

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. 08-2785

SHAWN SULLIVAN, ARRIGOTTI )  
FINE JEWELRY and JAMES )  
WALNUM, on behalf of )  
themselves and all others )  
similarly situated, )

VS. )

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, and )  
DE BEERS CENTENARY A.G., )

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Appeal from the United States District Court  
District of New Jersey  
Civil Action Index No. 04-cv-02819 (CRS)  
Audio Transcription of Oral Argument  
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## 1 P R O C E E D I N G S

2 JUDGE RENDELL: ...De Beers. We have  
3 indicated to counsel that we have really one -- one  
4 issue we would like addressed in oral argument.

5 MR. BASHMAN: Good morning, Your Honors,  
6 and may it please the Court. My name is Howard Bashman  
7 and I represent class member and objector Susan Quinn.  
8 With the Court's permission, I would like to reserve  
9 four minutes for rebuttal.

10 JUDGE RENDELL: That's granted.

11 MR. BASHMAN: Class counsel and counsel for  
12 De Beers have certainly overcome many impediments to  
13 reach the settlement that the district court approved,  
14 but we respectfully suggest that several insurmountable  
15 obstacles remain that necessitate overturning the class  
16 certification of this class action. This case is, at  
17 it -- at its essence, an antitrust action seeking  
18 predominantly damages.

19 JUDGE NO. 2: I there -- there are  
20 consumer --

21 JUDGE RENDELL: Well, there's also --

22 JUDGE NO. 2: I'm sorry.

23 JUDGE RENDELL: Counselor, there's also  
24 deceptive trade practices, there's other claims in the  
25 Sullivan case, correct?

1           MR. BASHMAN: Right, there are a number of  
2 claims, unjust enrichment, deceptive trade practices,  
3 that's correct. But if you look at the district court's  
4 opinion at or around pages 15 through 18, you see that  
5 the claims that were certified were the state law  
6 antitrust claims that's -- that were asserted in the  
7 various cases.

8           JUDGE NO. 2: Do you think it -- is it not  
9 apparent that -- that the District Court was intending  
10 to certify the other issues, too?

11           MR. BASHMAN: That -- that is not apparent.  
12 What is apparent is that the district court was  
13 intending to dispose of all of the other claims through  
14 the settlement, Your Honor. But under this court's  
15 opinion in the Wachtel case, a trial court's opinion has  
16 to list and discuss which issues are being certified for  
17 purposes of the class action, and the only issues or  
18 claims that the district judge's opinion does discuss,  
19 in that regard, are the antitrust actions. The judge  
20 relies upon the Bogosian presumption, which applies  
21 antitrust actions and -- and there's no getting around  
22 that in the judge's opinion. But nevertheless --

23           JUDGE RENDELL: Although we're not -- we're  
24 not going to litigate this case.

25           MR. BASHMAN: Uh-huh.

1           JUDGE RENDELL: It's a -- it's a settlement  
2 class so, I mean, aren't we dealing with all of these  
3 claims when -- when you come right down to it? There's  
4 a release, a nationwide release being given, which may  
5 be one of the reasons that it ended up the way it was  
6 with the definition that it did. But, you know, this is  
7 a settlement class; isn't that different?

8           MR. BASHMAN: What -- what the Amchem case  
9 of the U.S. Supreme Court stands for is -- is that the  
10 only way that a settlement class is different for  
11 purposes of class certification is with regard to  
12 manageability. One unique feature of these cases is  
13 that they were all defaulted by the defendants before  
14 the time that the class certification issues arose, so  
15 there was going to be no manageability concerns in these  
16 cases, whatsoever. Nevertheless, in -- in the Leider  
17 case --

18           JUDGE NO. 2: They weren't all defaulted,  
19 were they?

20           MR. BASHMAN: I believe they were, Your  
21 Honor.

22           JUDGE NO. 2: Every last one of them?

23           MR. BASHMAN: I believe that's correct.

24           JUDGE NO. 2: But the fact that they --  
25 when you said -- when they came in and they said we're

1 going -- "they" being De Beers -- and said we're going  
2 to -- we're going to confess liability here and we're  
3 going to move forward, is it fair to presume that if  
4 they had said we're going to confess liability on some  
5 points, but we want to move forward in trial on some  
6 others, the court wouldn't have said, all right, I'll  
7 lift the default and we'll go to trial on the things we  
8 need to go to trial on?

9 MR. BASHMAN: De Beers certainly maintained  
10 that one of the reasons it was settling the actions  
11 was -- in catch with that document, De Beers said it  
12 could have lifted the default. So -- so you're right,  
13 that was De Beers' position. And it's my experience  
14 that courts often are willing to allow defaults to be  
15 lifted. But -- but the fact remains that in the  
16 Sullivan action that gives this appeal its name, which  
17 was filed in the District of New Jersey, despite De  
18 Beers' default in that case, all that class counsel  
19 sought to have certified there was some 31 states that  
20 allowed indirect purchasers to either assert antitrust  
21 claims or consumer protection act claims. And -- and  
22 that's --

23 In the New York action, the Leider action,  
24 the district court there found that no indirect  
25 purchasers could assert damages claims against De Beers

1 notwithstanding the default. So what -- what Amchem  
2 stands for, if nothing else, is that invalid claims,  
3 claims that don't exist under state law, cannot be the  
4 subject of class certification in a federal court.

5 JUDGE RENDELL: Well, except Amchem, so  
6 very different. I mean, here the -- the whole focus  
7 would be on what the defendant did. And you've got a  
8 very different situation in Amchem where it's, you know,  
9 what did the plaintiffs do; did they seek treatment;  
10 diagnosis; you know, how bad is their condition? The --  
11 the differences are great between that kind of case and  
12 this case.

13 And isn't an antitrust or a deceptive trade  
14 practices case kind of the -- the poster child for one  
15 -- at least one common fact or legal issue predominates,  
16 I mean, exists as between them; therefore, it  
17 predominates over the individual issues? Isn't this the  
18 poster child, if you will?

19 MR. BASHMAN: Judge Rendell, I -- I both  
20 agree and disagree with what you're saying.

21 JUDGE RENDELL: Okay.

22 MR. BASHMAN: Amchem does recognize that --  
23 "ordinarily" I believe is the word that -- that is used  
24 in the majority opinion in Amchem. Ordinarily, an  
25 antitrust action or a securities fraud action would not

1 present these problems. But Amchem was talking about  
2 direct purchaser antitrust actions, not -- not indirect  
3 purchaser antitrust actions. And so if you look at the  
4 part of Amchem where the Supreme Court says what we're  
5 dealing with here are exposure of claims that certain  
6 states may recognize, other states may not recognize;  
7 you have the exact same situation here, where as the  
8 aptly-named District Judge Diamond of the Eastern  
9 District of Pennsylvania wrote in the In re OSB decision  
10 that he -- that we cite in our briefs, only 20 states in  
11 the District of Columbia recognize or allow indirect  
12 purchasers to assert antitrust claims under their loss.  
13 And -- and that, to us, is similar to the situation that  
14 the Supreme Court found as impermissible in Amchem  
15 where, in many states, these exposure-only plaintiffs  
16 did not have claims under state law.

17 JUDGE RENDELL: Does this mean that if we  
18 have nationwide classes -- and let's say there's  
19 different statutes of limitation -- we have to explore  
20 where a statute might have expired in a certain state so  
21 that their residents don't have a cause of action and we  
22 have to figure out conflicts of laws so that if  
23 someone's in Delaware, but they came to Sampson Street  
24 to buy their diamond and the action would be precluded  
25 in Delaware, but not in Pennsylvania -- I mean, are we

1 -- do we -- do we do this when we certify nationwide  
2 classes? Do we test out the viability and the existence  
3 of the claim for each individual?

4 JUDGE NO. 3: And does this mean that then  
5 the district court judge had to do a complete analysis  
6 of every one of the 50 states to see if the plaintiffs  
7 had actual claims that they could pursue under their  
8 state laws? Is that what it means?

9 MR. BASHMAN: Let me answer both questions  
10 one at a time, if I can.

11 JUDGE NO. 3: Okay.

12 MR. BASHMAN: Judge Ambrose, District Judge  
13 Hornby of the District of Maine, they'd undertake such a  
14 50 state --

15 JUDGE RENDELL: We know District Judge  
16 Hornby very well.

17 MR. BASHMAN: Right. He's a wonderful  
18 gentleman. I sat next to him a few weeks ago at a  
19 meeting. He undertook a 50-state analysis of these  
20 types of claims in his In re New Motor Vehicle case and  
21 so it is not an insurmountable obstacle to -- to do so,  
22 but -- but --

23 And then, Judge Rendell, to answer your  
24 question, we think that if a statute of limitations has  
25 expired, but someone had a claim that existed under



1 state law, that's a different type of a situation than  
2 someone who's in a state where they just don't have a  
3 claim at all, whatsoever. And -- and what we have here  
4 are states that don't recognize these types of claims.  
5 Indeed, class counsel themselves acknowledged that in  
6 seeking certification of the Sullivan case when they  
7 came in and only asked for 31 states to be certified.  
8 It was relying upon the Null default obtained in Madison  
9 County, Illinois State Court.

10 JUDGE NO. 2: Where a nationwide class was  
11 certified, right?

12 JUDGE NO. 3: Uh-huh.

13 MR. BASHMAN: Right, through a -- through  
14 the drive-by certification.

15 JUDGE NO. 2: Should that have any affect  
16 on our -- on our decision making here?

17 MR. BASHMAN: It certainly is not a  
18 preclusive outcome on -- on the district court, because  
19 otherwise the district court would never have undertaken  
20 the Rule 23(b) inquiry themselves, as -- as was  
21 necessary to approve the settlement. So we acknowledge  
22 that there was a drive-by class certification in Madison  
23 County, Illinois in the default case.

24 JUDGE NO. 2: What -- I mean -- what do you  
25 mean? I mean, I think I know what you mean, but why

1 don't you be explicit?

2 MR. BASHMAN: Right. What -- what I mean  
3 is that this is a court that's notorious for certifying  
4 claims before the defendant even appears in cases that  
5 are not defaulted, let alone in cases that are  
6 defaulted. And what I'm saying is that in that court,  
7 as I understand it, all that is necessary is that you  
8 file a motion saying that this class should be certified  
9 together with your initial pleading and the class is  
10 certified subject to later decertification.

11 JUDGE NO. 2: Yeah. If I may -- a question  
12 about the -- the consumer protection claims that we  
13 started with. You're saying that the anti -- the states  
14 without Illinois Brick Repealers, these folks couldn't  
15 have had any standing, but what about the unjust  
16 enrichment and consumer protection claims?

17 MR. BASHMAN: Right. In the -- in the  
18 Sullivan case --

19 JUDGE NO. 2: A nationwide class okay for  
20 that?

21 MR. BASHMAN: No, Your Honor, it's not.  
22 The Sullivan case, it sought to certify those types of  
23 claims and only sought 31 states; and, again, Sullivan  
24 is this case, so when the plaintiffs came in --

25 JUDGE RENDELL: Didn't you tell us that in

1 Ohio a claim would not exist for an indirect purchaser  
2 under their consumer protection law?

3 MR. BASHMAN: Absolutely. In -- in the  
4 Johnson against Microsoft case, the Supreme Court of  
5 Ohio ruled that any other type of claim that could be  
6 tacked on to an antitrust claim under Ohio law, such as  
7 unjust enrichment, consumer protection and anything  
8 else, is not recognized in Ohio because the --

9 JUDGE RENDELL: Well, the dissenting  
10 justice who said, oh, yes, it is...

11 MR. BASHMAN: Right, the chief justice and  
12 whatever justice dissented.

13 JUDGE RENDELL: I mean, how are we even  
14 supposed to figure these things out? Is this what a  
15 district court judge has to do? And if that --

16 MR. BASHMAN: With all due respect, Judge  
17 Rendell, I think that's the easiest state to figure it  
18 out, perhaps, because you have the Supreme Court of the  
19 state telling you what Ohio law is. It's the fact that  
20 two justices on a court that consists of, if I  
21 understand -- if I recall correctly, seven justices  
22 disagreed, you know, that -- that's not -- doesn't stand  
23 for anything.

24 JUDGE RENDELL: So we have a subclass of  
25 Ohio purchasers who may have gone to New York to buy

1 their diamonds, and, therefore, who knows? Do we -- do  
2 we send this back for sub classes? Do we send this back  
3 for further negotiation, because maybe the indirect  
4 purchasers who have a right of action get more money and  
5 then De Beers says, well, the other people don't have  
6 any right of action, so knock off -- knock off 50  
7 million off the settlement?

8 MR. BASHMAN: As -- as matters stand today,  
9 you're absolutely right, that the settlement treats  
10 purchasers in all states identically as -- as the  
11 plaintiff's brief -- as the class counsel's brief  
12 concedes on pages 16 and 17. So if you come from a  
13 state where you don't have a claim, you get treated  
14 identically as someone who's from a state that does have  
15 a claim. But to answer your question --

16 JUDGE RENDELL: You didn't object to that,  
17 did you?

18 MR. BASHMAN: Yes, we --

19 JUDGE RENDELL: You did, too?

20 MR. BASHMAN: Yes, we did object to that.  
21 And we argued that in our -- in our appearance in the  
22 district court.

23 JUDGE RENDELL: Okay.

24 MR. BASHMAN: But to answer your question  
25 directly, that -- that is what we believe at a minimum

1 has to happen here, is that the certification is vacated  
2 and it's sent back to certify only the states that  
3 recognize these claims.

4 JUDGE NO. 2: Did Warfarin Sodium, our  
5 opinion in that, indicate that -- that in a settlement  
6 you can get close and close is close enough, without  
7 going through this sort of careful parsing of every  
8 state law's jurisdiction or every jurisdiction's law  
9 that you described here?

10 MR. BASHMAN: What -- what that case  
11 recognized is -- is that the Delaware consumer  
12 protection -- consumer fraud statute applied to all  
13 purchasers of the drugs anywhere, so -- so there you had  
14 a state's law that the district court found did apply to  
15 all the transactions so that everyone in that class did  
16 have a claim that was recognized under Delaware law,  
17 whether they purchased in Delaware or not. I see the  
18 red light is on.

19 JUDGE RENDELL: Yeah, can I just ask one  
20 more question? But finally, if this -- if the  
21 certification were vacated, if it was sent back for  
22 subclasses, isn't the reality that the settlement will  
23 fall apart? I mean, De Beers, for lack of a better  
24 word, didn't they demand a global settlement; isn't this  
25 why this happened?

1 MR. BASHMAN: Whether -- number one, I  
2 can't answer directly whether the settlement will fall  
3 apart or not, because that -- that's part of the case  
4 that I'm not involved in.

5 JUDGE RENDELL: Right.

6 MR. BASHMAN: But if -- again, if Amchem  
7 stands for nothing else, it's that whether a settlement  
8 is good or bad does not overcome the flaws that are  
9 present there or here in our view. Thank you.

10 JUDGE NO. 3: Thank you.

11 JUDGE RENDELL: Thank you. We'll hear from  
12 you on rebuttal.

13 MR. TOBACCO: Good morning, may it please  
14 The Court. My name is Joseph Tobacco and I represent  
15 the appellees. And I will have to echo Judge Rendell's  
16 words about the poster child, because the poster child  
17 is really what Judge Chesler did in this case. These  
18 litigations were pending for several years. They --  
19 they, of course, like other complex cases, they had  
20 many, many issues that were certainly part of this  
21 litigation. But the court took its responsibilities  
22 very seriously, applied the existing law of the circuit  
23 at the time. Certainly Warfarin is right on point with  
24 this case. There's no question that the --

25 JUDGE NO. 2: Well --

1 MR. TOBACCO: -- Insurance Brokerage  
2 decision, which Judge Chesler didn't have the benefit of  
3 reading -- his decision really mirrors them in respects  
4 to the analysis in the final third circuit opinion in  
5 Insurance Broker.

6 JUDGE NO. 2: Is it -- is it really on  
7 point, Mr. Tobacco, where you've got a case here where  
8 it's clear that more than half the jurisdictions in the  
9 United States would not have allowed the claim at all?  
10 They don't have Illinois repealer statutes. They're --  
11 you're dealing with folks who, had they gone to state  
12 court, would have been shown the gate. How can it be  
13 that those people, by going into federal court, suddenly  
14 get substantive rights and share in a remedy?

15 MR. TOBACCO: I think the premise that my  
16 colleague stated is incorrect. This was not strictly --  
17 the claims that were brought here were much broader than  
18 antitrust claims.

19 JUDGE NO. 2: Well, let's focus on the  
20 antitrust claims for a minute, because that's what the  
21 district judge's opinion is all about, right? It's all  
22 about price fixing; and in the Sherman act, one kind of  
23 relief, isn't it?

24 MR. TOBACCO: Well, there's no question  
25 that a main focus -- and I would certainly concede, but

1 the judge did not ignore the fact -- and he says it in  
2 his opinion on a couple of occasions, that in the Null  
3 case, that this was a false and deceptive advertising  
4 claim --

5 JUDGE NO. 2: Let's -- let's --

6 MR. TOBACCO: -- so the defendants want --

7 JUDGE NO. 2: -- stick with the antitrust.

8 MR. TOBACCO: -- want to settle it.

9 JUDGE NO. 2: Let's stick with the  
10 antitrust for a minute.

11 MR. TOBACCO: Sure.

12 JUDGE NO. 2: And let's take New Jersey --  
13 so New Jersey -- New Jersey District Court. In New  
14 Jersey, if I'm -- if I understand correctly, under the  
15 substantive law of New Jersey, there would have been  
16 neither a right to the antitrust relief -- no standing,  
17 nor would there have been a right under consumer  
18 protection, because the New Jersey consumer fraud act is  
19 interpreted in a way by those courts to say you can't go  
20 through the back door of consumer fraud to get what you  
21 couldn't get through the front door of antitrust relief.

22 So in New Jersey where this court sits, you  
23 couldn't have gotten either under the substantive law.  
24 So that leaves me to wonder, how could you possibly,  
25 suddenly inquire substantive rights by going into



1 federal court with a bunch of buddies?

2 MR. TOBACCO: If this was strictly an  
3 antitrust case, I would agree with you. In fact, New  
4 Motor Vehicles was mentioned that was litigated. I was  
5 involved in that case, and in that case, it was strictly  
6 an antitrust case. This case involves conduct that goes  
7 beyond antitrust. That's the different here. And it's  
8 --

9 JUDGE NO. 2: Even -- even the consumer  
10 fraud claim under New Jersey would have fallen though,  
11 right?

12 MR. TOBACCO: No.

13 JUDGE NO. 2: As a matter of substantive  
14 law they couldn't have brought a consumer fraud claim  
15 because the New Jersey Supreme Court -- I think it's the  
16 Sickles case that they approved. It was a lower court  
17 case, but they cited it with approval -- said you can't  
18 use consumer fraud as a way around the Illinois brick  
19 block, if I can say it that way.

20 JUDGE RENDELL: Wall. The brick wall.

21 JUDGE NO. 2: Yeah. To get into court for  
22 an indirect purchaser kind of claim.

23 MR. TOBACCO: I don't disagree with that.  
24 And the reason that we can -- I can stand here and say  
25 that Judge Chesler got it right is because the

1 defendant, in the context of facing a certified class --  
2 remember, there was no certification in Warfarin before  
3 that case settled; there was no certification in  
4 Insurance Broker, but, yet, if you just look at the Null  
5 certification on it's face, if you're a defendant, what  
6 do you do with that? You have a couple of choices; you  
7 could come in and maybe lift the default and maybe  
8 attack that and maybe say it -- or you make the decision  
9 represented by extremely experienced counsel that we're  
10 going to make the economic decision to avoid the risk  
11 and liability and we're going to settle that case.

12           That case involved the 50-state  
13 certification. So it's not just an antitrust case  
14 that's being settled. We brought the Sullivan case, no  
15 question, antitrust theory and claim, but deceptive  
16 practice of false advertising "Diamonds are Forever",  
17 the attack on that case was focussed on the advertising.  
18 So that gives a whole new anticlave (phonetic) of causes  
19 of action nationwide. You have unjust enrichment, you  
20 have --

21           JUDGE NO. 2: So -- so Null is what gives  
22 the foundation for a nationwide class?

23           MR. TOBACCO: Well, it certainly is -- is a  
24 major underopinion (phonetic) of that; and, of course,  
25 there was an open question in the Leider case, because

1 the Leider case involved primarily antitrust and the --  
2 and the district court there said, gee, if I apply  
3 Article IX as punitive, but there's a whole debate about  
4 -- in open question now about this Rule 23, Trump  
5 Article IX in the CPLR. So these are open issues and  
6 does the defendant, as you've said, I think have to  
7 litigate these questions to get peace? Well, then you'd  
8 never have a settlement.

9           And Judge Ambrose confronted some of those  
10 questions in the MetLife case years ago. These are not  
11 simple questions, they are difficult questions. And  
12 here you have Judge Chesler, doing a very careful and  
13 artful job. It is true he probably could have --  
14 nothing is perfect. He could have gone off of pages and  
15 pages and analyzed law of each state, but, you know,  
16 let's face it, the record he had in the district court  
17 -- he had a compendium of eight different expert  
18 opinions talking about common impact. He had an  
19 overriding question about does the court have  
20 jurisdiction on impact and then --

21           JUDGE NO. 2: How -- how can there be  
22 common impact though, Mr. Tobacco? That's -- that's --  
23 I don't want to speak for anybody else, but that's --  
24 I'm struggling with that. How is there common impact  
25 if, under the substantive law of the state, there would

1 be no right to relief? If the -- if you could not go  
2 into -- we'll stick with New Jersey, but we could -- we  
3 could take Texas or Oklahoma or Connecticut or  
4 Washington or it could be a number of others. If you  
5 couldn't get that relief, how can it be said that  
6 there's a common impact from the behavior of De Beers  
7 when the legal rights associated or arising out of that  
8 behavior are vastly different jurisdiction through  
9 jurisdiction, and, indeed, in several jurisdictions you  
10 would have no right?

11 MR. TOBACCO: I'd -- I'd go back to the  
12 fact that this case that was brought and the case that  
13 was settled -- and the case that was settled is  
14 identical to the case that was brought; in other words,  
15 the settlement class here is no broader than the cases  
16 that were brought. And the case that was brought is  
17 much -- it goes beyond antitrust. It was strictly an  
18 antitrust price fixing case. We had two co-conspirators  
19 and that's all that was alleged and that's all that was  
20 involved in it, then maybe you would have that issue.  
21 I'm not going to dispute that. But in -- in Warfarin,  
22 it was deceptive practices in terms of advertising and  
23 how the drugs are marketed; in Insurance Broker, it was  
24 the same kind of conduct; and here, in the Null case,  
25 you had the allegations that they engaged in a deceptive

1 pattern of -- of artificially adver -- of false  
2 advertising. That's a different set of facts.

3 JUDGE NO. 2: So there would have to be --  
4 there would have to be an assumption that you could set  
5 the antitrust stuff aside -- even though that's  
6 99.9 percent of what Judge Chesler talked about -- set  
7 that aside, look at consumer fraud and say because Null  
8 said you can do this across the country, we're saying  
9 you can do this across the country?

10 MR. TOBACCO: Well, again, in the context  
11 of settlement and if full faith and credit is to be  
12 given any measure, what do you do when you have a  
13 certified -- a litigation order of a court? Now, you  
14 can say, well, maybe the judge got it wrong or maybe he  
15 got it right, but do we want district court judges to  
16 get into the practice and require them to get into the  
17 practice of looking beyond litigated decisions in cases?  
18 I mean, what is the defendant --

19 JUDGE NO. 2: Is it a full faith and credit  
20 issue? I mean, is it a full faith and credit -- this is  
21 not an enforcement of a judgment, this is a discussion  
22 by the district court about whether there was  
23 predominance and superiority.

24 MR. TOBACCO: Sure.

25 JUDGE NO. 2: And -- and it's -- you're not

1 making the assertion, are you, that somehow there's a  
2 collateral estoppel effect to what the Null court, did,  
3 are you?

4 MR. TOBACCO: No. No, I'm not. And I'm  
5 saying that, unlike Warfarin, you had no certification  
6 order; here you had three different certification orders  
7 in addition to the California certification and the Anco  
8 (phonetic) certification, you had the Null  
9 certification. And it's the defendant; the defendant  
10 waves its right to dig in and attack those. What's the  
11 district court judge to do? Because those are  
12 substantive rights that -- that were certified 50-state.  
13 So how could the defendant say, well, gee, I don't want  
14 a 50-state release because maybe some day someone could  
15 attack that certification order; we could never settle  
16 these cases.

17 What -- what Quinn respectfully requests,  
18 while trying to talk herself out of the right to recover  
19 here, because she says she can't recover under Texas  
20 law -- I don't really know what the motive is for the  
21 argument, but -- but assuming that that is her position,  
22 how could any defendant get the kind of peace that it  
23 needs, pay the appropriate amount of money -- and,  
24 again, if you look at the context of the \$300,000,000  
25 settlement -- remember this class contains --

1 JUDGE NO. 2: Well, can I -- can I hold you  
2 up for a second?

3 MR. TOBACCO: Sure.

4 JUDGE NO. 2: It sounds like what you're  
5 saying is that because -- and this is -- it maybe goes  
6 to what Judge Ambrose was saying, because De Beers  
7 really insisted on a nationwide settlement that -- that  
8 this is how it had to be. And I guess if -- that leads  
9 me to wonder whether that really makes any difference or  
10 not when it comes to substantive rights. No matter how  
11 much De Beers wants it, no matter how willing they are  
12 to stipulate to be liable, that -- that willingness,  
13 that desire, it -- it might lead to a settlement, but is  
14 that a legally sound -- I mean, isn't it, as a legal  
15 matter, just irrelevant how badly they wanted it?

16 MR. TOBACCO: Absolutely. That's not the  
17 standard. The standard is do they face a risk, however  
18 slight or however great. We're not going to sit here  
19 and second guess the business judgment of De Beers in  
20 the settlement. We're sitting here saying when you're a  
21 district court judge and you're confronted by a  
22 landscape where -- that includes -- a 50-state  
23 certification, includes claims that go well beyond  
24 antitrust and a defendant that says I am prepared to  
25 settle those claims rather than fight them; in that

1 context, just like in Warfarin, just like in Insurance  
2 Broker -- and remember, in Insurance Broker, the -- the  
3 -- there were claims that the district court had  
4 dismissed -- the Rico claims, the district court  
5 dismissed -- they went back to the analysis and said,  
6 gee, you know, we can even find a way to certify those  
7 claims even though the district court found them to be  
8 without merit at the lower level.

9 JUDGE RENDELL: How -- how do you write the  
10 opinion here that this fits squarely within the  
11 predominance requirement?

12 MR. TOBACCO: Well, certainly a predominant  
13 -- when we start with the fundamental predominance,  
14 which is, does every single class member here from  
15 every -- from Washington State to Alaska to Hawaii, the  
16 predominant question is, was the conduct of De Beers, as  
17 broad as it was as a monopolist that raised the price  
18 worldwide of all diamonds by its conduct, coupled with  
19 the predominant question of they set themselves up so  
20 they were not subject to the jurisdiction of the United  
21 States, those two questions overwhelm in a common basis  
22 in every other question.

23 JUDGE RENDELL: And is that, as far as we  
24 look -- I mean, there's case law that says you have to  
25 have one --



1 JUDGE NO. 3: One.

2 JUDGE RENDELL: -- common -- you know,  
3 okay.

4 MR. TOBACCO: At least one, yeah.

5 JUDGE RENDELL: So you've got it, do we put  
6 blinders on as to -- to every other aspect -- or maybe  
7 commonality is where the rest of -- of the situations  
8 get taken into account. Maybe it isn't in predominance,  
9 I'm not sure.

10 MR. TOBACCO: You know, it's, look --

11 JUDGE NO. 3: I mean, isn't that why  
12 Warfarin is really different from this case, because all  
13 the class members did have one common identical claim  
14 there?

15 MR. TOBACCO: Well, they did -- certainly  
16 the fact that it helped them to Delaware, but think of  
17 the opposite effect. I mean, if you were to actually do  
18 the conflicts of laws, you would say, gee, does that  
19 mean a foreign national gets a free pass, whereas  
20 someone who happens to be incorporated in Delaware gets  
21 nailed? I mean, that -- that practice couldn't make  
22 sense, because certainly whether a 50-state  
23 certification and Null ultimately, at the end of the day  
24 in the litigation context, would have stood up is  
25 irrelevant to the question of what do you do when you're

1 confronted with these broad claims that are asserted,  
2 you're a federal district court judge, you have a  
3 160-page special master's report with detail findings  
4 that talk about the economics that demonstrate how the  
5 price of diamonds was inflated from the -- from the  
6 mines all the way through to the finished jewelry. You  
7 have all of this economic evidence that demonstrates  
8 economic commonality and methodology to get there --

9 JUDGE RENDELL: Where's -- what --

10 MR. TOBACCO: -- which is nothing.

11 JUDGE RENDELL: What law would control De  
12 Beers' conduct?

13 MR. TOBACCO: If you were to try to this  
14 case --

15 JUDGE RENDELL: Yeah.

16 MR. TOBACCO: -- I think the court would  
17 have to do -- not the settlement context, but if you try  
18 the case --

19 JUDGE RENDELL: Right. It might not be the  
20 plaintiff's --

21 MR. TOBACCO: It might not be the  
22 plaintiff's choice of law. There would have to be a  
23 very careful assessment. I mean, obviously, many  
24 diamonds come through New York, many diamonds come  
25 through the other diamond centers. Would that be the

1 conduct? If it's advertising, maybe Illinois law  
2 applies. I mean, it's not -- these things -- one of the  
3 reasons that I think you have a settlement at  
4 \$300,000,000 in this case is because you have very -- a  
5 number of very difficult issues. I mean, I know we're  
6 not here to talk about the (inaudible) records, but --

7 JUDGE NO. 2: Right.

8 MR. TOBACCO: -- if you glance at the way  
9 Judge Chesler handled those first three (inaudible)  
10 records tells you why we ended up in the settlement.

11 JUDGE NO. 2: Well, let me ask about the  
12 injunction --

13 MR. TOBACCO: Yes.

14 JUDGE NO. 2: -- piece of this, if I can,  
15 because you've said a couple of times that it's clear  
16 that everybody suffered the same injury, but the  
17 objectors press the point pretty vigorously that your  
18 own experts made clear that there is not a common set of  
19 circumstances throughout the class period; that, in  
20 fact, De Beers' capacity to control the market dropped  
21 off dramatically. And at one point I think they quote  
22 your expert as saying that it was a competitive market.  
23 And if that is, in fact, what the evidence was, is it  
24 accurate to say that the people who bought at different  
25 times in this period all suffered the same injury, or is

1 it more accurate to say, if your experts really said it,  
2 some people may have suffered an injury, but other  
3 people didn't because they bought in a competitive  
4 market?

5 MR. TOBACCO: First off, let me just say  
6 something. And I was prepared in the 15 minutes I had  
7 to point out the three places where they quote our  
8 expert and they take the context -- take it out of  
9 context. Our experts have never conceded that, at any  
10 point during the class period, there was ever a truly  
11 competitive market. The context in which they talked  
12 about is that, perhaps, in -- in the ebb and flow  
13 between high and low tides, there were periods when  
14 there were more effect or less effect, but they never  
15 said that there was ever a point where there was a fully  
16 competitive market.

17 When De Beers had the ability, as it did  
18 for a century, to control and raise prices for 100  
19 years, it's a more difficult task and the experts, as in  
20 the context, were trying to find those relative points  
21 of high and low tide, but there was never a concession  
22 of competition breaking out during the class period.

23 After the class period, John Prozarkawitz  
24 (phonetic), one of our experts, said in 2006, after the  
25 injunction that was part of the settlement was in place,

1 he noted that prices were headed in a more competitive  
2 direction. Even there he didn't say it was true  
3 competition.

4 JUDGE NO. 2: Indeed, he used that as a  
5 measuring means, didn't he, to -- to look at -- how to  
6 look at effect by saying, well, it was more competitive  
7 in this period than it was earlier, and so I can make  
8 some judgment about the impact?

9 MR. TOBACCO: Prozarkawitz (phonetic)  
10 actually found damages every single year of the class  
11 period right to the end. And it was only after the  
12 fact -- he was talking about 2006 -- after the class  
13 period ends, that he said you need injunctions in place.  
14 There are the EC rules that are in place. Maybe we're  
15 heading more towards a point where there's competition.  
16 There was never a concession. I can keep going, but --  
17 but there's no time.

18 But I would certainly end by saying it's a  
19 silent majority here. You have major corporations by  
20 members of this class. It's unusual that you wouldn't  
21 have optouts that would have stepped forward. You have  
22 50 attorney generals that were -- state attorney  
23 generals that were notified. If they felt that my state  
24 was getting the short end because some other state was  
25 getting more money, don't you think they'd be here? I

1 mean, it speaks volumes to the work that Judge Chesler  
2 did on this record. It's a very thorough record. He  
3 followed through it well. No abuse of discretion,  
4 should be affirmed current (phonetic).

5 JUDGE RENDELL: Thank you.

6 JUDGE NO. 3: Thank you.

7 JUDGE NO. 2: Thank you.

8 JUDGE RENDELL: Mr. Bashman.

9 MR. BASHMAN: Your Honors, just very  
10 briefly. Class counsel brought to the attention of this  
11 court by means of Rule 28(j) letter a first circuit  
12 decision that issued November 2009, that they say stands  
13 for the proposition that where a defendant demands  
14 nationwide peace, it's possible to throw in states where  
15 the plaintiffs don't have any claims; that's the In re  
16 Pharmaceutical Industry Average Wholesale Price  
17 litigation case.

18 And I want the court to know that the  
19 district judge in that case sent a decision that's  
20 reported in the FRD Reporter, excluded those states, not  
21 because the plaintiffs didn't have claims, but, rather,  
22 just because, under the law of those states, they  
23 couldn't bring a class action. So that -- that case  
24 does not stand for the proposition, you can just throw  
25 in states where the claims actually don't exist.

1 Amchem --

2 JUDGE RENDELL: How -- how do we -- how do  
3 we know that the states where plaintiffs couldn't bring  
4 suit, how do we know that their law would apply? Maybe  
5 De Beers -- I don't know what the law -- where are they,  
6 South Africa?

7 MR. BASHMAN: Correct.

8 JUDGE RENDELL: What's the law there?  
9 Maybe that law would apply and -- and there be no  
10 liability at all because there is no such law in South  
11 Africa, or maybe there are very stringent laws and that  
12 law would apply? Is this what a District Court judge  
13 has to do?

14 MR. BASHMAN: The -- the way that the  
15 district judges who have sat on these cases that bring  
16 us here today have treated that, is that the law of the  
17 state where the purchase had occurred applies, and we  
18 believe that that is the correct approach. And in the  
19 Leider case, it was found that New York State does not  
20 allow these claims to be brought as a class action and  
21 that the claims don't exist under New York law. And as  
22 we said in Sullivan, only 31 states were sought to be  
23 the subject of class certification, only damage claims  
24 there.

25 But what Amchem says, contrary to opposing

1 counsel's argument, is that the defendants' concessions  
2 to the presence of the class certification criteria are  
3 not controlling, because that, of course, was a  
4 settlement case there where the defendant was conceding  
5 that the class certification was proper.

6 JUDGE RENDELL: Is Amchem your best case as  
7 far as you are concerned?

8 MR. BASHMAN: We believe it is our best  
9 case, as far as we're concerned.

10 JUDGE NO. 2: Can you --

11 MR. BASHMAN: Thank you, Your Honors.

12 JUDGE RENDELL: Thank you.

13 JUDGE NO. 3: Thank you.

14 JUDGE NO. 2: Can you speak -- just a --  
15 may I?

16 JUDGE RENDELL: Sure.

17 JUDGE NO. 2: Can you speak for a moment  
18 about the injunction piece of this? You heard Mr.  
19 Tobacco say that there have never been any kind of  
20 concession by their experts, that there was ever a  
21 competitive period during the market that's included as  
22 the class period. I want you to take on that factual  
23 issue. And then, assuming that he's right, is your  
24 argument on that score fall?

25 MR. BASHMAN: We -- we don't concede that



1 that's right. And, of course, in our opening brief, we  
2 do give the quotations that we're relying upon from the  
3 class counsel's experts that do say that from 2006  
4 forward, the market had become competitive. And we  
5 point out why the existence of the injunction was -- was  
6 not the reason given by the experts for that fact having  
7 come into existence, the competitive market. So the  
8 experts explain the reasons why the market became  
9 competitive and did not site that an injunction issued,  
10 just several months before, was the reason for it.

11           The New Motor Vehicle case, when the first  
12 circuit decided that appeal, that was a similar  
13 situation where -- where the basis for the injunctive  
14 relief no longer existed at the time the appeal was  
15 being heard. And the appellate court there sent the  
16 case back for -- for Judge Hornby to consider, whether  
17 the injunction should remain or not under the  
18 circumstances.

19           That -- that is our central argument for --  
20 for why the injunction does not give a reason for  
21 certification, but this is predominantly, as it stands  
22 today, a Rule 23(b)(3) class where damages is the  
23 central focus.

24           JUDGE RENDELL: Would you complete the  
25 sentence that this is not a case where there is one

1 common question of fact or law because...

2 MR. BASHMAN: Because in many of the states  
3 that are included within the settlement, the class  
4 members don't even have a substantive claim under state  
5 law.

6 JUDGE RENDELL: Okay.

7 MR. BASHMAN: Thank you.

8 JUDGE RENDELL: Uh-huh. Thank you very  
9 much. Case is well argued.

10 JUDGE NO. 3: Thank you. Yes.

11 JUDGE RENDELL: We'll take it under  
12 advisement.

13 MR. TOBACCO: Thank you.

14 (Proceedings concluded.)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. 08-2785

SHAWN SULLIVAN, ARRIGOTTI )  
FINE JEWELRY and JAMES )  
WALNUM, on behalf of )  
themselves and all others )  
similarly situated, )

VS. )

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, and )  
DE BEERS CENTENARY A.G., )

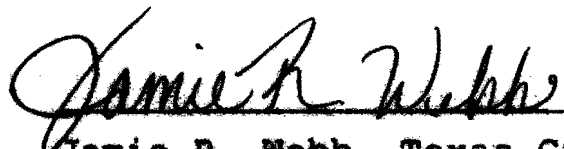
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5 otherwise interested in the outcome of the action.

6 Certified to by me this 26th day of April, 2010.

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