UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 08-2784/082785/08-2798/08-2799/08-2818/
08-2819/08-2831/08-2881

REHEARING EN BANC

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all
others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS
CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND
TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL
SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

DAVID T. MURPHY,
Appellant No. 08-2784
(Pursuant to Fed. R. App.P.12(a))

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all
others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS
CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND
TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL
SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

SUSAN M. QUINN,
Appellant No. 08-2785
(Pursuant to Fed. R. App.P.12(a))

CAPTION CONTINUED

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

MARVIN L. UNION;
TIM HENNING;
NEIL FREEDMAN;
KYLIE LUKE;
WILLIAM BENJAMIN COFFEE, JR.,
Appellants No. 08-2798
(Pursuant to Fed. R. App.P.12(a))

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

AARON PETRUS,
Appellant No. 08-2799
(Pursuant to Fed. R. App.P.12(a))

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

JANET GIDDINGS,
Appellant No. 08-2818
(Pursuant to Fed. R. App.P.12(a))

CAPTION CONTINUED

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

FRANK ASCIONE;
ROSAURA BAGOLIE;
MATTHEW DELONG;
SANDEEP GOPALAN;
MANOJ KOLEL-VEETIL;
MATTHEW METZ;
ANITA PAL; DEB K PAL;
JAY PAL; PETER PERERA;
RANGESH K. SHAH;
ED MCKENNA;
THOMAS VAUGHAN,
Appellants No. 08-2819
(Pursuant to Fed. R. App.P.12(a))

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY;
JAMES WALNUM, on behlaf of themselves and all others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

KRISTEN DISHMAN,
MARGARET MARASCO,
Appellants No. 08-2831
(Pursuant to Fed. R. App.P.12(a))

CAPTION CONTINUED

SHAWN SULLIVAN; ARRIGOTTI FINE JEWELRY; JAMES WALNUM, on behlaf of themselves and all others similarly situated,
V.
DB INVESTMENTS, INC; DE BEERS S.A.; DE BEERS CONSOLIDATED MINES, LTD; DE BEERS A.G.; DIAMOND TRADING COMPANY; CSO VALUATIONS A.G.; CENTRAL SELLING ORGANIZATION; DE BEERS CENTENARY A.G.

JAMES B. HICKS,
Appellant No. 08-2881
(Pursuant to Fed. R. App.P.12(a))

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BEFORE:

THE HONORABLE ANTHONY J. SCIRICA

THE HONORABLE MARJORIE O. RENDELL

THE HONORABLE THOMAS L. AMBRO

THE HONORABLE JULIO M. FUENTES

THE HONORABLE D. BROOKS SMITH

THE HONORABLE MICHAEL D. FISHER

THE HONORABLE MICHAEL A. CHAGARES

THE HONORABLE KENT A. JORDAN

THE HONORABLE THOMAS I. VANASKIE

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THE COURT: The first case that we're going to hear today is Sullivan versus DeBeers. Mr. Bashman. Good morning.

MR. BASHMAN: Good morning, your Honors. May it please the Court, my name is Howard Bashman and I represent class member Susan Quinn.

With the Court's permission I would like to reserve four minutes for rebuttal.

THE COURT: Fine.

MR. BASHMAN: This is an antitrust case. The district court's class certification opinion evaluates the requirement of predominance in the antitrust context, relying on the so-called Bogosian presumption to establish predominance.

In 1977 the U.S. Supreme Court held in Illinois Brick that indirect purchasers do not have standing to bring suit under federal law to recover damages for antitrust violations.

As Judge Jordan's opinion for the panel recognized, today approximately 20 states apply Illinois Brick to prohibit indirect purchasers from pursuing antitrust damages claims under state law.

In addition, many of those same states

also prohibit indirect purchasers from circumventing Illinois Brick by instead characterizing their state law antitrust claims as consumer protection act claims or claims for unjust enrichment.

Thus, as the law stands today, it is undisputed that consumers who purchase diamonds in a substantial number of states cannot bring a claim for damages under federal law or applicable state law, whether their claim is characterized as an antitrust claim, a Consumer Protection Act claim or an unjust enrichment claim.

It is my client's argument that a federal court cannot use Rule 23(b)(3) to certify a nationwide indirect purchaser antitrust overcharge class action to include class members whose claims are governed by the laws of states that prohibit any recovery of damages by indirect purchasers.

My client is not alone in that view. All three judges on the original panel agreed with it. Indeed, at an earlier stage of this case even class counsel agreed with it.

Before a settlement occurred in the Sullivan case, filed in the District of New Jersey,

but after DeBeers had defaulted in that action, class counsel sought certification of indirect purchaser claims arising under state law.

Because DeBeers had already defaulted, the issue of managability was not relevant to class certification as there would be no trial.

Nevertheless, in the Sullivan case class counsel limited their certification requests for indirect consumer purchasers to only 31 states, and for indirect reseller purchasers to only 23 states.

After these cases settled, however, the district court certified two separate 50 state indirect purchaser damages classes, one for consumers and one for resellers.

In the Amchem decision the U.S. Supreme Court held that even in a settlement class action, the court must ensure that Rule 23(b)(3)'s predominance requirement is satisfied. In Amchem itself the court prohibited certification and settlement of claims not recognized under existing law in the quest for universal peace.

And the court stressed that whether a particular settlement was viewed as desirable or

fair cannot substitute for actually satisfying Rule 23's requirements, including the requirements of predominance.

Here class counsel asks this court to ignore the requirements and plain language of Rule 23(b)(3), to ignore the Rules Enabling Act's limitations, and to disregard principles of federalism by ignoring state law prohibitions on indirect purchaser recovery, all to allow the certification and resulting settlement of state law claims that simply do not exist.

The price for achieving so little, namely the certification and settlement of nonexistent claims, is far too high.

This court's rulings in Warfarin and Prudential provide no support for affirmance here. In Warfarin the district court ruled that all class members possessed a claim under the Delaware Consumer Fraud Act.

Prudential, meanwhile, was not an antitrust case and thus did not implicate Illinois Brick's prohibition on indirect purchaser recovery.

Finally, in neither Warfarin nor

Prudential did this court conclude that applicable state and federal law deprived various class members of any ability to seek damages whatsoever.

By contrast, in this case that conclusion cannot be escaped. This court has a well-established tradition of vacating class action settlements that transgress what Rule 23, the Rules Enabling Act and principles of federalism allow.

In accordance with that tradition and for reasons that I've outlined, this court should vacate the district court's certification of this settlement class and remand for further proceedings. But with that I welcome the questions of the courts.

THE COURT: Good. Mr. Bashman, would your view be the same if this were an uncapped settlement, that all purchasers, direct and indirect purchasers, were getting 100 percent of their claims? Your position would be the same?

MR. BASHMAN: I have trouble grappling with that question because it assumes that everyone has claims that exist under some law.

THE COURT: Well, there certainly is injury. I don't think there's any doubt that even

the indirect purchasers have injury.

I guess I'm trying to figure out what your client, Miss Quinn, is looking for, what is her interest in the case.

MR. BASHMAN: Okay. Let me address that directly.

THE COURT: And I'm not sure whether you're seeking to vindicate her interest or whether you're concerned with something that's more abstract or structural, and whether it involves the fairness of the allocation rather than the Rule 23 certification requirements.

MR. BASHMAN: The way that the outcome that we are seeking benefits my client is that, first of all, although my client is a resident of the State of Texas, she purchased diamonds in the State of New Mexico, which is an Illinois Brick repealer state.

And the way that the settlement is currently structured is that all class members, regardless of whether they have claims that arise under the law of states that have or have not applied Illinois Brick, receive the same recovery under the settlement. So that the settlement is

diluted as to people who have valid claims under applicable law.

And so it is my client's position that by eliminating that dilution that her recovery would be greater.

THE COURT: All right. So your answer to my question would be you wouldn't have a problem if everything were uncapped and direct and indirect purchasers were able to get a hundred percent of their recompense?

MR. BASHMAN: In terms of my client's being injured by the problem that gives rise to this case, I guess your Honor is correct.

The same Rule 23(b)(3) issue would exist under that situation. But as to whether my client will be objecting to it or not is a totally different question.

THE COURT: Well, let me turn it a little bit then. It seems to me your problem is more with the allocation of the settlement then, rather than with the Rule 23 certification standards.

And if I'm correct on that, why couldn't this be handled perhaps by a remand to the

district court to rethink the allocation? And I recognize that Judge Chesler did do that and rejected the approach of Judge Young in In Re Relafen in Massachusetts, but perhaps we should ask him to do it again.

MR. BASHMAN: If what you're asking, Judge Scirica, is whether my client is willing to change the focus of her objection to be one that raises Rule 23(b)(3) under these circumstances to one that's raising an allocation or fairness objection, we are not willing to do that today nor were we willing to do that at some other time.

THE COURT: Yes, I'm not asking, I'm not asking you to change your view. I'm asking is the problem more of allocation or is the problem of Rule 23 standards?

MR. BASHMAN: The problem that we're focusing on in our objection is the Rule 23(b)(3) issue. And the reason that it affects us is for the reasons I just outlined.

But I think that there can be no escape that under these circumstances, bringing in people to this class who have no claims has an effect on the recovery of people that do have

claims.

And the way to deal with that, in our view, is by enforcing Rule 23(b)(3)'s limitations to apply only to causes of action that are recognized as existing under applicable law.

THE COURT: Where does it end in terms of cause of actions that exist under common law, and what questions does a district court have to ask?

For instance, you note that the Texas client purchased the diamonds in New Mexico and you're presuming that New Mexico law applies.

Would not a district court have to conduct a choice of law analysis with respect to every class member and determine which states' interests -- I don't want to use the word predominate, but in a conflict of laws analysis, would this have to be done for every class member and would the court not also have to determine whether there are statute of limitations problems, whether certain state laws required notice before suit is brought?

I mean how do you, how do you cabin the inquiry for the district court, and especially

for settlement purpose? How would this work?

MR. BASHMAN: No, that's an excellent question. And to begin with, class counsel and my clients agree that it is the law of where the purchase occurred that should govern whether a person does or does not have a claim. So I don't see that as being in dispute right now.

THE COURT: The district court has no say in that?

MR. BASHMAN: No, no --

THE COURT: The district court is supposed to just accept that?

MR. BASHMAN: As I understand, that was the way that the case was presented to the district judge, so I'm not sure there's even a disagreement there.

But let me proceed to --

THE COURT: Well, if we're going to be ruling on this we have to decide, we have to give some guidance to the district courts of the circuit of what they're supposed to do.

MR. BASHMAN: Well, there's no way to escape, whether it's residence or whether it's the place of purchase or whether it's any other

standard, that what the district judge did here was certify a nationwide class under the laws of all 50 states.

And so there's no way to escape that under the way this case is presented right now, that whether or not all 50 states confer causes of action upon purchasers governed by their laws or not is at issue.

But to go on to the rest of your question, which was how the statute of limitations fit in, we're not saying that if somebody's individual claim is barred by the statute of limitations that that's a reason to deny class certification.

In indirect purchaser antitrust cases the issues presented here today occur frequently. The In Re OSB case here in the district of Pennsylvania that Judge Diamond decided, numerous cases cited in our brief.

The attachment to class counsel's class certification request in the Sullivan case filed in the District of New Jersey contains a chart that has X's by the states that recognize antitrust claims without regard to Illinois Brick

and and Consumer Protection Act claims without regard to Illinois Brick.

And so the question of what states allow indirect purchasers to pursue these claims is not an issue that courts are unfamiliar with. To the contrary, they deal with it all the time in these cases.

THE COURT: But why focus on that? If I can quote a statement from the Supreme Court in Amchem, and the statement is that settlement is relevant to a class certification. And this case involves a settlement.

MR. BASHMAN: Right.

THE COURT: And in that same case the Supreme Court said that predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.

So why, instead of focusing on the vagaries of state laws of all of the 50 states, don't we focus on the conduct of the defendant, or the misconduct of the defendant as alleged in the complaint? Isn't that a simpler approach and isn't that what Warfarin focused on?

MR. BASHMAN: Judge Fuentes, Amchem does say that settlement is relevant to the class certification inquiry. And the specific way that Amchem says that it's relevant is that it's relevant to the question of manageability.

And that with regard to predominance, the rest of the predominance inquiry and the other Rule 23 requirements, that settlement, even in the situation of settlement, there should be heightened and undiluted attention given to those requirements.

Now to answer your question about the statement in Amchem about predominance being readily met in antitrust cases, if that were meant to overcome the Illinois Brick prohibition on standing then there's nothing to prevent federal class actions from being brought in as a settlement class notwithstanding Illinois Brick itself.

And I think that class counsel is, at least at the rehearing stage, arguing that that's an alternate way for affirmance to occur here, that this court could say we're going to approve a settlement class under federal law, notwithstanding Illinois Brick, because both sides agree that the

case should be settled.

And unless this court is willing to do that as to a federal law claim, it should not be willing to disregard the limitations that various states impose under their state laws.

Now with regard to the Warfarin decision --

THE COURT: You don't disagree that misconduct or the conduct of the defendant is a relevant factor in the class certification process?

MR. BASHMAN: We agree that if it were not for the existence of Illinois Brick's prohibition on standing at both the federal and various state levels, that the facts that give rise to this case could support an antitrust claim that would be subject to a settlement agreement.

So I agree with you that notwithstanding Illinois Brick, this case could be settled. And in fact we agree that this case could be settled as to all of the states that recognize the cause of actions that give rise to this case.

THE COURT: Those of course are factors that are common to all of the litigants, that is the misconduct of the defendant.

MR. BASHMAN: But what Rule 23 says is that the common issues and common facts have to be viewed with respect to claims. And what "claims" refers to are things that can be decided in court. And that's what the Supreme Court said.

THE COURT: Common questions.

MR. BASHMAN: Right.

THE COURT: Not claims.

MR. BASHMAN: In Amchem -- well, I can --

THE COURT: It doesn't say claims or issues. It says questions.

THE COURT: Questions.

MR. BASHMAN: I agree that that's correct with regard to (b)(3). But Rule 23 itself is talking about claims. And the Amchem decision says that you need to have claims that are cognizable in court in order to make the issues that Rule 23 gives rise to pertinent.

THE COURT: He talks about claims.

THE COURT: What's wrong, Mr. Bashman? DeBeers says, essentially in this case, we'll pay $297 million to settle all the claims, but we want releases, and we want releases

out there from anybody who has a claim or potential claim.

Now, this whole Illinois Brick question, I think if you look at it from a state-by-state basis, is very much up in the air. Those states today -- let's take the number 30 -- that don't have specific Illinois Brick repealers, they could pass a repealer tomorrow which would give the residents who purchased in their states standing.

Why shouldn't DeBeers be able to pay to get a release from that potential liability? Isn't that what this case is all about?

MR. BASHMAN: First as a matter of statutory law it's not clear to me that a state can pass an Illinois Brick repealer that gives rise to liability for acts in the past.

THE COURT: Let's assume that they could. It's an undecided question and DeBeers says no one's shown me that they can't, so therefore I want to make sure that that person gives me a release.

MR. BASHMAN: I understand your question. And --

THE COURT: And the release is for any

and all claims, whether they're good or not, or viable or not.

MR. BASHMAN: Absolutely. And we -- one of the issues that, with all respect, class counsel tries to make more difficult to understand than it should be, is the distinction between what claims can be certified and what claims can be settled.

And we, standing here today I have no problem with someone who is properly in a class action releasing any and all claims that that person could have, whether all of those claims were subject to certification or not, as long as one claim that they had was subject to certification.

But if you have someone from Ohio, where the Supreme Court of Ohio -- there's no doubt as to the State of Ohio, I respectfully submit to the court.

The Supreme Court of Ohio, which is the final arbiter of Ohio law, has held in the case of Johnson vs. Microsoft in 2005 that under Ohio law you cannot avoid Illinois Brick and indirect purchasers have no antitrust claim.

Furthermore, in that very same case

the court said you cannot try to recharacterize your antitrust claim as a Consumer Protection Act claim because that's also barred by Illinois Brick.

And then finally in that case the court said that you can't avoid Illinois Brick by characterizing your claim as an unjust enrichment claim.

So as to people from Ohio and to various other states, it's totally clear that they have no claim under applicable state law.

And so the question of whether people can settle nonexistent, indirect purchaser claims as to Ohio begins with the inquiry of is anyone in the class someone who has those claims or not?

And you can't be in the class unless you can have a claim that can be decided in court.

THE COURT: Would a court have to do the same thing with a joinder motion? Shady Grove said that class action, Rule 23 is just a species of joinder.

So every time a judge receives a motion for joinder, it seems to me, that under your view of the case the judge would have to assure himself or herself that there is a, quote, valid

claim on the merits.

MR. BASHMAN: That's a question that I have not given any thought to before right now. And so I don't have an answer to that off the top of my head.

THE COURT: What about Reed Elsevier vs. Muchnik, where the Supreme Court said look, the fact that certain plaintiffs failed to register their copyright, meaning they didn't have a valid claim, a good claim on the merits, did not prevent settlement of that.

MR. BASHMAN: The only question the Reed Elsevier case, as we pointed out in our supplemental reply brief, was the question of whether that was an issue of subject matter jurisdiction or not, not whether that defeated the question of predominance. And so it --

THE COURT: Boy, that's --

MR. BASHMAN: In reading the opinion the court did not address Rule 23(b)(3) at all.

THE COURT: Subject matter jurisdiction is a tougher hurdle than predominance.

MR. BASHMAN: All that I'm saying, Judge Scirica, is that the decision stated what the

question presented in Reed Elsevier was, and that was not a predominance question.

Now the Second Circuit, to perhaps try to answer that joinder question, in the case of McLaughlin vs. American Tobacco in 2008 did say that when a claim cannot succeed as a matter of law, the court should not certify a class action on that claim.

THE COURT: What about Matsushita? That's a pretty strong expression from the Supreme Court about settling claims that couldn't have been brought otherwise.

MR. BASHMAN: Again, I don't see the other side's relying on Matsushita in its briefs, so that's not a case that I'm readily familiar with standing here today.

THE COURT: How do you distinguish the Second Circuit case In Re Stock Exchange's Options Trading, which has said that the district court can rule on a proposed class settlement even after the court had rejected plaintiff's claims on the merits?

MR. BASHMAN: The rejection of claims on the merits is not necessarily the same thing as

whether somebody has a claim that's recognized under applicable law or not. There are many reasons for rejecting claims --

THE COURT: Well, you're saying on the merits. There are certain people that haven't, that are not in Illinois repealer states, for example Ohio. You think that they have no claims on the merits.

MR. BASHMAN: Right. But that's different than saying someone's claims are time barred, for example, and they don't have claims they could succeed on, but then those could be settled.

THE COURT: Well, but the Second Circuit case, the court decides afterwards that there's no claims on the merits and yet still it's okay to certify the class. I mean why shouldn't we follow that case?

MR. BASHMAN: Because that case does not stand for the proposition that people who don't have any claim whatsoever under applicable law -- in other words, these people had claims, they just couldn't succeed on them on the merits. And that to me is different than saying that you have no

standing to come into court and assert a claim.

THE COURT: If you have no claim on the merits you have no claim on the merits, whether it be your case or this case.

MR. BASHMAN: Your Honor --

THE COURT: Or the Second Circuit case.

MR. BASHMAN: The distinction between not having standing and not being able to succeed on the merits are two different things. That's what we're trying to, that's the distinction I'm trying to draw.

THE COURT: Good.

THE COURT: Aren't the courts just trying to be practical because there is a settlement here and DeBeers wants to pay out and wants to be done with this case? And what you're suggesting seems to present a nightmarish management problem for the district courts.

MR. BASHMAN: With respect, we don't believe that it's nightmarish. Class counsel themselves came into this very district court with the assertion that 31 states recognize claims for purchasers and 23 states recognize them for

resellers.

But what we're arguing over today is whether claims that are understood not to exist should be certified into a class action.

And that a defendant requires not only the settlement of claims that do exist, but the settlement of claims that do not exist, and is that worth sacrificing Rule 23(b)(3), the Rules Enabling Act and the federalism principles that are at stake.

THE COURT: Good. Mr. Bashman, thank you.

MR. BASHMAN: Thank you.

THE COURT: We'll have you back on rebuttal.

Mr. Pentz. Good morning.

MR. PENTZ: Good morning, your Honors. John Pentz on behalf of David Murray.

If I could turn to that last question first, the stock option case from the Second Circuit and the Verizon case from this circuit, the reason why the court could recognize or approve a settlement on behalf of class members who have been determined to have no valid claims is because the

entire class is united in its lack of a claim.

And your question about can a court certify a class for settlement when it's already dismissed the claims of a certain subclass, that's precisely what's happening as we speak in the district of Maine in the In Re New Motor Vehicle Canadian Export Litigation.

There Judge Hornby denied -- or granted a motion to dismiss the claims of several states that do not have Illinois Brick repealer statutes.

Later the defendant Toyota decided that it wanted to settle the nationwide class even though it had already won in the district court. And Judge Hornby said well, I can do that because the plaintiffs still have the right to appeal my decision denying, or dismissing those claims, and even though that's a very flimsy reed to hang a settlement on, I'm going to permit it because those class members are receiving no monetary compensation as part of this settlement.

So the plan of allocation there addressed the relative strengths of the various class members' claims. And my client is raising

the allocation argument here.

That is how the class is harmed because, Judge Scirica, this is not an uncapped settlement. This is a limited fund, and no class member, no claimant is going to receive a hundred percent of their damages.

Contrary to what the plaintiffs say, I believe that the court must reach the merits when ruling on a settlement class certification. The reason is because Rule 23(e) and Girsh require the court to weigh the merits against the proposed settlement as part of the analysis to approve a settlement.

THE COURT: That's post certification. That's -- you're talking about the fairness determination.

MR. PENTZ: Right. But in a settlement class those two analyses occur together.

THE COURT: I don't think so. There has to be a certification and then there's a fairness analysis.

MR. PENTZ: Well, in this case then the court's -- the court blended the fairness analysis between two entirely distinct subclasses

and was able to then reach a conclusion that the settlement was fair, reasonable and adequate.

The court brought in the irrelevant issue of the enforceability of a judgment, which is not a factor under Girsh, it may be a practical impediment but it's not part of the formal analysis about fair compensation for the claims presented.

THE COURT: But under the Girsh analysis doesn't the court have to analyze the risks of litigation? I mean this is part of the reason for approving the settlement. It's one of the many factors.

MR. PENTZ: Well, I point out in my reply brief that a judgment -- remember we had defaults here, so the Illinois Brick repealer states could have proceeded to recover a judgment. And that judgment would have been good for a period of up to 20 years.

It's possible that that would have been more valuable than the immediate cash value of a $295 million settlement.

THE COURT: Good. Thank you very much.

MR. PENTZ: Thank you, your Honor.

THE COURT: Mr. Gaudet.

MR. GAUDET: Good morning. May it please the Court, my name is Robert Gaudet. I represent Sandeep Gopalan and other members of the consumers' subclass.

About 117 million consumers stand to gain $1 each, while class representatives acting on their behalf stand to gain $5,000 each. And the class counsel stand to gain $75 million.

There's a clear conflict of interest among the parties. You can see who are the losers.

Since I have three minutes I'll only make three points.

First, the district court erred in approving the settlement because it refused to consider the class's right to treble damages when it compared the settlement to the best possible recovery under the eighth Girsh factor. This error occurs all the time but it is rarely preserved for appeal.

In fact, the same district court in this case made the same error a few years ago in Lenahan vs. Sears Roebuck. It violates Girsh vs. Jepson's instructions to consider the best possible

recovery, and it also violates the Rules Enabling Act.

If this error were corrected, consumers might recover three times as much damages. It could make a difference of billions of dollars.

Second, in the system of checks and balances, class members, like my clients, must have an opportunity to review motions for attorneys fees, class representative incentive fee awards, and class settlement, and file their own objections to those motions.

This is the only way to prevent excessive money from being taken out of the class settlement fund. Here, after the March 4th, 2008 deadline for objections had already passed, over 1,300 pages were filed on the docket. So was the motion for attorney's fees, so was the motion for incentive fee awards.

This timetable violated the due process clause and the federal rules, particularly 23(h). According to the Ninth Circuit in the Mercury case, this type of filing happens all the time, even though it's against the federal rules.

Third, the district court awarded the the consumer subclass representatives $5,000 each. That is 5,000 times, or, depending on how you look at it, 313 times more than each consumer will get.

It is disproportionate and it is unlawful, because it misaligns the incentives of the class representatives from the class.

Courts have found incentive awards that are six times or 16 times higher than average awards to class members are excessive.

The ratio in this case is 5,000 to 1 or 16 to one, it is completely out of orbit. This court has a rare opportunity to reverse these errors and fix the system of checks and balances.

THE COURT: Are you complaining about the amount of the settlement?

MR. GAUDET: Yes, I am.

THE COURT: Or the certification of the class, or both?

MR. GAUDET: Certification is Mr. Bashman's issue. I think we have some common ground. The court failed to make findings under Rule 23, it also failed to make adequate findings under Girsh vs. Jepson, and it made completely

erroneous findings under Girsh vs. Jepson.

And if you would like to extend my argument, I can give you some examples.

THE COURT: Wasn't there a fairness determination as to the settlement itself?

MR. GAUDET: I'm sorry, your Honor, I couldn't hear the first part of your question.

THE COURT: Didn't the court address whether the settlement was fair or not for the clients?

MR. GAUDET: There are two classes and there are two subclasses within the class of indirect purchasers. The court did not address the fairness of the settlement for 117 million consumers.

The court made no estimate of the damages suffered by 117 million consumers. And the only time it got an estimate as to the damages suffered by the indirect purchasers was on April 4th when class counsel filed the declaration of Mr. Pisarkiewicz. That was one month after the deadline for objections.

We did not even know the amount of damages suffered by the indirect purchasers in the

class. We never received an estimate of damages suffered by the consumers.

THE COURT: Thank you.

THE COURT: Was it proper for the district court in the fairness consideration to take into account the lack of personal jurisdiction, or at least the fight over personal jurisdiction and the enforcement of judgments? Or was that an improper thing to take into account when weighing the value or the fairness of the settlement?

MR. GAUDET: Well, your Honor, that's completely appropriate to take into account. But it should be done properly and it should be done under the ninth Girsh factor, which is risks attendant to litigation.

In this case the court spread that fact among all the different factors, muddied the analysis, made it difficult for you to review its decision, and it made erroneous findings.

It found that personal jurisdiction would have been difficult to establish. The evidence in the record says to the contrary. Personal jurisdiction would have been very easy to

establish for a company that sells half their diamonds, sells two-thirds of the diamonds in the world, half of which end up in America. Of course it can foresee being haled into a court in America.

It controls sightholders. Many of those sightholders who were called vassals by Mr. Pisarkiewicz, are in the United States with offices in the United States. These vassals of DeBeers are in New York City. Of course there can be found --

THE COURT: Thank you. Why don't you finish that thought. You may.

MR. GAUDET: Your Honor raises a good point about personal jurisdiction and enforcement of judgments. The court refused to consider the objections we filed on April 13th -- actually April 11th, they were docketed April 13th -- in response to over 1,300 pages supporting the settlement that were filed after the deadline for objections, and we were not able to address this issue --

THE COURT: We --

MR. GAUDET: -- and the court didn't make appropriate findings.

THE COURT: Would you please give us a

conclusory statement.

MR. GAUDET: Okay, your Honor. Conclusory statement is, this is a very rare opportunity for you to fix these problems and correct the system of checks and balances in a class action system which has become a joke in much of America. And even the Europeans are thumbing their noses at the American class action system because it pays lawyers $75 million and gives consumers one dollar.

This is your chance to fix the system.

THE COURT: Thank you very much.

MR. GAUDET: Thank you, your Honor.

THE COURT: Mr. Issacharoff. Good morning.

MR. ISSACHAROFF: Good morning. Judge Scirica, may it please the Court, Samuel Issacharoff for the appellees in this case.

The gravamen of Mr. Bashman's argument and the argument that persuaded the panel the first time this court heard this case is that this is a case that divides the world between citizens of states that have Illinois Brick repealers and citizens that do not -- states that do not.

And perhaps the best way to start is to walk the court through, if I may take my time on that, what exactly was before the district court, because this was not just the Sullivan case, this was seven class actions that were being settled in one unitary proceeding.

The first class action that was filed in this case, and one that was certified for litigation purposes in 2003 for injunctive relief, was the Leider case. And so I would like to just tell the court what the allegations were in Leider, and let me map them onto the kinds of claims that individuals would have.

I have prepared a document, which I file by motion afterwards. It just puts these relevant documents from the record together. But if -- on page 1983 of the record we have the declaration of Susan Michelle Quinn, who is the only client that Mr. Bashman has here. That says, "I purchased diamond products during the class period."

That is all we know about Ms. Quinn. Until today there was no place in the record where there was any evidence that she purchased her

diamonds -- or diamond, diamonds in New Mexico. That is something that is outside the record and raised for the first time here, and quite interesting, because in the earlier brief filed to this court, Mr. Bashman says of Ms. Quinn, and I quote, Ms. Quinn has an unjust enrichment claim which entitles her to monetary relief. The claim is not that she is from an Illinois Brick repealer state. The claim is that she has an unjust enrichment claim and therefore she has standing.

Now if she has standing for unjust enrichment, being from Texas, we would have to do the kind of analysis that Judge Rendell and Judge Fisher described, of trying to figure out what every single live claim was in order to figure out how every single class member has or could possibly participate in a recovery here.

But I think that Mr. Bashman undersells his client, because if we go to the Leider case, which is the first case on file, filed in 2001, it was in trial in 2005 at the time of settlement, trial was interrupted, a trial on the injunction.

What one finds in Leider is a series

of claims. At page 538 of the joint appendix the Leider opinion -- complaint begins by quoting the statement of the chairman of DeBeers in the United States at Harvard Business School: "I am chairman of DeBeers, a company that likes to think of itself as the world's longest running monopoly."

And he comes to the United States and he thumbs his nose at American law because they had established themselves in South Africa with a series of cut-away corporations that defeated any possible accountability in the United States, or so they thought.

Leider picks up on this statement and says ah-ha, there are causes of action that go to the maintenance of a monopoly in South Africa and the distribution system in the United States.

And so if one looks at the Leider complaint, what one finds is that the very first claim that is addressed in Leider, which is at -- I'm sorry, at page 35 of the opinion, of the handout, I'm sorry I could not use this more effectively.

First claim is "as and for a first claim against all defendants for violation of the

Wilson Tariff Act." Now the Wilson Tariff Act is a special provision of the antitrust laws which allows damages for cartelizing a market abroad.

No court, no court, has ever found that Illinois Brick applies to the Wilson Tariff Act until the court so determined in Leider. And that issue was preserved for appeal by the plaintiffs in Leider and suspended as a result of the settlement of this case.

There are good policy reasons why the Wilson Tariff Act, which involves bringing already cartelized goods into the United States, should not be held to the system of Illinois Brick.

As this court recognized in Linerboard and in Sugar Antitrust case, the policy reasons behind Illinois Brick are to consolidate the enforcement provisions of the antitrust laws.

What happens when you have a foreign monopoly is that they can create a series of cutout corporations so that the only direct purchasers are people who are in cahoots with them, and as a result there is no accountability in our law.

Now, these are arguments that have not prevailed, but they have not been addressed

anywhere either. And we intended to pursue them, which means we had the ability to make a claim on them and perhaps to realize a judgment.

THE COURT: Mr. Issacharoff, is the reason you're leading with Leider because you recognize that under the state law, states like Ohio, there's just no cause of action whatsoever that the people you represent could assert?

MR. ISSACHAROFF: I don't believe that's correct, Judge Jordan. I lead with Leider because it's the first case filed, it's the first one in this series of cases, and all the others picked up pieces from it. But I don't believe that that is the case.

The Null case, which was certified for a nationwide class action also, is a case that assumes the application of the laws of all the states on false advertising and material misrepresentations.

We have searched and we have found not a single case in which a court says an otherwise actionable misrepresentation or false advertising is absolved from legal liability so long as it's in furtherance of an antitrust conspiracy.

THE COURT: How about Johnson? How about the Ohio Supreme Court saying what you're asserting is a price fixing case, which is what was asserted, that's what was claimed in your complaint. If what you're asserting is a price fixing case you don't have a cause of action.

It's not a matter of whether you've got a valid this or whether you could beat the facts on that. It's you just can't bring a claim whatsoever. You can't bring it under our state Valentine Act, the antitrust statutes, you can't bring it under our state Consumer Fraud Act, you can't bring it under common law unjust enrichment, you can't bring it; go away.

MR. ISSACHAROFF: Judge Jordan --

THE COURT: Does Johnson not say that?

MR. ISSACHAROFF: Judge Jordan, Johnson does say that, but it doesn't go as far as I think your Honor indicates. So for example, Johnson says you can't bring the antitrust pricing claim under the consumer protection laws. I grant that.

But when you refer, when your Honor refers to our complaint, there are seven complaints

here, and the complaints allege very different things. They allege, for example, in the Null case, fraudulent misrepresentation and deception. And Johnson does not address whether it is actionable to have this. And in fact in the case --

THE COURT: Go with the hypothetical then with me. Assume for the sake of discussion that there were a state where the court, the highest court in the state said explicitly, expressly, as ironclad as you would like it to be, for purposes of an antitrust type claim we don't care what you call it, we don't care what label you hang on it, don't bring it here, period. Go away. Assume that happened, you had law just that clear.

Would you acknowledge if that were the case then a class that purported to give rights to recovery to people in that state would necessarily violate the predominance requirement of Rule 23 because you'd have a class of people for whom there just was no claim whatsoever?

MR. ISSACHAROFF: Your Honor, I would concede that, but I would have to add two qualifiers. One is that it has to be a state that

says no recovery for fraudulent misrepresentation, for fraudulent advertising, or any of the other laws, so long as it's in furtherance of an illegal antitrust conspiracy. I will grant if some state had that law, concession one; and concession two, and that were the only claim before the court, you would have a predominance issue. I don't dispute that.

But that's not this case. That's why the Leider complaint is so important, because you have first the Wilson Tariff Act. Second, you have a claim for equitable disgorgement under the federal antitrust laws brought on behalf of every single consumer. That's right in the Leider complaint.

Mr. Bashman very cleverly refers to the Keyspan case as our soup du jour, our menu du jour item. It is an item of the day, but the day was a decade ago when we filed the Leider complaint and we said there is a claim for equitable disgorgement on behalf --

THE COURT: Keyspan, Mr. Issacharoff, if I'm not mistaken, didn't the court in Keyspan say we think that -- that's the United States in

that case is the plaintiff, right?

MR. ISSACHAROFF: Nothing turns on that, your Honor. It's an antitrust --

THE COURT: Doesn't --

MR. ISSACHAROFF: -- disgorgement remedy to the consumers.

THE COURT: Doesn't that case itself say we think it might be optimal if you gave the recovery directly to the consumers? But we can't do that because we have these other impediments preventing us from doing it. There was other law that made it inappropriate, in fact impossible in the court's view, to give disgorgement to the consumers. So --

MR. ISSACHAROFF: That may be, your Honor. And this is law that is developing and untested. The question ultimately before this court is whether DeBeers could enter into a settlement when these claims are presented.

Now I will grant you, this has not been tested on appeal. We don't know the full parameters of the equitable disgorgement claim. But that is something that has to be capable of settlement.

I would add one more point, Judge Jordan, which is the next claim in the Leider complaint is a claim on behalf of all purchasers in the United States, all purchasers under the Donnelly Act, the New York State Illinois Brick repealer.

The claim in Leider is that over 95 percent of diamonds come into the United States and, because they transact first in the United States through New York, all of these transactions, wherever the ultimate transaction is, is actionable under New York law.

So Mr. Bashman --

THE COURT: So you're saying that because a diamond passes through the State of New York, that gives the State of New York the authority to say to Ohio, look, we really don't care what you people think. This diamond went through our territory, so we're applying our law.

MR. ISSACHAROFF: The New York State, in its application of the Donnelly Act, has taken the position that if it has antitrust effects in New York, even if the final transaction is not in New York, New York law applies.

Now the New York Court of Appeals has not ruled on that, but the Appellate Division has. And so again, the question is not will we ultimately prevail, but what was the answer that Mr. Bashman gave to this court at the panel stage on why Leider could not apply in this fashion, why New York Donnelly Act repealer couldn't apply?

His answer to the court was this is not an issue, this is not a serious issue, and I'll quote. The court did not certify the New York State antitrust claims because of New York State law. Quote, this opinion by itself clearly demonstrates that a 50-state class is improper.

Mr. Bashman's advice to this panel, to the panel of this court and to DeBeers, was never settle the Leider case on the basis of New York law as applied to the entire class. Why? Because New York law forbids class actions for this kind of claim. And the fact that this is brought in federal court is of no moment --

THE COURT: May I ask you a question?

MR. ISSACHAROFF: -- and we know that that's flat wrong. Flat wrong, couldn't be more wrong after Shady Grove.

THE COURT: May I ask you a question about something that you said just a moment ago.

MR. ISSACHAROFF: Yes, Judge Fuentes.

THE COURT: If a member of the class has only an antitrust claim and is from a nonrepealer state, that person would not be entitled to recover in this case; is that accurate? Is that a concession --

MR. ISSACHAROFF: What I was saying was that it could raise predominance issues. Just because somebody comes from a nonrepealer state -- one of the interesting things in the various opinions in this is that nobody can figure out who are the nonrepealer and repealer states. It's in flux all the time.

THE COURT: Would it be appropriate for a subclass or a subgroup of class members?

MR. ISSACHAROFF: If that were the only claim before the court, then there would have to be some equitable accommodation on the allocation side as between the different members.

But the facts of this case, again, your Honor, it's troubling to be here arguing the abstractions when we have a case that has seven

different class action complaints here.

THE COURT: Do all the class members have the garden variety generic fraud, misrepresentation type claims?

MR. ISSACHAROFF: They all have it under the certified Null case, and they all have claims that were denied for certification in Leider but which were pending on appeal from the magistrate and the district court's ruling when this was -- well, preserved for appeal when this was settled.

THE COURT: What should be our focus in arriving at the predominance decision? What do we look at?

MR. ISSACHAROFF: I think the focus is what the Supreme Court said in Amchem and what this court picked up in the Prudential opinion, which is is there a genuine controversy between all the class members and the defendant.

That's the reason Amchem failed. Amchem --

THE COURT: Well, Warfarin focused on the conduct of the defendant and the allegations of misconduct and fraud.

MR. ISSACHAROFF: That's correct, your Honor.

THE COURT: But you don't agree that that's the basis --

MR. ISSACHAROFF: I think that's absolutely critical. But I was addressing Judge Jordan's question about whether differences in the plaintiffs could ever defeat predominance.

And the answer is of course, under some in extremis scenario that doesn't correspond to the allegations in this case, it could. I don't deny that.

When the court conducts the predominance inquiry it is a multifaceted inquiry, it turns on whether there are questions of law or fact that are common and whether this will control the operation of the court's adjudication of the dispute.

THE COURT: Well, what is the law and what are the fact that are common in this case?

MR. ISSACHAROFF: The facts are clear. The facts are you had an international cartel for a hundred years that monopolized the diamond trade. You had complete control -- by the

way, complete control well into the class period.

I think if the court pays attention to the reports of Dr. Pisarkiewicz, Dr. French, and even the trial testimony from the Leider case, what one finds is that continuing antitrust violations throughout, and cartelization throughout the class period. So, for example --

THE COURT: Doesn't the fact, though -- you're reciting facts and you say they're clear. But isn't the question we have to deal with not whether there are facts that are in some abstract sense common because they are historical and they exist, but whether there are common questions of fact, that is whether there are legally relevant questions as to which those facts pertain?

I mean if -- I accept for purposes of discussion the stage of the case of what you said is completely true. But if it's the case that those facts give rise to legal liability for one person, but under the operative law of one of the states whose law you've invoked there is no right to recovery, is there a question of fact in any legally significant sense that's in common amongst

all the members of the class?

MR. ISSACHAROFF: Judge Jordan, you keep pushing me back to a hypothetical that assumes a one-claim case, which is we seek to recover for violations of the antitrust laws on grounds covered by Illinois Brick. There are states that have Illinois Brick repealers and states that do not.

Under that circumstances, yes, there is a division, and yes, there may be, there may be a division, such a division of such magnitude as to defeat the predominance. That's not this case.

THE COURT: So your case comes down to the Leider, to the Wilson Tarrif Act, Wilson, and to an assertion that New York law should apply generally?

MR. ISSACHAROFF: Wilson Tariff Act, equitable disgorgement as per KeySpan, Donnelly Act claims, common to all class members as alleged in Leider, rejected by the Leider court as a basis for damages class certification on grounds that are now squarely wrong under Shady Grove.

The Null case, which has the claims for false advertising and for material misrepresentation under the consumer laws of all

the states, and the various other claims, because there's a whole constellation of complaints that raise unjust enrichment claims across all the states.

There are at least a half dozen operative claims that cover every single claimant in this case.

And the question, your Honor, I think has to go back to what is the standard. The questions that the court submitted to the parties started to introduce the idea of the valid claim. This is a term that, as best I can tell, first appears in this court's jurisprudence in a footnote in Judge Rendell's concurring opinion in the panel decision in this case.

That has never been the standard that this court has applied. This court in Prudential was careful to go back to the Amchem formulation of genuine controversy.

In the Pet Foods opinion this court used the concept of a present claim, a present claim. That means a live asserted claim.

And I think that if one reads the totality of the record, all the cases that are

before this court, there's no question that every single member of this class, of all the classes, the seven classes, have genuine controversies, have present claims, have live claims against DeBeers.

THE COURT: Let's assume you're right and you've got, you say a half dozen claims that may exist for all class members. But the Fifth Circuit in the Sturman case 2002 said that variations in state law can nonetheless swamp those common issues. Why couldn't that happen here?

MR. ISSACHAROFF: It could happen here if the question were the manageability of a case for trial.

I am not aware of a court that has held, in the settlement context post Amchem, that variations in state law are so significant that you cannot hold the class together when class members make common claims, particularly, Judge Ambro, when the gravamen of the first case that was filed was federal law, was two damages claims directly under federal law.

Not to mention the claim that has been made in several of the cases and preserved, and we addressed it in our brief, that there may be a

different standard for section two as opposed to section one, that under section two monopolization claims you may have a different application of Illinois Brick type principles.

THE COURT: Mr. Issacharoff --

THE COURT: Your answer surprises me, or what you just said in response to Judge Ambro, that settlement is different.

That to me seems to be very important. And in your analysis of if this were only Illinois Brick then maybe there's a problem, that seems inconsistent with the idea that Illinois Brick really was a manageability case, it had prudential concerns, it wasn't really a settlement case.

And in a settlement situation could DeBeers not buy global peace, even if the only claims were Illinois Brick type claims, where what they wanted was to prevent someone from walking in, even if they were from an Illinois Brick state, and saying I'm an indirect purchaser and I want to sue?

Doesn't settlement make a huge difference, even if this were only an Illinois

Brick situation?

MR. ISSACHAROFF: I think it does. I think that this court's recent decisions in Verizon and in Pet Foods indicate that settlement is an important policy.

I fully agree with your Honor and I hope I did not speak to the contrary earlier that Illinois Brick is indeed a prudential decision, it is indeed a way of allocating the enforcement provisions of the antitrust laws. And this court recognized that in Linerboard and in the Sugar antitrust case.

THE COURT: But wait, wait, wait.

THE COURT: Otherwise we're saying there is a 12(b)(6) inquiry in Rule 23.

MR. ISSACHAROFF: I think we would be saying even more than that, your Honor. I think they would require going beyond 12(b)(6) and introducing the idea of what your Honor addressed before, which was individual-by-individual determinations.

What the court is being invited to do here is to substitute a requirement for anything that's found in Rule 23 about, which is comparative

and which is highly deferential to the discretion of the trial court. What the court is being asked to do is to find basically a requirement of trial for each individual's claims, in order to determine the relative weight of them and in order to determine the relative strength of them. Judge --

THE COURT: Does it take a trial, Mr. Issacharoff, to look at the law of Ohio? I mean --

MR. ISSACHAROFF: No, Judge Jordan. I think --

THE COURT: I get this sense here that you just retreated pretty rapidly from a concession you made right at the start, which was if this were about the laws of the 50 states, and there were a state that said plainly you can't bring a claim for injury under these facts, no matter what you call it, that that would defeat predominance.

I understood you to say that. Now maybe you're unsaying it. And if you're unsaying it, say that plainly.

MR. ISSACHAROFF: I am not unsaying anything, your Honor.

THE COURT: All right.

MR. ISSACHAROFF: I think that what I am saying is, that even in Ohio, your Honor's rendition of the Ohio law is not correct.

THE COURT: Okay. I understand you disagree. I understand you disagree. But --

MR. ISSACHAROFF: No, no, no, I don't disagree on your reading of Johnson. But if you look at In Re Abbott Labs from the Northern District of California in 2007, when they were dealing with purchase, indirect purchasers who might have claims under the state laws for conduct that was in addition to or consistent with an antitrust monopoly claim, what they found was that the states do not preclude indirect purchasers from asserting claims for unjust enrichment. And among the states that they listed there was Ohio. Now maybe that court got it wrong.

THE COURT: Can you point to a single case where there's a decision by a court where there's no Illinois Brick repealer, where they've said go ahead and you can recover for unjust enrichment, where you can recover for consumer fraud?

MR. ISSACHAROFF: The Supreme Court --

THE COURT: On behalf of a class.

MR. ISSACHAROFF: -- of New Jersey in the Wilson case, and New Jersey is not a repealer state. In the Wilson case, the Supreme Court of New Jersey says, "However, we leave for another day whether a consumer fraud action would be precluded when the allegations of a violation of the antitrust act include --"

THE COURT: "We leave for another day. We leave for another day."

MR. ISSACHAROFF: "-- include --" but, your Honor, if I may finish. "-- include communications with or statements to New Jersey consumers that are clear violations of the CFA." They preserve that.

THE COURT: Right.

MR. ISSACHAROFF: The Segura case in Texas, another nonrepealer state, has identical language.

Your Honor, it is true I don't have a case on point. But your Honor has no cases on point, and there are none cited by Mr. Bashman, that establish that you can commit consumer fraud as long as it is in furtherance of an antitrust

conspiracy. I don't know there's such a case.

THE COURT: I guess that depends on how one reads Johnson. But you started earlier by saying look, we've got a federal cause of action, Leider is a federal cause of action under the Wilson Tariff Act.

MR. ISSACHAROFF: It has several --

THE COURT: So aren't we arguing about class certification for a class under the laws of the 50 states?

I mean if what Judge Chesler had certified was a nationwide class based on federal law, we wouldn't be having an argument about the laws of the 50 states, would we?

MR. ISSACHAROFF: But your Honor, I believe he did. If one looks at the district court's opinion the first three pages are a careful recitation of all the underlying claims in all of the cases that are up before the court.

And when he recites those cases, including the Leider case, he recites not just the state law claims but the federal law claims. And then he makes a finding that in addition he is persuaded that there are live claims under the laws

of all the 50 states.

But that is not the exclusive basis for his certification. And let's keep in mind that what Judge Chesler had before him from the Leider case was a case that was already certified on a nationwide basis under federal law for injunctive purposes and that there were pending appeals on the question whether the New York Donnelly action applied to everybody and whether the federal damages claims, either the equitable one or the Wilson Tariff Act one, should allow recovery there.

Under that circumstance, I would submit to the court, that if there were no case that mentioned state law, that that would be sufficient.

THE COURT: But of course we have to deal with the certification as it stands, right? He did certify it.

MR. ISSACHAROFF: But the certification was of multiple cases on multiple bases. And the question here is largely an allocation question between, you know, whether this was ultimately more about the cases from the

indirect purchaser and the purchaser. Judge Chesler was not persuaded that this was a fundamental difference, given the overlap of claims that everybody had. And he points, for example, and specific to the Null case, which is a nationwide consumer case that's there before him.

Under these circumstances what he had to do was figure out what was the appropriate division. And in fact, the hardest division turned out to be between the resellers and the direct consumers, the ultimate consumers.

THE COURT: Would you agree that Judge Chesler did not engage in a predominance analysis?

MR. ISSACHAROFF: I would not, your Honor. I read that in your opinion. But I think that if one looks at the opinion, he does exactly what this court said to do in Warfarin, which is you start with the common questions under 23(a)(2) and then you put them together into a predominance inquiry.

And what he, when he went through the predominance inquiry he found that the constellation of federal claims and state law claims clearly predominate over individual issues.

That is the language of 23(b)(3). Does it predominate over individual issues.

THE COURT: But in doing so doesn't the court need to analyze more so the differences in state law claims?

MR. ISSACHAROFF: I think that what the court did was it looked at the proffered objections on state law claims and found that as a result of the Null case and the certification there, there were live claims before him on behalf of the consumers of every single case -- of every single state.

Further, in reciting the claims from the Leider case, he picks up the various claims for damages under federal and New York law that are common to all class members.

He has one statement where he says, and I find that the differences between the state laws are not significant. And he further finds as a prudential matter, as a matter of his case administration, that it would exhaust the funds, even of this very large settlement, to figure out where the claimants have their claims. Because today we learned for the first time that Ms. Wilson

is -- I'm sorry, Ms. Quinn is now from New Mexico. This is a revelation.

We would have to do this, under their standard, a district court would have to do this with every single claimant in every single case as long as there is a state law claim asserted. That can't be right, that state law --

THE COURT: Why do you say that? I'm puzzled by that. You say you'd have to do this for every single claimant in every single case that ever came up.

This is -- the case that's presented here is not one that requires asking every class member in every single case, you know, what the choice of law is.

The class that was certified purported to apply Ohio law. For example, Ohio law says, if you accept the reading of Johnson that Mr. Bashman puts forward, you don't have a claim.

MR. ISSACHAROFF: And, Judge Jordan --

THE COURT: If that's the case isn't that on its face, without any inquiry about --

MR. ISSACHAROFF: No, absolutely not, your Honor. Absolutely not. With all respect,

absolutely not.

We don't know whether Johnson applies to a single person, even under your reading of Johnson, because we would have to figure out where they bought the diamond, whether in the chain of distribution some other state's laws were applicable.

We learned today, today, that this is a New Mexico claim. Well, don't we have to do more inquiry on every single person in Ohio?

It may be that the entire Ohio diamond market is people who buy through resales of various states -- of various transactions that occurred elsewhere.

THE COURT: Well, I guess it may be. But wouldn't it be pretty easy to establish a class that said if your claim arises under Ohio law you don't have a claim, without asking that question at all?

MR. ISSACHAROFF: I would make two points, and I realize my time is up.

First of all, we don't need to make that because every single person in Ohio has a claim under the Wilson Tariff Act, has a claim

under the equitable disgorgement in federal law, has a claim in Leider under the Donnelly Act.

THE COURT: Understood, but unresponsive.

MR. ISSACHAROFF: Second, even if we were to go down this path, the figuring out, the transactional chain to figure out which law applies to each sale is a matter that would require an extraordinary choice of law analysis because we would have to figure out whether states are intrastates, whether states are final transaction states, and then we would have to do a choice of law factual determination for every single class member.

If you go down that road, Judge Jordan, what you are doing is making it easier to try these cases than settle them because nobody would ever do that at trial.

THE COURT: I've got to ask, how -- I don't feel like you're responding to the question I'm putting to you.

If it's facially clear on the law, not on the facts, but if it's facially clear on the law that persons whose only claim could arise under

Ohio law have no claim, then what factual inquiry is there?

In a certification of the class, what factual inquiry is there? All you have to say is, well, if the claim you're asserting is one under Ohio law you don't have part in this.

What is more difficult about it than that?

MR. ISSACHAROFF: Your Honor, under the narrow scenario you just gave me I agree with you.

THE COURT: All right.

MR. ISSACHAROFF: But that is not this case.

THE COURT: I understand.

MR. ISSACHAROFF: And --

THE COURT: I understand that's your position.

MR. ISSACHAROFF: -- what's more, you have forced me to stipulate that it would be a relatively easy factual matter to determine under whose law this arises so we would know whether it's Ohio.

I will submit to you, your Honor, that

this is not the case here. We had no idea, as we learned today, shockingly, that Ms. Quinn has resurrected herself as a New Mexico resident in order now to claim an Illinois Brick argument for her controlling law, which appears nowhere in the five-year history of the objections in this case.

That inquiry will doom every class action settlement. And I think that if the court goes back -- may I have one minute, your Honor?

If the court goes back to the standard from Prudential, which is whether the district court, within its sound discretion supported by the record and amply demonstrated in its opinion, has resolved the appropriateness of the certification, that what what one finds is that, purusant to Wachtel, the district court identified all the claims, all the sources of law that were applicable here.

It identified how it was going to manage the distribution so it was fair, adequate and reasonable to the class, as 23(e) requires. And I think this has to be within the discretion of the trial court, because the objections that are put forward are basically to a case that was not

before the court, as the court recognized in the first pages of its opinion.

Thank you, your Honor.

THE COURT: Thank you Mr. Issacharoff.

Mr. Bashman.

MR. BASHMAN: Your Honors, in the Georgine case from 1996, Judge Becker's opinion for this court stated, "We must apply an individualized choice of law analysis to each plaintiff's claims." And that, of course, is the case that the U.S. Supreme Court affirmed in Amchem. And in support of that proposition he cited Phillips Petroleum against Shutts.

So the idea in a settlement class that an individualized choice of law inquiry has to be made as to each plaintiff's claims is already the law of this court.

THE COURT: Could you address something that really hangs over this case but we haven't talked about, or at least not directly, federalism and the Rules Enabling Act.

How can a settlement present either federalism or Rules Enabling Act concerns when a

defendant could easily choose to settle a lousy claim in state court, even if the defendant believes that it could win?

MR. BASHMAN: I think that the difference, your Honor, is that the court is embroiled in a class action settlement to a much different degree than in a settlement of a nonclass action.

And so that's the answer to the question. And both Ortiz and Amchem recognized that the Rules Enabling Act does apply to settlements.

And the idea that class counsel has about settlements just being a private agreement is, for lack of a better word, hogwash. Because if someone comes in who's bound by a class action, tries to sue in a different court, as this court well knows because it had happened in Prudential, it happened in other cases, it's happened in these subsequent cases, that person is bound.

THE COURT: DeBeers is settling, they're willing to go along with it. Now it's almost like it becomes a contract.

MR. BASHMAN: Well this, this is more

than a contract, as I just said, because the court is involved in approving it and these people are giving up their nonexisting claims in exchange for not being able to go into court somewhere else.

THE COURT: Isn't the focus on the absent class members whose rights may be improperly compromised? When we talk about the fiduciary duty of the judge in the class action approval, isn't that the focus and --

MR. BASHMAN: Well, first of course the class action has to be properly certified, which we submit --

THE COURT: I understand that.

MR. BASHMAN: -- this was not. And if I could just respond to that question about claims and defenses and how that comes in.

Judge Scirica, your opinion in Prudential, relying upon the U.S. Supreme Court's opinion in Amchem, stated that, quote, The claims and defenses relevant to the predominance tests -- I'm going to leave out some of the unnecessary language in the middle there -- refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending lawsuit.

And we submit that where the claims do not exist under state law, and you're certifying state law claims, that those are not the types of claims and defenses being spoken off.

THE COURT: But there were several claims in Prudential, and they all arose out of the same nucleus of common fact.

MR. BASHMAN: Right. And for the reasons we discuss --

THE COURT: We focused on the defendant's conduct.

MR. BASHMAN: That was not an Illinois Brick case. Now in Wachtel and Constar, Judge Rendell, your opinion in Constar, and Judge Smith, your opinion in Wachtel, this court established the requirement that a district court has to identify, with precision, what claims are being certified for purposes of a class certification, and that did not occur here.

Judge Chesler's opinion discusses antitrust claims in the predominance section of that opinion, and that's the only types of claims that are being discussed for purposes of predominance.

THE COURT: Respond to Mr. Issacharoff's point that, look, under Leider we had a Wilson Tariff Act claim here. It's a valid one. We may have gotten ruled against, but we have our appellate rights.

And just like in In Re New Motor Vehicles case up in Maine where Judge Hornby certified it, we're entitled to get a certification on that basis alone.

What's wrong with that argument?

MR. BASHMAN: There are several things wrong with that argument. First of all, that was not the claim that was certified by the district court. And we see no basis for this court to affirm on an alternate basis. The district court has to decide whether a class can be certified based on certain claims or not.

And this court can't come in after the fact and say, well, we could certify it on different causes of action. The district court did not even examine in the certification or predominance context, because it is a very factually intensive inquiry in various ways.

But even more importantly, the

argument that we could come in and say that there is some change in the law that could occur in the future that would actually give us a claim is not the basis on which the court has to consider the predominance inquiry.

Rather the predominance inquiry is based on the law as it exists at the time that the court considers the case.

THE COURT: Is it your view that the district court did in fact engage the predominance inquiry and simply got it wrong, or that he did not?

MR. BASHMAN: There was a discussion of predominance in connection with the antitrust, the state law antitrust claims in the opinion. But for the reasons we've offered the court, those claims do not exist in approximately 21 states and therefore cannot be certified under Rule 23(b)(3).

We agree with Judge Rendell that the district judge's predominance inquiry leaves a lot to be desired. And I think that Judge Jordan's opinion for the panel sent the case back with the thought that perhaps a different class could be certified.

So this is not an all or nothing exercise, nor did the panel say that this case could never be certified based on the facts.

THE COURT: Good.

MR. BASHMAN: Thank you, your Honors.

THE COURT: Mr. Bashman, thank you very much. We had a spirited argument this morning. The argument was superb from all sides. We thank counsel very much. We thank you for superb briefs as well.

The court would like to have a transcript prepared of the oral argument, and ask the parties to share in the costs of that.

And if you would kindly check with the clerk's office, they will tell you how to do that.

The court will take this matter under advisement and we will be in short recess.

CERTIFICATION

I, JAMES DeCRESCENZO, a Registered Diplomate Reporter, Certified Realtime Reporter, Certified Shorthand Reporter of New Jersey, License Number XI 00807, and Notary Public, hereby certify that the foregoing is a true and accurate transcript.

I further certify that I am neither attorney nor counsel for, not related to nor employed by any of the parties to this action; and further, that I am not a relative or employee of any attorney or counsel employed in this action, nor am I financially interested in this case.

_____

James DeCrescenzo
Registered Diplomate Reporter
Certified Shorthand Reporter Notary Public

LIAISON COUNSEL'S CERTIFICATION OF ACCURACY

I hereby certify that I have served as liaison counsel on behalf of all parties in the preparation of the attached oral argument transcript and that the attached oral argument transcript is accurate.

Dated: March 8, 2011

/s/ *Howard J. Bashman*

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