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KEYNOTE ADDRESS: THE HONORABLE ALEX KOZINSKI, CHIEF JUDGE OF THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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

KEYNOTE: *The Honorable Alex Kozinski*
IN CONVERSATION WITH: *Arthur R. Miller*

PROFESSOR TROY A. MCKENZIE: Fitting with a conference on the consumer class action, our announcement was deceptive. We said this was going to be a keynote address by Chief Judge Alex Kozinski of the Ninth Circuit, but it will be a keynote conversation between Chief Judge Kozinski and Professor Arthur Miller. Obviously this will be a very interesting occasion. I am waiting with bated breath to see what they will have to say, but I'm also confident that it will be interesting and maybe even entertaining, given what I know about both of our participants.

Chief Judge Kozinski needs no introduction. He is currently the Chief Judge of the Ninth Circuit, and has been a prolific author and commentator, and bon vivant as well. Without any further ado, I turn it over to Arthur Miller.

PROFESSOR ARTHUR R. MILLER: Thank you, Troy. So that everybody in the room understands, Alex and I go way back. You were not even a judge when we met. It was before you went on the Claims Court.

HON. ALEX KOZINSKI: I won't even admit to being that old.

PROFESSOR MILLER: You mean, you deny existence before the Claims Court?

HON. KOZINSKI: I think so.

PROFESSOR MILLER: I show him no reverence, but he's never shown me any. Are you still Chief Judge?

HON. KOZINSKI: I'm still Chief Judge.

PROFESSOR MILLER: Until when?

HON. KOZINSKI: Until December 1st.

PROFESSOR MILLER: That's what I thought. We've had a full day on consumer class actions. Sitting up there on the Ninth Circuit, what's your sense of consumer class actions? Are they a waste of time? Do they have any value?

HON. KOZINSKI: Theoretically, they're great. As a practical matter, they seem to wind up generating a lot of money for the lawyers, and a lot of *gornisht* for the consumers.

PROFESSOR MILLER: Is that a technical term?

HON. KOZINSKI: I'll ask Judge Rosenthal this: Is that a technical term? I think it's in the Rules. It means plenty of nothing: coupons, discounts on the next time you want to buy their rotten product. Stuff like that which nobody cares about. I'm actually of mixed mind on the subject because I think they do have a function. They can work well, but in practice I'm skeptical.

PROFESSOR MILLER: In a sense you've fallen into a continuing theme of the entire day here: What the purpose of a consumer class action is. Is it compensation or might there be some form of deterrence with regard to the underlying conduct?

HON. KOZINSKI: Deterrence or perhaps correction. It's like criminal law: deterrence and incapacitation go hand in hand. The question is, if a defendant class of people who serve consumers fear there might be a class action, they might act better *a priori*. And if a particular company gets hit with a class action, then maybe they'll behave better in the future even as to other matters, because they've been taken out to the woodshed.

That's why I'm of a mixed mind. I think that without class actions or without the ability to bring class actions or something like them—we can talk about what the alternative might be—but without some leverage like that it would be very easy to chisel large classes of consumers for very small amounts or to commit lots of tiny wrongs, each of which is not capable of being redressed because nobody has incentive to do it.

What I wonder from time to time is whether this whole mechanism of class actions and all of the stuff that's involved in creating and administering them is really worth the candle. If the benefits we're giving to consumers, I mean to individual people who are damaged, are not really worthwhile, and what we're trying to do is create deterrence, why not have something like *qui tam*. Do people here know what *qui tam* is?

PROFESSOR MILLER: Give them a paragraph.

HON. KOZINSKI: I don't know myself exactly.

PROFESSOR MILLER: All I know is that it's Latin.

HON. KOZINSKI: No, I mean I don't have a definition. It's when you bring a claim on behalf of the government to recover—let's say, consistent tax frauds or fraud by government contractors—and you bring the lawsuit, and you get part of the bounty, plus I guess attorney's fees. I'm wondering, having that entire mechanism of certifying class and worrying about numerosity and worrying about all those things that classes worry about, whether really what you want to do is create an incentive for bringing that kind of lawsuit, and if you can prove that a million consumers have been damaged, you get an award for it. You're a knight in shining armor. You and your lawyer get handsomely compensated, the company gets deterred, and the consumers don't get anything anyway.

PROFESSOR MILLER: It's a perfect world.

HON. KOZINSKI: Well, they get a benefit in the future, so it's not like they're not getting a benefit, but we're not spending all this time and energy and reversals trying to figure out whether the requirements of a class action are met.

PROFESSOR MILLER: Do you find that you and your colleagues get a little tired of all these questions about predominance coming up all the time? Like Rule 23(f) interlocking choices.

HON. KOZINSKI: I must say, we do not have the zest of the Seventh Circuit when it comes to these issues. They seem to revel in them. They love them. They, "Oh my God." They probably arm-wrestle each other for who gets to write the opinion.

PROFESSOR MILLER: I'm trying to understand whether I'm sensing a bitterness or jealousy.

HON. KOZINSKI: I think it's more of an admiration.

PROFESSOR MILLER: An admiration. But they do seem to be making a turn in the road in terms of being more forth-

coming and permissive in accepting consumer class actions? Because that's what they've been, largely on the liability question without worrying too much about the back end of the individual claims. Does that bother you?

HON. KOZINSKI: No. They're smart judges: Posner, Easterbrook, Wood. You can't do any better than that, unless you come to the Ninth Circuit of course. I'm serious. I know them all very well—Diane particularly; we've worked together. They're very good, they make a lot of sense, and then Dick makes short work of convoluted arguments, and cuts to the chase. I think it's all good opinions. I was just merely commenting. They just show a lot of enthusiasm for this area of the law. I'm not sure that I myself, or many of my colleagues, would be quite so enthusiastic.

PROFESSOR MILLER: I think a lot of us proceduralists wonder whether this activity in the Seventh Circuit has legs. Whether it will transfer to the Sixth, Second, Third, Ninth.

HON. KOZINSKI: It's hard to say because you look at cases a little differently when they are being argued to you than when you're reading them in preparation for a discussion with Arthur Miller. You have arguments on both sides, but just reading the cases and warming up to this area of the law, I would think they'll be followed because they seem utterly persuasive.

PROFESSOR MILLER: Now you started the response to the first question by pointing to the nether regions of class action practice. In the spirit of full disclosure, although I assume everyone in this room knows—

HON. KOZINSKI: And is waiting to hear.

PROFESSOR MILLER: —and is waiting to hear, you were an objector.

HON. KOZINSKI: I'm still an objector. Actually, I'm half an objector.

PROFESSOR MILLER: Marcy's the other half.

HON. KOZINSKI: Marcy is the other half.

PROFESSOR MILLER: Alex's wife is sitting right here. Is she the better half?

HON. KOZINSKI: By far.

PROFESSOR MILLER: Good. I'm glad you said that.

HON. KOZINSKI: Isn't it always true?

PROFESSOR MILLER: Now that was a consumer class action.

HON. KOZINSKI: It was a consumer class action. I had a LEAF, an electric car, and one day I get a notice in the mail telling me: Good news! We have given you a new warranty on your car on the battery life. There were details, but basically if your battery capacity fell below a certain level within 60,000 miles, they would fix it.

I said: That's pretty nice of Nissan. What decent people they are. And they even sent me a sticker. They said: You be sure to take this sticker and paste it on your manual so that you will not forget that this warranty is extended. The next time I went to the Nissan dealer for service, he showed me. There it shows right in your record when we put in your VIN number, is your warranty.

I said: That's nice. Then about three months later I get a notice in the mail saying: Good news! You are a member of a class, and we have settled these terrible claims about how bad your battery is. And what you get is 60,000 miles if it falls under a certain level, we will repair the battery.

I went, and I took the class action notice, and I compared it to the sticker, which was handily right on my car manual, and they were word for word the same thing. So I said: Wait a minute. I already own this, how can they have a class action? I said that was taking my idea that the consumer gets nothing at all and the lawyers get all the money to a ridiculous extreme. It was $1.9 million. I said: I think they need to earn their $1.9 million. So Marcy and I wrote an opposition.

PROFESSOR MILLER: Yes. As I remember, it's thirty-six pages long.

HON. KOZINSKI: That was only the first part. I had a supplemental opposition, which was another twenty-four pages.

PROFESSOR MILLER: What really grieved you, because there are different themes in the objection?

HON. KOZINSKI: I hadn't been in a district court in a long time, and I just wanted to stand up and make an argument.

PROFESSOR MILLER: You're a troublemaker.

HON. KOZINSKI: Perhaps.

PROFESSOR MILLER: I can see, and it's clearly laid out the objection, you were getting nothing. You were getting what the company had already given you.

HON. KOZINSKI: We're getting what the company had already given. Let me add a footnote to this, which I didn't know at the time, but I suspected. After I did this and got—and

I didn't publicize this, I didn't send it to any of my friends in the press, so I don't know how they got it. I consciously did not do any of that. I just filed it and made my appearance. Then it hit the press, and people heard about it.

It turns out there is a class of people, there is a group of people, something like 110, who did exactly the same thing as I did: looked at the notice. They said: I don't need to sign this to opt into this class, because I already have this, so what benefit do I get from it? So they opted out. What happened is, Nissan at that point put a block on their record so their warranty, which they supposedly had gotten in the mail for nothing, was blocked. So people were, in fact, misled and I figured probably some would be.

I was misled. I didn't know what the consequences would be of opting out. They didn't say: Oh, that warranty we already gave you for nothing, you're going to lose it if you opt-out. They made no reference to it, like it didn't exist. But as a consequence they, in fact—

So I did a little more research, and the companies were out there sort of independent of the class action saying: Oh, we just love our consumers, we want to be helpful to them. We know they have concerns about the battery. We're going to institute this new warranty to relieve their mind about it. Lies, just total lies. I guess it—what's the polite term—ticked me off. It ticked me off.

PROFESSOR MILLER: It's a technical notion, too.

HON. KOZINSKI: I said, not in the Ninth Circuit.

PROFESSOR MILLER: So you were not happy with the company?

HON. KOZINSKI: I was not happy with the company.

PROFESSOR MILLER: But you were also not happy with the lawyers.

HON. KOZINSKI: I was not happy with the lawyers.

PROFESSOR MILLER: $1.9 million, a shade above what you earn annually. What was your concern about the lawyering?

HON. KOZINSKI: Listen, I think lawyers, when they work, deserve to be paid, so I'm chintzy on attorneys' fees and stuff like that. I have no problem with it, but I then looked at what they actually did. They did no discovery; everything they got were things that Toyota fed to them. They did not know anything about the battery or the value of replacing it or the cost or anything like that.

As best I could tell, they had filed a complaint, they had entered settlement, and then they did what is called a confirmatory discovery which—again, when I dug into it a little more and I looked at what they said—apparently this was all stuff handed to them by Nissan, which they did the difficult job of reading.

Again, I think when lawyers work hard they deserve to be paid. I've seen lots of lawyers who do a lot of important work for their clients, criminal lawyers, people who represent 983 plaintiffs. I've seen them. I've seen the district judge. I've seen cases tried. I've seen cases on appeal, so I think when lawyers work hard they deserve to be paid. To me this just seemed like a gravy train.

PROFESSOR MILLER: Without throwing stones, part of it has got to lie with the degree of supervision the district judge will impose on the settlement process. How much can we realistically expect the district judges to do in what ends up as a nonadversary, except if you're hanging out?

HON. KOZINSKI: This is a good question, but this is a question that arises in many areas of the law. It arises in bankruptcy cases a lot where there are trustee fees. It arises in CJA cases. Even if you're the presiding judge at a criminal trial, trying to judge what a lawyer should have spent or what a lawyer reasonably spent to bring a criminal defense is very difficult because often lawyers do things you don't see as a judge.

They do a lot of thinking, they do a lot of investigating, they do a lot of interviewing witnesses, they follow a lot of dead ends that don't lead anywhere, but eventually one pans out.

It's a difficult problem, but it's not an intractable problem. It seems to me that when the temptation, and this is what, as I worked myself up in this case, I guess it also started being good for me to stand in the shoes of somebody actually litigating a case in court because I'm not in that position that often, almost never.

There was a time that I sued the Chief of Police, but that was a long time ago.

AUDIENCE MEMBER: And it was a class action.

HON. KOZINSKI: It was a class action, yes. I did bring a class action. I forgot about that.

I think what happens is there's a tendency for the lawyers to buy themselves off. They reach a settlement, and the lawyer is there representing the class, and certainly brings the lawsuit

in the hopes of getting corrective action and also earning fees. But it's very easy at some point to settle the case, and at the time you settle the case, you get paid, too. To look at the thing and think of it as: This must be a very good deal; it feels good. Well, it feels good because you get paid, and the case is over. Next to the satisfaction of getting paid, there's a satisfaction of finishing a case successfully.

It's a great pleasure as a lawyer to say I brought this case and I succeeded, so there is sort of an inherent conflict there. So I think judges need to be extremely vigilant and ask hard questions. I guess I wasn't sure that if I didn't file this objection that the judge would even be told that there was this other thing here where they had sent out the notice and told people they had a warranty.

I looked; I pulled the papers before I filed and saw what they told the district judge. If they had said: By the way, we already sent out this notice, and here's the situation and so on, and here's why we think this is okay anyway—and they do have a theory, a bad one, as to why the class action was fine.

They claimed that they gave the warranty without consideration so they are free to pull it back any time. I think in the UCC, they are so totally wrong about that; it's hardly worth saying without laughing, but that's their theory. If they had told the district judge that, I might not have done it. I would have said: Well, it was Dean Pregerson, a great District Judge; he will look at it; he will make a judgment. But how can he make a judgment if he's not even told?

PROFESSOR MILLER: How do we solve that? Should the district judge always get his own lawyer? In effect, create the adversary system.

HON. KOZINSKI: I'm not sure. Always is a lot of times, but I think there's something to be said for appointing some sort of master or independent auditor to look into that.

As a way of reverse-engineering my situation is what you would have to have done—I am convinced that, if I hadn't come along, Judge Pregerson would have approved this class action or disapproved. I don't know whether he would have approved it on other terms or not, but he would have done whatever he did without ever finding out that they had sent out this notice, and that essentially they were giving nothing to settle the case.

The question would be: What mechanism could you adopt to have brought that to light? One of them is fuller disclosure requirements on the lawyers. More like an SEC-like disclosure requirements. I mean not only just tell the bare truth, tell the full truth. Now how you would phrase that and how you would enforce it, I leave that up to the Rules Committee.

PROFESSOR MILLER: You've got a piece of that in Rule 23 now in terms of agreements among the lawyers.

HON. KOZINSKI: That's one possibility, but I would certainly give the judge authority to appoint a "master." I don't know if you call it master or auditor, or something like that to look into the situation and do something inquisitorial. Because there's no one else there; there's no one on the other side.

PROFESSOR MILLER: And when a settlement comes up to the court of appeals, what's the job of the court of appeals?

HON. KOZINSKI: Well, supposedly we review for abuse of discretion. But it's like the chancellor's foot, right? What is abusive? When a judge abuses discretion is a little bit hard to figure out.

In the Ninth Circuit, I think we actually have been pretty good about using these things and figuring out whether or not, on the record before us, whether or not it was a fair deal.

What worries me is that we are limited to the record before us, and so is the district judge. It's all that stuff out there that we don't know about, and we certainly on appeal don't have any mechanism for figuring that out.

PROFESSOR MILLER: Aren't the objections typically part of the record on appeal?

HON. KOZINSKI: If there are people who object, then there will be. In my case, I happened to come along and object in this case. God only knows whether there are in other cases. There's not a second judge in every class action, although maybe there should be.

PROFESSOR MILLER: One of the themes during the day has been the problem of the professional objector, the scourge of the human race.

HON. KOZINSKI: I don't know as much about them as some other people about professional objectors, but isn't there the same problem in other areas, like corporate vote and stuff like that?

PROFESSOR MILLER: You mean derivative suits?

HON. KOZINSKI: That's the one. That's what I'm talking about, derivative suits. You know it's one of those things. It's not pleasant. You think you've got a deal sewn up, and then somebody comes along and tries to kick it over. But how was I going to find out when it's a bad deal?

PROFESSOR MILLER: It's just that in that context there are some bad actors. Picking the bad actors out from the good actors, the bad objectors from the good objectors. See, you may get lumped in!

HON. KOZINSKI: That's why we have district judges.

PROFESSOR MILLER: Ah. I knew there must be a reason, right?

HON. LEE H. ROSENTHAL: I was wondering.

HON. KOZINSKI: I mean, that's why we give district judges discretion, to make judgments like that. We have district judges on the spot to look at these things. I just wish district judges looked at these things more closely sometimes.

PROFESSOR MILLER: But as you point out, they can only look at what's given to them.

HON. KOZINSKI: Only what's given to them, right.

PROFESSOR MILLER: Have you noticed in the years since the enactment of the Class Action Fairness Act, which I think is CAFA, which I think is 2005, any change in the pattern of class actions since we've had this federalization of class actions? Has it changed anything?

HON. KOZINSKI: We certainly get a lot more of them than we used to. They used to be much more an animal of state court. They've become much more an animal of federal court, as far as I can tell.

PROFESSOR MILLER: This would burden the district judges more than the Court of Appeals.

HON. KOZINSKI: We get our share. But since most of what was there before was a state court, it's hard to tell.

PROFESSOR MILLER: You don't resent them do you?

HON. KOZINSKI: I've never resented enhancement of our jurisdiction.

PROFESSOR MILLER: Can I quote you on that?

HON. KOZINSKI: I am sort of a grab-power kind of guy rather than a defer-authority kind of guy.

PROFESSOR MILLER: I never would have guessed that. Another subject, the cy pres motion.

JUDGE KOZINSKI: Ah, yes.

PROFESSOR MILLER: You were one of five or six colleagues that dissented from en banc, if I remember correctly, on a cy pres. What does that reflect in your thinking about class actions?

HON. KOZINSKI: Well, doubt on that particular mechanism. I'm not sure it's authorized. I'm not sure it's a good idea, and it creates a huge moral hazard. All I meant by joining that particular dissent from the Maryland Bank was that I thought the issue should be considered by an en banc court.

I often vote for en bancs and sometimes am quite active in pursuing en bancs. And when I actually hear the case en banc, I come out the same way as the panel. I don't think I have a firm notion, but it struck me, from what I could tell from it, that this was something that could really be dangerous.

PROFESSOR MILLER: Do you think in those terms globally about cy pres, or is this contextual or situational?

HON. KOZINSKI: I was only commenting or thinking about it in the class action context. I guess don't know enough about what the global picture looks like.

PROFESSOR MILLER: But even if you think about this from a total class action perspective, first you said you wondered where the authority to cy pres would come from.

HON. KOZINSKI: Right.

PROFESSOR MILLER: Although you said five or ten minutes ago you like power. Cy pres is power—gets you into country clubs.

HON. KOZINSKI: Well, unfortunately, it gives power to the plaintiffs' lawyers who set up these foundations. If they made the federal judges a trustee, then I might feel differently.

PROFESSOR MILLER: Look, the judge who awards cy pres into the community becomes a big man in the community.

HON. KOZINSKI: Yes, that's what worried me, really. It is easy for using other people's money to, you know, aggrandize yourself. I don't mean particularly the judge. I mean the plaintiffs' lawyers, the plaintiffs. You are basically tempted to use other people's money to further yourself or advance other causes.

PROFESSOR MILLER: It's an issue that has become more and more visible in recent years around the country. Judges are now shying away from it in a way they didn't ten years ago. They're, in a sense, using methods that overcompensate class members by taking all of the undistributed funds and pushing

it back out to those who put their snouts into the gruel the first time.

HON. KOZINSKI: You know, I feel better about just giving it to the court, to the taxpayers. I mean, the consumers are not going to get anything of value, why not just take it for the taxpayers?

PROFESSOR MILLER: You mean the Treasury?

HON. KOZINSKI: The Treasury. Reduce the debt.

PROFESSOR MILLER: Reduce the debt. That's pretty funny. You trust your elected representatives to use the Treasury wisely?

HON. KOZINSKI: No, but they're going to use it unwisely regardless. I'm just trying to make up some of the deficit. But it is these entities you set up with, the cy pres entities, that concern me. I'm not sure—are they authorized by the Federal Rules?

PROFESSOR MILLER: Not by the Federal Rules, no. You might think of it as an inherent sort of descendent of an equity power, since class actions are equitable.

HON. KOZINSKI: For where? Are they equitable?

PROFESSOR MILLER: Well, you know, it's the old chancellor's foot. Equity should do that which ought to be done.

HON. KOZINSKI: The bill of peace?

PROFESSOR MILLER: Well, there are those that like the oldies but goodies.

HON. KOZINSKI: I mean, ultimately, lawsuits are there to compensate or to vindicate private rights. Where do you get authority to create this entity that will do this other stuff?

PROFESSOR MILLER: Even if they're just hypothetically giving money to their law schools? I mean, just to take a neutral case. Suppose it was a cy pres to UCLA or now that your son's at Yale, to Yale?

HON. KOZINSKI: Well, that's a bit different.

PROFESSOR MILLER: Ah. I love your—

HON. KOZINSKI: Or NYU.

PROFESSOR MILLER: Or NYU.

HON. KOZINSKI: Well, that's the problem. We can each come up with lots of entities that we think are doing good works, but what does that have to do with a lawsuit? What does that have to do with what is essentially—the fact that it's a class action doesn't change the reality that this is still a dispute

among private individuals over some wrong that's been committed.

If the lawsuit does not result in vindicating that wrong, how is it authorized? How is it even within the Article III power of federal courts? Maybe it's just one of things that you might have no wrong, no remedy, you have to dismiss because we are not authorized to—it's sort of like, almost an embodiment of an advisory opinion.

PROFESSOR MILLER: I don't hear a power grab there.

HON. KOZINSKI: That's why I say give it to the taxpayers. That would solve the Article III problem. But why don't you hear a power grab?

PROFESSOR MILLER: About the power?

HON. KOZINSKI: Yes.

PROFESSOR MILLER: I think you do. My personal experience, just in conversation with district judges, is a real sense of concern about their authority to cy pres.

HON. KOZINSKI: No, no, I'm not pointing the finger at any district judge; I'm saying the mechanism of if we said it's authorized, where does the power come from to?

PROFESSOR MILLER: I do not think you can find it in black letter. Obviously, it's not in Article III. It's not in any federal statute I know anything about. It's not in the Federal Rules of Civil Procedure. Indeed, such a rule might violate the Rules Enabling Act.

HON. KOZINSKI: That's what I was going to ask. Do you think that if the Rules Committee came up with a cy pres rule—

PROFESSOR MILLER: You're driving me nuts. Those are questions I ask my class. No, I think—I don't know what Lee thinks about it—but I think there is a real Rules Enabling Act issue with regard to a federal rule that authorized cy pres. On the other hand, whether it's an inherent aspect of a federal equity judge, that's a different question. I have no answer to the question as to whether equity principles would extend that far. Certainly cy pres exists as a trust doctrine, but whether it applies in the context of what a federal judge can do in a class action—

HON. KOZINSKI: So cast your mind back to the time of Thomas Moore, when he was Chancellor.

PROFESSOR MILLER: Yes, I was there.

HON. KOZINSKI: [Laughs] We all saw the movie.

PROFESSOR MILLER: [Pointing at Hon. Kozinski] He's a great movie buff.

HON. KOZINSKI: There we go. Would a chancellor in those days have thought—it's one thing to say you can shape rules and take the hard edges of the common law, which, after all, was at that time based on writs and all these forms of action, which were very constricting—and to ease those things. But to actually say: I'm going to do justice between the parties by having the defendant pay, not the plaintiff now, but construct a school. Take the money and instead of giving it to the plaintiff, make him build a monastery. I can't imagine.

PROFESSOR MILLER: No, not in a two-party situation, and not that dramatically. But a judge sits there and says: I've got $20 million left over from distribution; they've done the best job in distribution. What are my choices?

HON. KOZINSKI: Nice dinner.

PROFESSOR MILLER: Hmm?

HON. KOZINSKI: Nice dinner, Per Se.

PROFESSOR MILLER: Well I know one judge who endowed professorships at a medical school, and he gets the greatest healthcare in his community imaginable. I don't vote for that, but here's the judge: I have $20 million. I can return it to the government. I can put it in the Treasury. I can over-compensate those who have already claimed, because we know they're interested in the money. Or I can take the $20 million and perhaps do pharmaceutical research because this was a drug case.

HON. KOZINSKI: It gives me the heebie-jeebies.

PROFESSOR MILLER: Another technical term. Okay, I think it's one hell of a difficult problem.

HON. KOZINSKI: I just don't think judges should be—I mean, the way you phrased it is: you had this case, and there's $20 million left on the table, what do you do with it? You've sort of given your answer to that. But I don't want the next time for the judge to get a case and say: Well, if I just do these things, I'll have $20 million more left on the table, and so at that point I'll be able to get not only good healthcare, but also good motor care for my car by making an endowed professorship at the mechanical school.

PROFESSOR MILLER: That is the moral risk you refer to, and the answer to that—

HON. KOZINSKI: Or maybe not personal benefit. Say I'm a big environmentalist, whatever the judge seems to think is a good cause. And then judges across the country say: I can do things, too, to leave money on the table. I just don't think judges should be having that kind of incentive in their minds. I trust judges far more than the Rules would permit. There's this idea that if judges own ten shares of stock, they need to disqualify themselves. I just think it's stupid.

If we wanted to make money, we'd quit judging and go do something else. So I really trust judges, not just because of they're my colleagues and I've dealt with them for years, but it is not good to create incentives that systematically create distractions or that cloud a judge's thinking.

PROFESSOR MILLER: Two large questions that have been part of the discussion today. The Rules process: Do you have any sense from your perspective from where you sit as to whether the Rules process works, doesn't work, needs tinkering, revision?

HON. KOZINSKI: I served on the Appellate Rules Committee for a while, and when I heard the answers earlier to the question: Does anybody pay attention when there are comments? I think that's absolutely right. That if people comment, the Rules Committee will pay attention.

I remember we worked on Rule 32, the rule about the size font in briefs, and somebody brought to our attention that there was some lawyer in Texas, and I forget he had a nickname, "Typewriter Joe," or "Backwards John," something like that, who refused to get a computer, and would type. So we were sitting there discussing it, and the question was: Can we assume everybody has a computer? So no, because it was "Shoeless Joe," whatever his name, back in Texas—he might have been a mythical character for all I know. I have no proof of life, but we were told in one of the comments. So we actually crafted a separate rule for typewriters, just to take care of this mythical character.

So I think the question about whether or not the committees are responsive to comments actually made, I think, is accurate. I think the big downfall is most people find rules boring, and don't look at the notices, and sort of count on other people to comment, and then they wake up one morning, and they are stuck with a new requirement that they've never heard of, and they say: Oh shucks, or words to that effect, why

did they do this? And why didn't I get a say? Well, you did get a say about it; you just haven't paid attention.

I think part of the reason that it is the way I've seen the rule notices go out—they're not very user-friendly. Maybe they've changed since I've been on the committees, but there's nothing that sort of explains in plain English what it is they are about to do. If they were, I think they would have gotten a million comments on these meet and confer requirements that are in the Rules, which absolutely make life hell for lawyers—totally useless, totally pointless. Just gives the lawyers another chance to give a call and say: We're supposed to meet and confer. And you know, bark at each other and then they go ahead and do what they're going to do anyway.

I don't think anybody would have let that one go if they had been paying attention. I think there's a lot of stuff in there that people just don't pay attention to, and maybe the notice process can be made more user-friendly.

PROFESSOR MILLER: You have confidence in the rulemaking process as a process?

HON. KOZINSKI: I think so. I've not always been successful either. I remember when they passed the rule prohibiting local rules that wouldn't allow citation of unpublished dispositions. We had a rule like that, and I felt very strongly about it. I agitated widely to keep that, and it was removed by federal lawmen. So I've not always been successful, but I felt they listened. I mean, they clearly paid attention. They got it wrong, but they didn't get it wrong for lack of being informed.

PROFESSOR MILLER: The last question is a more global question, and obviously a centerpiece for the day here. Do you think Rule 23 should be rooted out and they should start from scratch, redo the rule completely? Or, as is fairly common of late in the rulemaking on the civil side, just continue to tinker with it?

HON. KOZINSKI: You know, it depends. It's a matter of philosophy. If you're going to have a Rule that continues to authorize class actions, then I think tinkering with it is fine. If you're going to take a completely different approach, like I suggested a little while ago, which is to say we realize you're never going to compensate consumers. They're just there to meet the Article III requirement of case and controversy, and this is really all about fixing conduct in the future and deterring future misconduct. If you're going to go down that kind

of road, I think you're probably better starting from scratch. I think there's a lot to be said for that.

I think it would be very nice if the academy did a study, and maybe you have and I'm not aware of it, that told us how many class actions have there been in the last twenty years—let's say, where rank and file consumers have gotten a real benefit. Something that you could say: Wow, I'm better off.

I don't think getting five dollars in the mail, depending on what the product is, or getting a coupon for future purchases, or getting preferential treatment in the future or something like that— I think those are fake, I think those are not real benefits. They're more like promotional programs for the defective product.

PROFESSOR MILLER: Although requiring even those small payments has a deterrent effect, it is thought.

HON. KOZINSKI: Right. Although I would save all the distribution costs and send the money to the taxpayers.

PROFESSOR MILLER: You want to take care of my taxes this year? Alex, it's always great to see you.

HON. KOZINSKI: You know, I'll swap you.

PROFESSOR MILLER: Touché. Thanks for coming. Thanks.

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