there should be in class actions some quick-look process, not summary judgment, but some way that at an early stage of the case, maybe right after the motion to dismiss, there's some extraordinarily targeted discovery that has a cost ceiling on it. Then the parties go to the judge and make their case, and the judge says, "Yeah. I think this is legitimate. It should go forward." Or the judge says, "You know what, I think this is a fishy claim. If you want to go forward, there's going to be some kind of fee shifting as a result."

Maybe because of social media we should think seriously for some or all claims about an opt-in process instead of opt-out. That would change the dynamics and be a way of ensuring that if a claim goes forward, it's actually going to be something that the real people who are supposedly being represented care about, as opposed to something that the real people who

are supposedly being represented don't care about. Because there really is a way of reaching a lot of people today that just didn't exist before, and also reaching them at a pretty low cost.

To some extent I see the procedural changes that we're talking about today in this tinkering around the edges context of courts or other people saying, "Gee, we still have problems, what should we do?" You know, I think ascertainability and cy pres to some extent are a reaction to a system where we have lawyers disconnected from any real clients in any sense, and feeling that they are quite legitimately, in many cases, vindicating some public interest. But our system doesn't really have the controls on them to be sure that they're vindicating some public interest, as opposed to using the rules to vindicate a profit motive in the guise of the public interest.

We don't really have a way of filtering that out, and I think the *Trans Union* case is a perfect example. We really don't know the extent to which the $20 million or so went to the plaintiffs' lawyers is something that is on top of a very legitimate settlement. Or, I would say, it's on top of a settlement that in the real word, did that really convey benefits to those class members commensurate with $20 million, and by the way, all of the other costs both to the judicial system and to the parties of that litigation? I think there's a real question there.

So again, ascertainability and cy pre*s* are saying, "Gee, these cases really aren't about compensation." Rule 23 as we've talked about—compensation is one of the key tent poles of why that rule was adopted—but once you say we don't really care about finding the people very much, and we don't really care if they get the money, we're happy for it to go to some other party. That pretty much separates the claim from one of its fundamental purposes. Again, if deterrence isn't real because of the vagaries of the class action process, you don't really have any basis for going forward. So I think, that's a question here.

As I say in the *Trans Union* case, it's a question of is this a great deal or is it a clever deal in a world where it was necessary to structure a deal to get approval by a judge. So there had to be some benefits that were being given to class members, and maybe because the number was low, this right to sue individually. But of course, it was quite interesting to me that the right to sue individually, the money for those successful lawsuits came out of the $75 million. To some extent this was a settle-

ment with a $75 million cap for the defendant unless there were some huge number of individual lawsuits. Of $75 million dollars, is $20 million in attorneys' fees a sensible result? I don't know, I think it's troubling.

I'm happy to talk more about arbitration as an alternative. As I said, I think AT&T actually does want people to use their arbitration provision, and it's one of the reasons we've made it attractive. Some lawyers have used it to vindicate tens of thousands, or try to vindicate tens of thousands of claims, and I think it is a very viable alternative. I believe we want to have some discussion, and time is ticking so I am going to stop there.

PROFESSOR ISSACHAROFF: I want to suggest actually that there is a common core to all the remarks for the apparent disagreement, and that is that we are not in court right now where most of these arguments are usually held. In court the arguments are quite stylized because Rule 23 is one of the joinder devices, and it starts from the assumption of privately held rights. It starts from the assumption that it is in a (b)(3) context, efficient to aggregate what would otherwise be lots and lots of privately held claims.

We see a variety of contexts in which we want to stop and say, "Wait a second. Is that right?" Myriam starts from the assumption that there's more at stake here than just simply the aggregation of individual rights. Andy starts from the beginning that there may not be individual rights out there at all—that this is all an artifact of the legal rules that we have created. And Teddy says, if we think about it that way, then maybe we can judge value and appropriate results on a different template than if we start from the assumption of individual rights.

The problem is that there's a lot of pressure on the stylized inquiry that Rule 23 adopted in 1966. When we were looking at this fresh through the ALI project, we were struck by how little the evolution of the case law actually mapped onto what the drafters of Rule 23 in 1966—and this always drives Arthur crazy when I say this, but he is not here right now, so I can get away with it—what the drafters thought would be the way this rule would evolve, that certain aspects of the rule didn't stand out separately. Particularly after *Dukes* there's not much distinction between the 23(a)(2) factors and the 23(b)(3) factors. Typicality never did any work because at the end of the day, most of these cases, the very justification for

aggregation was that the individual was subsumed, so going back to look at the individual never made sense conceptually, and never panned out in practice.

The very distinctions between (b)(2) and (b)(3) turned out not to be whether you sought an injunction or not. That was too malleable because injunctions can be monetized and monetary relief can be "injunctified," if that's a word. So that didn't hold up very well. What really was the problem was the core issue of, is this simply an aggregation of individually held rights, or does it correspond to the transformation of the society?

One of the things that gave Rule 23 so much vitality was that it was forward-looking in terms of, we more and more are a mass society, and these are different kinds of claims that are being brought into the system. It wasn't just backward looking ten years to *Brown v. Board* and that we didn't have a rule that quite captured how to do the civil rights injunction case. It was forward looking, and said this is happening not just in the injunctive domain, but in the commercial marketplace, and life is changing. So, I think, what's on the table to start this conference is, we're not in court, so we don't have to argue 23(a)(1), 23(b)(2), (b)(3). We can just say basically and bluntly, what is the purpose of this? Why do we want these aggregative devices?

Myriam, do you want to start off by responding?

PROFESSOR GILLES: Of course, to Andy. I think Teddy's paper is a great paper, and I'm going to get to some comments on this paper. I think it's a really interesting paper.

Andy is just wrong. I sort of fundamentally disagree with the going-in assumptions. As we said, we just come at it from a different perspective. My view is that class actions were never justified as a great way of getting compensation in the hands of small-value victims, because what a horrible, crappy way of trying to do this—what an expensive way of trying to get compensation in the hands of my mom who bought the WeightSmart in Florida during the relevant statutory period. That's not what class actions do.

Class actions are great at deterrence. Class actions should be there to, in a case like *Bayer*, to disgorge ill-gotten funds. When Andy talks about compensation, I think that's the real bugaboo. I think that shows that the anti-class action, anti-law-

suit narrative has really changed the way we think about things.

When Sam raises the historical moment when class actions were viewed as having public law resonance, that we were a collective, the people who were injured were a collective. In that moment it matters not who benefits, necessarily, and specifically from a particular damages settlement, nor a settlement that allows people to go to school in a place that they otherwise wouldn't be able to go to school. These were collective claims, and for that reason they were justifiable.

Andy says there's not very much deterrence. Here, I think I'm with Peter. I think we need a lot more data on this. The Mayer Brown memo, not study, gets us nowhere in trying to analyze whether there's been actual deterrence. I've always assumed tremendous amounts of deterrence.

I think that companies don't do lots of really, really bad things because they're terrified of the plaintiff's class action bar. And I think that companies will now do many, many more bad things because the plaintiff's class action bar has been weakened, has been hobbled by some of these decisions. I don't want to take a wait-and-see on this, but I think that deterrence is there. How to figure out, how to model and study deterrence is way above my pay grade. It's not what I do, but I think there are smart people who should be focused on that.

The question of whether individual—this now goes to Teddy's paper—on the question of whether individual litigation or arbitration is efficient, I have my doubts. Andy has told me many times, but only in panels like this, with no substantiating evidence, that AT&T is so psyched that lots of people are individually arbitrating their claims. AT&T wakes up every morning so concerned about the hoards outside of their AAA boardroom where they're giving away money for free.

I don't think so. I highly doubt it. I think individual claimants are not going to bring these claims. I've talked to lots of plaintiff's lawyers who are interested in trying to crowd class individual claims and bring them seriatim. Of course they have to be brought seriatim. They cannot be masked or classed because of the evil genius of the arbitration clause drafted by Mayer Brown.

I just don't see how it could be more efficient. Moreover, when we don't actually know, when there's no information

that comes out of a public justice system, when these cases are not adjudicated in a public court of record, at some point don't we worry about the law itself atrophying? We're not going to see a lot of doctrinal development if we don't get cases in court.

We don't know if Andy's telling us the truth because confidential arbitration means he actually can't tell us anything. We don't know what claims are being brought by AT&T. We'll never know. We should worry about that.

I think that there are huge concerns here. Maybe Andy's right. Maybe we're nibbling along the edges of a dying cadaver of Rule 23, but I think that there are even bigger issues here, and, I think, it really obfuscates the issues to talk about [how] there's not a lot of compensation going to individual plaintiffs, that was never the point, [and] oh, there's not a lot of deterrence. Of course there is. That's why they've been fighting this fight so hard.

As Sam started himself, I think these are fundamentally different views on what class actions can and should do.

PROFESSOR ISSACHAROFF: Let me go, everybody gets one turn. Teddy is complaining that nobody's paying attention because he's the reasonable person in the center. There's a lesson to be learned there if you want to be an academic: never take reasonable positions in the center. Go ahead.

PROFESSOR RAVE: I want to push back on Myriam a little bit. I don't think she can be right that deterrence is the only goal for almost the same reason that she says that Andy can't be right that compensation is the only goal.

If deterrence is the only goal, the class action mechanism is a really, really weird way to get there. Why not just have public enforcement of these rights? Instead we've made a choice to have private rights, and I guess now I'm stuck answering the question that Sam posed in the beginning: what is a private right worth? We've made a choice in our legal system to create lots and lots of substantive rights that aren't worth a whole lot on their own because the cost of enforcing them is just too high.

I think that when we've made a choice to both do regulation in an ex post private rights model, and to assign those rights to people who can't enforce them on their own, that our system needs some method of aggregation.

Andy brought up an interesting point with the fact that in the *Trans Union* case there was aggregation outside of the class action mechanism, even though the parties did their best to make sure that there wouldn't be. They wrote the settlement agreement to say it didn't just bar future class action litigation, it barred anything in an aggregated action, which they maybe foolishly in hindsight defined as any action where two or more plaintiffs are joined in a common case.

There's pressure in the system for aggregation outside that, and lawyers went out and gathered up these claims, and filed them in individual actions with identical complaints, and they of course picked the jurisdiction with the lowest filing fee. So if you want to increase the legal market in your local economy, lower your filing fees.

I think, we have to take both compensation and deterrence into account when we're thinking about why we made the choice as a society to delegate enforcement of the law to private parties rather than having a public system do it, and to assign these rights to individuals who can't enforce them without cooperating with other individuals.

PROFESSOR ISSACHAROFF: Thank you. And the final word, Andy.

MR. PINCUS: Hopefully not the final word. I think what Myriam said is important because if compensation isn't really relevant, then why should Trans Union face the $190 billion liability? The fact is that Rule 23 creates a system where it incorporates both compensatory remedies and all other kinds of remedies into this big bowl of wax, and then as a result changes fundamentally the litigation dynamic.

If deterrence is the only purpose, then maybe Rule 23 actions should be kept at disgorgement. You could think of a lot of ways to modify. Again, clean piece of paper to say, "You know what? In some category of claims, we're not going to allow aggregation of damages, compensatory claims—we're going to limit the exposure to disgorgement, or to some appropriate civil penalty based on finding authority."

The current model doesn't do that, and because it doesn't do that, it creates, I think, all of the problems that we see. There's no totally secret justice in consumer arbitration. Several states, California is one, require arbitration providers to publicly report on their websites claims filed and resolutions. So the fear that there's some secret—nobody knows

what's happening in terms of who's filing and who isn't—just is not right anymore in arbitration.

I don't think we have to worry that there won't be any real litigation. Why do people fight these claims? Because the legal fees are so high. The fact is once you file a lawsuit, it imposes a huge cost on the defendant even if the defendant is totally innocent. That's the problem, and it's why we need a system that minimizes that and maximizes the chances that a legitimate suit will be filed, and that the defendant will feel he or she should get rid of it as quickly as possible by settling. We don't have a system that does that now.

PROFESSOR ISSACHAROFF: So we are at the end of our time unfortunately, I see that people want to speak from the audience. We didn't get to Andy's second point, which is perhaps a fruitful area for further work. I know it is, which is, what should be the procedural mechanisms for handling these aggregated cases?

Should there be an early-look procedure? Should there be a summary jury trial convened at the very front end? This is one of the things that we tried to look at in the ALI, and I'm not persuaded that we resolved it in any satisfactory fashion, which is, can we lower the transaction cost both in terms of how much is required for a quick, early look, and also lower the consequences so that the parties can say instead of dancing around the edges, with is this ascertainable or not? Let's have a quick trial of some issue that we all know is going to drive this case. Let's figure out a cost-effective way of cabining the discovery on that point. And let's get it on the table in the way that we used to do it, which is once upon a time, people were trial lawyers. They actually tried cases if you had a dispute instead of filing paper upon paper.

This is a real question. There's the high-end question about what's the objective, but there's also the real practical question that the system just doesn't work very well right now at moving these cases toward a cost-effective resolution of what's driving the central part of the litigation as opposed to the 190 million. That means everybody in this room is a class member when you hear the number 190 million.

Please join me in thanking the panel.

* * *

Editor's Note: This Conference transcript has been edited for clarity.