1 09:34:35

2 UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

3

4 ---
)
5 In Re: Baycol Product Litigation) MDL No. 1431 MJD
)
6) 9:30 a.m. o'clock
) February 6, 2003
7) Minneapolis, MN
)
8) VOLUME I
)
9 ---

10 BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE
11 (CLASS CERTIFICATION HEARING)

12 APPEARANCES:

13 ON BEHALF OF THE PLAINTIFF: CHARLES ZIMMERMAN, ESQ.
ARTHUR MILLER, ESQ.
14 ELIZABETH CABRASER, ESQ.
STANLEY CHESLEY, ESQ.
15 RICHARD ARSENAULT, ESQ.
RICHARD LOCKRIDGE, ESQ.
16 JOHN CLIMACO, ESQ.
DIANNE NAST, ESQ.
17
ON BEHALF OF THE DEFENDANT: PHILIP BECK, ESQ.
PETER SIPKINS, ESQ.
SUSAN WEBER, ESQ.
19 FRED MAGAZINER, ESQ.
ADAM HOEFLICH, ESQ.
20 REBECCA BACON, ESQ.

21 COURT REPORTER:

22 BRENDA E. ANDERSON, RPR
300 South 4th Street
23 Suite 1005
Minneapolis, MN 55415
24 (612) 664-5104
E-mail - BAnder2400@aol.com

25

1 THE CLERK: Multi-District Litigation No. 1431, 09:34:37
2 In re: Baycol Products. Please state your appearances for 09:34:41
3 the record. 09:34:44
4 MR. ZIMMERMAN: Good morning, Your Honor, Charles 09:34:45
5 Zimmerman for the Plaintiffs Steering Committee. 09:34:46
6 THE COURT: Good morning. 09:34:50
7 MR. CHESLEY: Good morning, Stanley Chesley for 09:34:53
8 the Plaintiffs Steering Committee. 09:34:55
9 THE COURT: Good morning. 09:34:57
10 MS. CABRASER: Good morning, Elizabeth Cabraser 09:34:58
11 for the Plaintiffs. 09:35:01
12 THE COURT: Good morning. 09:35:02
13 PROFESSOR MILLER: Good morning, Arthur Miller 09:35:04
14 for the Plaintiffs. 09:35:06
15 THE COURT: Good morning, Professor. 09:35:08
16 MS. NAST: Dianne Nast for the Plaintiffs. 09:35:12
17 MR. CLIMACO: John Climaco, Plaintiffs Steering 09:35:15
18 Committee. 09:35:20
19 MR. ARSENAULT: Richards Arsenault for the 09:35:20
20 Plaintiffs Steering Committee. 09:35:23
21 THE COURT: Good morning. Mr. Beck. 09:35:25
22 MR. BECK: Philip Beck for the Defendants, and I 09:35:27
23 want to introduce, also, if I may, Dr. Roland Hartwig who 09:35:30
24 is the General Counsel from Bayer AG who is here this 09:35:37
25 morning. 09:35:42

1 THE COURT: Good morning. 09:35:43
2 MR. BECK: Also Gary McConnell, Senior Counsel 09:35:46
3 for the Bayer United States, and with me are my colleagues 09:35:51
4 from my firm Rebecca Weinstein Baker and Allison Freedman. 09:35:53
5 THE COURT: Good morning. 09:36:01
6 MS. WEBER: Good morning, Susan Weber for Bayer, 09:36:02
7 and I have a couple of my colleagues, James Mizgala and 09:36:05
8 Sherry Knutson.
9 THE COURT: Good morning. 09:36:13
10 MR. BECK: I'm sorry, one of my late arriving 09:36:15
11 colleagues who hasn't worked very hard on this matter is 09:36:19
12 Adam Hoeflich. 09:36:24
13 THE COURT: You got him on the hard bench back 09:36:26
14 there. What did you do to deserve that, Adam? 09:36:28
15 MR. HOEFLICH: I lost a motion the last time, 09:36:34
16 Judge. 09:36:37
17 MR. MAGAZINER: Fred Magaziner for 09:36:38
18 GlaxoSmithKline. 09:36:43
19 MR. SIPKINS: Peter Sipkins. 09:36:48
20 MR. SCHAERR: Gene Schaerr for Bayer. 09:36:51
21 THE COURT: Good morning. Mr. Zimmerman. 09:36:52
22 MR. ZIMMERMAN: May it please the Court, Counsel, 09:37:16
23 about a year ago, Your Honor, I made a pledge to this Court 09:37:26
24 and the PSC made a pledge, and that was to do justice. The 09:37:29
25 Plaintiffs and Defendants in April in New Orleans made a 09:37:37

1 pledge to the courts around the country and lawyers around 09:37:43
2 the country to do justice. A pledge of fair, equal and 09:37:46
3 inexpensive justice. 09:37:54
4 Today in this courtroom we seek fair, fast, equal 09:37:57
5 and inexpensive justice. What is justice? What is fair? 09:38:03
6 Fast, inexpensive justice. According to the Supreme Court, 09:38:09
7 it's the touchstone of federal procedure. It is stated as 09:38:13
8 the purpose of the federal rules in Rule 1 to be 09:38:19
9 administered to secure just, speedy and inexpensive 09:38:24
10 determinations of every action. 09:38:28
11 The concept of justice, however, is not a static 09:38:32
12 one. In 1969, Justice Thurgood Marshall at the Tenth 09:38:37
13 Annual James Madison series said justice must be revised to 09:38:47
14 suit the times. 09:38:52
15 Today, Your Honor, we are at a crossroads. 09:38:54
16 Decisions we make today will be affecting everyone in this 09:38:58
17 country with the Baycol case. Everyone looking to this MDL 09:39:01
18 for help in this litigation, everyone looking to this MDL 09:39:10
19 for management and resolution of the issues that will 09:39:15
20 advance their claim. And, really, everyone who looks to 09:39:17
21 the federal courts for answers to complex legal problems. 09:39:25
22 This MDL, the Baycol litigation, involves one 09:39:28
23 product, Baycol, one manufacturer, Bayer, who in a period 09:39:32
24 of less than 42 months injured thousands and thousands of 09:39:39
25 people with one signature disease. 09:39:44

1 The question really is how are we going to fairly 09:39:48
2 and promptly compensate the victims who truly deserve 09:39:54
3 compensation and fairly treat people who deserve medical 09:40:04
4 monitoring. How are we going to fairly administer justice, 09:40:07
5 give equal justice to all? To make our system work to 09:40:11
6 those with legitimate claims, and I mean legitimate claims, 09:40:15
7 and do so again without unreasonable delay, without 09:40:18
8 unneeded expense, and without unneeded repetition of the 09:40:23
9 litigation. 09:40:26
10 How are we going to resolve common issues and 09:40:29
11 prevent endless relitigation of the same issues for far as 09:40:34
12 the eye can see. And, Your Honor, we have choices -- 09:40:39
13 choices that will be guided by experience and the law. 09:40:43
14 Experience, Your Honor, we are fortunate, we are very 09:40:50
15 fortunate. Almost every major mass tort decision after 09:40:53
16 every major mass tort case in this country over the last 15 09:40:57
17 years have been litigated by lawyers in this courtroom 09:41:02
18 today -- breast implants, tobacco, diet drugs, Albuterol, 09:41:06
19 Telectronics, asbestos, Ford, Firestone, Propulcid, 09:41:13
20 Rezulin, Sulzer. All of the lawyers that were the 09:41:19
21 architects and Steering Committee of those cases are here 09:41:24
22 today. And all cases cited, or almost all cases cited by 09:41:27
23 both parties in the brief that involve these issues, we 09:41:31
24 have the people here who can compare and contrast and 09:41:36
25 discuss in a learned way with this Court those decisions. 09:41:41

1 Those facts must be well understood and the law must be 09:41:45
2 well understood. 09:41:49
3 We have Professor Arthur Miller. He brings to us 09:41:50
4 an extreme range of understanding and experience. I 09:41:56
5 believe he will demonstrate to this court how and why a 09:42:00
6 class action is superior, how and why a class action can 09:42:04
7 work and be managed and show how and why a well-managed 09:42:08
8 class action is not only possible but practical, and will 09:42:15
9 serve the interest of effective management of this MDL. 09:42:22
10 And we will show how and why a well-managed class 09:42:27
11 action can resolve issues common to all Baycol litigants, 09:42:33
12 plaintiff and defendant. And then we will hear from 09:42:37
13 Elizabeth Cabraser as well who will demonstrate to us why a 09:42:41
14 refund class to be certified before this court is the right 09:42:46
15 thing to do. 09:42:51
16 Your Honor, you will hear sharp contrast. 09:42:53
17 Plaintiffs will show the possibilities. Defendants will 09:42:58
18 attempt to show the reasons why not. We call it the parade 09:43:02
19 of horrors. Defendants will try and show why thousands and 09:43:05
20 thousands of cases and thousands of trials in ever federal 09:43:10
21 district in this country is best when again we have one 09:43:16
22 drug, one manufacturer, one set of liability facts in a 09:43:19
23 period of 42 months who were given to a universe of people 09:43:24
24 with the same problem, high cholesterol, and produced the 09:43:33
25 same signature disease. They are going to demonstrate to 09:43:37

1 this Court how justice should be piecemealed and delayed. 09:43:40
2 But, Your Honor, the ultimate discretion in the 09:43:45
3 final analysis lies with Your Honor. Much discretion under 09:43:49
4 the federal rules is vested in this Court. 09:43:55
5 The Court will hear learned debate. I trust the 09:43:59
6 debate will be vigorous and the debate will be learned and 09:44:04
7 the debate honorable. But in the end, after all is said 09:44:09
8 and the dust is settled, I believe there will be little 09:44:13
9 doubt that justice will be best served, fairness best 09:44:16
10 administered, our pledges best kept by this Court's proper 09:44:20
11 management of a class. We hope Plaintiffs' argument and we 09:44:25
12 believe Plaintiffs' argument will be disciplined, linear 09:44:34
13 and persuasive. 09:44:36
14 My job is to introduce Professor Miller and 09:44:40
15 Elizabeth Cabraser who will argue the law. First, we'll 09:44:45
16 hear from Richard Arsenault for the factual predicate that 09:44:50
17 has to be laid out so the Court will understand how the 09:44:55
18 issues are common and how the issues can be managed. 09:45:01
19 Then we'll ask the Court to address any questions 09:45:04
20 to the Steering Committee, and we're all here to answer 09:45:06
21 them. We hope our cumulative experience will be a benefit 09:45:11
22 to the Court. We are each here and prepared to answer 09:45:16
23 questions. So, I would like to begin. But I would like to 09:45:19
24 leave the Court with one thought before I sit down. 09:45:22
25 I'd like to paraphrase the words of Bobby Kennedy 09:45:25

1 who said many times in many parts of the country, "Some men 09:45:28
2 see things that are and say why. I dream things that never 09:45:37
3 were and say why not." 09:45:43
4 I ask this Court to see the possibilities, the 09:45:48
5 potential, the promise, that justice can be given to all 09:45:48
6 who look to this Court for fast, fair and inexpensive 09:45:54
7 justice by utilizing the superior methods of Rule 23. 09:46:00
8 Thank you. 09:46:07
9 At this time I would like to introduce Richard 09:46:10
10 Arsenault. 09:46:13
11 THE COURT: Thank you, Mr. Zimmerman. 09:46:17
12 MR. ARSENAULT: Good morning, Your Honor. 09:46:19
13 Richard Arsenault for the Plaintiffs Steering Committee. 09:46:20
14 Your Honor, we think the facts in this case 09:46:28
15 demonstrate, in this litigation, essentially, involve a 09:46:31
16 single product, a single marketing campaign, and single set 09:46:31
17 of scientific issues. The key themes present the following 09:46:36
18 common issues. 09:46:40
19 The Defendants' studies were improperly used to 09:46:41
20 market Baycol. Evidence of this will apply in all cases. 09:46:44
21 The Defendants manipulated adverse events, data. 09:46:50
22 This conduct, likewise, applies to all cases. At any dose, 09:46:55
23 Your Honor, with or without concomitant use, Baycol created 09:46:57
24 more than twice the risk of any other statin. At any dose, 09:47:03
25 Baycol was unreasonably dangerous. It simply lacked the 09:47:07

1 efficacy and did not justify the risks presented. 09:47:12
2 The Plaintiffs' evidence about the injuries 09:47:15
3 caused by Baycol is the same in every case, myalgia, 09:47:19
4 myopathy, rhabdomyolysis. They are all conditions caused
5 by the same mechanism. The differences are just 09:47:26
6 differences in the degree of muscle deterioration and 09:47:29
7 kidney involvement. 09:47:33
8 If individual cases are tried separately, courts 09:47:34
9 will have to hear the same evidence, the same testimony 09:47:37
10 over and over again. 09:47:42
11 Statins, Your Honor, are used to treat, rather, 09:47:45
12 high cholesterol. Whether the Defendants in this case 09:47:50
13 decided to enter the statin market, there were already five 09:47:53
14 statins on the market. Those were Mevacor, Zocor, 09:47:57
15 Pravachol, Lescol and Lipitor. These statins are still on 09:48:01
16 the market today, whereas Baycol was withdrawn in August of 09:48:06
17 2001. During its short life span, some 900,000 patients 09:48:10
18 used Baycol. Over 4,000,000 prescriptions were written, 09:48:16
19 and some 25,000,000 free sample packets were distributed. 09:48:20
20 The statin market is a rather lucrative one. In 09:48:26
21 1999 the U.S. market was growing by nearly 40 percent. The 09:48:32
22 sales for '97 projected to reach 4,000,000,000, rising to 09:48:38
23 9,000,000,000 by 2001. 09:48:42
24 Statins had been on the market for over a decade 09:48:44
25 without Baycol. The existing variety and number of statins 09:48:48

1 adequately covered the waterfront. Nevertheless, the 09:48:52
2 Defendants hoped to squeeze into the statin-growing 09:48:55
3 multi-billion dollar sector. 09:49:00
4 Your Honor, Baycol was created in Germany in the 09:49:02
5 late '90s -- late '80s rather. In 1991 Bayer AG offered 09:49:05
6 Bayer U.S. an opportunity to participate in Baycol's 09:49:14
7 development and commercialization. This offer, however, 09:49:14
8 was met with resistance by Bayer U.S. Dr. Lawrence Posner, 09:49:16
9 who is worldwide head of Regulatory Affairs for Bayer, and 09:49:22
10 Dr. Gerald Rosenberg, who is the Senior Vice President of 09:49:26
11 Sales and Marketing, they both recommended against Baycol's 09:49:29
12 development in the United States. We have a passage here 09:49:33
13 from Dr. Rosenberg that explains what he refers to as his 09:49:36
14 bosses in Germany had to say. Doctor Rosenberg explains -- 09:49:41
15 and Professor Meyer and other senior management in Germany 09:49:45
16 said, "We know what you're saying, but we disagree with 09:49:48
17 you. We want you to develop this." And Rosenberg goes on 09:49:52
18 to say, "They are the bosses, so we agreed to go through 09:49:58
19 with the development." 09:50:02
20 He was then asked, "So they could override the 09:50:03
21 decision not to do it made by you and Dr. Posner?" He 09:50:08
22 answered, "Absolutely." "And Professor Meyer, what was his 09:50:11
23 title with Bayer AG?" "He was the head of the 09:50:14
24 pharmaceutical business group worldwide, the most senior 09:50:18
25 individual in pharmaceutical on a worldwide basis." 09:50:22

1 Now, GSK, like Bayer AG, also wanted in on this 09:50:27
2 statin market. Initially, GSK promoted Zocor, one of the 09:50:34
3 other statins. However, that contract came to an end when 09:50:39
4 GSK was accused of not meeting their contractual 09:50:41
5 obligations. GSK then moved to another statin, or at least 09:50:45
6 tried to, and that was Lipitor, and had not able to get 09:50:50
7 that contract. They finally settled on Baycol, signing a 09:50:52
8 co-promotional agreement with Bayer on July 21, 1997. 09:50:58
9 However, their involvement was turbulent from the very 09:51:03
10 start. 09:51:07
11 Your Honor, even before the co-promotional 09:51:08
12 agreement was signed, GSK was painfully aware of Baycol's 09:51:12
13 safety and efficacy problems. In a June 1997 letter, 09:51:16
14 nearly one month prior to the signing of the co-promotional 09:51:23
15 agreement, Jerry Karabelas, who was the GSK Vice President, 09:51:29
16 wrote David Ebsworth, Bayer's Pharmaceutical President 09:51:29
17 about these problems. 09:51:33
18 This is -- these are passages from the June of 09:51:42
19 1997 correspondence, Judge. Karabelas says, "The message 09:51:49
20 was simple and safe, simple price, simple dosing, milligram 09:51:54
21 efficacy at microgram doses. No worry about drug 09:52:00
22 interactions. This was a product with a profile we were 09:52:04
23 excited to market. One that we believed offered excellent 09:52:09
24 income opportunities to both Bayer and GSK." He goes on to 09:52:13
25 explain, "Now, more than a year after working with these 09:52:20

1 original assumptions and developing sales forecasts, we 09:52:22
2 have learned more about Baycol. And in light of these 09:52:25
3 changes, the opportunity is not as we expected." And, 09:52:28
4 again, this is one month before they enter into the 09:52:32
5 co-promotional agreement. 09:52:34
6 He goes on to conclude, "In summary, the profile 09:52:37
7 of Baycol has now evolved to one of low cost, comparable 09:52:39
8 efficacy to Lescol," that's one of the other statins, "with 09:52:46
9 drug interaction that could be magnified at higher doses. 09:52:46
10 Simple and safe no longer appears to be a viable 09:52:54
11 promotional platform." Now, this is a company that's going 09:52:57
12 to be co-promoting Baycol, and this is a month before they 09:53:00
13 signed that agreement. 09:53:06
14 GSK was also aware that increased dosage would be 09:53:08
15 critical for Baycol to compete. That's is why they want 09:53:14
16 major force and the development of the .4 dose. In fact, 09:53:16
17 Your Honor, the co-promotional agreement contained a 09:53:18
18 specific provision which allowed GSK to terminate the 09:53:21
19 agreement if.4 was not approved for marketing by August 1, 09:53:26
20 1999. Dr. Rosenberg was asked and explained why did that 09:53:32
21 provision end up in the co-promotional agreement. He 09:53:37
22 answered, "I think that provision was in there because GSK 09:53:42
23 felt to be competitive in this marketplace we had to have a 09:53:45
24 product that would reduce cholesterol at a higher level 09:53:48
25 than we were able to get in the.2 and the .3 doses. 09:53:54

1 Therefore, they wanted the.4 doses to be available. They 09:53:57
2 knew they needed a stronger dose to be competitive, but 09:54:02
3 they also knew that as the dose increased, there was a 09:54:03
4 commensurate increase in the danger. 09:54:06
5 How do you market a product like this? We have 09:54:09
6 some documents that suggest how the marketing took place. 09:54:14
7 The Defendants made conscious decisions to stretch the 09:54:19
8 data, to push regulatory authorities to the limit and skew 09:54:22
9 studies for marketing purposes. What we have here were 09:54:27
10 excerpts from minutes from the September 30, 1998 Baycol 09:54:32
11 grand review meeting and they spell it out. We need to 09:54:36
12 stretch the data to the maximum. Other companies have 09:54:41
13 developed an attitude of pushing marketing material 09:54:46
14 aggressively, following the philosophy, we do not know 09:54:50
15 where the legal boundary is until we hit it. 09:54:53
16 One may not value this, but since it is the rule 09:54:56
17 in the market, we as a company have to follow it. The area 09:55:00
18 is greater than we treat it. We can pick the better study 09:55:04
19 for the detail aid. It is the role of marketing to 09:55:10
20 challenge regulatory systematically. 09:55:11
21 It didn't take long, however, for this data 09:55:18
22 stretching to catch up with the Defendants. In October of 09:55:21
23 1999, the FDA's Division of Drugs, Marketing, Advertising 09:55:26
24 and Communications cited Bayer's promotional materials as 09:55:30
25 false, lacking in fair balance, or otherwise misleading. 09:55:35

1 What we have here, Your Honor, is excerpts from 09:55:43
2 is that letter. On the first page it notes references made 09:55:43
3 to the sales aid submitted under cover of form FDA 2253, 09:55:57
4 dissemination of this material by Bayer Corporation and/or 09:56:03
5 Bayer agents violates the Federal Food, Drug and Cosmetic 09:56:06
6 Act. 09:56:11
7 It goes through the aid and talks about some of 09:56:12
8 the representations the Defendants were making. The sales 09:56:17
9 aid, for example, in their discussion about the science for 09:56:20
10 success, the FDA said that the presentation under this 09:56:24
11 header is misleading because it implies without substantial 09:56:27
12 evidence that Baycol is superior. 09:56:31
13 On the second page there is discussion about 09:56:35
14 claims that were being made by Bayer about Baycol being a 09:56:39
15 powerful enzyme inhibition. The FDA concluded, again, the 09:56:43
16 presentation under this header is misleading because it 09:56:49
17 implies that Baycol is superior. Apparently, Bayer was 09:56:53
18 also making claims that there were dramatic results across 09:56:57
19 key lipid parameters. Likewise, the FDA concluded that the 09:57:01
20 presentation of HDL-C efficacy information under this 09:57:06
21 header was misleading because it overstated the efficacy of 09:57:07
22 Baycol. 09:57:13
23 There were claims being made with regard to 09:57:14
24 Baycol that it was proven significantly better than 09:57:17
25 Pravachol, one of the other statins. The FDA concluded 09:57:22

1 that the presentation under this header is misleading 09:57:25
2 because it implies that Baycol is superior to Pravachol 09:57:29
3 without substantial evidence. 09:57:31
4 The FDA concluded that the promotional materials 09:57:33
5 lacked fair balance. They exploded the presentation of 09:57:37
6 risk information in this promotional piece lacks fair 09:57:42
7 balance. Promotional materials may be lacking in fair 09:57:43
8 balance or otherwise misleading if they fail to present 09:57:46
9 information relating to side effects and contraindications 09:57:48
10 with a prominence and readable reasonable comparable to the 09:57:53
11 presentation of efficacy information. 09:57:58
12 The FDA admonished that Bayer should immediately 09:58:00
13 cease using this and all other promotional materials for 09:58:06
14 Baycol that contained the same or similar violations. 09:58:11
15 There is a concept in this case, Your Honor, that 09:58:17
16 deals with concomitant use and throughout the facts you'll 09:58:22
17 be hearing terms like monotherapy and concomitant use. 09:58:25
18 Statins, as you know, is a drug helps that lower 09:58:31
19 cholesterol. Many people who have high cholesterol also 09:58:34
20 have high triglyceride levels. The cholesterol is treated 09:58:40
21 with a statin, and Baycol is one of those statins. The 09:58:43
22 triglyceride situation is treated with fibrates. One of 09:58:47
23 the popular fibrates is Gemfibrozil. So, when we talk 09:58:50
24 about the terms concomitant use, we are typically talking 09:58:53
25 about the use Baycol and Gemfibrozil together. When we are 09:58:56

1 talking about monotherapy, we are talking about Baycol 09:58:59
2 being used alone. 09:59:04
3 Your Honor, in this case, the Defendants knew 09:59:06
4 from the beginning that the Baycol was dangerous. As early 09:59:09
5 as May, 1999, they knew that when compared to other 09:59:13
6 statins, Baycol presented a much greater risk of 09:59:17
7 rhabdomyolysis. In fact, 5 to 10 times more with 09:59:22
8 monotherapy and 100 to 200 times more with concomitant use. 09:59:26
9 There are five sources -- at least five sources that stand 09:59:32
10 for this proposition that we have cited in an illustrative 09:59:36
11 sense. 09:59:40
12 Baycol was sold in the U.K. under the trade name 09:59:40
13 Lipobay. What you see next is a slide by Dr. Tim Shannon 09:59:45
14 who's making a presentation to the FDA's equivalent in 09:59:52
15 England, June 21, 2001 presentation. And as you can see at 09:59:57
16 the top there, November of 2000, they are talking about 10:00:03
17 Lipobay which is, again, the trade name in England. And in 10:00:08
18 those comparisons the rhabdomyolysis risk profile with 10:00:12
19 other statins in freedom of information database shows 10:00:14
20 difference for monotherapy five to tenfold and combination 10:00:17
21 therapy one hundred fold. 10:00:22
22 During Baycol's three and a half year life span 10:00:33
23 in the U.S., it was marketed to the public in four 10:00:33
24 different doses, those being .2, .3, .4, and .8. 10:00:36
25 Initially, Bayer sought approval of even smaller dosages, 10:00:41

1 .05 and .1. However, when Baycol was actually launched in 10:00:50
2 the U.S., only the .2 and the .3 were initially marketed. 10:00:54
3 From it's inception, Baycol was plagued with
4 efficacy problems. Early on the FDA informed Bayer the
5 absolute efficacy of this drug at these doses is limited
6 relative to other market statins. And this comes from a 10:01:10
7 1997 FDA medical review memo. Because of these efficacy 10:01:14
8 problems, approval for higher doses was constantly sought. 10:01:23
9 However, again, as the dosages increased, the danger 10:01:26
10 increased. Notwithstanding the risk, the Defendants moved 10:01:30
11 to a .4 dose and then a .8 dose. They considered a 1.6 and 10:01:34
12 a 3.2 does, and those clinical trials presented such 10:01:40
13 obvious and serious problems at these levels that Bayer 10:01:43
14 abandoned the development of those doses. 10:01:47
15 Again, as the Defendants increased dosage, they 10:01:51
16 exponentially increased the dangerous side effects of this 10:01:56
17 drug. An increase of enzymes called CK or CPK are 10:01:57
18 indicators diagnostic of the rhabdomyolysis problem. 10:02:04
19 As early as 1999, Bayer expressed concern about 10:02:07
20 CPK elevations. In fact, minutes of a July 21, 1999 video 10:02:14
21 conference revealed that it is not acceptable to study 1.6 10:02:18
22 because of the high incidence of CK elevation and an 10:02:23
23 exponential increase in side effects from .8 to 1.6 doses. 10:02:30
24 Development of the 3.2 is likewise not recommended for 10:02:32
25 similar reasons. 10:02:37

1 The Defendants flooded the market with .8 10:02:40
2 samples, and what we are going to do now is just go through 10:02:42
3 four or five, maybe half a dozen vignettes that illustrate 10:02:48
4 some common issues and conduct that's applicable to every 10:02:51
5 Baycol case. 10:02:54
6 Why the Defendants admonished that .8 was not to 10:03:01
7 be a starting dose, they inexplicably gave away millions of 10:03:01
8 .8 samples. These samples were distributed with such 10:03:10
9 enthusiasm, that as of March 2001, the samples outnumbered 10:03:14
10 .8 prescriptions 2 to 1. In fact, .8 samples were 10:03:18
11 distributed to sales reps even before the FDA approved .8. 10:03:22
12 In June of 2000, a conference called took place with key 10:03:28
13 Bayer executives. The discussions included a patient 10:03:33
14 information leaflet that warned about increase 10:03:36
15 rhabdomyolysis risks associated with Baycol use. 10:03:36
16 The executives all agreed that the leaflets 10:03:41
17 should be prepared before July 12, 2000, and that was the 10:03:45
18 date that the FDA was scheduled to meet regarding the .8 10:03:48
19 approval. The executives decided, and this is in the memo, 10:03:55
20 this leaflet should not be distributed prior to .8 Baycol 10:03:59
21 approval, otherwise, most likely it will delay the 10:04:03
22 approval. 10:04:07
23 Again, this is illustrative of the priorities 10:04:10
24 that Bayer had with regard to this drug. There was some 10:04:14
25 that opposed the .8 launch, and we have an example of that. 10:04:18

1 Bayer moved forward with this .8 launch despite 10:04:24
2 those of the organization that knew it was ill-advised. 10:04:30
3 Dr. Richard Goodstein was the Bayer VP of Scientific 10:04:35
4 Relations. We are starting to see stress, Your Honor, 10:04:38
5 between the scientific part of Bayer and marketing part of 10:04:40
6 Bayer. In any event, Dr. Goodstein recognized the danger, 10:04:45
7 expressed his opinion and found himself as what he referred 10:04:51
8 to as a minority of one. His exchange with fellow Bayer 10:04:53
9 employee, Pat Stenger, and she was the Bayer Internal 10:04:58
10 Manager of Scientific Affairs, two science people here, the 10:05:01
11 exchange takes place on May 13, 2000 following a Baycol 10:05:05
12 project team meeting. 10:05:10
13 He writes Pat and says, "Thank for your report 10:05:13
14 below. I am indebted for your inside information or I 10:05:18
15 would not have the latest news." He goes on to say, The 10:05:22
16 status of things does not surprise me. I see a false 10:05:25
17 comfort factor in place across the company for obvious 10:05:30
18 reasons. It appears the strategy is to get by the July 10:05:34
19 hurdle," and that was the .8 launch hurdle date, "and 10:05:40
20 continue to be silent. I will know more when I meet with 10:05:44
21 Karen Dawes face to face on Monday and with Neil and Felix. 10:05:46
22 Unfortunately, I think that unless the OL," and those were 10:05:52
23 opinion leaders, so, that would be the opinion leader 10:05:57
24 meeting, "takes place on May 19, and they push hard as we 10:06:00
25 have, for immediate response, we will not see any specifics 10:06:04

1 until after launch," and that is after the .8 launch. "This 10:06:09
2 message seems very clear given the total lack of response 10:06:18
3 to my note two weeks ago that the subject is in control of 10:06:18
4 global drug safely now, and they will respond per Worldwide 10:06:23
5 Marketing. We are a minority of one and have been told to 10:06:27
6 stay away upon severe penalties. We may face some tough 10:06:32
7 personal decisions as this progresses." 10:06:38
8 In an August 7, 2000 memorandum from Laurie 10:06:41
9 Simpson who was Bayer's marketing department to Tig Conger, 10:06:47
10 who is also in Bayer marketing, it becomes abundantly clear 10:06:49
11 that initially Bayer stressed the lack of problems 10:06:52
12 associated with the concomitant therapy, the therapy with 10:06:55
13 Gemfibrozil. The memo that we are going to refer to here 10:07:00
14 has a specific session called mixed messages. The memo 10:07:03
15 specifically notes and criticizes an October 1, 1999 10:07:08
16 promotional piece which should have but did not warn about 10:07:10
17 Baycol use with Gemfibrozil being contraindicated. 10:07:15
18 And if you can go to the second page that's up 10:07:21
19 there, Your Honor, you can see under Baycol there's a mixed 10:07:23
20 message and a question mark. And it says initial marketing 10:07:28
21 stressed, a no drug/drug interactions, and apparently the 10:07:32
22 theme there is mixed messages. Well, you see a little 10:07:35
23 lower down on the document it says, awareness of contra 10:07:40
24 indication and physician reaction. 10:07:42
25 So, if we send mixed messages, what do we expect 10:07:45

1 to occur? The answer is right here. It says during 10:07:49
2 marketing research, some physicians have spontaneously 10:07:54
3 mentioned the contraindication. Reactions were mixed. So, 10:07:57
4 when you send mixed messages, you get mixed reactions. 10:08:02
5 Reactions were mixed from highly negative, i.e., one more 10:08:04
6 reason not to use Baycol to neutral. All statins have this 10:08:08
7 warning. Statins are safe and it's no big deal. 10:08:13
8 A few more examples, Your Honor, of how Bayer was 10:08:21
9 trying to react to the adverse events and the activity that 10:08:26
10 they were seeing with this drug actually on the market. 10:08:31
11 This section gives you some examples of how they were 10:08:35
12 trying to inappropriately blame it on the concomitant use. 10:08:38
13 They knew there was a problem with the use of 10:08:43
14 Baycol alone, the monotherapy. And Karen Dawes who is the 10:08:45
15 Bayer Marketing Senior Vice President admitted it. She 10:08:51
16 testified that the majority, over 60 percent of the 10:08:53
17 rhabdomyolysis from launch to the point where they put in 10:08:57
18 the contraindication for Gemfibrozil in December, 1999, 10:09:01
19 those were caused by the use of Baycol alone, monotherapy. 10:09:05
20 So, here she's admitting that 60 percent of the problems 10:09:10
21 are caused under circumstances where Baycol is being used 10:09:13
22 by itself. 10:09:15
23 Notwithstanding that, in December of 1999, Bayer 10:09:17
24 sends a letter to health care professionals across the 10:09:21
25 United States with input from the Bayer GSK Steering 10:09:26

1 Committee describing the Gemfibrozil contraindication 10:09:35
2 change in the package insert stating that the majority of 10:09:35
3 the rhabdomyolysis was caused by Baycol with Gemfibrozil. 10:09:37
4 Ms. Dawes was deposed and she indicated while no 10:09:43
5 cases of rhabdomyolysis were reported, this is an exhibit 10:09:49
6 during her deposition, while no cases of rhabdomyolysis
7 were reported during the extensive clinical trials of 10:09:52
8 Baycol, there had been a number of cases reported during 10:09:57
9 the post-marketing period. Now, here she takes the 10:10:00
10 position the majority of which patients taking -- excuse 10:10:06
11 me, the majority of which involved patients taking 10:10:10
12 concomitant Baycol and Gemfibrozil. 10:10:10
13 Incredibly, even though Bayer knew that most of 10:10:16
14 the problems were occurring with monotherapy, it told its 10:10:19
15 sales force that in the majority of cases, Rhabdo was 10:10:22
16 occurring where Baycol was being us concomitantly. 10:10:25
17 Even at the time of Baycol's withdrawal, sales 10:10:31
18 reps were being shown data showing the safety issues with 10:10:31
19 Baycol resulted primarily from concomitant use. 10:10:34
20 Another strategy was to try to blame it on class 10:10:40
21 effect. Class effect, essentially, is when there is a 10:10:45
22 similar group of drugs the position is that they all have 10:10:46
23 the same problem. But finding Gemfibrozil 10:10:50
24 contraindication, the defense tried to minimize the problem
25 by arguing this class effect, i.e., all statins have this

1 problem. However, they knew the problem was Baycol 10:11:00
2 specific. There was something about Baycol that made it 10:11:03
3 different when it was combined with Gemfibrozil. 10:11:06
4 What you see now is an e-mail from Richard King, 10:11:10
5 who is with GSK Marketing to David Rand, who is a GSK 10:11:18
6 Marketing Senior VP. It's dated January 24, 2000, and 10:11:22
7 acknowledges that there was something specific about Baycol 10:11:24
8 which created the concomitant use problems. He notes, 10:11:27
9 "Gemfib is not a drug interaction, but is a quirky 10:11:34
10 interaction with Baycol." 10:11:38
11 Now, what were Baycol's quirks? How was it 10:11:40
12 different from the other statins? Well, number one, it was 10:11:45
13 up to one hundred times more potent than any other statin. 10:11:50
14 Number 2, other statins used one metabolic pathway. Baycol 10:11:55
15 used two. Baycol alone caused rhabdomyolysis 5 to 10 times 10:12:05
16 more than any other statin. Baycol in combination with 10:12:11
17 Gemfib caused Rhabdo 100 to 200 times more often than any 10:12:13
18 other statin, and this is even though Baycol only had a 10:12:19
19 small percentage of the market share. 10:12:20
20 Baycol caused the highest body burden event of 10:12:21
21 any statin due to metabolization problems. Unlike other 10:12:25
22 statins, Baycol had no study proving it lowered morbidity 10:12:30
23 or mortality, and Baycol was at least twice as likely to 10:12:36
24 cause myopathies as any other statin on the market. 10:12:42
25 In discovery, Your Honor, we have also seen 10:12:48

1 distortions that took place by sales representatives at the 10:12:50
2 behest of these defendants. Sales representatives were 10:12:53
3 instructed to minimize the impact of information delivered 10:12:57
4 to doctors regarding the label changes, i.e., the 10:13:01
5 contraindications Baycol with Gemfib. In a written memo to 10:13:03
6 sales reps, Bayer told reps not to unduly prolong 10:13:06
7 physicians with the label change. 10:13:15
8 On December 3, 1999 Bayer instructed its sales 10:13:15
9 force not to emphasize important safety information when 10:13:18
10 meeting with doctors. Specifically, Bayer issued a letter 10:13:21
11 and a scripted Q and A, question and answer to a sales
12 force regarding the label change and contraindication. 10:13:27
13 Included with the instructions was the statement, please do 10:13:29
14 not unduly alarm physicians with regard to this label 10:13:32
15 change by starting your presentation with this issue. 10:13:37
16 A scripted Q and A was also provided for 10:13:40
17 addressing physicians' inquiries and instructed sales reps 10:13:44
18 not to answer questions which were not addressed in the Q 10:13:50
19 and A. 10:13:52
20 A March 2000 feedback from the field memo quotes 10:13:54
21 numerous sales representations commenting that they were 10:14:01
22 told not to bring up the Baycol-Gemfib contraindication. 10:14:01
23 Similar internal documents recommend that the 10:14:09
24 sales rep stress that the label change was for patients' 10:14:10
25 safety and that sales rep should not acknowledge the number 10:14:10

1 of adverse events. Rather, Bayer instructed the sales rep 10:14:14
2 to emphasize the anticipated .8 approval that was upcoming 10:14:20
3 in July of 2000. 10:14:23
4 I've got another example here of some promotional 10:14:27
5 materials, Your Honor. The first one is what's called a 10:14:30
6 promotional version. Bayer recognized that safety required 10:14:33
7 .8 -- the .8 dose to be titrated. You didn't started at 10:14:39
8 .8, you worked your way up, .3, .4 titration does. 10:14:43
9 However, Bayer mislead doctors as to this critical dosing 10:14:49
10 information. Bayer directed its sales force to use a 10:14:53
11 promotional version. And this is a promotional version 10:14:57
12 here. We're going to show you the journal in a moment.
13 But Bayer directed its sales force to use a promotional 10:15:03
14 version of its exciting tug boat ad when making calls on 10:15:05
15 doctors. 10:15:07
16 While the promoted version characterized .8 as a 10:15:12
17 powerful titration dose, it contained no safety 10:15:12
18 information, including language recommending .4 as a 10:15:17
19 starting dosage. At the same time, Bayer published a tug 10:15:19
20 boat ad in 2001 issues of the American Heart Association 10:15:23
21 Journal. The .4 milligram dose was characterized as an 10:15:30
22 effective starting does while the .8 was characterized as 10:15:32
23 even more power when you need it. The ad contained a 10:15:36
24 legend recommending .4 as a starting dose and other safety 10:15:43
25 information. 10:15:44

1 If you go back to the promotional version, 10:15:45
2 please, the promotional version had doctors for the curious 10:15:48
3 legend for representative consultant use only, not to be 10:15:50
4 left with the physician. Bayer's sales representatives 10:15:57
5 were instructed never to leave the promotional version with 10:16:00
6 physicians. Bayer didn't want the physicians to compare 10:16:05
7 the ads in question prescribing .8. 10:16:09
8 The Defendants told sales representatives not to 10:16:11
9 discuss the U.K. withdrawal. This drug was withdrawn in 10:16:16
10 England before it was withdrawn in the United States. 10:16:19
11 Bayer continued its don't tell philosophy in 2001. 10:16:19
12 Shortly before the market withdrawal in the U.K., 10:16:24
13 Karen Dawes, who was the Senior VP of Sales and Marketing, 10:16:26
14 forwarded a message and scripted Q and A to the sales force 10:16:29
15 regarding withdrawal to .8 in the U.K. Bayer explicitly 10:16:36
16 instructed its sales force not to initiate discussions with 10:16:43
17 the U.S. physicians regarding the U.K. withdrawal. 10:16:43
18 THE COURT: What was the date of the U.K. 10:16:45
19 withdrawal? 10:16:47
20 MR. ARSENAULT: It as shortly before that, Your 10:16:48
21 Honor. I don't know the exact date -- June 27th. 10:16:52
22 In June 2001, Bayer employee Mitch Druell, 10:17:06
23 Director of Scientific Affairs, forwarded an e-mail to a 10:17:11
24 sales training manager with similar instructions not to 10:17:15
25 discuss the U.K. situation, specifically, the memo noting, 10:17:18

1 "You will find comments from the field forces to use if a 10:17:21
2 physician asks about Baycol in the U.K. Please reinforce 10:17:23
3 the sales representatives should not initiate this 10:17:28
4 discussion. Please forward this message to your teams." 10:17:32
5 Your Honor, the discovery also revealed that the 10:17:35
6 defendants manipulated clinical trials and the data 10:17:38
7 associated with that. In a variety of marketing materials 10:17:42
8 and detail aids, Bayer touted Baycol safety and claimed 10:17:46
9 that no one developed Rhabdo in the clinical trials. 10:17:51
10 However, Bayer never informed the health care providers 10:17:57
11 that it pulled patients from clinical studies before they 10:18:00
12 reached full-blown rhabdomyolysis. An example of this 10:18:03
13 appears in a memorandum dated March 11, 1999 from Lori 10:18:07
14 Simpson who is the Marketing Research Manager to the Baycol 10:18:10
15 project team. She specifically notes, "in clinical trials, 10:18:14
16 patients are typically closely monitored and would be 10:18:18
17 discontinued prior to reaching Rhabdo. 10:18:22
18 The Defendants also manipulated the definition of 10:18:26
19 rhabdomyolysis. They were getting these adverse events on 10:18:29
20 a regular basis, and depending on how you manipulated the 10:18:35
21 definition, that would impact the number of hits that you 10:18:41
22 were getting in terms of adverse events coupled with 10:18:43
23 rhabdomyolysis. 10:18:43
24 What follows is a memo, Your Honor, from Roger 10:18:47
25 Celesk, he's the Associate Director of Safety Assurance at 10:18:50

1 Bayer, to Kuno Sprenger, a member Global Drug Safety. It's 10:18:52
2 illustrative of many documents and sworn testimony which is 10:18:57
3 established that Bayer manipulated the Rhabdo definition 10:19:04
4 with the obvious goal of attempting to cosmetically reduce 10:19:06
5 reports of rhabdomyolysis. The Rhabdo definition from 10:19:18
6 Global Drug Safety is a moving target. Amazingly, Roger 10:19:21
7 Celesk, who at this time is the Association Director of 10:19:29
8 Safety Assurance, doesn't even know what the definition GDS 10:19:29
9 is using. 10:19:35
10 He notes, "there may have been a shift in the GDS 10:19:41
11 attitude regarding what we call Rhabdo. So that I may 10:19:44
12 clarify this issue for myself and colleagues in West Haven, 10:19:48
13 Connecticut, could you provide the formal definition GDS 10:19:51
14 now uses to create a diagnosis of Rhabdo when it is not a 10:19:58
15 reported term. Thanks for your help." 10:20:01
16 The Defendants also either ignore or sometimes 10:20:06
17 undermine the studies that were adverse to Baycol. A June 10:20:08
18 22, 1999 internal sales training bulletin summarized the 10:20:13
19 results of a study comparing Lipitor with Baycol. The 10:20:18
20 study concluded that only 5 percent of the Lipitor group 10:20:24
21 experienced adverse events, whereas, a 14 percent of Baycol 10:20:27
22 did. Additionally, two percent of the Baycol withdrew from 10:20:35
23 the study due to adverse events. There were no Lipitor 10:20:35
24 withdrawals. 10:20:40
25 The study concluded that Lipitor demonstrated a 10:20:40

1 significantly better tolerability profile compared to 10:20:47
2 Baycol. Despite these conclusions, the training bulletin 10:20:48
3 outlined a counter strategy sales representatives should 10:20:54
4 use, if confronted with questions regarding this study, but 10:20:56
5 admonished the sales reps not to leave the information with 10:21:02
6 doctors or a related e-mail advised, we should not use the 10:21:04
7 study or the argument against the design of this trial 10:21:08
8 proactively. This statement is only aimed to help argue in 10:21:09
9 the case that some doctor may raise the issue. Bayer 10:21:14
10 conveyed the message to its sales representatives to not 10:21:18
11 initiate these discussions. 10:21:22
12 Eventually, the drug was withdrawn and that took 10:21:23
13 place on August 2001 following meetings with the FDA in 10:21:27
14 July or August of that year where the FDA expressed grave 10:21:34
15 reservations about Baycol's safety, particularly the high 10:21:39
16 rates of Rhabdo and myopathy, in both combination and 10:21:41
17 monotherapy. 10:21:45
18 The data gathered each year from 1998 to 2001 10:21:46
19 showed that the incidence of fatal rhabdomyolysis reported 10:21:53
20 to the FDA was up to eighty times higher among patients 10:21:57
21 using Baycol and than among patients using other statins. 10:22:02
22 The actual decision to withdraw Baycol came just 10:22:06
23 five days after a critical August 3, 2001 FDA letter to 10:22:11
24 Bayer requesting that Bayer update its drug application of 10:22:13
25 Baycol by submitting all the safety information currently 10:22:17

1 in Bayer's possession. Furthermore, the FDA specifically 10:22:21
2 asked for all data, regardless of dose level. 10:22:25
3 Additionally, they asked for a re-tabulation of the reasons 10:22:30
4 for premature study discontinuation. Rather than give up 10:22:34
5 this information that would confirm the FDA's grave 10:22:40
6 reservations, Bayer finally withdrew Baycol. 10:22:45
7 I wanted to speak just for a moment, Your Honor, 10:22:48
8 with regard to the medical monitoring claim. At the end of 10:22:51
9 the day, the medical monitoring relief sought essentially 10:22:54
10 presents three simple questions that have universal 10:23:00
11 applicability and present common issues. 10:23:03
12 Number one, do we need it? Number two, will it 10:23:08
13 help? Number three, who will pay? 10:23:09
14 Many patients exposed to Baycol suffered 10:23:15
15 significant and ongoing loss of kidney function. This 10:23:19
16 creates a risk for silently progressive kidney disease, 10:23:25
17 including the risk of kidney failure. If detected, the 10:23:28
18 disease can be treated and further injury and/or death can 10:23:32
19 be avoided. 10:23:35
20 According Dr. Kaysen, a world-renown 10:23:36
21 nephrologist, it's generally accepted in the field of 10:23:40
22 nephrology that patients who suffer from an impaired kidney 10:23:43
23 function should receive medical monitoring to detect and 10:23:46
24 treat progressive renal disease. The process by which 10:23:50
25 Baycol causes Rhabdo often goes undiagnosed, and in turn 10:23:55

1 causes injury to the kidneys which continues to go

2 undetected.

3 Medical monitoring is necessary to ensure that 10:24:00

4 loss of kidney function or damage to the kidneys do not go 10:24:05

5 undiagnosed and untreated, thereby placing the patients at 10:24:09

6 risk for further harm. Dr. Kaysen recommends a simple 10:24:15

7 periodic blood test to measure serum creatinine and blood 10:24:19

8 pressure monitoring. When renal function is impaired, it's 10:24:23

9 indicated by an elevated serum creatinine test. National

10 guidelines for monitoring and treatment can be found.

11 Science and related literature supporting Dr. 10:24:32

12 Kaysen's report to this court establishes beyond dispute 10:24:37

13 that simple, expensive serum creatinine testing will in 10:24:41

14 fact provide early detection of potential serious problems. 10:24:46

15 Based upon Dr. Kaysen's report the common 10:24:51

16 questions are these, Your Honor. Whether medical 10:24:54

17 monitoring is necessary to detect and prevent silent and 10:24:57

18 progressive harm due to Baycol use. And if so, what is a 10:25:01

19 reasonable plan for medical monitoring and should the 10:25:05

20 Defendants bear the cost of monitoring? And these 10:25:09

21 questions have global applicability to everyone who would 10:25:12

22 potentially be a class member available for this remedy. 10:25:16

23 At the end of the day, Your Honor, both Bayer US 10:25:21

24 and ASK were correctly apprehensive about bringing Baycol 10:25:24

25 to the United States. They knew about the efficacy 10:25:30

1 problems at that would require the constant dosage 10:25:35
2 increases. They also knew that if they increased the dose, 10:25:38
3 they unreasonably increased the risk. Their plan, as we've 10:25:42
4 seen, was to stretch the data and push regulatory 10:25:46
5 authorities to the limit, pick the better study for the 10:25:51
6 detail aid, push the legal boundary until they hit it. 10:25:52
7 Eventually, they did hit and exceeded it. 10:25:57
8 In the meantime, as we've seen, they did a lot of 10:26:02
9 bobbing and weaving. Constant dosage increases, blaming it 10:26:05
10 on concomitant use, blaming it on class effect, using the 10:26:09
11 sales representatives as buffers, hiding information from 10:26:13
12 the health care providers, manipulating definitions, 10:26:15
13 manipulating the data, flooding the market with samples, 10:26:22
14 withholding critical safety information, sending mixed 10:26:22
15 messages, and undermining or ignoring adverse studies. 10:26:26
16 Eventually, no tactics could keep this drug afloat and it 10:26:29
17 was withdrawn. 10:26:35
18 Your Honor, what we have here are an illustrative 10:26:36
19 list, and I'm not going to go through all of them. They 10:26:40
20 are in your bench book. They are illustrative. There are
21 25 different issues that give you a sense for what are some 10:26:42
22 of the common issues in this particular case. 10:26:46
23 We also have a time line that because of time 10:26:49
24 constraints I'm not going to go into very much detail, but 10:26:53
25 it outlines in a lot of detail what Bayer knew and at the 10:26:57

1 same time what they were saying. I appreciate your time. 10:27:03

2 THE COURT: Thank you. Let's take a stretch 10:27:11

3 break. Mr. Zimmerman. 10:27:11

4 MR. ZIMMERMAN: Thank you, Your Honor. Next, I'm 10:36:47

5 going to introduce Mr. Arthur Miller with the next 10:36:49

6 argument. 10:36:56

7 THE COURT: You had made some comments in your 10:36:56

8 opening remarks, and I don't want to interrupt Professor 10:37:00

9 Miller when he gives his or Mr. Beck when he responds, but 10:37:07

10 one of the things that concerns the Court, and I don't ask 10:37:15

11 a lot of questions during oral arguments, so, don't be 10:37:18

12 surprised if I don't ask any because I've read all the 10:37:23

13 materials and I try to digest everything. 10:37:28

14 One of the things that was clear in my mind is 10:37:34

15 that you want class certification, but you don't know how 10:37:37

16 to get together if it's on the trial end of it. You say 10:37:51

17 that you have a lot of people here from all these different 10:38:00

18 types of litigations across the country. Certainly to say 10:38:04

19 that the materials that I received did not give a cogent 10:38:10

20 view of how a trial would proceed. And I have 20 years of 10:38:22

21 being on the bench and being a trial attorney. It's one 10:38:28

22 thing to win a motion, but you've got to give a judge 10:38:35

23 direction on how that case is going to be tried, just not 10:38:41

24 to say you won, let's fly. 10:38:45

25 It takes a lot of effort and direction, and in 10:38:48

1 dealing with that, and I think defense has certainly dealt 10:38:56
2 with that issue, and I'm sure Mr. Beck will deal with that 10:38:59
3 issue again when he argues or whoever is going to be 10:39:07
4 arguing for the defense, and that's one of the points that 10:39:10
5 the Plaintiff has. 10:39:13
6 I start in what do you want me to do and how do 10:39:17
7 you want me to do it, and you have not given me any visual 10:39:23
8 help on how that would happen other than with the mass 10:39:29
9 confusion. 10:39:34
10 So, I put that out so you can map with your 10:39:46
11 people how you want to deal with that. But that's going to 10:39:51
12 have to be dealt with. And if you don't deal with it, 10:39:56
13 that's one of my major concerns. I have some other major 10:40:00
14 concerns that you will address, and Professor Miller and 10:40:06
15 Mr. Beck will address those issues. But the weakest point 10:40:08
16 of the presentation and materials that I have seen, it's 10:40:14
17 one of those, hey, we won, now, let's go ahead and try to 10:40:18
18 put it together. And I think the Defendants say even if 10:40:24
19 they win, they can't put it together, and you are going to 10:40:28
20 have to address those issues. 10:40:32
21 MR. ZIMMERMAN: I appreciate that, Your Honor, 10:40:36
22 and I submit to you that we will and we should and we must. 10:40:36
23 THE COURT: Okay. 10:40:39
24 MR. ZIMMERMAN: And I appreciate that. 10:40:40
25 THE COURT: Just as long as at some point and 10:40:42

1 time -- I know you have down here rebuttal. 10:40:50

2 MR. ZIMMERMAN: With that question in mind, I ask 10:40:57

3 that Mr. Miller come before you and show how a well-managed 10:40:59

4 class action can resolve a common issues to aid in the just 10:41:05

5 and fair and appropriate resolution of the case for all 10:41:10

6 claimants as well as for all Defendants. Mr. Miller. 10:41:14

7 THE COURT good morning. 10:41:25

8 MR. MILLER: Good morning, may it please the 10:41:29

9 Court, you've on the bench 20 years and been a trial lawyer 10:41:31

10 for 10 years before that. I've been in academic for 40 10:41:39

11 years, never tried a case, so in a curious way this is a 10:41:46

12 slight mismatch. Mr. Beck, who I have un-unqualified 10:41:56

13 regard for, has, of course, that experience. We have 10:42:04

14 Elizabeth Cabraser who is a distinguished complex 10:42:06

15 litigation trial attorney. 10:42:14

16 What I'd like to do is set it up in response to 10:42:15

17 your question. But do it, I suppose, the way academics do 10:42:21

18 things by wandering around a little bit. 10:42:26

19 When I was walking over here this morning, being 10:42:30

20 led by some very attractive seeing eye dogs -- 10:42:35

21 THE COURT: I hope you went through the skyways. 10:42:40

22 MR. MILLER: Through the skyways, I said to 10:42:44

23 myself, the metaphor is things change, a great Don Ameche 10:42:49

24 movie. 10:42:58

25 I was here 40-odd years ago on the U's law 10:43:00

1 faculty, and the only building of consequence was the 10:43:04
2 Foshay Tower. And no matter which range they took me over, 10:43:08
3 I looked for the Foshay Tower, and I couldn't see it. 10:43:13
4 THE COURT: And there was only one or two 10:43:17
5 bridges. 10:43:21
6 MR. MILLER: I believe there was one, maybe two, 10:43:22
7 things change, things change. 10:43:25
8 When federal Rule 23 was drafted as we now know 10:43:27
9 it in '63, effective '66, there were really no complex 10:43:30
10 cases. Judicial management was unknown. Federal Rule 16 10:43:38
11 envisioned nothing but an eve of trial conference. And no 10:43:44
12 one who drafted federal Rule 23, and I was one of them, 10:43:50
13 working with the then reporter while I was still in 10:43:56
14 practice and then when I was here at the U, no one 10:44:00
15 envisioned anything like what we have today. Yes, we 10:44:05
16 envisioned desegregation cases. We envisioned some 10:44:10
17 securities case and some anti-trust cases. 10:44:16
18 Mr. Zimmerman said in his opening remarks, you 10:44:18
19 have to change with the times. You have to have 10:44:24
20 flexibility, elasticity, you have to be wise. The beauty 10:44:31
21 of the Federal Rules of Civil Procedure is that it was 10:44:35
22 drafted initially and sequentially by very wise people, 10:44:42
23 people who saw the value of open he textured rules that 10:44:44
24 could be elastic when needed to be. 10:44:50
25 And the Bench changes. In the Advisory Committee 10:44:59

1 Rule with the 66th Amendment, there is a little passage 10:45:04
2 that says, ordinarily, doesn't say never, ordinarily, the 10:45:12
3 rule shouldn't be used in mass accident cases. I was 10:45:17
4 wracking my brain as to whether I wrote that the Ben Kaplan 10:45:22
5 the reported, which means I gave birth to artifact. It's 10:45:30
6 dead. Nobody refers to that anymore. Everybody 10:45:33
7 understands that was the product of that time and the 10:45:36
8 political pressures within the committee and outside the 10:45:39
9 committee working on the committee. Nobody mentions it 10:45:44
10 anymore. 10:45:48
11 Rule 16, a whisper in 1983 began to bark, began 10:45:50
12 to speak loud terms. Began to speak about management, 10:45:55
13 building on the manual which had no official status, the 10:46:03
14 electrical supply cases, and, obviously, the growth of what 10:46:08
15 we now call complex cases. 10:46:11
16 '83, that's only 20 years ago. The first time 10:46:15
17 the word settlement appears in the Federal Rules of Civil 10:46:19
18 Procedure, first time. Reinforced in '93, reinforced in 10:46:24
19 '93. Mr. Zimmerman read parts of Rule 1 to you. 10:46:31
20 Rule 1 was amended in '93. They, the rules shall 10:46:38
21 be construed and administered, words and administered were 10:46:48
22 added in '93, and the Advisory Committee note to the '93 10:46:55
23 amendment says this, the purpose of this revision, adding 10:47:02
24 the words "and administered" to the second sentence is to 10:47:05
25 recognize, everybody knew it. Very often things get 10:47:09

1 codified into the rules, and to recognize the affirmative 10:47:15
2 duty of the court to exercise the authority conferred by 10:47:19
3 these rules to ensure that civil litigation is resolved not 10:47:25
4 only fairly, but also without undue cost or delay. 10:47:30
5 And here's a sentence that I suppose speaks to 10:47:37
6 Mr. Beck and speaks to my colleagues, speaks to me. As 10:47:41
7 officers of the court, attorneys share this responsibility 10:47:46
8 with the judge to whom the case assigned. The affirmative 10:47:50
9 duty to administer. Speed, fair, cost. 10:47:57
10 Now, in this forty-year spread, we have seen the 10:48:06
11 emergence of the complex case, the mass case, the 10:48:11
12 aggravated case, the class action. And life is pendular, 10:48:17
13 goes back and forth. We've gone through cycles. We've 10:48:24
14 loved the class action, we've hated the class action. And 10:48:28
15 then we fell in love with it again. Maybe we don't quite 10:48:33
16 love it as much today. Cycles, cycles. 10:48:37
17 Indeed, there is almost a religious debate 10:48:45
18 between the proponents and opponents of the class action. 10:48:49
19 The proponents, using their brand of hyperbole, say, oh, 10:48:55
20 it's a panacea. I remember a great, great district judge, 10:49:03
21 Chief Judge of Missouri, primary author of the manual, Bill 10:49:05
22 Becker, used the old panacea, panacea, a tool of social 10:49:13
23 justice. And we know in a variety of context such as 10:49:18
24 reapportionment, desegregation, some form of 10:49:22
25 discrimination. It has been a tool of social justice. 10:49:25

1 It's a field leveler. It's an access mechanism. It gives 10:49:31
2 distributive of justice. 10:49:36
3 There is hyperbole on the other side. It's been 10:49:38
4 called the Frankenstein monster. It's been called 10:49:43
5 extortion. It's been called a bunch of lawyer cases. The 10:49:49
6 truth, obviously, lies somewhere off those extremes. But 10:49:53
7 with all these cycles back and forth, there has been one 10:50:00
8 constant, and nobody has given up on it. We have just 10:50:06
9 gotten more sophisticated in using it. We know so much 10:50:10
10 more each day. We develop new techniques. We know how to 10:50:15
11 describe classes now. We don't say all poor people. We 10:50:25
12 know how to subclass now. We know how to write notices 10:50:30
13 now. We know how to make intelligent estimates as to the 10:50:38
14 fairness, the reasonableness and the adequacy of a 10:50:44
15 settlement. And, of course, we understand the degree to 10:50:49
16 which we have developed better calibration techniques for 10:50:56
17 attorney's fees. We've gotten smarter and smarter and 10:51:02
18 smarter. We've changed with the times. With each 10:51:07
19 challenge comes a response. 10:51:12
20 Now, here we are in 2003. We may be on the eve 10:51:15
21 of legislation that in effect pushes most large-scale class 10:51:26
22 actions into federal court. We have already had a 10:51:33
23 multi-party, multi-forum statute that came in on cat-like 10:51:39
24 feet in November attached to an appropriations bill. 10:51:42
25 Now, the Plaintiffs would be foolish if they said 10:51:47

1 to Your Honor everything is okay in River City. It's not 10:51:53
2 from their perspective. We can't deny that in the recent 10:52:00
3 past there have been a series of decisions, that explicitly 10:52:04
4 or implicitly are negative about the class action. We know 10:52:13
5 about Roland Polank. We know about Castano. We know about 10:52:23
6 AMS. We know about Bridgestone-Firestone. Indeed, many of 10:52:29
7 the people in this room were involved in those cases, 10:52:36
8 argued them and lost them. 10:52:39
9 We know about Propulcid, PPA, Rezulin, but that's 10:52:43
10 not the universe. That is not the universe. Nor do any of 10:52:50
11 those cases say thou shalt not certify. 10:52:56
12 There is another side to the ledger. Even in the 10:53:08
13 Fifth Circuit, which gave us Castano, you have Mullen, a 10:53:13
14 mass tort case, somewhat limited dimension, to be sure. 10:53:19
15 You have Watson, a single event mass tort. So, even in the 10:53:26
16 Fifth Circuit, mass tort actions do get certified. 10:53:30
17 In the Sixth Circuit which gave birth to AMS, you 10:53:43
18 still have those, a course of conduct mass tort which was 10:53:47
19 certified. Not overruled, indeed, relied on periodically 10:53:55
20 by other courts. 10:53:58
21 In the Third Circuit, you recently had the 10:53:59
22 approval of diet drugs, a case that I think we would 10:54:03
23 suggest to you has a certain similarity to this case and 10:54:10
24 provides certain footprints to answer some of your concerns 10:54:17
25 about how do you do it, how do you do it. 10:54:20

1 The Second Circuit and the Ninth Circuit, Second 10:54:23
2 Circuit in Robinson, the Ninth Circuit in Hanford Building 10:54:30
3 on Valentino versus Carter-Wallace seem open to mass tort 10:54:36
4 cases. And what's particularly interesting for purposes of 10:54:44
5 today's discussion is that both of those courts looked 10:54:49
6 forward and not backward. Both of those courts say, maybe 10:54:55
7 you should start thinking about 23(c)(4)(a), a provision of 10:54:58
8 the federal rules that's been rather quiet for 40 years. 10:55:08
9 In other words, do you get the feeling that the 10:55:14
10 Second and the Ninth Circuits recognize the pressure, the 10:55:15
11 challenges, the problems confronted by mass events. And 10:55:19
12 that's what we are talking about, whether it's a mass event 10:55:24
13 in terms of Watson with an explosion or mass event in terms 10:55:28
14 of a drug or a diet drug. Maybe we just got to be more 10:55:31
15 careful, more precise. Maybe we got to go to the toolbox 10:55:38
16 again to see what's in there that we haven't used. 10:55:43
17 So, look at that universe, Second Circuit, Third 10:55:46
18 Circuit, Fourth Circuit. Fourth Circuit in the A.H. 10:55:52
19 Robbins Bankruptcy used the class form. And then in 10:55:58
20 Central Wesleyan, also seemed quite receptive to mass class 10:56:01
21 actions. So, you've got the Second speaking, the Third 10:56:16
22 acting, the Fourth acting, the Fifth and Sixth ambivalent 10:56:16
23 going both ways. Seventh, no doubt where they stand at 10:56:22
24 this time, and the Ninth being open. 10:56:28
25 Now, what does this tell us? I think it tells us 10:56:32

1 what we have already known, that this is a matter of 10:56:39

2 judicial discretion. There are no rights or wrongs, 10:56:46
3 really. It is discretion. Some of the Judges recently, 10:56:50
4 like in Rezulin and PPA and Propulcid have exercised 10:56:57
5 negative discretion. They have. They are not binding on 10:57:03
6 this Court. Indeed, none of the cases I've mentioned are 10:57:09
7 binding on this Court. We are in the Eighth Circuit. It 10:57:14
8 hasn't spoken yet. 10:57:19
9 So, there is discretion. And how do you exercise 10:57:21
10 that discretion? We say in context, in context. 10:57:25
11 None of the cases in which class certification 10:57:34
12 has been denied match this case. As Mr. Arsenault said, 10:57:38
13 and Mr. Zimmerman before him, we are dealing with a single 10:57:50
14 product, manufactured by a single company in a 10:57:56
15 co-ventureship arrangement with a second company. 10:58:03
16 Their conduct, and that was one of the messages 10:58:09
17 of that presentation by Mr. Arsenault, their conduct has 10:58:12
18 been uniform with regard to Baycol. Their advertising, 10:58:17
19 their marketing, their knowledge, their relationships with 10:58:25
20 the FDA, their relationships with their sales force, and 10:58:29
21 the doctors. And it has a short life, three and a half 10:58:35
22 years, 42 months. We are not talking about tobacco for 40 10:58:40
23 years. We are not talking about penile implants, multiple 10:58:47
24 products, multiple models, multiple modifications. We are 10:58:54
25 not talking about Bridgestone-Firestone, millions of tires 10:59:02

1 in 67 formats. We are talking about a contained 10:59:07

2 environment. 10:59:11

3 And we are talking about consequences that have 10:59:13

4 been referred to this mornings as signature. There is a 10:59:18

5 signature to the consequences of Baycol, the muscle aches 10:59:22

6 and pains, the Rhabdo, the renal failure, the instinct 10:59:27

7 renal failure. 10:59:36

8 It's not like many of these cases in which you 10:59:37

9 get allegations of injuries that are circumferal, that come 10:59:42

10 from left field, right field. This is a line. It's a 10:59:47

11 single, progressive series of events. 10:59:52

12 We think the context of this case is unique. We 10:59:58

13 think this context permits you to use the word in Rule 1 to 11:00:08

14 administer this case, to administer it. 11:00:15

15 Now, I appreciate that it has the feeling of a 11:00:25

16 wooly mammoth -- some ill-defined blob. 11:00:38

17 THE COURT: How about a black hole. 11:00:40

18 MR. MILLER: Black hole. 11:00:46

19 THE COURT: I get sucked into it and then we are 11:00:48

20 here again. 11:00:52

21 MR. MILLER: You have a feeling of the case, if 11:00:54

22 you look at the mortality table, it will outlive you? 11:00:57

23 THE COURT: Yes. 11:01:01

24 MR. MILLER: Yes. I suppose if you look at the 11:01:03

25 wholesale level, it's forbidden, it's forbidden. Even 11:01:06

1 though I say again and again, it's a case that's 11:01:10

2 dimensionalized. It isn't of the dimension of those other 11:01:18
3 cases. And we believe that there are lots of tools in the 11:01:20
4 proverbial toolbox. We believe that this is not simply a 11:01:26
5 binary choice, certify, don't certify. We believe that 11:01:34
6 there are alternatives. 11:01:43
7 Now, in the supplemental brief, the writers 11:01:46
8 started to develop a combination that has some favor with 11:01:55
9 some Judges, and that is the so-called 23(b)(3) 11:02:00
10 certification, and then using the 23(c)(4)(a) issue 11:02:06
11 mechanism. 11:02:16
12 We think this case satisfies 23(b)(3). We start 11:02:21
13 with that as our platform. You look at this case, and we 11:02:25
14 believe it has predominance. I think Mr. Arsenault 11:02:33
15 demonstrated the predominance, from soup to nuts. It's all 11:02:36
16 common conduct. It is all common conduct that applies to 11:02:42
17 each and every member of the class. In the words of the 11:02:46
18 Jenkins opinion in the Fifth Circuit, the resolution of 11:02:51
19 those common repetitive duplicative questions will 11:02:54
20 significantly advance the resolution of the action. And 11:03:02
21 that's sort of the test. It's not a nose counting test. 11:03:06
22 It's not it's bigger than a bread box or smaller than a 11:03:10
23 teacup. It's can I see that all of this singularity of 11:03:15
24 conduct is common and can be resolved on a common basis, 11:03:21
25 and that's what (c)(4)(a) is all about. 11:03:33

1 Now, there are pros to the class action. The 11:03:42

2 obvious first one is the resource question. It's what I 11:03:49

3 read to you from the note to Rule 1, the duty to administer 11:03:59

4 so it's fair, so it's expeditious and economically, which, 11:04:06

5 of course, is a reformulation of what's in the rule itself. 11:04:16

6 The ability to resolve on a class-wide basis all 11:04:19

7 of the factual questions relating the Defendants' conduct 11:04:24

8 holds promise for enormous economies and efficiencies. Few 11:04:31

9 resources, both in the form of energy for the Bench, for 11:04:41

10 the lawyers, for the parties and the cost. What sense -- 11:04:47

11 everybody recognizes that when you have a common question 11:04:50

12 that stretches across a large class, the repetitive inquiry 11:04:54

13 into what did the Defendants know when. Did they withhold 11:05:00

14 information about adverse results? Did they conceal things 11:05:10

15 from the FDA? Did they deep six any talk about the 11:05:14

16 withdrawal from the U.K. Again and again and again, no, 11:05:25

17 that's what (c)(4)(a) is for. 11:05:34

18 So, you get enormous savings of resources, and 11:05:38

19 you get a bonding effect on class members, either through 11:05:42

20 direct estoppel, if it's part of the case tried, or 11:05:51

21 anywhere else in the federal system under the Park Lane 11:05:56

22 Hosiery case. And you can't swear today that you'll get it 11:06:01

23 in each and every state court because you can't tell the 11:06:04

24 Texas court what res judicata is all about, but Park Lane 11:06:08

25 is not a federal phenomenon. New York has it, and most 11:06:13

1 states now accept offensive, non-mutual collateral 11:06:20

2 estoppel. At the very least, a well-tried determination of 11:06:21
3 all common issues will be very persuasive in any court. 11:06:28
4 Now, we come to fairly. We know -- we know that 11:06:37
5 if something is not pulled out of the toolbox that would 11:06:43
6 allow some form of aggregation, there will be thousands and 11:06:48
7 thousands of people who will never be compensated, assuming 11:06:53
8 they were entitled to be compensated. They will never get 11:07:00
9 notice. They have small claims that are either of negative 11:07:04
10 value or modest value, not attractive to lawyers. They may 11:07:08
11 live in parts of the country in which they have no access 11:07:14
12 to legal services, or they may be part of American's 11:07:18
13 disenfranchised. A class forum will at least move the ball 11:07:23
14 for them. 11:07:28
15 Curiously, something that you don't see discussed 11:07:34
16 much is let's think of something unthinkable to Plaintiffs' 11:07:38
17 lawyers that they win some of these issues. That they win 11:07:43
18 on, say, muscle aches. Is that the case? Think of the 11:07:48
19 resources that you save by shrinking the case, because now 11:07:56
20 you have no individual litigation on an issue that's out of 11:08:02
21 the case. That's almost unquantifiable, but there are 11:08:07
22 aspects here that could produce that result. 11:08:13
23 Maybe it's determined that the FDA warning, this 11:08:21
24 FDA warning, that FDA warning was adequate. Failure to 11:08:24
25 warn may disappear. 11:08:31

1 Maybe on the common issue trial, the conduct 11:08:36

2 doesn't look as severe as Mr. Arsenault presented today. 11:08:40

3 Maybe punitive damages falls out. So, it's a very funny 11:08:47

4 business that the common issue determinations can work both 11:08:54

5 ways. But the net effect either way is to save resources, 11:08:58

6 to give people a day in court, maybe not a literal day in 11:09:04

7 court, but at least a figurative day in court. They have 11:09:13

8 all sorts of due process protections through the class 11:09:15

9 forum. They get notice. They get adequacy of 11:09:19

10 representation. On the damage side, they have the ability 11:09:23

11 to opt out. 11:09:26

12 Now, we come to the part you don't like. They 11:09:29

13 have you. You're are. You're scrutinizing. You're 11:09:34

14 keeping the lawyers in place, and we know lawyers are like 11:09:38

15 herding cats. You are going to determine the fairness, the 11:09:44

16 adequacy and the reasonableness of any settlement. You are 11:09:50

17 going to determine the propriety of an attorney's fee, 11:09:54

18 which on a class-wide basis may mean a good reward for 11:09:58

19 them, but when distributed all over the class means more 11:10:08

20 money in the class member's pocket. All of is these 11:10:13

21 protections are available through the class forum, even if 11:10:17

22 it's just a (c)(4)(a) common issue adjudication. 11:10:22

23 You ask how would it look. It would look -- Mr. 11:10:28

24 Arsenault has just presented the Plaintiffs' case. That's 11:10:31

25 what it would look like. And you would have, and must 11:10:34

1 confess, you would have to write -- but they have 11:10:40

2 counsel -- a Rule 49 verdict form. And it would take 11:10:47
3 several pages. And everybody would worry as to whether it 11:10:54
4 was comprehensible to the jury. 11:11:00
5 Now, we here we hit a philosophical wall. Do you 11:11:00
6 believe in the jury system or don't believe in the jury 11:11:08
7 system? Down you can construct a verdict form that they 11:11:13
8 can comprehend and give you answers and take out all these 11:11:17
9 common issues. Being an old fogey, I believe in the jury 11:11:21
10 system. We do things like this right now. We know it's 11:11:26
11 done in conspiracy cases, civil RICO cases. It was done in 11:11:31
12 Exxon Valdez. The verdict form, I'm told, was over 20 11:11:39
13 pages in length. There are enormous resources out there, 11:11:42
14 done by people who have fought about this. There are 11:11:50
15 models of verdict forms. There is a book by Mr. Eaves. We 11:11:53
16 have things in the toolbox. We can use Rule 49 in a 11:12:01
17 sophisticated fashion. But there is a work level attached 11:12:07
18 to it. 11:12:14
19 It's easy for me to talk about your spending 11:12:18
20 time, Your Honor. You are 1407 Judge. There was a 11:12:20
21 decision made that there are commonalities here. Rule 1 11:12:30
22 does say and administer. You're the general. A lot of it 11:12:35
23 can be delegated, but there is no doubt there is a work 11:12:41
24 portion attached to it. But you can get these common 11:12:48
25 issues, which are at the spine of this case, resolved in a 11:12:51

1 highly refined trial. And when I say these common issues, 11:12:59
2 I'm taking it all the way over to punitive damages. Mr. 11:13:12

3 Arsenault's presentation, much of that conduct is the 11:13:12

4 conduct that would be presented on punitive damages 11:13:12

5 presentation, up or down, that's it. 11:13:17

6 So, you come through all of these common issues 11:13:23

7 right over to punitive damages, unified result, available 11:13:27

8 to everyone, and it enables a judge who has invested in 11:13:31

9 this black hole or millstone or adventure to control, to 11:13:47

10 control it, to make sure it goes from the wooly mammoth to 11:13:57

11 a sleek horse, rather than going from a wooly mammoth to a 11:14:05

12 wooly mammoth with a gland condition. 11:14:16

13 There is another element to this, call me an 11:14:20

14 academic. A reality of one-on-one litigation is that it 11:14:23

15 has virtually no transparency. A class action centralized 11:14:28

16 in a federal court before a managing judge has 11:14:36

17 transparency. All relevant voices can speak because they 11:14:41

18 know what's going on. 11:14:45

19 Now, it is true, and this is philosophical again, 11:14:47

20 I said before that one of the consequences of dispersion is 11:14:53

21 that hundreds, if not thousands of people, who believe they 11:14:58

22 have been injured by Baycol will never be heard from. Some 11:15:04

23 people might say that's good, that's good. Why motivate 11:15:13

24 cases. That's philosophical. In the world of some judges 11:15:20

25 on the Seventh Circuit, that's the market. In the world of 11:15:28

1 other people, it's not fair. It's a fortuity that's just 11:15:33

2 plain not fair. That's so philosophical, so subjective, 11:15:42

3 only you can think that one through. 11:15:51

4 Now, let me give you a variation or offer you a 11:15:54

5 variation. According to a census of cases that you'll find 11:15:57

6 in Volume 3, Tab E of your Bench books, Plaintiffs' side, 11:16:04

7 there is a census of cases, and something is very striking 11:16:11

8 about it. According to this census, which spoke as of 11:16:18

9 January 31st, there were 805 cases on your docket, exceeded 11:16:24

10 only by Pennsylvania where there are 3,031 cases. The 805 11:16:33

11 cases are the Minnesota cases. The 3,031 cases are the 11:16:44

12 Pennsylvania cases. 11:16:51

13 We believe there are alternatives, Your Honor. 11:16:55

14 It's almost a smorgasbord. I've only thus far described 11:16:58

15 one, the (b)(3)(c)(4)(A), the combination. Get the common 11:17:08

16 things adjudicated, the rest go home or settled. We live 11:17:14

17 in a world in which 97, 97-plus percent of all federal 11:17:19

18 civil actions never reach trial. It's a reality. 11:17:26

19 Suppose you certify the Minnesota class, had full 11:17:31

20 adjudication, and then dealt with the individual issue of 11:17:41

21 an individual causation of damage at the back end if you 11:17:45

22 got the back end. That certainly would give you a very 11:17:50

23 good indication as to whether you could do the whole thing. 11:17:54

24 That's a contained group. You've got jurisdiction over 11:18:00

25 them, probably no choice of law problem. To me it's 11:18:04

1 somewhat analogous to what Judge Spiegel, who is going to 11:18:09

2 do or did do in Telectronics, summary judgment trial. 11:18:17

3 Let's do a dry run and see if anything works. 11:18:25

4 Now, you can take that Minnesota class all the 11:18:29

5 way through. Learn from it. I think one lesson that 11:18:31

6 powerfully comes through from Judge Bectal's opinion in 11:18:39

7 diet drugs is you don't have to do everything in one day. 11:18:47

8 Rome wasn't built in a day, and Baycol can't be solved in a 11:18:53

9 day. He took a baby step, a tentative certification of a 11:19:00

10 medical monitoring class. Judge Spiegel in effect did the 11:19:05

11 same thing by saying I'm going to have a summary jury 11:19:10

12 trial. A piece of the action, a significant piece. We're 11:19:13

13 talking 17 point something percent of all the Baycol cases 11:19:17

14 in the federal court, 17-plus percent are there in 11:19:22

15 Minnesota. You can have a Pennsylvania class, too. 11:19:27

16 Pennsylvania class decided under Pennsylvania law, common 11:19:31

17 issues. You probably have to send those back to 11:19:36

18 Pennsylvania, but that's not a baby step, that's a giant 11:19:39

19 step. I think the Minnesota resolution is a giant step, 11:19:43

20 too. Those are all the possibilities -- other 11:19:48

21 possibilities. 11:19:54

22 Here's another possibility. For reasons I don't 11:19:55

23 know, Federal Rules 16(c)13 and 42(b) talk about 11:19:59

24 consolidation for resolution of individual issues. You 11:20:10

25 could do that for the Minnesota cases. You could have a 11:20:16

1 unitized trial on the common issues under 42(b), encouraged 11:20:21

2 by one of those amendments to Federal Rule 16 I described a 11:20:28

3 few minutes ago. Federal Rule 16 says one of the things in 11:20:34
4 the pretrial management toolbox is consolidation of a 11:20:38
5 single issue of adjudication. 11:20:44
6 Now, you might ask what's the difference between 11:20:48
7 that and a class action. Well, I could be puckish about it 11:20:49
8 and say you wouldn't be vulnerable to a 23(f) appeal, 11:20:55
9 assuming that you didn't want to embrace the 23(f) appeal 11:21:01
10 to get the beast off your back for a year. But that's 11:21:05
11 inconsistent with the exigency of time. This is an old 11:21:11
12 class. These people are not young. You don't go on statin 11:21:18
13 until fairly late in life, by and large. 11:21:22
14 In any event there wouldn't be a 23(f) appeal. 11:21:26
15 There wouldn't be any of the hassling about the class 11:21:30
16 action, class action notice, class action certification, 11:21:34
17 class action settlement, class action this, class action 11:21:38
18 that. 42(b) consolidated trial on common issues. If need 11:21:42
19 be, you then go to Phase 2 and adjudicate the individual 11:21:50
20 issues if you're dealing with Minnesota group. You get the 11:21:55
21 same power of formal adjudication you would have under 23. 11:21:59
22 You could make sure that those due process procedures 11:22:04
23 safeguards that are attendant to the class action were 11:22:07
24 provided in 42(b). You can insist on adequacy of counsel. 11:22:12
25 You can insist on anything you want, the notice. So, 11:22:20

1 that's another possibility. 11:22:22
2 You could do that for the monster class, too. 11:22:26

3 Instead of certifying under (b)(3), (c)(4), just take the 11:22:30

4 common issues under 16(c)(13) and 42(b), the entire class. 11:22:36

5 And, again, get out of the religiosity of the class action. 11:22:43

6 All I'm going is illustrating that there are things in the 11:22:52

7 toolbox. 11:22:55

8 Let me throw out something else. And I guess 11:22:58

9 because I am of an older generation, and I am worried about 11:23:04

10 an elderly class, and do think public health is a value in 11:23:09

11 our society, maybe the first step, a baby step or not so 11:23:17

12 baby a step would be if memory serves, Your Honor, June 6, 11:23:24

13 2003, the anniversary of D-Day, you set something up for 11:23:31

14 trial. One of the things you can front load on that day is 11:23:43

15 medical monitoring. As Mr. Arsenault made clear, just 11:23:49

16 about everything on medical monitoring is a common 11:23:59

17 question. It's a common question. 11:24:05

18 Medical monitoring is time sensitive. If you're 11:24:15

19 going to get some public health benefits, some 11:24:20

20 prophylactics, you are going to develop epidemiological 11:24:24

21 data to try to move forward with dealing with rhabdo and 11:24:29

22 renal diseases, sooner is better than later, and it moves 11:24:34

23 forward, it moves forward. 11:24:40

24 By the way, if you don't use something in the 11:24:44

25 tool box, there will never be any medical monitoring by 11:24:47

1 anybody. Any individual litigation can't produce it. And 11:24:51

2 even dispersed aggravated litigation won't do it. Medical 11:24:59

3 monitoring in and of itself requires aggregation, otherwise 11:25:07
4 it's useless, otherwise it won't achieve it's objective 11:25:17
5 ever trying to bring some health knowledge to people. 11:25:19
6 It's estimated that maybe 280,000 people in the 11:25:22
7 larger class have never been tested. And on June 6, maybe 11:25:28
8 you will want to adjudicate this question of medical 11:25:35
9 monitoring. Is it needed? Are there tests? Will it do 11:25:40
10 any good. 11:25:46
11 It's a bench trial. It's all equity. It may not 11:25:49
12 look like a thou shalt not injunctive order, but it's 11:25:54
13 equity, it's equity. It's a bench trial. 11:25:59
14 So, again, there are lots of ways to do it, and 11:26:14
15 I'm not standing here saying you should do A or B or C or D 11:26:17
16 or A and B or E and D, because these things can be 11:26:24
17 combined. They can be staged in sequence. 11:26:31
18 Judge Bechtal in diet drugs started with a 11:26:35
19 tentative medical monitoring class. I think he felt that 11:26:41
20 the public health elements for the diet drug population 11:26:47
21 should get primacy. Everything else was reserved, but it 11:26:54
22 seems to be critical that you maintain control of the wooly 11:27:01
23 mammoth. Failure to certify anything or take a baby step 11:27:05
24 or a giant step will diffuse, will disaggregate, will 11:27:17
25 disassemble, which I think you've worked very, very, very 11:27:24

1 hard to hold together. 11:27:31
2 There was a perfect illustration of that a couple 11:27:33

3 of days ago on remand on Bridgestone-Firestone back to 11:27:36

4 Judge Barker back in Illinois. Irony of ironies. The 11:27:38

5 defense lawyers wanted her to enjoin the lawyers and 11:27:46

6 parties from fleeing and bringing state-based or state-wide 11:27:51

7 class actions. And an opinion that has a lot of doesn't 11:28:00

8 say, but you can feel, she said, hey, defense, you told me 11:28:13

9 I couldn't aggregate. Seventh Circuit has agreed with you. 11:28:20

10 I no longer have the ability to control those people. I 11:28:26

11 can't always act them. They're gone. They're gone. You 11:28:31

12 won't have it both ways. You can't tell me I can't 11:28:37

13 aggregate for class purposes, but I can aggregate to order 11:28:44

14 all of those people to do X or Y or not Z. 11:28:49

15 I think it's a very interesting object lesson. 11:28:54

16 It demonstrates the importance of the maintenance of 11:28:58

17 control by the 1407 Judge, and that's achieved I think, by 11:29:02

18 doing something, whether it's medical monitoring, whether 11:29:11

19 it's a common issue trial, whether it's both. 11:29:15

20 To be sure, so much of this is about philosophy. 11:29:27

21 It's about attitudes, beliefs. Just as I can't teach 11:29:33

22 Ethics at the law school, I say nothing on that subject. 11:29:41

23 We believe you should do something. We believe 11:29:49

24 that in the course of this presentation, you will hear from 11:29:50

25 Mr. Beck. You've got bench books, something that you feel 11:29:57

1 is right for this case. There is not a question of right 11:30:03

2 or wrong in the abstract. This is a question of your 11:30:08

3 discretion to decide what is right for this case. This, I 11:30:12

4 think, singular case involving a highly specific and, thus 11:30:17

5 far, relatively unique fact pattern. 11:30:22

6 Let me close, since I am in this building, by 11:30:35

7 reading some words written 13 years ago by someone who is 11:30:38

8 now your chief judge. This is from In re Worker's 11:30:43

9 Compensation, factually, not at all relevant. Judge 11:30:52

10 Rosenbaum says, Defendant's parade of horror is chimerical. 11:30:57

11 They know, as does this Court, that this case can be 11:31:04

12 managed. It does not take a battalion of rocket scientists 11:31:09

13 to handle a large case. If the Plaintiffs' claims are 11:31:14

14 substantiated, the class action mechanism is clearly the 11:31:20

15 most efficient means of resolving the many claims which may 11:31:25

16 be asserted. If the case were not handled as a class, 11:31:30

17 thousands of small claims would be either brought or 11:31:34

18 unjustly abandoned. The first possibility would be a flood 11:31:41

19 of cases. The second would involve individual claims 11:31:44

20 abandoned because of costs. Things change, but some things 11:31:51

21 remain the same. But Judge Rosenbaum saw as that duality 11:32:00

22 in 1990 is just as true in 2003. Thank you. 11:32:06

23 THE COURT: Thank you. 11:32:16

24 MR. ZIMMERMAN: Your Honor, I expect maybe your 11:32:35

25 reporter would like a break. She asked me how long it 11:32:37

1 would be and I said an hour. 11:32:43

2 THE COURT: Let's take a 15-minute break, 15 11:32:44

3 minutes. 11:32:48

4 (Recess taken.)

5 MR. ZIMMERMAN: Can I ask the Court if you're 11:32:50

6 going to take a lunch break? 11:32:55

7 THE COURT: Yes, we'll take a lunch break, 12:30 11:32:58

8 to 1:30. 11:33:00

9 THE COURT: Mr. Zimmerman,. 11:49:57

10 MR. ZIMMERMAN: I thank you, Your Honor. At this 11:50:06

11 time, I'd like to introduce Elizabeth Cabraser from San 11:50:06

12 Francisco and New York who is going to talk about the 11:50:11

13 refund class and also make some comments on issues and 11:50:13

14 follow up to Professor Miller's presentation. 11:50:18

15 THE COURT: Okay. 11:50:22

16 MS. CABRASER: Good morning, Your Honor. 11:50:39

17 THE COURT: Good morning. That whole podium can 11:50:42

18 be lowered. On the side is a button. 11:50:46

19 MS. CABRASER: How did Your Honor know I needed 11:50:51

20 to do that. That's a wonderful thing. I don't have to 11:50:53

21 stand on a box. That's what keeps me from being a 11:51:03

22 distinguished trial lawyer. If you have to stand on a box, 11:51:09

23 it's very, very difficult to maneuver persuasively with a 11:51:15

24 jury, anyway, and it adds to the length of trials. 11:51:17

25 Before I start, Your Honor -- 11:51:21

1 THE COURT: What trial lawyer doesn't stand on a 11:51:22

2 box? (Laughter). 11:51:25

3 MS. CABRASER: Well, I need to stand on a real 11:51:27

4 one. Before I start just some housekeeping matters in 11:51:30

5 terms of some of the document that we are speaking from 11:51:40

6 this morning. They are in a bench book, Your Honor. Most 11:51:44

7 of the actual presentation materials are in Volume III of 11:51:50

8 your bench book, including the printout form of the slides 11:51:52

9 that were shown during Mr. Arsenault's presentation and the 11:51:57

10 actual documents to back those up. Those are -- the slides 11:52:01

11 are at Tab A. The supporting documents bates number order 11:52:05

12 are at Tab B. Some outlines of Professor Miller's remarks 11:52:11

13 are at Tabs C and D. The case census that Mr. Miller 11:52:18

14 referred to which we believe was prepared by Defendants and 11:52:24

15 appears to be pretty accurate in terms of the number of 11:52:28

16 federal cases that are before you as part of the MDL is at 11:52:30

17 Tab E. And that's where the data on the 805 Minnesota 11:52:35

18 filings and the 3,031 federal cases transferred in from 11:52:42

19 Pennsylvania is taken. 11:52:48

20 The Bridgestone-Firestone order from Tuesday of 11:52:50

21 Judge Barker denying the Defendants' joint motion to enjoin 11:52:56

22 all state court class proceedings nationwide is included as 11:53:01

23 Tab H. We don't have a signed copy because that comes out 11:53:07

24 on the website and was faxed around by Judge Barker. I do 11:53:12

25 understand that that is currently under petition for appeal 11:53:18

1 to the Seventh Circuit. 11:53:23

2 What you don't have in the bench book is kind of 11:53:26

3 the census on that litigation. Just for comparison 11:53:34

4 purposes in the wake of the Seventh Circuit's reversal of 11:53:35

5 the class certification order, a number of cases were 11:53:38

6 commenced in state courts across the country. One of those 11:53:42

7 has been certified as a statewide class in Illinois, I 11:53:47

8 believe. Another one is up for the class certification 11:53:50

9 hearing. Various state court systems have gotten involved 11:53:51

10 and pursued their own coordinated proceedings in an attempt 11:53:55

11 to manage the many Bridgestone-Firestone proceedings that 11:54:00

12 were commenced of necessity to protect the Plaintiffs' 11:54:06

13 claims in the wake of that order. 11:54:09

14 And if the Bridgestone-Firestone cases before 11:54:12

15 Judge Barker were a black hole and a case that presented 11:54:16

16 management challenges, I think right now that litigation, 11:54:20

17 despite the best efforts of the Plaintiffs' counsel across 11:54:23

18 the country to continue to coordinate it and to keep all 11:54:27

19 the courts apprised of what's going on so that the courts 11:54:30

20 at least have information is now a management challenge of 11:54:40

21 many orders of magnitude greater. We have a system of 11:54:42

22 black holes in that universe many courts will have to deal 11:54:47

23 with on the same issues and claims. 11:54:50

24 So, I was going to speak to you this morning, 11:54:53

25 Your Honor, about the refund class, and I will do that. 11:54:56

1 But in light of your question, I think I will start first 11:54:59

2 with what seems to be most pertinent and relevant. Indeed, 11:55:05

3 I think it's crucial to the questions and the decisions and 11:55:12

4 the choices that have been presented to you in the form of 11:55:14
5 the Plaintiffs' motion for class certification in these MDL 11:55:20
6 proceedings. 11:55:25
7 And I think the one thing that most troubles 11:55:27
8 Judges who are confronted with cases thing cry out for some 11:55:29
9 form of aggregation is the absence of the ideal class 11:55:34
10 action trial plan, graven in stone and descending from the 11:55:43
11 heavens or wherever the federal rules come from to provide 11:55:50
12 clear, precise, unambivalent, unequivocal guidance that is 11:55:54
13 not only easy and quick, but appeal proof and 11:56:02
14 non-controversial, and we have not achieved that level of 11:56:08
15 certainty in the field of complex litigation and 11:56:17
16 aggregation and complex trials. 11:56:19
17 And if you asked me if I believed in class action 11:56:24
18 trials, I would have to revert to that old song about do 11:56:29
19 you believe in infant baptism. Yes, I've seen it done. 11:56:37
20 Well, yes, I have seen class action trials done. I've seen 11:56:43
21 plaintiffs win them, I've seen plaintiffs lose them. I've 11:56:48
22 been involved in the planning and the structuring and the 11:56:51
23 conduct of some of them. And there are other lawyers in 11:56:54
24 this court with even greater experience than mine who have 11:56:57
25 participated in the actual conduct of mass tort class 11:57:03

1 action trials. 11:57:06
2 So, we do have a small universe of guide points 11:57:08
3 to look to see which of those techniques and which of those 11:57:15

4 structures might be appropriate in this case. In our 11:57:20

5 briefing, we attempted to describe some of those. Some of 11:57:25

6 the class certification decisions in other mass tort cases 11:57:31

7 such as the class certification decision in Copley 11:57:36

8 Albuterol, and the final class certification decision of 11:57:42

9 Judge Spiegel in Telectronics after the case was first 11:57:48

10 certified and then decertified and then recertified do 11:57:54

11 include or append trial plans. Those are trial plans very 11:57:57

12 specifically designed for those cases. 11:58:00

13 And if you look at those trial plans in Copley 11:58:03

14 Albuterol, which was a single prescription medication case 11:58:07

15 MDL from all across the country involving multiple states 11:58:15

16 laws, and if you look at Telectronics, a medical device 11:58:19

17 case MDL from all across the country involving multiple 11:58:23

18 state laws, what you see is very much like what Professor 11:58:30

19 Miller described to you just a moment ago. You see classes 11:58:33

20 certified under Rule 23(b)(3). You see the courts 11:58:38

21 selecting common issues for a Phase I trial, utilizing Rule 11:58:43

22 23(c)(4)(a) expressly or not, depending upon the style of 11:58:47

23 the opinion. You see medical monitoring claims treated as 11:58:51

24 a common issue and certified, either under 23(b)(2) or 11:58:54

25 23(b)(2) and (b)(3), because I think it's fair to say that 11:59:00

1 most courts preclude that while predominance and 11:59:06

2 superiority are not requirements for certification of

3 medical monitoring claims, those requirements are usually 11:59:13

4 met simply because the medical monitoring claim shares 11:59:14

5 common liability issues and common fact patterns with the 11:59:17

6 other claims in the case. 11:59:21

7 What you typically see would be Judges as MDL 11:59:24

8 Judges, even before Lexecon who recognized that whether or 11:59:29

9 not the Plaintiffs had a right to take their individual 11:59:34

10 cases back to transferor or district or other courts for 11:59:37

11 trial, they might wish to and, indeed, their personal 11:59:43

12 injury and wrongful death claims were sufficiently serious 11:59:47

13 and had sufficient value to vest the Plaintiffs with a real 11:59:53

14 interest in controlling insofar as they could without 11:59:58

15 clashing with other provisions of the federal rules. Some 11:59:58

16 individual destiny in their cases. So, you see courts 12:00:03

17 balancing those interests. 12:00:07

18 So, it's not to say that a mass tort personal 12:00:09

19 injury wrongful death trial arising from a dispersed mass 12:00:14

20 tort like a medical device or a drug could not be tried 12:00:18

21 front to back, all phases, including damages, in one court, 12:00:22

22 courts typically do not go there. They determine, I think 12:00:27

23 quite pragmatically, that the resolution of the common 12:00:33

24 issues that relate to the Defendants knowledge, conduct, 12:00:38

25 duty, the characteristics of the product itself, whether or 12:00:41

1 not it's detective, whether or it's dangerous, whether or 12:00:44

2 not it can cause a specific disease. The resolution of 12:00:49

3 those issues by one jury will significantly advance either 12:00:51

4 the resolution or the adjudication of the remaining issues 12:00:55

5 in the case. 12:00:57

6 Because Albuterol and Telectronics were certified 12:00:57

7 and tried before the United States Supreme Court issued its 12:01:01

8 recent decision in Cooper Industries v. Letterman Tool 12:01:08

9 Group, you see courts reluctant to place or phase the 12:01:13

10 punitive damages issue in the phase one common issues 12:01:21

11 trial. And the courts have reserved that in the past in 12:01:26

12 some fashion for individual adjudication. 12:01:28

13 Other courts have included punitive conduct and 12:01:33

14 punitive damages as a phase or multi-phase jury trial, in 12:01:36

15 the Marcos Human Rights litigation, for example, and Exxon 12:01:43

16 Valdez case, which I will get to in a moment. But Judge 12:01:50

17 Spiegel in Telectronics and Judge Brimmer in Albuterol were 12:01:56

18 not faced with a Supreme Court that has now prescribed the 12:02:04

19 factual determinations and the policy considerations which 12:02:09

20 must be made by any jury in any federal or state trial 12:02:12

21 involving punitive damages. 12:02:19

22 The BMW decision, and more expressly, the Cooper 12:02:19

23 decision have, in effect, created a federal common law on 12:02:26

24 punitive damages law, yet, the state judge is still free to 12:02:29

25 decide whether he will allow punitive damages on a given 12:02:35

1 claim. But any jury anywhere must now consider certain 12:02:37

2 factors and answer certain questions in deciding that. And 12:02:41

3 as the Supreme Court said in Cooper, the Seventh Amendment 12:02:47

4 is not implicated in those determinations. They are not 12:02:51
5 pure fact determinations. They are mixed. There is a 12:02:57
6 legal element, an equity element in those determinations, 12:02:59
7 so much so that it's not only all right, but now mandatory 12:03:04
8 that when the jury issues a punitive damages verdict, it is 12:03:08
9 subject to de novo review. 12:03:14
10 We have a situation now where the Supreme Court 12:03:15
11 has said that punitive damages is of constitutional 12:03:19
12 dimension, and the defendant has a due process right to be 12:03:25
13 exposed to a just level of punitive damages and to be 12:03:29
14 protected against excessive punitive damages on a single 12:03:31
15 course of conduct or a single product or a single event. 12:03:37
16 And that goal, that mandatory goal that is now imposed on 12:03:41
17 the federal and state court systems by the Supreme Court is 12:03:46
18 difficult, if not impossible, we suggest, to achieve 12:03:50
19 through multiple proceedings in multiple courts on punitive 12:03:53
20 damages involving the same conduct and the same product, 12:03:58
21 each going up to multiple appellate courts for mandatory de 12:04:01
22 novo review. 12:04:08
23 We see no way to get to the Supreme Court's goal 12:04:09
24 in a situation involving multiple plaintiffs and a mass 12:04:13
25 tort through those dispersed proceedings. That situation 12:04:16

1 was not faced by earlier MDL courts looking at mass tort 12:04:19
2 cases and how to phase trials and how to gather common 12:04:24
3 issues together and how to reserve individual issues. 12:04:32

4 So, the trial plan we would ask you to consider 12:04:34
5 in this case does differ from the trial plans that were 12:04:39
6 described in Copley and in Telectronics and which were 12:04:42
7 quite successful in persuading the parties that the cases 12:04:45
8 could be managed as class actions in providing the parties 12:04:50
9 sufficient information to settle them on an in-forward 12:04:54
10 basis and resolving thousands of claims in a fair, speedy 12:04:56
11 and inexpensive way. 12:05:00
12 These days, it seems, though the Supreme Court 12:05:03
13 has not spoken directly to this issue, that any judge faced 12:05:06
14 with the management of a mass tort case and personal injury 12:05:10
15 wrongful death and consumer claims that give rise to the 12:05:17
16 possibility of exposure to punitive damages should 12:05:21
17 seriously consider to the extent to which one jury 12:05:24
18 addressing as part of its common issues verdict form the 12:05:32
19 questions that the Supreme Court has said any jury must 12:05:35
20 answer on a defendant's punitive conduct, on its 12:05:41
21 reprehensibility, on the appropriate level of punishment 12:05:44
22 for that conduct. 12:05:48
23 This could be done in a number of ways. Years 12:05:49
24 ago, it seems like 15 years ago or 16 years ago, I guess it 12:05:54
25 was, in the Jenkins case, which were a group of asbestos 12:06:02

1 cases consolidated before a district judge in Texas, the 12:06:06
2 court decided to craft a trial plan which determined 12:06:09
3 punitive conduct in Phase I and asked the Phase I jury to 12:06:14

4 answer a series of questions about the defendant's conduct 12:06:18
5 with asbestos. Did they know it was dangerous. The state 12:06:21
6 of the art defense that they had. And the jury was asked 12:06:27
7 to assess a multiplier of punitive damages which could then 12:06:30
8 be applied to perspective compensatory verdicts in 12:06:35
9 different phases of the case or in other phases or other 12:06:39
10 cases. The Fifth Circuit upheld that plan as 12:06:40
11 constitutional. It was never overruled despite all the 12:06:44
12 vagaries of asbestos litigation in Texas. 12:06:50
13 That is one model the Court could follow today. 12:06:56
14 In other words, Your Honor, you can certify the classes on 12:06:57
15 injury and refund through 23(b)(3). You could delineate 12:07:00
16 the common issues for the common issues trial. Those 12:07:06
17 common issues could include questions regarding the 12:07:11
18 Defendants' punitive conduct, and the jury could be asked 12:07:15
19 to establish a ratio he or multiplier that would be imposed 12:07:17
20 to reflect a fair and just proportion of punitive damages 12:07:22
21 on prospective compensatory awards, compensatory awards 12:07:26
22 rendered by that jury in favor of the named representative 12:07:30
23 Plaintiffs in your common issues trial which could be front 12:07:34
24 to back as to them and the ratio that could be applied in 12:07:38
25 later cases. 12:07:42

1 Your Honor need not go that far. The jury can 12:07:42
2 answer the questions about punitive conduct without a 12:07:46
3 multiplier, and the Your Honor can go farther and ask that 12:07:48

4 jury in the common issues trial to go ahead and calculate 12:07:51
5 the aggregate amount of punitive damages, if any, that 12:07:56
6 would be imposed against each of the Defendants for its 12:08:00
7 conduct and its role in the research, development, 12:08:04
8 marketing, promotion and sale of Baycol. 12:08:08
9 Information would have to be provided to the jury 12:08:13
10 about the harm caused by that conduct and the potential 12:08:16
11 harm because that is one of the Cooper factors, but that 12:08:21
12 could be done. It could be done through expert testimony. 12:08:24
13 It could be done through surveys of the members of the 12:08:28
14 class. 12:08:31
15 We realize as a tactical matter Plaintiffs' 12:08:31
16 lawyers like to maintain control over the punitive damages 12:08:37
17 component of their clients' claims because that adds value 12:08:41
18 to the claims and that could drive settlement. And that is 12:08:50
19 a legitimate, tactical consideration and we honor it. 12:08:50
20 We also recognize that this Court has a different 12:08:54
21 perspective, and institutional perspective and a 12:08:58
22 perspective of taking care to see that everyone is treated 12:08:59
23 fairly and the dynamics that drive settlements are 12:09:02
24 available to everyone. And although Defendants would not 12:09:06
25 ask for it, and, indeed, would say they don't need it 12:09:09

1 because they have done nothing wrong, this Court does have 12:09:13
2 an interest in seeing, as the Supreme Court has says it 12:09:18
3 must, that if the Defendants are exposed to punitive 12:09:22

4 damages, it is not excessive. It is not repetitive, and I 12:09:25
5 would suggest given the complexities of multiple de novo 12:09:30
6 review and the time delays, this Court has the 12:09:36
7 responsibility under Federal Rule 1 to see that money that 12:09:36
8 would otherwise be available to pay a fully adjudicated and 12:09:38
9 fair punitive damages award is not otherwise dissipated in 12:09:42
10 the transaction costs of endless, repetitive trials and the 12:09:46
11 inevitable de novo appeals. 12:09:51
12 This gets me to the experience aspect of this. 12:09:56
13 We are all victims of our experience. One of the class 12:10:00
14 action trials that I have seen done, and indeed was 12:10:04
15 implicated somewhat in the doing of it, was the Exxon 12:10:09
16 Valdez trial. Exxon Valdez was a mass accident case, and 12:10:14
17 the class claims were largely economic. But as District 12:10:20
18 Judge Hollins most recent decision in Exxon Valdez makes 12:10:28
19 very clear, and you have that, Your Honor, attached to the 12:10:33
20 Lockridge Declaration in your opinion briefing book, the 12:10:37
21 course of conduct that culminated in that accident was many 12:10:40
22 years in the making, and it was complex, and it was 12:10:45
23 contention. And the aftermath of that tanker's grounding 12:10:48
24 was complex and contentious in terms of its impact upon the 12:10:52
25 economies of the fishing industries in Alaska, the native 12:10:57

1 Alaskan societies and figuring out the factual complexities 12:11:04
2 of who was owed damages in what amount and for what was a 12:11:11
3 daunting task for the jury. I would submit a far greater 12:11:18

4 complexity than any set of questions, a common questions 12:11:23
5 jury would be asked to decide in this case. 12:11:27
6 We haven't given Your Honor a verdict form per 12:11:31
7 se. The rules and jurisprudence do not suggest that we 12:11:37
8 must, but we have given thought to lists of common 12:11:43
9 questions that are fact questions that a common issues jury 12:11:48
10 would -- could be asked to answer as factfinder in a common 12:11:53
11 questions trial or Phase I trial in this case. Some of 12:12:00
12 those are gathered in Volume III of your Bench book, and if 12:12:05
13 I could have Slide 50. We can show you some of them on the 12:12:10
14 screen. And these are not -- you can just keep going and 12:12:16
15 scroll through those. These are not the ultimate language 12:12:28
16 that might be used by the time the trial lawyers might be 12:12:28
17 through wrangling over jury instructions should look like 12:12:33
18 and how they should read, but they are many of the common 12:12:34
19 questions that any jury in any case would be required to 12:12:40
20 deal with on its way to a verdict on liability and damages. 12:12:44
21 And those common questions -- you can just go 12:12:51
22 through those a little quicker -- those common questions 12:12:53
23 don't include the list of questions and factors that the 12:12:58
24 Supreme Court has said must be asked in a punitive damages 12:13:03
25 case, but we have the best source of all for those 12:13:09

1 questions. We have the Supreme Court itself in Cooper 12:13:15
2 Industries telling us at 532 U.S. Page 1440 that there is a 12:13:21
3 uniform set of factors that must be utilized and questions 12:13:27

4 that must be answered in determining punitive conduct and 12:13:31

5 damages questions in every case by every Court. Number 1, 12:13:36

6 the degree or reprehensibility of the Defendant's conduct; 12:13:41

7 Number 2, the disparity between the harm or potential harm 12:13:42

8 suffered by the Plaintiffs and the punitive damages award 12:13:48

9 that's being requested; and, 3, the difference between the 12:13:51

10 punitive damages awarded by that jury and the penalties or 12:13:54

11 punishments authorized or imposed in comparable cases. And 12:13:58

12 that's what makes multiple punitive damages decision now so 12:14:02

13 problematic because someone has to have an overall view of 12:14:09

14 what the total exposure might be. And that could be a 12:14:14

15 reviewing Court, but more to the point, it could be a class 12:14:16

16 action common questions jury. 12:14:22

17 It's what the jury did in the Exxon Valdez case. 12:14:23

18 Exxon Valdez was certified as a class action at the 12:14:28

19 Defendants' request. Exxon, now Exxon Mobil, asked for 12:14:35

20 that, after the Plaintiffs had asked the federal court to 12:14:39

21 certify the class under (b)(3), and the federal Court 12:14:46

22 denied the motion. Exxon found itself in a 12:14:50

23 Bridgestone-Firestone situation. It had gotten what it had 12:14:55

24 asked for, and now it was faced with thousands of irate 12:15:00

25 claimants in state and federal court in Alaska, not across 12:15:06

1 the country, but at least in two court systems, who wanted 12:15:09

2 a shot at punitive damages and somehow were going to have 12:15:12

3 to get it. 12:15:16

4 And, so, Exxon thought better of its previous 12:15:18

5 opposition of class certification and its invocation of its 12:15:21

6 Seventh Amendment and all the other arguments that 12:15:24

7 Defendants make against class trials. And Exxon swallowed 12:15:27

8 hard and asked the district judge to certify the class for 12:15:31

9 trial, to have one trial on the common questions of the 12:15:34

10 Defendants' conduct and its culpability, Phase I. Phase 12:15:38

11 II, the compensatory damages, if any, that ought to be 12:15:47

12 awarded by the thousands of people in the very complex 12:15:47

13 class system, the Exxon court certified. And in Phase III, 12:15:53

14 if there was a compensatory verdict or a determination of 12:15:55

15 compensatory harm, the total and punitive damages, if any, 12:16:02

16 that ought to be awarded for the Exxon Valdez incident, the 12:16:02

17 conduct that led up to it and it's after math. 12:16:09

18 In 1994, Judge Holland convened a jury and 12:16:13

19 conducted that trial in three phases and it took a while. 12:16:20

20 It took the summer of 1994 in Anchorage, Alaska. 12:16:23

21 Fortunately, it did not go into the winter, but it occurred 12:16:29

22 in three phases, a single jury. And the parties, after 12:16:34

23 much wrangling and multiple status conferences, and lots of 12:16:39

24 heats and eventually some light, were able to agree on a 12:16:43

25 specific trial plan for the three-phase trial of that case 12:16:46

1 which we have not submitted to the Court but can do so. 12:16:50

2 And, ultimately, based on submissions from the parties made 12:16:54

3 in the course of the trial, the Court crafted three special 12:16:59

4 verdict forms which we can likewise submit to the Court. 12:17:02

5 They were Rule 39 Special Verdict Interrogatories forms. 12:17:06

6 Phase I was the special verdict dealing with negligence, 12:17:12

7 recklessness and cause, and the jury found the Defendants 12:17:21

8 were negligent, they were reckless and their conduct caused 12:17:24

9 the harm. 12:17:28

10 Special verdict for Phase 2, compensatory 12:17:30

11 damages, was a 13-page special verdict form with 140 12:17:36

12 questions, more questions, I think, than a jury in this 12:17:39

13 court would be asked to answer, even in a front-to-back 12:17:42

14 trial of the economic damage refund claim. 12:17:46

15 THE COURT: In dealing with that verdict form, 12:17:51

16 I'm assuming that they had Plaintiffs on that form. 12:17:52

17 MS. CABRASER: They did not. 12:17:57

18 THE COURT: They did not? 12:17:58

19 MS. CABRASER: No. The reason for that, Your 12:17:59

20 Honor, is the post-class certification and pretrial, the 12:18:03

21 Plaintiffs organized the members of that class obtained 12:18:09

22 data on their damages, accumulated that data, presented it 12:18:17

23 to the Court, gave it to the expert economists who used 12:18:24

24 that data on both sides to opine as to the amount of damage 12:18:31

25 that had, in fact, occurred as a result of the spill, and 12:18:35

1 that was complicated calculus, and the sides did not agree 12:18:39

2 and the percentage of that harm that was attributable to 12:18:48

3 the Defendants' conduct, and, again, a complicated 12:18:52

4 calculus, and the parties did not agree. 12:18:52

5 It looked somewhat like the damages or impact 12:18:55

6 phase of an antitrust trial, which is largely about what 12:18:58

7 the experts utilize in data, which may itself be in 12:19:00

8 dispute, to try to figure out in quantitative terms harm 12:19:03

9 that has been caused by anti-competitive behavior, 12:19:08

10 overcharging, and in this case, an oil still that set in 12:19:13

11 motion a complex chain of events that Plaintiffs claimed 12:19:18

12 wiped out certain fisheries, reduced the market price of 12:19:23

13 different species of fish caught in different areas, and 12:19:28

14 impacted six different areas for five different species of 12:19:30

15 fish. That's a permutation of 30 fact scenarios. 12:19:35

16 Here in a compensatory phase here on the refund 12:19:44

17 claim, for example, we have two claims in that category. 12:19:47

18 We have the breach of implied warranty claim based on the 12:19:49

19 Uniform Commercial Code that has been adopted by name or 12:19:53

20 provision in all states. And the claim there is that 12:19:58

21 Baycol, which was not a breakthrough drug, which was an 12:20:00

22 unnecessary drug coming into a saturated market, which was 12:20:05

23 not effective and dangerous, was not worth its purchase 12:20:09

24 price, and that Plaintiffs are entitled to a refund in the 12:20:14

25 amount of difference between the drug's price and drug's 12:20:18

1 value. Classic breach of warranty, classic economic harm, 12:20:24

2 classic fodder for the experts looking at pricing and 12:20:26

3 purchasing data to opine and to argue about what the amount 12:20:32

4 of the refund should be. None of that has anything to do 12:20:36

5 with the individual Plaintiffs. They came in at the end of 12:20:41

6 all the upstream conduct, and they became class members by 12:20:45
7 purchasing the drug. They didn't have control over the 12:20:48
8 amount they paid, at least as far as individual bargaining. 12:20:54
9 They usually didn't have control over drug that was 12:20:57
10 prescribed to them. They took what the health plan paid 12:21:01
11 for and what the doctor prescribed. But they paid for 12:21:05
12 something that wasn't worth the price. If the jury agrees 12:21:09
13 that was true, the jury will calculate what the amount of 12:21:10
14 the refund should be. 12:21:15
15 Our second refund claim is an unjust enrichment 12:21:17
16 claim, and that's the equitable side of the refund class. 12:21:17
17 And that simply says that Defendants got something they are 12:21:23
18 not entitled to keep and should give it back. They got 12:21:25
19 profits from a drug that didn't need to be sold and that 12:21:28
20 should never have been sold, that no one should ever have 12:21:33
21 bought and paid for. That's unjust enrichment in a 12:21:35
22 nutshell. It's a uniform claim. The factfinder could be 12:21:39
23 this Court sitting on a bench trial on unjust enrichment 12:21:42
24 because it's an equity claim. And the question there is 12:21:49
25 were the Defendants unjustly enriched, weighing the 12:21:51

1 equities, the utility of their conduct, the harm their 12:21:55
2 conduct could have caused, and how much did they make in 12:21:58
3 profit and how much of that profit should they give back, 12:22:01
4 and how should that refund be used. And that involves 12:22:03
5 experts looking at the Defendants financial records and 12:22:08

6 their profit figures, and this Court doing equity under the 12:22:11
7 circumstances. 12:22:15
8 So, certainly for the refund, a much simpler 12:22:17
9 version of the battle of the experts and the data and the 12:22:22
10 verdict form in Exxon Valdez could certainly be used. With 12:22:27
11 respect to those among the Plaintiffs whom this Court calls 12:22:34
12 to have their claims tried front to back from liability to 12:22:39
13 compensatory damages, the same type of verdict form could 12:22:43
14 be used. 12:22:47
15 On the punitive damages, having heard the 12:22:49
16 evidence, the disputed evidence about the level of harm and 12:22:51
17 the amount of compensation that Plaintiffs want, and by the 12:22:58
18 way, Your Honor, having disagreed substantially with 12:23:04
19 Plaintiffs' view of their damages, Plaintiffs asked for 12:23:07
20 nearly a billion dollars in compensatory damages in Exxon 12:23:09
21 Valdez and had experts to prove that. The jury cannot 12:23:14
22 accept that number and they are not required to. They did 12:23:18
23 their own calculations and they came up with a compensatory 12:23:23
24 award of just over $200,000,000, an award confirmed on 12:23:27
25 appealing by the Ninth Circuit in 2001. 12:23:33

1 The special verdict for Phase III, III is the 12:23:35
2 trial was a simpler verdict form that would be used today, 12:23:37
3 post Cooper. It awarded the Plaintiffs as a class, an 12:23:42
4 undifferentiated class, the amount of $5,000,000,000 in 12:23:46
5 punitive damages, and that launched the appeal to the Ninth 12:23:51

6 Circuit from the Exxon Valdez trial. Not from the 12:23:55
7 structure. Not from the class certification. Not really 12:23:58
8 from any of the evidence or the way the evidence had come 12:24:02
9 in, but simply because Exxon contended that that award was 12:24:05
10 excessive in the light of all the evidence and the policies 12:24:11
11 that underlie punitive damages. 12:24:14
12 In 2001, the Ninth Circuit ultimately agreed with 12:24:19
13 Exxon on that point. The Cooper case come down on in the 12:24:22
14 meantime. The Cooper case had told the Ninth Circuit -- 12:24:27
15 Cooper, by the say, was a Ninth Circuit case that went up, 12:24:29
16 and as sometimes happens with Ninth Circuit cases, got 12:24:32
17 reversed. On remand, the Ninth Circuit -- it's a rare 12:24:37
18 occurrence, but it happened there. So, the Ninth Circuit 12:24:39
19 knew very well about de novo review of punitive damages 12:24:44
20 award and that it had that obligation in Exxon Valdez. The 12:24:48
21 Ninth Circuit could have done one of two things. It could 12:24:55
22 have recalculated the jury's award. It did not do that. 12:24:58
23 It remanded the award to the district court for 12:25:03
24 recalculation in light of the Cooper mandate and in light 12:25:06
25 of the Cooper factors, and Judge Holland's decision on 12:25:07

1 remand is the decision you have that came out late last 12:25:11
2 year. Judge Holland thought $5,000,000,000 was still the 12:25:15
3 right number after all the calculus, reduced it to four, 12:25:19
4 recognizing he was under a mandate, and the case is now 12:25:20
5 back in the Ninth Circuit. And at some point, someone will 12:25:25

6 come up with a final number and it will be administered by 12:25:28

7 Judge Holland as a case management task. 12:25:32

8 If that process on that award has taken so many 12:25:36

9 years and resources of court time, and if the Supreme Court 12:25:41

10 now mandates that same process in any and every punitive 12:25:46

11 damages award, our concern is that because Plaintiffs have 12:25:50

12 a compelling case on punitive conduct and will be able to 12:25:54

13 persuade more than one jury to award punitive damages in 12:26:01

14 Baycol, that we will have a hundred or a thousand Exxon 12:26:07

15 Valdezes in the appellate courts of this country. And the 12:26:18

16 purposes of punitive damages, its legitimate purpose, may 12:26:18

17 be frustrated and receipt of punitive damages will be 12:26:22

18 delayed, and that alone places this Court's opportunity to 12:26:27

19 construct a trial plan that works in this case in an 12:26:31

20 entirely new light. In terms of the time and resources you 12:26:37

21 could save by adopting a trial plan procedure that answered 12:26:39

22 some or all of the Cooper questions on punitive damages for 12:26:41

23 this course of conduct in -- and this product than any 12:26:45

24 other court has had the opportunity to do. 12:26:52

25 Now, there have been other class action trials of 12:26:56

1 product defect cases. There have been other class action 12:27:00

2 trials of consumer claims. They have taken different 12:27:05

3 formats. In the Masonite litigation in the state court in 12:27:07

4 Alabama, the court certified a nationwide class on a 12:27:12

5 non-personal injury defective product claim. The masonite 12:27:19

6 exterior siding was defective and it deteriorated too soon. 12:27:23

7 Alabama does not have a choice of law doctrine 12:27:25

8 that enables it to select any particular state's law to

9 apply to nationwide claims. It lacks locus, so all states' 12:27:33

10 laws applied at that trial. 12:27:35

11 The trial judge decided to manage that case with 12:27:37

12 very complex legal issues and claimed legal variations in 12:27:40

13 this way. He said, look, this case is about a defective 12:27:45

14 product. I know no one is claiming they got hurt or 12:27:49

15 killed. But if there is nothing wrong with the product, 12:27:53

16 then you don't have breach of warranty claim, which is the 12:27:56

17 claim. Masonite was not unjustly enriched, and there is no 12:27:59

18 consumer fraud. So, let's find out if this product was 12:28:07

19 defective.

20 The various states used a total of five different 12:28:08

21 tests for defect. So the court prepared a special verdict 12:28:11

22 form and asked the jury to decide whether the Plaintiffs 12:28:14

23 met their burden of proof to demonstrate a defect on each 12:28:18

24 of those tests. The jury was not required to answer all 12:28:21

25 the questions the same way, and the jury was provided with 12:28:24

1 evidence that was relevant to each of the tests. And the 12:28:27

2 jury returned a special verdict form in Masonite finding 12:28:31

3 for the Plaintiffs on four defect tests and for the 12:28:32

4 Defendants on the remaining tests. And that told the Court 12:28:35

5 that the 37 states that used the first four tests, those 12:28:39

6 class members are defect claim. The class members in the 12:28:44

7 remaining states did not, and the Court was then able to 12:28:49

8 organize subsequent phases of the trial. The case settled 12:28:51

9 on the very eve of the second phase of the trial which was 12:28:57

10 going to determine the remaining liability and compensatory 12:29:04

11 and punitive damages issues for the class were the viable 12:29:05

12 claim. 12:29:08

13 That case was managed well. It was managed 12:29:11

14 fairly. It culminated into settlement, but not because it 12:29:16

15 was untriable. It culminated into settlement because it

16 was triable. In was triable in phases, and it gave the 12:29:22

17 parties enough information to know rationally what the 12:29:24

18 ultimate outcome might be and to comprise those claims in a 12:29:28

19 fair way. And that Court is in the midst of administering 12:29:33

20 a 20-year claims program for homeowners with siding, and 12:29:38

21 money that would have otherwise been spent in multiple 12:29:41

22 cases or proceedings is being used to fix people's homes. 12:29:43

23 The Avery case in Illinois was tried as a 12:29:51

24 simultaneous jury trial and bench trial on state law claims 12:29:59

25 of breach of contract and consumer fraud. The consumer 12:30:05

1 fraud claim was an equity claim. The Plaintiffs were 12:30:07

2 requesting restitution as they are here, disgorgement, and 12:30:11

3 the Judge dried that while the jury tried the breach of 12:30:14

4 contract claim. There was overlap of the evidence. 12:30:19

5 Some of the evidence the jury was not entitled to 12:30:22

6 see on the breach of contract claim because it had to do 12:30:25
7 with fraud, and the Judge viewed that evidence after the 12:30:30
8 jury went home for the day. So, that's how that trial was 12:30:30
9 structured. The jury came in with a special verdict on 12:30:34
10 damages. The Judge issued an order with reasons and 12:30:37
11 findings on the consumer fraud claim. And the Judge 12:30:39
12 determined punitive damages in that case under that claim. 12:30:44
13 The structure of the trial and the certification 12:30:48
14 of the nationwide class and the choice of Illinois law and 12:30:50
15 the verdict were affirmed on appeal by the Illinois Court 12:30:54
16 of Appeals, and we have cited that case in our briefs. The 12:30:59
17 matter is now before the Supreme Court of Illinois on 12:31:02
18 another issue and that issue really is, did a state court 12:31:05
19 have the right and the power to try those claims on a 12:31:12
20 nationwide class basis and to bind class members from 12:31:16
21 around the country in one proceeding. That is a question, 12:31:23
22 Your Honor, that any state court attempting to certify a 12:31:28
23 nationwide, or even a statewide class, involving 12:31:30
24 out-of-state conduct is going to face in Baycol if this 12:31:36
25 Court does not manage the class itself from a federal 12:31:39

1 courtroom where nationwide jurisdiction is unquestioned. 12:31:43
2 And I think that is another consideration which Your Honor 12:31:47
3 may properly take into account, and we urge should take 12:31:54
4 into account in considering the black hole and considering 12:31:57
5 what system may, with the least amount of controversy and 12:32:02

6 constitutional challenge, best and most comprehensively 12:32:07
7 adjudicate common questions. You could leave it to the 12:32:12
8 state courts. They can try class actions. As Masonite and 12:32:16
9 Avery demonstrated, they have tried nationwide product 12:32:22
10 defect and consumer class actions. And those trials, while 12:32:27
11 they have resulted in relief or been affirmed on appeal, 12:32:32
12 have been and are increasingly controversial and Congress 12:32:36
13 may soon put an end to that opportunity. 12:32:39
14 So, this litigation, though it's based on state 12:32:43
15 law claims, but there is no federal question, may not only 12:32:47
16 have its least controversial and most appropriate home 12:32:51
17 only, but, perhaps, it's only home in this courtroom. 12:32:57
18 There are other variations on the trial plan 12:33:00
19 themes that I have addressed, and we would be happy to 12:33:06
20 provide even more detail. I think, though, that if you 12:33:10
21 imagine for a moment that there is no Rule 23, let's wipe 12:33:15
22 it off the books. It's a troublesome rule and it causes 12:33:21
23 people to get upset, and it seems so sectarian. Plaintiffs 12:33:24
24 have one view and Defendants have another. 12:33:32
25 If we wipe it off the books and we were left with 12:33:34

1 the joinder rules, Rules 18 through 21, and the 12:33:37
2 consolidation Rule 42 and Rule 16, as Professor Miller 12:33:40
3 suggests, and we have in this court what we actually do 12:33:46
4 have today, a very large group of Minnesota-filed cases of 12:33:51
5 which this Court has original jurisdiction, a very large 12:33:54

6 group of cases coming in from other jurisdictions which the 12:33:59
7 parties may agree that this the Court can and should try, 12:34:02
8 and you didn't have Rule 23, and you didn't have a choice 12:34:05
9 about aggregation because aggregation had occurred and 12:34:07
10 aggregation was here, and these claims weren't going 12:34:11
11 anywhere else, certainly the Minnesota claims weren't, like 12:34:16
12 it or not, arrogant trial plan or not, specific guidance 12:34:18
13 from the manual for complex litigation or not, we would 12:34:26
14 have all to figure out how to try those case. And I would 12:34:26
15 suggest, as I did and as Professor Miller did, that what a 12:34:31
16 trial would probably look like without Rule 23 would be a 12:34:35
17 consolidation, would be an initial phase with common 12:34:40
18 issues, would be reliance on joining the parties as 12:34:43
19 parties, and not class members, to bind them to the outcome 12:34:50
20 of those special verdicts and those judgments and a hope 12:34:54
21 that collateral estoppel would work to bind, or at least 12:34:59
22 persuade or influence those not parties whose claims were 12:35:04
23 on unfiled or filed in other courts. 12:35:10
24 If you look at it in that perspective, what you 12:35:19
25 suddenly see is the only thing that Rule 23 adds to that 12:35:19

1 equation, and it's a big thing, is that it provides a way 12:35:24
2 to add people into that inevitably process, the trial that 12:35:27
3 must occur, when their numbers are too large to guarantee 12:35:33
4 that their joinder as named Plaintiffs would be 12:35:37
5 practicable. It's joinder plus. It's adding a level and 12:35:40

6 order of magnitude of benefit from the process. There are 12:35:46
7 concerns that would not exist with all the parties here by 12:35:49
8 name. 12:35:53
9 This Court could forego Rule 23 and, in effect, 12:35:53
10 create an opt-in chase by issuing invitation for people to 12:35:57
11 join up for trial purposes to have their common issues 12:36:03
12 tried in this court, and large part of the good that Rule 12:36:07
13 23 does can be accomplished in that way. But it's 12:36:10
14 makeshift and it's unnecessary because we have Rule 23 and 12:36:14
15 it's incomplete. And that's really at the end of the day 12:36:17
16 the primary reason and, in fact, the only reason why we say 12:36:22
17 as Plaintiffs that some form of class proceedings, some 12:36:24
18 gathering of common issues is superior to the other 12:36:28
19 alternatives that the federal rules make available to us 12:36:35
20 all. There is not a fool-proof, bullet-proof, tailor-made 12:36:37
21 trial plan appended either to the manual for complex 12:36:47
22 litigation or the federal rules of civil procedure that we 12:36:52
23 can simply put this case caption on and use tomorrow for 12:36:56
24 trial. But the makings of it are there. We can learn from 12:36:59
25 other trials. We can see what worked. We can look at 12:37:06

1 verdict forms, and we can look at the facts that must be 12:37:09
2 proved in this case and the issues that are really involved 12:37:12
3 far simpler than most mass torts. 12:37:14
4 Finally, just a couple of words about the refund 12:37:18
5 class. We've really simplified that claim. We only have 12:37:22

6 two claims in the master complaint that relate to the 12:37:27
7 refund remedy, the implied warranty and unjust enrichment, 12:37:30
8 and we have reduced the consumer claims to those 12:37:37
9 essentials. We could have asserted state consumer claims. 12:37:40
10 We gave Your Honor some materials on those in the event 12:37:43
11 that anyone wanted to consider adding those claims in. But 12:37:47
12 every state has the UCC, even Louisiana by another name. 12:37:50
13 Every state has it verbatim. Every state has same the 12:37:54
14 remedy for breach of warranty. Some statements require 12:37:59
15 privity 16 or 17. We have identified those for the Court. 12:38:06
16 That's a common question. Is there privity in this case 12:38:07
17 because the doctors are agents of the Defendants? Maybe. 12:38:11
18 Maybe in some categories that's true. That's a categorical 12:38:16
19 questions. If privity is required and is not present and 12:38:18
20 the jury answers, yes, it's required, and, no, it's not 12:38:22
21 present, then we know whose states residents have a viable 12:38:27
22 implied warranty claim. It really is that simple. 12:38:33
23 Is this about what people thought Baycol could 12:38:33
24 do? Is this about the fact that some people were fortunate 12:38:37
25 enough not to get injured. Not an implied warranty. 12:38:42

1 Defendants have suggested that our Plaintiffs' claims 12:38:44
2 aren't typical because they don't have personal injuries. 12:38:47
3 There is no personal injury requirement for an implied 12:38:53
4 warranty claim. Implied warranty is about economic loss. 12:38:54
5 In drug cases where no one is injured, the consumers bring 12:38:58

6 implied warranty claims because the drug was not worth what 12:39:02
7 was charged either because of an antitrust violation, over 12:39:08
8 charge or because the drug did not do what it was claimed 12:39:12
9 to do. We gave the Your Honor the Cardizem CD antitrust 12:39:17
10 litigation cites on motion to dismiss and on class 12:39:18
11 certification. And the claim there was unjust enrichment 12:39:22
12 by people from ten different states, including Minnesota. 12:39:25
13 And on the motion to dismiss, as well as the motion for 12:39:31
14 class certification, the Cardizem found that unjust 12:39:34
15 enrichment is a universal claim . It is essentially 12:39:37
16 uniform, certainly, in all ten states surveyed by that 12:39:40
17 court in a survey far more detailed that the survey we 12:39:43
18 gave, Your Honor, from our advocate's perspective, and far 12:39:54
19 more detailed than the arguments Defendants made, three 12:39:54
20 pages in F.Supp.2d, comparing the language and the elements 12:39:54
21 of the unjust enrichment claim in all of those states. It 12:39:59
22 is uniform. 12:40:00
23 More to the point, the Cardizem court said it's a 12:40:01
24 class-wide remedy. It belongs to the class as a whole. 12:40:05
25 It's going to be granted or not. It's going to be 12:40:09

1 calculated with respect to the class as a whole. It's 12:40:12
2 based on the Defendant's conduct and the value of the drug 12:40:16
3 and what's there. 12:40:19
4 Cardizem was a drug case. It was a hypertension 12:40:21
5 drug and the claim is there was Cardizem that makers 12:40:26

6 conspired with others to keep generics off the market and 12:40:29

7 the kept the price too high. And if consumers had had a 12:40:37

8 free and informed choice, they would have bought less 12:40:40

9 expensive drugs. Here we have Baycol entering the market. 12:40:43

10 It's low priced. It's an unnecessary drug, and siphoning 12:40:46

11 purchasers away from other, safer and more effect drugs. 12:40:50

12 That's what the evidence suggests. Now, we say that is as 12:40:53

13 much an unjust enrichment claim and, indeed, breach of 12:40:55

14 implied warranty claim as the situation where a drug price 12:41:00

15 is hyped up or the Centroid case where a brand name drug 12:41:08

16 manufacturer claimed the generics weren't as good and kept 12:41:13

17 consumers from buying cheaper drugs. Here it was Baycol 12:41:18

18 that we claim wasn't as good. Same situation. Some 12:41:23

19 experts need to come in and some factfinder, this Court or 12:41:27

20 jury, needs to decide whether Baycol was worth what was 12:41:32

21 charged for it, whether the price was manipulated unfairly, 12:41:36

22 whether consumers have a refund remedy. 12:41:42

23 That claim is really the tail wagging dog in all 12:41:45

24 of this, Your Honor. You know, when people have been hurt 12:41:49

25 and killed, it's hard to come and wave the flag and make 12:41:50

1 policy arguments and get really worked up about a 12:41:53

2 money-back claim because the refund class members in the 12:41:55

3 very real sense are the very lucky ones. But they do have 12:42:00

4 the right to that recovery if they can prove their case. 12:42:05

5 The proof is all the Defendants' conduct. It's all 12:42:09

6 upstream. There is no reliance requirement on either 12:42:11
7 claim. There is nothing subjective about it. It's 12:42:18
8 objective. It's market forces. It's reasonable consumer. 12:42:20
9 That's where those claims live, and that's why commentators 12:42:24
10 and courts alike say those consumer claims are ultimately 12:42:29
11 suited for class treatment. They don't get brought 12:42:32
12 otherwise. 12:42:36
13 We're not representing the health plan who's here 12:42:36
14 who's brought their refund claims to this Court and who are 12:42:40
15 negotiating settlements to get money back from the 12:42:41
16 Defendants. We represent the people who cannot do that 12:42:47
17 alone, and we represent them as a class because that's the 12:42:52
18 only way that claim gets before this Court. 12:42:55
19 By the way, Your Honor, we know this is not a 12:42:57
20 limited fund case, at least not yet, but you can say in a 12:42:58
21 sense that the refund claimants are completing with the 12:43:05
22 wrongful death claims and the injury claims and the medical 12:43:11
23 monitoring claims for a share of either a finite or even an 12:43:16
24 infinite pie.
25 How better to achieve proportionality, justice 12:43:19

1 and fairness to everyone in every category than to have the 12:43:23
2 determinations of liability and damages made in a single 12:43:28
3 court under the supervision of a single Judge sitting in 12:43:31
4 equity on the unjust enrichment claim and the medical 12:43:37
5 monitoring claim to make sure that everyone is treated 12:43:42

6 fairly and there is a sense of proportionality among the 12:43:45

7 payments to people in those category because, again, to the 12:43:50

8 extent that this Court decides not to manage that claim, to 12:43:55

9 aggregate that claim, to have that claim's value 12:44:00

10 determined, to administer a remedy in this court. Other 12:44:04

11 courts may, other courts will and there is no way to build 12:44:10

12 equity from the bottom up. 12:44:13

13 The Seventh Circuit has told us in Firestone use 12:44:16

14 the market model on whether or not you can use your claims, 12:44:20

15 go file a bunch of cases, have a bunch of trials, and at 12:44:22

16 the end of day, we will probably know what that trial is 12:44:27

17 worth or everybody will be to bored or broke to care. But 12:44:30

18 economics drove the conduct that with we claim is the wrong 12:44:36

19 doing here, and the market model caused the harm and the 12:44:43

20 market model can't be relied on to generate justice, and it 12:44:47

21 can't be relied on to give equity. The courtroom is not a 12:44:53

22 marketplace. The courtroom is a hallowed place, and it's 12:44:59

23 the one place where the alleged exuberance of the marketing 12:45:03

24 force behind Baycol can be moderated and can be corrected 12:45:12

25 to put those who were only economically damaged back in the 12:45:17

1 position they were originally in. 12:45:22

2 Perhaps to provide some of the refund remedy to 12:45:26

3 be used for medical monitoring for those same consumers, to 12:45:31

4 do them some good and to protect their health as they 12:45:36

5 thought the drug they bought would have done itself. This 12:45:42

6 Court cannot only create economies of scale, this Court can 12:45:45
7 do justice in a way that separate courts in separate 12:45:50
8 individual cases, or even multiple class actions never 12:45:57
9 could. And that is the great and unique opportunity we 12:45:59
10 believe that justifies working through some of the complex 12:46:02
11 and daunting management challenges and procedural 12:46:08
12 challenges presented by the aggregation and trial of our 12:46:12
13 claims. Thank you. 12:46:15
14 THE COURT: Thank you. We'll take a luncheon 12:46:19
15 break and we'll start up at quarter to two. 12:46:21
16 (Noon recess.)
17 THE COURT: Good afternoon Mr. Beck. 13:52:18
18 MR. BECK: Good afternoon, Your Honor. May I 13:52:20
19 proceed? 13:52:30
20 THE COURT: You may. 13:52:30
21 MR. BECK: Your Honor, Mr. Zimmerman began today 13:52:32
22 with some remarks in which he cited a famous quote from 13:52:34
23 Bobby Kennedy, and I remember hearing that same quote 13:52:38
24 during a memorial service for Senator Wellstone, and the 13:52:45
25 familiar quote ended with the phrase, "I dream of things 13:52:51

1 that never were and asked why not." And that is certainly 13:52:56
2 a noble sentiment, particularly for United States Senators 13:52:58
3 and candidates for President of the United States because 13:53:03
4 one of the things that they do is they enact laws, amend 13:53:07
5 laws and change laws. But a District Court's role, 13:53:13

6 generally speaking, is to apply the laws that have been 13:53:17

7 enacted by people like Bobby Kennedy and Paul Wellstone. 13:53:21

8 And the District Court's role is generally not to dream up 13:53:26

9 laws and procedures that never were. And the District 13:53:31

10 Court's role is generally not to order procedures and laws 13:53:35

11 that never were. And make no mistake about it, Your Honor, 13:53:41

12 certifying the classes that have been requested by the 13:53:45

13 Plaintiffs here, given the circumstances of these cases, 13:53:47

14 which I will describe in a moment, truly would be to order 13:53:50

15 things that never were. 13:53:56

16 And one of the things that Bobby Kennedy 13:53:58

17 cautioned in his quote was that if you are going to dream 13:54:03

18 of things that never were, you ought to ask why not, 13:54:08

19 because sometimes there is a good reason that things never 13:54:13

20 were. Because sometimes the thing that's being proposed 13:54:18

21 and that never has been adopted before is a real bad idea. 13:54:21

22 And sometimes the things that never were violate the rules 13:54:28

23 that have been enacted by public servants who are charged 13:54:34

24 with the responsibility for formulating those rules. And 13:54:38

25 sometimes the things that never were would work serious 13:54:42

1 injustices without achieving offsetting savings of money 13:54:46

2 and time. 13:54:50

3 But the theme that Mr. Zimmerman set about 13:54:51

4 dreaming things that never were carried over, I think, 13:54:56

5 throughout much of the presentation by the Plaintiffs. 13:55:00

6 Really, when you read the briefs or you listen today, one 13:55:09
7 is left with the suggestion from the Plaintiffs that this 13:55:11
8 Court should not be too persnickety about the requirements 13:55:16
9 of Rule 23 and should not hold them too closely to those 13:55:22
10 requirements. 13:55:28
11 Professor Miller, for whom I have the greatest 13:55:29
12 regard, spoke about philosophy and elasticity and really 13:55:33
13 ended up articulating a philosophy of elasticity when it 13:55:40
14 came to his approach towards the requirements of Rule 23. 13:55:43
15 And in the briefs that the Plaintiffs have filed 13:55:47
16 they cite several times the general exhortation at the 13:55:50
17 beginning the rules to secure the just, speedy and 13:55:54
18 inexpensive determination of every action. And it seems to 13:55:57
19 be the rule that they rely on primarily. And it's a very 13:56:01
20 important, rule but it's a general exhortation that does 13:56:06
21 not trump the specific requirements set forth for class 13:56:09
22 actions. Indeed, the specific requirements and 13:56:15
23 prerequisites that they are required to meet reflect the 13:56:24
24 rules drafters' conclusions about how to implement that 13:56:24
25 general exhortation about just, speedy and inexpensive 13:56:27

1 resolution in the complicated context of a class action. 13:56:33
2 Rule 23 incorporates not just the goals of speed 13:56:38
3 and inexpensiveness, but also the very first goal as 13:56:45
4 mentioned in Rule 1, and that is justice. Because no 13:56:53
5 matter how speedy it might be or inexpensive from the point 13:56:55

6 of view of Plaintiffs class action lawyers, concerns with 13:56:59
7 justice dictate that Defendants not be subjected to the 13:57:06
8 threat of massive liability in collective cases where 13:57:11
9 individual issues of law and fact overwhelmingly dominate 13:57:14
10 and are intertwined with whatever common issues they are 13:57:19
11 able to identify. 13:57:23
12 But even if we set aside concerns about justice 13:57:27
13 and fairness in cases like that, the class action lawyers 13:57:30
14 that you have heard from today are simply wrong when they 13:57:34
15 claim that certifying these classes would achieve speedy 13:57:38
16 and expensive determination of the Baycol cases. When they 13:57:44
17 make those representations to you, Your Honor, I think they 13:57:49
18 ignore two key realities of these cases. 13:57:52
19 Reality number one, and well look at some 13:57:59
20 evidence from the doctors of the class representative in a 13:58:00
21 little bit to confirm this, but reality number one, is that 13:58:05
22 for the vast, vast, vast majority of people who took 13:58:10
23 Baycol, the drug worked perfectly. Cholesterol was 13:58:16
24 lowered. They are protected from heart disease, and they 13:58:23
25 suffered no side effects. For a small percentage, people 13:58:27

1 suffered some side effects, and for an even smaller 13:58:33
2 percentage of those, they suffered some serious injuries. 13:58:37
3 So, reality number one is that for the vast majority of the 13:58:41
4 people, the drug worked perfectly, and it is a tiny 13:58:46
5 percentage who were injured. 13:58:51

6 Reality number two is that for that tiny 13:58:55
7 percentage -- 13:58:58
8 THE COURT: When we are talking about the vast 13:58:58
9 majority, what percentage. 13:59:01
10 MR. BECK: You know, Judge. 13:59:03
11 THE COURT: Guesstimate. I'm not going to hold 13:59:04
12 to you it. I'm trying to get -- 13:59:08
13 MR. BECK: In terms of Rhabdo cases, I think we 13:59:10
14 have how many Rhabdo cases that have been filed? 13:59:14
15 THE COURT: I think the numbers that I've seen, 13:59:17
16 the percentages that you have given me are about 12 percent 13:59:20
17 of the cases that have been filed. 13:59:22
18 MR. BECK: But that's 12 percent of the cases 13:59:26
19 that have been filed are Rhabdo cases. That's 7,000 people 13:59:28
20 who filed cases. There are 900,000 people we heard today 13:59:32
21 who took Baycol. 13:59:39
22 THE COURT: I understand that. I'm saying when 13:59:40
23 you say vast majority, what is your best guesstimate. 13:59:43
24 MR. BECK: I think it's well over 99 percent, but 13:59:48
25 I don't have a statistical analysis -- 13:59:53

1 THE COURT: Again, I'm not going to hold it to 13:59:56
2 you and print it anywhere. I just want a feel for what you 13:59:56
3 think the universe is. 14:00:01
4 MR. BECK: Yes. That's a ballpark field for what 14:00:03
5 I think the universe is. So, we're talking about these 14:00:06

6 classes. If you put them altogether, of course, they 14:00:10

7 include all 900,000 people or so who took Baycol would be 14:00:13

8 in probably two or more of the classes. 14:00:19

9 Now, so, reality number one is huge numbers of 14:00:24

10 people for whom the medicine worked just fine and a tiny 14:00:29

11 number of people who had actual significant injuries. 14:00:34

12 Reality number two which they don't seem to be 14:00:38

13 able to come to grips with is that the people with the 14:00:40

14 actual injuries, the serious injuries, are going to opt out 14:00:43

15 of this class action if it's certified and pursue their own 14:00:50

16 claims. That's what they are doing now by way of their own 14:00:54

17 individual lawsuit. 14:00:57

18 People who have real injuries, and thankfully 14:01:01

19 there were few, but there were some, people who have real 14:01:04

20 injuries by in large are represented by experienced and 14:01:10

21 skilled trial lawyers who are pursuing their claims right 14:01:13

22 now in state courts, Texas, Alabama, Mississippi, Illinois, 14:01:17

23 Oregon and California and who want to pursue their claims 14:01:22

24 in federal courts, wants the remand to take place. But 14:01:24

25 these experienced trial lawyers, when representing people 14:01:29

1 with real injuries, are not going to have their clients' 14:01:32

2 claims determined in a class action trial, tried by class 14:01:36

3 action lawyers in Minnesota. That is a reality staring us 14:01:39

4 in the face, and it's an important driver here. 14:01:43

5 Going down the path that has been urged today by 14:01:47

6 the class action lawyers is not going to lead to the just, 14:01:52

7 speedy and inexpensive resolution of the Baycol cases if 14:01:59

8 you take them as an overall problem. It's not going to 14:02:03

9 lead to any kind of resolution of that overall problem. 14:02:07

10 The overall resolution is likely to be driven by the 14:02:10

11 outcomes of individual negotiations over settlements and 14:02:14

12 trials where the people who were really injured see what 14:02:21

13 their cases are worth, and those who weren't really injured 14:02:26

14 but hoped to cash in, see what the juries think about their 14:02:31

15 cases. And that's what's going to drive the ultimate 14:02:37

16 resolution. 14:02:41

17 Meanwhile, Your Honor, I really believe that if 14:02:41

18 you follow the path that's being urge on you today by my 14:02:45

19 brothers from the other side, you would put at risk the 14:02:49

20 significant accomplishments that this Court has already 14:02:53

21 made and is in a position to make in terms of how MDLs 14:02:56

22 ought to be managed. I believe, and I think this view was 14:03:02

23 shared by members -- all the members of both the defense 14:03:08

24 team as well as the Plaintiffs' team that this MDL has been 14:03:08

25 a -- as close to a model of efficiency as one could come. 14:03:13

1 And we would like to pretend that we share in some of the 14:03:18

2 credit, but it's largely driven and mainly driven by Your 14:03:23

3 Honor. 14:03:28

4 The discovery in this case, while people on 14:03:28

5 different sides have occasional complaints, the discovery 14:03:31

6 has been handled with genuine dispatch when you compare how 14:03:36
7 things have gone in other cases. 14:03:39
8 One of the I think striking accomplishments of 14:03:43
9 the Court has been your ability to secure cooperation from 14:03:47
10 state court judges and even most of the state court 14:03:51
11 lawyers. I remember early in the case we had threats of 14:03:54
12 competing and inconsistent and incompatible discovery 14:04:00
13 programs that were going to be imposed down in Texas and 14:04:06
14 Pennsylvania and around the country. I remember when we 14:04:11
15 then convened in Louisiana in New Orleans where Your Honor 14:04:16
16 was hoping to calm the waters and secure some cooperation, 14:04:22
17 that's the last time I had the honor of sharing a 14:04:26
18 microphone with Professor Miller, and I find him here again 14:04:29
19 today. I hope he doesn't get any aches and pains. I might 14:04:35
20 have to cross examine him again, soon. 14:04:39
21 But we were down in Louisiana and Your Honor and 14:04:43
22 Professor Miller was helping out. The focus was on 14:04:46
23 exploring ways that federal and state judges can cooperate 14:04:50
24 with one another and can accommodate one another instead of 14:04:54
25 worrying about turf fights. I think that this Court has 14:04:58

1 made other efforts in terms of almost a national road show 14:05:05
2 and creating a State Liaison Committee with the state trial 14:05:09
3 court lawyers, and the result, I think, has been a model of 14:05:14
4 cooperation and coordination between this Court supervising 14:05:18
5 all the federal cases and the state court judges. 14:05:24

6 Even in the next couple of weeks or months, we 14:05:27
7 are going to have a series of depositions of our top 14:05:30
8 executives from Germany that are going to be held in 14:05:37
9 London. We are going to be having coordinated schedules 14:05:37
10 and agreed on procedures, not just from the lawyers in this 14:05:39
11 proceeding, but from the lawyers in all the state court 14:05:44
12 proceedings. And all of this, Your Honor, has required a 14:05:47
13 lot of patience, diplomacy on your part, and I would 14:05:49
14 suggest even a dosage of humility. Your Honor did not go 14:05:55
15 down to New Orleans and declare there is a new sheriff in 14:05:59
16 town and everybody is going to do it your way. It was 14:06:03
17 exactly the opposite. 14:06:07
18 I believe that that spirit of cooperation and 14:06:08
19 accommodation is going to be genuinely endangered if you go 14:06:12
20 along with what will be perceived by state court trial 14:06:16
21 judges and state court trial lawyers as a power grab by the 14:06:20
22 federal class action lawyers. 14:06:28
23 It's going to be much harder to secure 14:06:29
24 cooperation, either by you or the next Judge who has an 14:06:34
25 MDL. If the state court judges and the state court trial 14:06:36

1 lawyers say, gee whiz, there was all this great talk about 14:06:40
2 how we were going to be respected and our prerogatives are 14:06:43
3 going to be respected, and the next thing you knew, we had 14:06:47
4 a class action, a nationwide no opt-out class, trying 14:06:51
5 issues like punitive damages and medical monitoring, issues 14:06:53

6 that we considered to be central to the public policy of 14:06:59

7 our states. And not only is it swept into a class action, 14:07:02

8 but people can't opt-out, and this federal judge in 14:07:05

9 Minnesota tells me that I don't get to try those cases. 14:07:10

10 Whether you are a trial lawyer or a trial judge in these 14:07:13

11 states, I think that's going to be a serious concern. 14:07:18

12 And I think that, Your Honor, instead of the kind 14:07:21

13 of cooperation and accommodation that you have encouraged 14:07:24

14 and achieved in this MDL so far, the likely result of 14:07:28

15 certifying the kind of classes they want you to certify 14:07:35

16 would be -- we would revert to what I think as the Oklahoma 14:07:37

17 land rush style of litigating these cases where it's a mad 14:07:42

18 race to the courthouse to see who can impose the most 14:07:48

19 onerous discovery schedule soonest, who can get their cases 14:07:53

20 to trial soonest so they can hold themselves out as the guy 14:07:58

21 who can deliver the bucks and can sign up on the cases from 14:08:06

22 around the country. And those races, Your Honor, are 14:08:11

23 always won by local lawyers who are in local jurisdictions 14:08:13

24 where the courts are going to be especially accommodating 14:08:17

25 to them for whatever reasons. Those races are never won by 14:08:20

1 MDL judges who have broader responsibilities to federal 14:08:25

2 courts throughout the country to get their cases ready in 14:08:31

3 an orderly way so that they can be remanded. 14:08:35

4 So, I think these practical considerations that 14:08:38

5 I've outlined, I genuinely believe these are very real 14:08:41

6 considerations, and I think that when contemplating what 14:08:44

7 kind of philosophy, as Professor Miller suggested you ought 14:08:47

8 to bring to this, those are factors that I would suggest 14:08:52

9 the Court might want to consider. 14:08:58

10 Now, why is it -- 14:09:01

11 THE COURT: Before you go on, without the 14:09:01

12 cooperation of both sides, this MDL would not be moving in 14:09:04

13 the way that it's moving. I can't take all the credit for 14:09:13

14 it. I just want to make sure that the record is clear that 14:09:22

15 without the Plaintiffs and the defense being cooperative 14:09:27

16 and bringing issues to the Court to understand that state 14:09:31

17 court issues and in allowing the Court to reach out to 14:09:39

18 state trial judges and also the state trial lawyers, we 14:09:45

19 would not be where we are at today. And, certainly, you 14:09:51

20 know that other defense counsel in other cases have taken 14:09:57

21 the scorch the earth policy. And if you had taken that 14:10:02

22 position, the Court would not have been able to do 14:10:12

23 anything. 14:10:12

24 I want to make sure the record is clear that 14:10:12

25 without the cooperation of both sides, we would not be 14:10:15

1 where we are at today. It's very important that you 14:10:17

2 understand that. I understand that and I appreciate that. 14:10:21

3 And, also, again, as I've stated all the time, 14:10:25

4 what I want is a fair administration of justice in this 14:10:31

5 case and I want to seriously hear what you have to say and 14:10:35

6 the responses from Plaintiffs on what you are putting 14:10:43
7 forth. 14:10:49
8 One other issue dealing with the state court 14:10:50
9 lawyers. As you well know, there are going to be lawyers 14:10:55
10 that are going to go out and try the cases no matter what, 14:11:05
11 and you have that situation in Texas now. 14:11:08
12 MR. BECK: In fact, I pick a jury a week from 14:11:10
13 Monday. 14:11:12
14 THE COURT: That's right. Let's see where we go 14:11:12
15 with that. 14:11:18
16 MR. BECK: I appreciate the Court's comments. I 14:11:19
17 think that certainly on behalf of the defense counsel, we 14:11:23
18 appreciate the comments and we share the Court's 14:11:26
19 appreciation for how the Plaintiffs' counsel helped to move 14:11:35
20 this along and secure the cooperation from the state arenas 14:11:41
21 as well. 14:11:46
22 My point is that even with all the goodwill that 14:11:46
23 I think we have assembled in this room, if we didn't get a 14:11:51
24 pretty healthy dose of cooperation and accommodation from 14:11:55
25 the other side, from the state court side, we'd be in a 14:12:00

1 heck of a mess. And my concern, Your Honor, is that 14:12:04
2 notwithstanding the continued goodwill that you will get 14:12:10
3 from all sides in this case, no matter how this matter of 14:12:12
4 class certification is resolved, it's going to have an 14:12:17
5 impact in the state courts and with the state court trial 14:12:21

6 judges. And it's also going to have an impact, Your Honor 14:12:24
7 I know that you are concerned with this, but the next MDL 14:12:29
8 that comes along. Even if you are not blessed with this 14:12:33
9 responsibility, some other poor judge is going to be, and 14:12:36
10 if he tries or she tries to duplicate Your Honor's 14:12:42
11 accomplishments in terms of achieving that level of 14:12:46
12 cooperation, it's going to be an awful lot harder if those 14:12:49
13 same judges who showed up at the New Orleans conference are 14:12:54
14 saying to themselves, yeah, this sounds great, and the last 14:13:00
15 time I was asked to cooperate and I did not put my cases on 14:13:03
16 the super fast track, and I didn't accommodate my state 14:13:07
17 trial lawyers who wanted to get to trial right away, a year 14:13:12
18 later the federal judge took away the cases from my lawyers 14:13:15
19 here in Harris County. And he said that punitive damages 14:13:19
20 are not going to be tried in Texas or Illinois or West 14:13:24
21 Virginia. Punitive damages could be tried by a judge or a 14:13:29
22 jury up in Minneapolis. That's not the way we do things in 14:13:39
23 Texas. I'm going to risk that again. I'm going to impose 14:13:39
24 my own schedule. People are going to live by my schedule, 14:13:41
25 and my case are going to go to trial first. 14:13:44

1 That's really what we heard back in Louisiana 14:13:47
2 from the Pennsylvania judge, as I recall. He talked about 14:13:51
3 how his were going to go first and, in fact, I think he was 14:13:52
4 brought into the fold and the schedule had been coordinated 14:13:54
5 reasonably well. I think it's a different story if that 14:13:58

6 judge who is in charge of complex litigation in 14:14:03
7 Philadelphia, Pennsylvania, which is a big center for state 14:14:06
8 court complex litigation, if he gets it in his head that 14:14:11
9 the next time I cooperate with a federal judge, then he's 14:14:15
10 going to turn around some months later and certify a no 14:14:21
11 opt-out nationwide class on causes of action that we here 14:14:24
12 in Philadelphia think are awfully important and under our 14:14:28
13 state public policy. 14:14:34
14 So, I throw that out, Your Honor, because I think 14:14:36
15 they are important considerations to the administration of 14:14:38
16 justice that go beyond these particular classes and even go 14:14:43
17 beyond this particular case. But I think that they're the 14:14:47
18 types of things that Your Honor would at least like to 14:14:50
19 consider. 14:14:52
20 Now, why is it that a state court lawyer, or for 14:14:53
21 that matter, a lawyer who's got a federal case that was 14:15:00
22 MDLed, perhaps against her will, and she's waiting for the 14:15:04
23 case to get prepared and remanded, why is it that they as 14:15:11
24 well as Defendants would view these certification of the 14:15:16
25 classes that they have asked for as basically a power grab 14:15:20

1 by the class action lawyers. 14:15:27
2 Well, we think this situation with these 14:15:28
3 circumstances that I'm going to talk about is a classic 14:15:31
4 situation where individual questions of facts predominate 14:15:35
5 over and are inextricably intertwined with whatever common 14:15:40

6 questions of fact that can be identified. We also believe 14:15:47

7 that individual questions of law predominate over and are 14:15:50

8 inextricably intertwined with any common issues of law. I 14:15:56

9 note in this regard, Your Honor, that most of the legal 14:16:00

10 issues that we talk about concern state laws, and as I 14:16:03

11 alluded to earlier, these are state laws on matters that 14:16:08

12 touch on very important issues of state public policy. 14:16:11

13 It's also a classic situation, Your Honor, where 14:16:16

14 no matter what the outcome of the kind of common issue 14:16:21

15 trial that they are hypothesizing, the ball would not be 14:16:27

16 significantly advanced toward an ultimate resolution of the 14:16:32

17 Baycol product. 14:16:36

18 Now, let me turn to some of those circumstances. 14:16:40

19 I'm going to be discussing some facts today, but I want to 14:16:42

20 pause for a moment and just comment briefly Mr. Arsenault's 14:16:48

21 presentation of the facts. He spent twenty minutes or so 14:16:57

22 weaving together an excellent story from the Plaintiffs' 14:17:00

23 point of view. Of course, there are evidentiary fragments 14:17:15

24 that he takes, and you can imagine that if I were to give 14:17:15

25 an opening statement I would have some answers to many of 14:17:17

1 the points that he made. 14:17:20

2 Most of the facts that he talked about were 14:17:20

3 geared to the underlying -- to the merits of the underlying 14:17:25

4 case to show Your Honor, or to hope to persuade Your Honor 14:17:27

5 that they had a real strong case on the merits. As I'm 14:17:33

6 sure Your Honor appreciates, we have a different view as to 14:17:38

7 many of those fact issues. I am not going to spend my time 14:17:43

8 today, however, going through a rebuttal of those or trying 14:17:46

9 to put our context on the facts that he went through. 14:17:50

10 Instead what I'm going to do is I'm going to review some 14:17:52

11 facts that Bayer directly on class certification, rather 14:17:56

12 than on whether they think they could win in a trial 14:18:01

13 against us. And the kinds of facts that I'm going to 14:18:04

14 review are, first, undisputed historical events when labels 14:18:08

15 changed and when new doses were approved. So, a simple 14:18:15

16 timeline of key chronological events. And the second thing 14:18:19

17 I'm going to be taking a look at is what the Plaintiffs 14:18:26

18 lawyers themselves say about the nature of their claims and 14:18:29

19 how they think they are going to prove those claims, 14:18:32

20 because that's a pretty good indication about whether in a 14:18:36

21 real life trial common issues or individual issues are 14:18:40

22 going to end up predominating. So, I'm going to be 14:18:46

23 spending time on those kinds of facts. 14:18:49

24 Before I do, I want to pause and deal with a few 14:18:53

25 what I think of as threshold legal issues that when I 14:18:57

1 thought about the organization of this, I just thought I 14:19:00

2 need to get these out of the way sooner rather than later 14:19:04

3 because otherwise it's going to be too disruptive to the 14:19:07

4 presentation. So, let me deal first with some of these 14:19:11

5 legal points. 14:19:15

6 I think everyone understands that in a trial of a 14:19:16

7 real life person's case, issues of causation, fact of 14:19:21
8 injury and damages are going to be key components. And I 14:19:30
9 believe that the Plaintiffs' lawyers have conceded that 14:19:36
10 individual causation, in other words, did they cause Mrs. 14:19:41
11 Withers any harm. And an injury, what was the harm, if 14:19:48
12 any, caused by Baycol, and the extent of damages. All of 14:19:57
13 those by their nature individual issues and not susceptible 14:20:01
14 to a common trial. 14:20:06
15 These are the types of issues that most courts 14:20:08
16 agree predominate over the sort of common issues that they 14:20:11
17 try to identify, and they are the kinds of issues that most 14:20:17
18 courts agree render class trials unmanageable because they 14:20:21
19 are going to be intertwined, even if they don't 14:20:31
20 predominate. 14:20:31
21 Now, the Plaintiffs' lawyers have tried to get 14:20:33
22 around this problem of these kind of overarching, highly 14:20:35
23 individual questions. They've tried to get around that 14:20:40
24 problem in a couple of different ways. 14:20:44
25 The first way I call the slice and dice approach. 14:20:46

1 What they've tried to do is they take the case and then 14:20:49
2 they slice off all of the issues that they have to agree 14:20:52
3 are individual issues. And then they are left with a tiny 14:20:56
4 slice, sort of from the end of the sausage, but then they 14:21:02
5 say here on this slice of the case we found some common 14:21:06
6 issues that we think can be segregated. And on this little 14:21:10

7 slice of the sausage, the common issues predominate. And, 14:21:15

8 Your Honor, we think that that approach to defining whether 14:21:22

9 common or individual issues predominate is incorrect and 14:21:26

10 impermissible. 14:21:32

11 We believe that the law is that you look at the 14:21:33

12 case as a whole and as it exists in real life, and you say, 14:21:35

13 do common issues predominate this real life case, or do 14:21:40

14 individual issues predominate this real life case. You do 14:21:44

15 not slice away all the individual issues and then say, have 14:21:49

16 I carved out an artificial piece of the case where I can 14:21:53

17 say common issues predominate. 14:21:58

18 We have a cite from the Castano case on this 14:22:03

19 point. This is the Castano opinion. It's the kind you get 14:22:05

20 off the internet rather than F.2d. So, if you turn over to 14:22:16

21 Page 14 of the opinion, what I'm going to be focusing in, 14:22:24

22 if I can blow it up a little bigger, is this footnote, 14:22:30

23 where the Castano court, the Fifth Circuit, tobacco case in 14:22:35

24 1996, said, "severing the defendants conduct from 14:22:40

25 reliance," that's what was involved there, "under Rule 23 14:22:46

1 (c)(4) does not save the class action. A district court 14:22:48

2 cannot manufacturer predominance through the nimble use of 14:22:52

3 Subdivision (c)(4). The proper interpretation of the 14:23:00

4 interaction between Subdivisions (b)(3) and (c)(4) is that 14:23:02

5 a cause of action as a whole must satisfy the predominance

6 requirement of (b)(3) and that (c)(4) is a housekeeping 14:23:09

7 rule that allows courts to sever the common issues for 14:23:10
8 class trial." 14:23:15
9 So, this is the approach that we think reflects 14:23:17
10 the law, and that is, Your Honor, you have to decide the 14:23:20
11 case as whole do common issues predominate. If they do, 14:23:24
12 then it's okay under (c)(4) as a housekeeping matter to 14:23:31
13 sever those predominant common issues for a separate trial. 14:23:35
14 But what you don't do is slice it up artificially and then 14:23:41
15 say walla, I found myself a case suitable for class action. 14:23:44
16 Now, the second way that the Plaintiffs' lawyers 14:23:54
17 try to get around the fact that the case really is 14:23:59
18 characterized by individual issues such as causation, 14:24:02
19 injury and damages, the second way they try to get around 14:24:08
20 that is through their sort of shifting positions as to 14:24:12
21 choice of law. When I was reading the briefs recently, I 14:24:18
22 was struck at the metamorphosis of their position. I guess 14:24:22
23 times change in Professor Miller's words, and here the 14:24:26
24 Plaintiffs started out by saying that the law of 14:24:30
25 Pennsylvania should govern all of their causes of action 14:24:32

1 against Bayer, or as Plan B, the law of Connecticut should 14:24:38
2 govern all of their causes of action against Bayer. And 14:24:45
3 somebody along the line may have figured out that that may 14:24:50
4 have created problems for them because we know from 14:24:53
5 subsequent briefs that under the law of Pennsylvania, there 14:24:57
6 is no strict liability for pharmaceutical products. So, 14:25:01

7 that would not be a good thing for that cause of action 14:25:06

8 that they. 14:25:09

9 And, also, under the law of Pennsylvania, the 14:25:09

10 refund theory that was discussed right before lunch has 14:25:13

11 been rejected. Meanwhile, Plan B, the law of Connecticut, 14:25:19

12 Connecticut rejects medical monitoring as a cause of 14:25:24

13 action. 14:25:28

14 So, as the Plaintiffs said, their initial view 14:25:31

15 was Pennsylvania or Connecticut, but they said further 14:25:33

16 discovery might persuade us that the laws somewhere else 14:25:39

17 might be more appropriate. This case may have been 14:25:41

18 discovery of the law rather than discovery of the facts, 14:25:45

19 but in later briefs, we stopped hearing about Pennsylvania 14:25:48

20 governing all their causes of action or Connecticut 14:25:55

21 governing all their causes of action. And, instead, they 14:25:59

22 seem to be fighting the battle now on the battle ground of 14:26:01

23 saying, okay, 51 states, 50 states plus the District of 14:26:06

24 Columbia, but we can do it with 51 states. We can have a 14:26:14

25 manageable, sensible class action trial under the laws of 14:26:18

1 51 states, don't be scared by 51 states. And their 14:26:20

2 rationale there is that, well, the law, while there are 51 14:26:24

3 states, the law really is pretty uniform and whatever minor 14:26:29

4 differences exist in the laws of the 51 states can be taken 14:26:33

5 care of through mechanisms such as special verdict forms 14:26:36

6 and jury instructions. 14:26:43

7 Now, Your Honor, I'm going to spend some time on 14:26:49
8 this because I think, and those of us on the defense team 14:26:50
9 are very firmly convinced about this that the existence of 14:26:55
10 the controlling laws from 51 different jurisdictions is an 14:26:59
11 insurmountable barrier in this case to class certification. 14:27:04
12 I want to use as an example one of the questions that would 14:27:09
13 come up in any kind of trial, including one of their 14:27:13
14 hypothesized class issues trials. And that would be 14:27:20
15 whether we conform to the state of the art in our design 14:27:32
16 and manufacture of Baycol. So, state of the art will 14:27:32
17 likely come into play, at least under the laws of some 14:27:36
18 states. It's an issue that -- it's not a cause of action, 14:27:40
19 obviously, but it's an issue that's kind of a mix of fact 14:27:44
20 and law that would be relevant, depending on whose law 14:27:49
21 applies to a negligence cause of action, to a strict 14:27:54
22 liability cause of action, to a failure to warn cause of 14:28:01
23 action and under punitive damages. I have a slide that 14:28:05
24 illustrates this. 14:28:10
25 This is a slide where we just pulled together a 14:28:13

1 summary of the state of the art analysis under the laws of 14:28:17
2 a few of the 51 states. In Colorado and Kentucky the plans 14:28:24
3 with the state of the art sets up a presumption that the 14:28:31
4 defendant was not neglect or strictly liable. Of course, 14:28:35
5 like all were presumptions, they can offer evidence to try 14:28:40
6 to rebut it. So, we would have that presumption in our 14:28:45

7 favor under the law of those two states. 14:28:48

8 In Georgia and Indiana, it's the defense to 14:28:51

9 liability. In Missouri, it's a defense to failure to warn 14:28:56

10 case. In California it can be used to prove the lack of 14:29:00

11 the kind of state of mind that's necessary to impose 14:29:04

12 punitive damages. In Arkansas and Illinois, the court say 14:29:08

13 that a jury can consider it. But in Arkansas, they say 14:29:12

14 that the state of art has to be determined from the date 14:29:18

15 the product was put on the market, not the date on which 14:29:21

16 the plaintiffs sustained an injury. And that can vary from 14:29:26

17 state to state. In Montana, state of the art evidence is 14:29:30

18 actually part of the plaintiff's case in chief rather than 14:29:37

19 defendant's defense. 14:29:42

20 In some states, our examples are Rhode Island and 14:29:45

21 Vermont, the courts have not yet determined whether state 14:29:48

22 of the art evidence is admissible or not or for what 14:29:52

23 purpose. 14:29:57

24 And then, of course, in Hawaii and Pennsylvania, 14:29:57

25 it's reversible error for the jury to consider evidence on 14:29:59

1 the state of the art. 14:30:04

2 Here we have one that's state of the art and our 14:30:09

3 jury here of Minnesotans is going to have a verdict form 14:30:12

4 and jury instructions that say, well, the Plaintiffs have 14:30:15

5 to prove it for this state, the defendants have to prove it 14:30:18

6 for -- I'm going it make up the states -- the defendants 14:30:23

7 have to prove it in California, the plaintiffs have to 14:30:25
8 prove it in Wyoming. And then defendants prove it in 14:30:29
9 Arkansas is relevant to one cause of action and not 14:30:35
10 another. In California, only if we're talking about 14:30:38
11 punitive damages. And when you get to Hawaii and 14:30:41
12 Pennsylvania, put it out of your mind because it's 14:30:44
13 reversible error for you to even have heard any evidence 14:30:46
14 about it. So, that's one example of how confounding the 14:30:55
15 problems would be if we try to have any sort of liability 14:30:57
16 trial under the laws of 51 jurisdictions. It's not the 14:31:03
17 only example. 14:31:08
18 There'll be questions whether our product was 14:31:11
19 unreasonably dangerous. I think one of the lawyers this 14:31:15
20 morning said that they would be able to prove to this 14:31:18
21 Minnesota jury that our product was unreasonably dangerous. 14:31:22
22 But whether our product was unreasonably dangerous is 14:31:30
23 subject to legal tests. Some of them are set forth in 14:31:36
24 statute. Some are set forth in judicial decisions. Others 14:31:37
25 are set forth in pat jury instructions. 14:31:42

1 Again, we have only taken a sampling of this 14:31:45
2 case. In Missouri there is no tests. In Arkansas and 14:31:49
3 Wisconsin, they have what they call the ordinary consumer 14:31:53
4 test. And I think it was Ms. Cabraser who said on issues 14:31:56
5 like this, it's just the objective, you know, reasonable 14:32:01
6 man or something. Maybe she is right under some of the 14:32:04

7 states. But here's what the states themselves say. 14:32:07

8 Arkansas and Wisconsin, ordinary consumer. Whereas, in 14:32:11

9 Kentucky it's not the consumer at all. It's ordinary, 14:32:16

10 prudent manufacturer tests. In California and Alaska, it's 14:32:19

11 a two-prong test, and I confess as I sit here right now, I 14:32:27

12 can't remember either prongs. But there are two prongs in 14:32:29

13 those states. 14:32:32

14 In Oklahoma, a jury has to look at the 14:32:33

15 subjective knowledge and expectation of the consumer who 14:32:36

16 would be forseeably expected purchase the product. That's 14:32:41

17 their particular formulation.

18 Alabama is whether the consumer ought to have 14:32:48

19 reasonably anticipated the danger. In New York and Florida 14:32:51

20 there is a risk benefit analysis. So, people are 14:32:57

21 instructed you have to look at the risks that are posed by 14:33:02

22 the product, but you also have to look at the benefits 14:33:03

23 derived that are from the product. 14:33:05

24 In Idaho the question is is there a defect that 14:33:06

25 boils down to that. And in our old friend Pennsylvania and 14:33:09

1 in West Virginia, it's reversible error to instruct the 14:33:14

2 jury on the meaning of unreasonably dangerous. 14:33:21

3 So, again, you'd have the preposterous situation 14:33:26

4 where if we only take these states on the question of 14:33:29

5 unreasonably products, you'll get conflicting and 14:33:35

6 inconsistent instructions for 10 states. And then when you 14:33:37

7 get to Pennsylvania and West Virginia, you say put it out 14:33:41

8 of your mind because you are not allowed to consider any 14:33:45

9 instruction at all on what unreasonably dangerous means. 14:33:49

10 The last example that I want to discuss in this 14:33:56

11 regard, Your Honor, is punitive damages. The practice in 14:33:59

12 Minnesota, as Your Honor knows quite well, is that a 14:34:05

13 plaintiff is not even allowed to plead punitive damages 14:34:09

14 without leave of court after making a threshold showing. 14:34:12

15 The Plaintiffs' lawyers, they are like me, they are from 14:34:19

16 around the country and not all of them are well versed in 14:34:22

17 Minnesota law, and, so, they overlook this requirement, and 14:34:26

18 we had scheduled for today this hearing on whether you are 14:34:32

19 going to certify a class for punitive damages, and they 14:34:35

20 have forgotten to seek to amend their pleadings to ask you 14:34:40

21 for permission to include a punitive damages claim. 14:34:45

22 I raise that not to tease them, because the truth 14:34:47

23 is, Judge, I probably would have forgot too, and it's not 14:34:52

24 that big a deal, but what it does underscore is that 14:34:56

25 Minnesota takes seriously how it handles punitive damages. 14:35:01

1 This is -- it's a snafu in this case that can be overcome, 14:35:05

2 and we are not going to stand on ceremony. But it reflects 14:35:12

3 a serious public policy in Minnesota about the extent to 14:35:17

4 which punitive damages are appropriate, whether they're 14:35:19

5 going to be allowed even to be pleaded until the somebody 14:35:24

6 can make a threshold showing. And Minnesota is not the 14:35:27

7 only state in America that cares deeply about how punitive 14:35:30
8 damages are handled. Other states feel like they have a 14:35:38
9 big stake in this issue as well. 14:35:40
10 So, we have different rules, then, on punitive 14:35:43
11 damages and how they are handled in different states. And 14:35:48
12 you know, we can do a fifty-state survey on the thing, but, 14:35:52
13 happily, with power point you are kind of forced to limit 14:35:57
14 it to a small enough handful and they fit on one page. 14:36:02
15 Pennsylvania -- I keep talking about Pennsylvania 14:36:07
16 because once upon a time, their Plaintiffs' lawyer said 14:36:07
17 they wanted everything resolved in Pennsylvania. In 14:36:12
18 Pennsylvania on punitives, juries may consider things such 14:36:15
19 as the character of the defendant's acts, the nature and 14:36:18
20 extent of the harm to the plaintiff, and the wealth of the 14:36:22
21 defendant. It would be of hard, incidentally, under 14:36:25
22 Pennsylvania law and the kind of trial that's being 14:36:31
23 hypothesized by the Plaintiffs to get any kind of punitive 14:36:34
24 damages judgment or assessment or special verdict that 14:36:41
25 would mean anything since they are carving out the nature 14:36:44

1 and extent and the harm to the Plaintiffs. 14:36:50
2 Pennsylvania jurors are -- I shouldn't say 14:36:54
3 Pennsylvania jurors, a Minnesota jury applying Pennsylvania 14:36:59
4 law are entitled to consider that if it's not going to be 14:37:00
5 in this case. 14:37:06
6 In New York, juries are allowed to consider the 14:37:08

7 wealth of the defendant. They are told they don't have to, 14:37:13

8 but they can. 14:37:17

9 In California, they must consider the wealth of 14:37:17

10 the defendant. And if the plaintiff forget to put in that 14:37:21

11 evidence, they lose. So, we are going to have an jury 14:37:23

12 that's told that you can consider it when you answer this 14:37:32

13 is question, you must consider it when you answer this 14:37:37

14 question. California punitives are not allowed in wrongful 14:37:42

15 death actions. They purport to represent people who died 14:37:48

16 from Baycol. And in California, at least, they are not 14:37:50

17 allowed to have punitives. 14:37:53

18 And, then, in Connecticut the jury decides 14:37:54

19 whether to give punitive damages, and the court has to 14:38:00

20 decide the amount, but it can't be more than twice the 14:38:04

21 compensatories. Then, they've got a whole bunch of 14:38:06

22 variations as you go from state to state. 14:38:10

23 Even the Plaintiffs' cases, by and large, the 14:38:12

24 cases that they rely on recognize that punitive damages are 14:38:15

25 not appropriate for class-wide treatment. They are not 14:38:18

1 asking you here to dream of things that never were because 14:38:23

2 there are some isolated examples. Judge Weinstein, most 14:38:30

3 notably out of New York, who has certified a punitives 14:38:35

4 class. We believe that Judge Weinstein in this instance is 14:38:40

5 way outside the stream of normalcy on punitive damages and 14:38:44

6 class actions. We think that his order, which he -- my 14:38:54

7 understanding of the procedural situation, is that the 14:38:59

8 defendants have sought an immediate appeal. The Plaintiffs 14:39:06

9 have agreed that an immediate appeal is appropriate, and 14:39:11

10 Judge Weinstein has agreed that an immediate appeal is 14:39:14

11 appropriate. And the papers have been filed and have been 14:39:18

12 sitting up there in the Second Circuit for quite some time, 14:39:20

13 so everybody is kind of waiting for the other shoe to drop. 14:39:27

14 In any event, we think that here, even if Your 14:39:31

15 Honor were persuaded by Judge Weinstein's analysis in that 14:39:38

16 case, and that case, Your Honor -- well, that analysis 14:39:42

17 would not apply here. 14:39:44

18 In the Simon case that Judge Weinstein did this 14:39:46

19 in, and it's a tobacco case is what he calls a mature tort. 14:39:49

20 There have been lots and lots of verdicts around the 14:39:55

21 country including lots of verdicts for punitive damages. 14:39:59

22 There is some concern that he expressed that money could 14:40:01

23 run out and people who might be entitled to an award of 14:40:05

24 punitive damages won't get any because punitive damages 14:40:09

25 would have been awarded to so many other people in so many 14:40:13

1 other cases based on the proven track record in the tobacco 14:40:16

2 litigation. And, so, he created basically a limited fund 14:40:25

3 for punitive purposes. 14:40:27

4 Here we have a much different situation. No 14:40:29

5 matter what the Plaintiffs say, you know, they are 14:40:32

6 advocates and they're ethically bound to make the best case 14:40:33

7 they possibly can on behalf of their real clients as well 14:40:38

8 as their punitive clients, but he we have immature tort. 14:40:43

9 We have one that's about as immature as you can get. There 14:40:48

10 is not a single decision out there anywhere that says 14:40:52

11 anything about liability, anything about causation, 14:40:55

12 anything about damages, anything about punitive damages. 14:40:59

13 So, we don't have the kind of track record, years of 14:41:02

14 experience that Judge Weinstein was looking at. Nor do we 14:41:05

15 have any assertion, much less a showing that Bayer would 14:41:10

16 not be able to satisfy any awards that the Plaintiffs 14:41:13

17 reasonably could expect. 14:41:18

18 In this respect, Your Honor, we think the case is 14:41:18

19 quite similar to the Paxil case that was decided recently 14:41:23

20 by Judge, I think her name is pronounced Pfaelzer, in the 14:41:29

21 Central District of California. Let me just put up an 14:41:34

22 excerpt from that. 14:41:40

23 There we go. I'm going to have to read from two 14:41:56

24 pages, so let's see if I can do a split screen here. Yes, 14:42:03

25 okay. Bear with me for just a second, Judge. Here we go. 14:42:08

1 So, we were at the bottom of Page 30, over to the 14:42:33

2 top of Page 31, and this is commenting on the approach that 14:42:37

3 Judge Weinstein took in deciding the case. "For the sake 14:42:46

4 of its analysis, the Court assuming without in any way 14:42:51

5 suggesting that the theory adopted in Simon II is a viable 14:42:54

6 one. Even with this assumption, the Court must decline 14:43:00

7 Plaintiffs' invitation to certify a limited fund class 14:43:02

8 here. Initially, Plaintiffs failed to demonstrate that 14:43:07

9 they would be entitled to a punitive damages award. Before 14:43:13

10 certification on the basis of a punitive damages cap, the 14:43:14

11 Court must scrutinize whether the Plaintiffs here have a 14:43:18

12 legitimate chance of, one, recovering punitive damages, 14:43:22

13 and, two, large enough to breach the punitive damages cap. 14:43:26

14 As a result of extensive discovery and numerous previous 14:43:32

15 trials, the Simon court had available such evidence 14:43:35

16 suggesting that punitive damages might be available. No 14:43:38

17 such evidence or arguments are advanced by plaintiffs." 14:43:38

18 Now here we have a lot of talk about punitive 14:43:43

19 damages, but we're not trying the case on the merits, and 14:43:46

20 we don't have the kind of track record that was pointed out 14:43:49

21 as the present in the Simon case. 14:43:53

22 And, then, further down, let me just get rid of 14:43:58

23 these and go on Page 31. This applies quite directly here. 14:44:06

24 The Judge continues, "Furthermore, the method in which 14:44:18

25 Plaintiffs propose to try the case would not solve the 14:44:22

1 problem that Simon II contemplates." Remember Simon was 14:44:26

2 contemplating a problem where, gee whiz, the tobacco 14:44:30

3 companies might run of out money to pay punitive damages, 14:44:38

4 so some people who might otherwise be able to collect are 14:44:41

5 going to be going to be left without a punitive award, so I 14:44:45

6 need to gather all the money in my courthouse to figure out 14:44:49

7 how to pass it out. 14:44:58

8 Says, "Furthermore the method in which the 14:44:58

9 Plaintiffs propose to try the case does not solve the 14:45:00

10 problem that Simon II contemplates. By trying each case 14:45:03

11 separately, each Stage 2 jury would have no idea how 14:45:07

12 another jury was awarding to other class members. Thus, no 14:45:11

13 jury would possess the knowledge necessary to determine 14:45:15

14 what the overall punitive damages should be and how those 14:45:15

15 damages should be applied to the different classes. The 14:45:16

16 overall cap might, thus, exceed any Constitutional cap." 14:45:21

17 Your Honor, this type of criticism applies to two 14:45:27

18 out of the three ways that the Plaintiffs have suggested 14:45:30

19 you could deal with punitive damages in a class trial. One 14:45:34

20 of the ways that they suggested is we're just going to ask 14:45:37

21 a jury of Minnesotans to give us a multiplier or a ratio. 14:45:45

22 We're going to convene this jury and we're going to try the 14:45:53

23 case and then we're going to stand over there and look at 14:45:55

24 those friendly faces in the jury box, and we're going to 14:45:57

25 say, we'd like to you fill out a verdict that says whatever 14:46:00

1 damages anybody gets across the country will be multiplied 14:46:03

2 times three, eight, whatever, a multiplier. And then, 14:46:08

3 according to the Plaintiffs, all the lawyers from around 14:46:15

4 the country can put that multiplier in their pocket and 14:46:21

5 their entitlement to punitive damages and go back to 14:46:28

6 Homewood, Illinois, try their case and then put that on the 14:46:30

7 table and get their multiplier. Well, if they did that, 14:46:35

8 then there is no cap. The whole rationale from Simon II, 14:46:40

9 or one of the rationales, was that the Constitution as 14:46:43

10 interpreted in Cooper says that at some point there has to 14:46:49

11 be a cap. 14:46:53

12 Well, getting a multiplier to an open-ended 14:46:54

13 number of verdicts with open- ended potential actual 14:47:00

14 damages does not achieve that. So, their first way would 14:47:03

15 fail. 14:47:07

16 The second way that they have suggested is that, 14:47:08

17 well, we won't have multiplier, we won't have dollars, 14:47:10

18 we'll just have determination that punitives are 14:47:16

19 appropriate. And, then, the lawyers can bring that back to 14:47:19

20 their home court and they'll have res judicata in their 14:47:24

21 favor that punitives are appropriate. 14:47:28

22 But once again, that doesn't accomplish the 14:47:34

23 goal -- and we think that Judge Weinstein was really 14:47:36

24 reaching outside where he should have been here. But at 14:47:39

25 least he had a coherent theory of needing a cap. That 14:47:42

1 wouldn't accomplish any sort of cap. All that does is make 14:47:47

2 it easier for people to get punitive damages all around the 14:47:50

3 country. It's going to result in unlimited punitive 14:47:55

4 damages, not some sort of constitutionally acceptable cap. 14:47:57

5 The third approach that they have suggested is, 14:48:03

6 well, let's create a limited fund here in Minnesota where 14:48:06

7 we're going to try the case to a Minnesota jury and we're 14:48:11

8 going to say to the Minnesota jury, you tell us the 14:48:16

9 aggregate amount, the total amount you think is right for 14:48:19

10 the punitive damages, and that would be the punitive 14:48:24

11 damages award, then we'll divvy that up later among people 14:48:28

12 who want in on the action. 14:48:32

13 The problem there is that while you would have a 14:48:35

14 cap, you would have a cap if, in fact, people from around 14:48:37

15 the country had any respect for that cap which I will get 14:48:44

16 to in a second. But for the class members, at least, I 14:48:47

17 guess, you would have a cap. But the problem with that 14:48:50

18 approach is that you'd run afoul of the requirements in 14:48:54

19 Cooper that punitive damages bears some relationship to the 14:48:58

20 harm actually caused. Do you remember these cases? I 14:49:03

21 can't actually remember the names of these cases, but you 14:49:09

22 get these crazy cases where somebody has got a scratch on 14:49:11

23 their BMW and it's a 150 bucks to fix it and there's 14:49:22

24 $500,000,000 or something in punitive damages, and the 14:49:22

25 courts say from a Constitutional point of view, that's out 14:49:24

1 of whack. There has to be some sensible proportionality. 14:49:30

2 Well, just coming up with a number which is then 14:49:34

3 going to be divvied up by the class action lawyers, and 14:49:36

4 they are going do decide which of their Plaintiffs get how 14:49:39

5 much, doesn't respect that Constitutional requirement. 14:49:42

6 A couple of final points on punitive damages. 14:49:46

7 Ms. Cabraser was talking about the Cooper case, and 14:49:50
8 basically was suggesting that Cooper has federalized the 14:49:54
9 standards for punitive damages. Now, after Cooper, there's 14:50:01
10 just three questions that you have to ask in any punitive 14:50:05
11 damages case, and it doesn't matter whether it's here in 14:50:09
12 federal court in Minnesota or down in Nueces County, Texas 14:50:14
13 where I will be confronting this issue in about a week. 14:50:19
14 Incidentally, Judge, if you're going to take punitive 14:50:23
15 damages away from all those state court lawyers, I take it 14:50:26
16 as a personal favor if you do it within the next five days. 14:50:31
17 But Ms. Cabraser the incorrect. In fact, what 14:50:36
18 Cooper did was it set Constitutional limits on what states 14:50:40
19 are allowed to do. States retain the ability to have their 14:50:44
20 own unique approaches to when punitive damages are 14:50:50
21 appropriate and the factors that could be considered and 14:50:53
22 the amounts that can be appropriate. And then superimposed 14:51:01
23 on top of the state procedures are the Constitutional 14:51:05
24 limits that they can't go beyond. 14:51:09
25 So, just because Cooper said that there are 14:51:11

1 Constitutional limits beyond which states cannot go, that 14:51:14
2 doesn't mean that the only question in any state in the 14:51:19
3 union on punitive damages are those three Constitutional 14:51:24
4 limits that you read. That's just not the law. 14:51:29
5 Lastly, on this idea of a limited fund, the 14:51:36
6 limited fund works only if it is a no opt-out class, 14:51:39

7 because otherwise we've got all these thousands of people 14:51:50

8 who are pursuing their claims in state courts already and 14:51:54

9 others, represented by some lawyers in this room, who at 14:51:59

10 the first opportunity want to try their case in federal 14:52:03

11 court back in Los Angeles, who are not going to be all that 14:52:07

12 keen on being a part of a class. They're going to want to 14:52:11

13 try their own case and put in all the glory evidence and 14:52:16

14 make the best use they can of it because they thing they 14:52:23

15 are really good lawyers and they can make win more money 14:52:23

16 doing it their way than they can if the class action 14:52:23

17 lawyers do it for them here in Minnesota. And any notion 14:52:30

18 that this limited fund is going to hold up and is going to 14:52:32

19 cap punitive damages, I think is awfully ambitious 14:52:37

20 thinking. And, in fact, I think I can predict with a high 14:52:42

21 level of confidence that that would be attacked like crazy 14:52:47

22 by members of the Plaintiffs' bar, both from the state 14:52:52

23 court side as well as from the federal court side. 14:52:55

24 THE COURT: Well, at some point, address the 14:53:01

25 issue that happened in Indianapolis dealing with Firestone. 14:53:05

1 They won the issue there. 14:53:14

2 MR. BECK: I didn't. 14:53:17

3 THE COURT: I know. I said they won the issue 14:53:17

4 there and came back to the court and tried to enjoin the 14:53:19

5 court from allowing anything to happen in state court. 14:53:25

6 MR. BECK: Your Honor, I would like to come back 14:53:28

7 to that, I'm sure that at some point during my remarks we 14:53:29
8 are going to take a break, and I'd like to be able to 14:53:37
9 organize my thoughts on that and respond to it after our 14:53:39
10 first break, if I could. 14:53:43
11 THE COURT: Yes. 14:53:44
12 MR. BECK: The Plaintiffs also have suggested, 14:53:48
13 Your Honor, some alternatives to a nationwide class. And I 14:53:52
14 think that these alternatives that they have suggested, 14:53:59
15 basically, for this Court to try statewide class would be 14:54:02
16 unworkable for the same reasons that we are going to be 14:54:09
17 going through concerning the nationwide class. 14:54:13
18 Rule 42, for example, does not work to create a 14:54:17
19 common issue trial unless you really have workable common 14:54:23
20 issues. In fact, it ends up being similar to Rule 23. If 14:54:27
21 you've got individual issues of fact and law that overwhelm 14:54:35
22 the common issues, a Rule 42 approach is not practical. 14:54:40
23 Here, of course, they have not given the Court 14:54:48
24 any kind of coherent plan to proceed under Rule 42 any more 14:54:50
25 than they have given a coherent plan on how they would plan 14:54:57

1 to proceed under Rule 23. They just said that somehow they 14:55:00
2 will come up with a plan, but we haven't seen one. 14:55:05
3 In terms of the proposed statewide class, there 14:55:08
4 was mention that maybe Your Honor could have a trial that 14:55:14
5 would just be the Minnesota claimants, people who filed 14:55:17
6 their cases here in Minnesota, and -- or Professor Miller 14:55:20
7 suggested that maybe you could have a trial here in 14:55:26

8 Minnesota for the, I think he said 3,000 cases that are 14:55:30
9 pending in federal court in Pennsylvania that have been 14:55:36
10 transferred here. 14:55:42
11 A couple of problems. One is there are by our 14:55:42
12 count over 800 cases that have been filed in federal court 14:55:49
13 in Minnesota that are part of this proceeding. Twenty-four 14:55:54
14 of the 800 were filed by people who live in Minnesota. 776 14:56:02
15 were filed as diversity claims by people who live in 14:56:16
16 Pennsylvania, Illinois, Oklahoma, Arizona, Hawaii, etc., 14:56:19
17 etc., etc. So a class trial of the Minnesota claimants, 14:56:24
18 the people who filed case in Minnesota, is going to be a 14:56:29
19 trial concerning the laws of 51 states. 14:56:34
20 Similarly, Professor Miller said, well, there are 14:56:38
21 those 3,000 cases pending in Pennsylvania, I haven't gone 14:56:42
22 through the complaints, but through deductive reasoning, 14:56:47
23 I've figured out the number of Pennsylvania plaintiffs and 14:56:50
24 those federal Pennsylvania cases is zero or close to it. 14:56:55
25 And that is because if they were from Pennsylvania, we're 14:57:02

1 from Pennsylvania and there wouldn't be diversity and they 14:57:05
2 wouldn't be in federal court. They would be in -- state 14:57:10
3 court. So, they have got some really good lawyers in 14:57:13
4 Pennsylvania, and a lot of people think that the 14:57:17
5 Pennsylvania federal courts are good places to try 14:57:19
6 plaintiffs' causes of action, so people come from all over 14:57:23
7 the country and file diversity actions in Pennsylvania and 14:57:27

8 venues are okay because we operate there. So, if you as a 14:57:32

9 Minnesota federal judge get a Minnesota jury to try 14:57:36

10 Professor Miller's class of Pennsylvania federal claimants, 14:57:40

11 the only law that you probably wouldn't have to apply is 14:57:46

12 Pennsylvania. So, you would have 50 jurisdictions. 14:57:49

13 Pennsylvania just wouldn't be one of them. 14:57:53

14 So, you are going to have the same problem of 14:57:56

15 defining and then applying the law of 51 jurisdictions, 14:58:01

16 whether that's on the liability issues that they identify 14:58:03

17 or on punitive damages. 14:58:07

18 Okay, so, I said I was going to talk about facts 14:58:11

19 after my brief excursion into the law. Now, I'm going to 14:58:15

20 actually do that. Your Honor, what I've got up here on the 14:58:20

21 screen is the beginnings of a timeline, and what I'm going 14:58:24

22 to show up here on the top of the timeline is whether we 14:58:29

23 came out with different doses of Baycol and then what the 14:58:37

24 different warning labels said and how they evolved over 14:58:37

25 time. So, these are the facts that I referred to earlier 14:58:41

1 as just sort of undisputed historical events rather than 14:58:46

2 characterizations about what we knew or anything else. 14:58:51

3 So, we first came on the market in the United 14:58:56

4 States with the .2 milligram and .3 milligram doses in 14:58:59

5 September of 1997. At the time, we had what was called a 14:59:06

6 rhabdomyolysis class warning. Just for the Court's 14:59:10

7 information, we didn't have a warning at the time that said 14:59:17

8 Baycol can cause Rhabdo, and the reason is, interestingly, 14:59:23

9 when we did our clinical trials, we didn't have a single 14:59:28

10 case of Rhabdo. But we knew that Baycol is a statin, and 14:59:33

11 all statins, once they get out there beyond the clinical 14:59:39

12 trial stage and larger numbers of people take them, that 14:59:44

13 all statins, people are going to experience Rhabdo with. 14:59:48

14 So, we had a warning that said Baycol is a statin, statins 14:59:52

15 can cause Rhabdo. And there can be acute renal failure. 14:59:56

16 We also said that if you experienced muscle pain, 15:00:02

17 tenderness and weakness, talk to your doctor. So, that was 15:00:06

18 -- obviously, there was a lot of other stuff on the label, 15:00:11

19 but the key stuff for this case. That's from September of 15:00:15

20 '97, and the little pills down there, that's the .2 dose 15:00:17

21 and the .3 dose and that shows when they came out. 15:00:24

22 Your Honor, we don't have sets already prepared, 15:00:29

23 but before we leave this week, we'll give you a set of 15:00:32

24 materials that we have been showing up here. 15:00:36

25 The next label was from November of 1998, what we 15:00:40

1 call Label No. 2. This still related to the 2 and 3 15:00:46

2 milligram doses. Here, by this time now, we have been 15:00:50

3 selling the medicine and we've got a lot larger universe, 15:00:55

4 more experience than we had just in the clinical trials. 15:01:00

5 So, just as we knew would happened and everybody in the FDA 15:01:05

6 knew and everybody knew, every doctor knew, sure enough 15:01:09

7 people take Baycol, someone is going to get Rhabdo just 15:01:12

8 like they do with Zocor and Lipitor and all the other 15:01:18

9 statins. 15:01:22

10 So, now we are able do warn specifically that 15:01:24

11 Rhabdo has been reported with Baycol and sometimes with 15:01:25

12 acute renal failure. We also noted at this point what was 15:01:32

13 an unusual situation that when people, at least the report 15:01:36

14 of Rhabdo with us, they seemed to be focused mainly where 15:01:39

15 people also were taking another drug called Gemfibrozil. 15:01:43

16 You heard about Gemfibrozil this morning, and I know you've

17 read about it in the paper -- in the papers that have been 15:01:50

18 filed. So, when people are taking what we he call Gemfib 15:01:55

19 along with Baycol, that seemed to account for a significant 15:02:01

20 percentage of the Baycol reports. And we said, if you have 15:02:06

21 any muscle pain, tenderness or weakness, talk to your 15:02:10

22 doctor. 15:02:15

23 The next label change came out in May of 1999. 15:02:20

24 That's when our .4 dose was approved by the FDA. So, this 15:02:23

25 label applied to .2, .3, and .4. It repeated the Rhabdo 15:02:30

1 warning that Baycol had been associated with Rhabdo, 15:02:38

2 sometimes with acute renal failure. Once again, cautioned 15:02:42

3 patients that if they experienced any muscle pain, 15:02:49

4 tenderness or weakness, they should talk to their doctors. 15:02:50

5 And, then, since we had some more experience with 15:02:54

6 Gemfibrozil, the warning was beefed up somewhat and it was 15:02:59

7 explained that the combined use of Cerivastatin, that's the 15:03:03

8 non-brand name for Baycol. It's the chemical name. So, 15:03:12

9 combined use of Baycol and Gemfibrozil should be avoided 15:03:15

10 unless the benefit is likely to outweigh the increased risk 15:03:18

11 of this drug combination. So, increased knowledge is what 15:03:25

12 we have that led to an additional more elaborate warning 15:03:30

13 label. 15:03:34

14 The next label was Label No. 4. We're still now 15:03:34

15 we have .2, .3, and .4 as the doses. And now we have 15:03:41

16 what's called a Gemfibrozil contraindication. And in the 15:03:44

17 world of pharmaceuticals, a contraindication is a big deal. 15:03:50

18 Doctors understand that when something is contraindicated, 15:03:55

19 that's a stronger statement than merely a warning about how 15:03:59

20 you shouldn't use them together. Contraindication means 15:04:05

21 that it's basically off-labeled usage if you're going to 15:04:08

22 co-prescribe. 15:04:14

23 There may be a doctor out there who's got a 15:04:19

24 patient who has a condition that's such where they need 15:04:20

25 Gemfibrozil and Lipitor hasn't worked and Zocor hasn't 15:04:24

1 worked and the other statins haven't worked because each 15:04:29

2 one is a little different. That may be that a doctor makes 15:04:33

3 a medical determination that he's going to co-prescribe 15:04:34

4 even though it's contraindicated. Or it may be that the 15:04:42

5 doctor is doing a lousy job. He's not paying any 15:04:43

6 attention. That can happen, too.

7 But in any event, that's what the new label said. 15:04:46

8 And, then, of course we recorded that Rhabdo could be 15:04:50
9 associated with Baycol, sometimes with acute renal failure, 15:04:53
10 and asked to report any muscle pain, tenderness or 15:04:59
11 weakness. 15:05:04
12 We also sent out on this contraindication this 15:05:05
13 Dear HCP. That's for Dear Health Care Provider, and we 15:05:09
14 wanted to get the word out and, so, we sent out a Dear 15:05:13
15 Health Care Provider letter explaining to doctors and 15:05:18
16 clinicians and others that a majority of the Rhabdo cases 15:05:22
17 that we had seen involved patients end taking Baycol and 15:05:26
18 Gemfibrozil at the same time. 15:05:33
19 Label 5 came out in July of 2000. This was when 15:05:37
20 we introduced .8. So, .8, which you have heard a lot about 15:05:42
21 today, doesn't really come on the scene until July of 2000. 15:05:47
22 We included the Gemfibrozil contraindication, don't use 15:05:53
23 Baycol with Gemfibrozil. We once again encouraged the 15:05:55
24 people to report any muscle pain, tenderness or weakness. 15:06:02
25 We also in our Rhabdo, we had the usual Rhabdo warning, but 15:06:08

1 we also had learned some more, and we said that it's 15:06:12
2 especially important for elderly and low body weight women, 15:06:16
3 that they were particularly susceptible here. So, we have 15:06:21
4 seen in the reports from the field that older women who 15:06:26
5 were thin seemed to be particularly susceptible, so we 15:06:31
6 included that. 15:06:34
7 We also had a recommendation. Remember, now, we 15:06:36

8 are coming out with this new dose, .8. We had a 15:06:39

9 recommendation that people start at .4. And you don't 15:06:44

10 start somebody at .8, start them at .4, and, then, if .4 15:06:46

11 isn't doing the job, then you consider taking them up to 15:06:52

12 .8. That process is called titration, Your Honor. So, we 15:06:56

13 were saying you should titrate. Start at the low does, 15:07:01

14 because .8 is powerful stuff, and only use .8 if the lower 15:07:05

15 dose isn't working. 15:07:11

16 The next label is from December of 2000. It 15:07:16

17 applies to all the doses that are out there, 2, 3, 4, 8 15:07:19

18 milligrams, and has the Gemfibrozil contraindication. 15:07:24

19 Encourages people to report any muscle pain, tenderness or 15:07:29

20 weakness. Repeats the special caution for elderly, low 15:07:34

21 body weight women. Again, it recommends starting at .4 15:07:35

22 rather than starting immediately at .8. And, then, has the 15:07:40

23 patient information sheet that went along with it. It had 15:07:46

24 all the sort of prescribed warning stuff that you have. 15:07:50

25 And then it had a patient information sheet, basically, in 15:07:52

1 an effort to say some things and repeat some things and say 15:07:56

2 it in as direct English as we could. 15:08:01

3 We told people -- we're telling the doctors that 15:08:07

4 Gemfibrozil was contraindicated, and then we say to the 15:08:10

5 people, do not take Baycol if you're taking Lopin. That's 15:08:13

6 the brand name for Gemfibrozil. And we tell them, again, 15:08:16

7 report any muscle pain, tenderness or weakness. 15:08:20

8 Label 7, this was in May, 2001. It relates to 15:08:27
9 all of the doses. And here we are elaborating on the .4 15:08:32
10 versus .8 notion of what you should start out. And we say 15:08:39
11 in this label that beginning Baycol, that is your starting 15:08:43
12 dose, if you start Baycol above .4, that increases the risk 15:08:50
13 of myopathy and Rhabdo. So, well tell them don't do it. 15:08:56
14 Report muscle pain, tenderness and weakness which we have 15:09:02
15 said from day one, repeating about the elderly, thin women 15:09:07
16 and the patient information sheet, once again, in plain 15:09:09
17 English, don't take Baycol if you're taking Gemfibrozil. 15:09:11
18 Report any muscle pain. And then we say if you're taking 15:09:13
19 Baycol for the first, your daily dose should be .4 or 15:09:21
20 lower. Don't start at .8. We sent out a Dear Health Care 15:09:23
21 Provider stressing the same thing, .4, and this was around 15:09:32
22 the same time. .4 is the starting dose. .8 is only the 15:09:35
23 titration dose. And once again we repeated, don't 15:09:40
24 co-prescribe. Don't give your patients Baycol and 15:09:45
25 Gemfibrozil at the same time. 15:09:50

1 Notwithstanding these efforts, people -- we were 15:09:53
2 getting reports of people who were experiencing Rhabdo. A 15:09:58
3 lot of those report, not all, by any means, a lot of the 15:10:04
4 reports were people who had been started at .8, not 15:10:08
5 notwithstanding everything we said, and people who had been 15:10:11
6 prescribed Gemfibrozil, notwithstanding everything we said. 15:10:15
7 So, after consultation with the FDA, we withdrew Baycol 15:10:19

8 from the market the first week of August of 2001. So, 15:10:24
9 that's the basic sequence of warning labels and when doses 15:10:29
10 came out. 15:10:36
11 Your Honor, just as aside, I think Your Honor 15:10:37
12 asked a question of Mr. Arsenault about when was the drug 15:10:41
13 withdrawn in England, and I think, I'm pretty confident 15:10:44
14 that the accurate response to Your Honor's question was 15:10:51
15 that in England, the authorities suspended sales of .8, but 15:10:54
16 not the other dosage -- not the other doses. That they 15:11:01
17 suspended sales of .8 about six weeks earlier than Bayer 15:11:07
18 voluntarily withdrew all Baycol from the market in the 15:11:13
19 United States. So, I think that's an accurate response to 15:11:20
20 the Court's question. 15:11:22
21 Now, I couldn't resist, and as I went along, I 15:11:27
22 did a little bit of editorializing. You could see how we 15:11:31
23 would present our case here. What I really want to spend a 15:11:36
24 little time on now is to talk about how the Plaintiffs have 15:11:40
25 presented to you today the way that they are trying their 15:11:43

1 case and what they are going to show and why we are bad 15:11:47
2 people. And what we saw in the half an hour or forty-five 15:11:51
3 minute presentation this morning was an argument that Bayer 15:11:58
4 started off early on with these low doses based on clinical 15:12:07
5 trials, and, of course, they would say said that we did 15:12:14
6 something wrong here, but then they say, boy, it got much 15:12:17
7 worse. It got more comfortable because they started to 15:12:22

8 learn more information and started to get feedback from the 15:12:27

9 field. And notwithstanding this additional information, 15:12:33

10 they continued to sell these doses. And then they he did 15:12:33

11 some studies and other people did some studies, and they 15:12:38

12 should have known that putting .4 on the market was going 15:12:40

13 to be a bad idea. I think I got one over here. 15:12:44

14 THE COURT: In fact, you can touch the screen and 15:12:49

15 make marks on it. 15:13:01

16 MR. BECK: I feel like John Madden if I start 15:13:04

17 doing this. Here we go, when we. When I was listening to 15:13:06

18 their presentation, when you had move into the time right 15:13:12

19 before .4, they had additional information, and 15:13:14

20 notwithstanding the new information that should have 15:13:17

21 convinced them not to do it, the people came into the 15:13:21

22 market with .4. And then with .4, sure enough they gained 15:13:28

23 more information that should have told them to yank it off 15:13:35

24 the market, but they didn't yank it off the market because 15:13:39

25 they put dollars before the people, and they were working 15:13:44

1 on .8. And at the time they were working on .8, they had 15:13:48

2 all kinds of information that should have told them not to

3 put .8 on the market, but the put it on the market anyway. 15:13:57

4 After they got .8 on the market, they got more information, 15:13:57

5 and they should have yanked it off the market sooner than 15:13:58

6 they did. And the story that we heard was one of 15:14:03

7 increasing culpability. One of more and more proof as you 15:14:07

8 go on in time that Bayer did the wrong thing. We can see 15:14:15
9 that story if we look at their pleadings. 15:14:18
10 This is from their opening brief, Page 13, 15:14:33
11 undeterred by the evidence of increased injuries at higher 15:14:44
12 doses. So, here we were, you know, we've gone past .2. 15:14:49
13 We're in the higher doses, and according to Plaintiffs' 15:14:55
14 lawyers we have evidence of increased injuries, but we are 15:14:56
15 undeterred by it, and we continue to push for FDA approval 15:15:02
16 to market Baycol at higher doses. May, 1999, four months 15:15:05
17 after 1999 required warnings changed, the FDA approved 15:15:13
18 increasing the doses from 3 to 4, despite the data from 15:15:20
19 there clinical trials blaming increased adverse experiences
20 to the high doses. The Defendants launched an advertising. 15:15:24
21 So, the idea is we knew more and more, and, yet, 15:15:26
22 we persisted in this evil scheme. I hope Your Honor 15:15:30
23 appreciates that I'm not buying into the story as I go, but 15:15:38
24 I think it's important to know what kind of case they say 15:15:41
25 they are going to put up. 15:15:45

1 Same thing over on Page 24, bottom paragraph, 15:15:46
2 Paragraph J. Defendants seek approval, and then, Your 15:15:51
3 Honor, remember, this is not their complaint or memo for 15:15:57
4 some extraneous purpose. This is their brief explaining 15:16:09
5 why class certification is appropriate. So, when they're 15:16:14
6 telling you why the class should be certified, they say 15:16:17
7 well the facts are that despite the serious events that 15:16:22

8 occurred in the post market patient population, including 15:16:26

9 fatality reports and the sign that the drug had caused 15:16:26

10 significant cellular necrosis, particularly at higher 15:16:36

11 doses. Bayer and SmithKlineBeecham once again, sought 15:16:36

12 approval in the market, again, at even higher doses. 15:16:39

13 Now, there's a lot of facts packed in there, but 15:16:40

14 each one of them has to do with their theory that we became 15:16:42

15 increasingly culpable over time because we got post 15:16:45

16 marketing information, and we got fatality reports. We got 15:16:51

17 reports that at particularly higher doses things were bad. 15:16:55

18 And notwithstanding that, we decided to go ahead with .8. 15:16:59

19 The same theme is over on Page 17 in their brief. 15:17:05

20 I don't even have to read them. I mean you get the idea, 15:17:13

21 Judge, and all you have to do is really look at the 15:17:17

22 heading. The Defendants ignore the results of their own 15:17:20

23 testing. So, we're going to have, as you can imagine a 15:17:23

24 different factual story at trial, but that's their story. 15:17:32

25 And as I said, their story is that culpability increased 15:17:39

1 over time. Let's see if I can go back -- back to this 15:17:45

2 timeline that I put up. 15:17:52

3 The reason I spent so much time on this, Judge, 15:17:53

4 is because Plaintiffs' own papers made clear that there are 15:17:57

5 going to be thousands and potentially hundreds of thousands 15:18:01

6 of particular, unique personal fact patterns that are going 15:18:07

7 to govern liability in this case. And that's even before 15:18:12

8 we start talking about individual causation or whether 15:18:18

9 there was injury or what the damages are. And let me -- I 15:18:21

10 can't help myself, I have to wander over here even if I 15:18:26

11 have the space-age laser beam. 15:18:30

12 If I'm a plaintiff's lawyer and I've got a case 15:18:34

13 for Mrs. Withers who started taking .2 Baycol a couple of 15:18:39

14 weeks after it came on the market and took it for 3 weeks, 15:18:46

15 and then stopped because her HMO said that they had a good 15:18:50

16 deal with the makers of Lipitor and they wanted her to use 15:18:55

17 Lipitor instead and she switched to Lipitor and she never 15:18:59

18 had any problems while she was on Baycol, and she never had 15:19:03

19 any problems when she felt on Lipitor, she's got one case. 15:19:07

20 And if I got Mr. Jones over here in June of 2001 who took 15:19:12

21 .8 Baycol for a week and got rhabdomyolysis and was 15:19:22

22 hospitalized and had to go on dialysis, he's got a 15:19:31

23 different case. It's not just a different case because 15:19:37

24 Mrs. Withers didn't suffer any injury and Mr. Jones 15:19:40

25 suffered acute renal failure. It's a different liability 15:19:44

1 case because the facts are different as to what we knew 15:19:49

2 back in 1997 and what we were telling the medical community 15:19:53

3 back in 1997 versus what we knew in the year 2001 and what 15:19:59

4 we knew and what we were telling the medical community in 15:20:06

5 2001. 15:20:10

6 Their failure to warn case, for example, which 15:20:10

7 they say is just a simple cases, applies to everybody. But 15:20:11

8 there's a whole bunch of different warnings. There are 15:20:17

9 people who bought the drug back when Label 1 was out there, 15:20:20

10 and there are people who bought the drug when Label 6 was 15:20:24

11 out there. And those are different liability cases. 15:20:28

12 Same thing with negligent failure to warn or 15:20:32

13 negligent marketing. The drug shouldn't' have been on the 15:20:36

14 market. They are going to be able to tell one story if the 15:20:40

15 real life plaintiff took the drug back in here in the early 15:20:47

16 days when what we have got are clinical trials and not a 15:20:52

17 single person experienced Rhabdo, and we have it on the 15:20:56

18 market and we are just starting to get feedback from the 15:21:00

19 marketplace as to the effects of our medicine, their story 15:21:05

20 on negligent marketing is a lot different here than it is 15:21:09

21 over there. And they're both different from even here. 15:21:18

22 In fact, what you have if you took their 900,000 15:21:18

23 plaintiffs, is you would have 900,000 bars up here that 15:21:24

24 would begin where somebody started Baycol and end where 15:21:28

25 they stopped taking Baycol. Except for some of them, there 15:21:32

1 would be more than one bars because they would take Baycol 15:21:37

2 for a little while and then they would switch to Lipitor 15:21:40

3 and then they would switch back to Baycol. 15:21:43

4 So, we have in terms of the critical time period 15:21:46

5 to ascertaining liability under their own theory, it's 15:21:49

6 going to be different for every single plaintiff. And a 15:21:53

7 ruling as to somebody in 2001 is not going to mean anything 15:21:57

8 as to somebody in 1998 and vice versa. So, there are going 15:22:02

9 to be all these unique types. And that would be true, 15:22:09

10 Judge, even if you were going to apply the law of Minnesota 15:22:12

11 to everybody's claim because you would still have all these 15:22:14

12 individual facts in terms of, okay, failure to warn as to 15:22:19

13 what, when and what. So, those facts, individual facts, 15:22:25

14 are going to predominate even if you were to apply the law 15:22:29

15 of one state. 15:22:33

16 But, of course, what we are really going to end 15:22:34

17 up doing, is we are going 900,000 little bars up here 15:22:38

18 representing individual Plaintiffs' Baycol uses 15:22:44

19 superimposed over those 900,000 bars are the laws of 51 15:22:47

20 states, and not just the laws on 51 states just on 15:22:53

21 negligence, but the laws of 51 states on eight of ten 15:22:57

22 causes of action that they have identified. 15:23:03

23 So, understand their own theory as to why we're a 15:23:08

24 bad company, they reveal that the individual questions are 15:23:10

25 going to predominate any liability issues. 15:23:15

1 Now, it was interesting to me that the class 15:23:19

2 action lawyers, I don't think ever mentioned once any of 15:23:22

3 the class reps. Not a single class representative was ever 15:23:27

4 alluded to or mentioned by name. So, I'm going to talk 15:23:32

5 about them instead. So, I've got a handful of the 900,000 15:23:39

6 little bars that we put up here. So, these are the little 15:23:47

7 vignettes that come along with each one -- 15:23:53

8 THE COURT: Before we move to this, it's time for 15:23:55
9 a break before my court reporter quits on me. Let's take a 15:24:00
10 15-minute break. 15:24:05
11 (Recess taken.)
12 THE COURT: Mr. Beck, you may continue. 15:43:49
13 MR. BECK: Thank you, Your Honor. Before I move 15:44:00
14 on to the individuals Plaintiffs, let me respond to the 15:44:00
15 Court's question concerning the Firestone case. Here's my 15:44:05
16 understanding of the case. I confirmed it over the break. 15:44:08
17 A district judge in Indiana certified an economic class in 15:44:10
18 the Firestone cases. He must not have been on the mailing 15:44:16
19 list for the Seventh Circuit's opinions for the last couple 15:44:24
20 of years, but he certified -- I'm sorry, she. She 15:44:32
21 certified an economic class. The Seventh Circuit, no 15:44:33
22 surprise, decertified the class and also said, don't come 15:44:36
23 back here with any statewide classes. The Seventh Circuit 15:44:41
24 said the laws would have to be under 51 jurisdictions, and 15:44:44
25 that's an insurmountable problem, but don't come back here 15:44:47

1 asking for statewide classes because that has the same kind 15:44:51
2 of problem, and we don't want you taking up our time with 15:44:55
3 that. 15:44:58
4 So, then what happened is the Plaintiffs' lawyers 15:44:59
5 went out instead of to the district judges in Indiana, went 15:45:01
6 to state court judges around the country and sought to get 15:45:05
7 state classes certified in state courts. And then the 15:45:09

8 defense lawyers tried to use the All Writs Act and convince 15:45:13

9 the district judge that the Judge ought to enjoin the state 15:45:21

10 court class actions under the All Writs Act. The district 15:45:25

11 judge said, no, such an order will not be in aid of my 15:45:30

12 federal jurisdiction, and if you don't like the class 15:45:33

13 actions in the state courts, then go to the state court 15:45:37

14 judges and persuade them that the class actions are a bad 15:45:40

15 idea. So, the teaching of the case, Your Honor, is that 15:45:43

16 it's a good thing that the Jones Day firm is not involved 15:45:48

17 in this case. (Laughter) Now, I say that because they are 15:45:52

18 not here to defend themselves. 15:46:03

19 Your Honor, back to the timeline. I've been 15:46:06

20 talking how even if you focus solely on our conduct and the 15:46:09

21 horrible things they say about us, all that does is 15:46:17

22 underscore that individual issues predominate because this 15:46:19

23 is not a ship that sank. This is not a bad batch of 15:46:24

24 medicine that got contaminated. This is a course of 15:46:29

25 conduct over five years that under their theory, we became 15:46:33

1 increasingly culpable. So, there is different evidence as 15:46:44

2 to whether we would be liable, depending on when the 15:46:44

3 plaintiff took the medicine. So, it's fundamentally 15:46:48

4 different from a typical mass disaster where an event 15:46:53

5 occurs in time and affects people at the same point in 15:46:59

6 time, and, perhaps, they suffered different damages, but 15:47:03

7 they were affected basically in the same way by the same 15:47:06

8 event that took place at the same time so the evidence as 15:47:09

9 to liability is going to be the same. Here, the evidence 15:47:11

10 is going to be vastly different depending on when somebody 15:47:16

11 began taking -- began taking Baycol. 15:47:19

12 So what I want to do now is go through some of 15:47:28

13 these individuals, and we've got them organized by color. 15:47:31

14 There are three classes that the Plaintiffs have been 15:47:35

15 talking about. The red individuals are the class 15:47:38

16 representatives that they have identified in the personal 15:47:43

17 injury class. So, the people who they claim actually were 15:47:47

18 injured by taking Baycol. The purple people are the class 15:47:52

19 representatives for the medical monitoring class that they 15:48:01

20 want certified. And then the green people are the class 15:48:06

21 representatives for their refund class. And what I want to 15:48:09

22 do is spend a few moments on each one of these class 15:48:15

23 representatives because when we look at their story, we see 15:48:18

24 that no matter what might -- no matter what one might think 15:48:23

25 about common issues versus individual issues, focusing only 15:48:31

1 on Bayer, once you include the other parties to the 15:48:35

2 litigation, the plaintiff, because after all the other 15:48:39

3 parties are the Plaintiffs rather than the class action 15:48:42

4 lawyers, once you include the real life Plaintiffs, then 15:48:45

5 the individual issues are brought into even sharper relief, 15:48:48

6 and it's even clearer that they predominated. 15:48:52

7 So what we have for these individual Plaintiffs 15:48:56

8 is we have some fact sheets that they filled out, and in 15:48:59

9 some instances we have some depositions. So, I want to go 15:49:03

10 through and spend a minute or two on each one of the people 15:49:07

11 that the class action lawyers say are representatives of 15:49:09

12 the classes that they want to certify. Oops, I'm going to 15:49:12

13 fast. 15:49:17

14 Joseph D'Agui, I think is how his name is 15:49:19

15 pronounced, he's a representative of the personal injury 15:49:23

16 class. He's 83 years old and lives in New Jersey. He took 15:49:28

17 .4 relatively late in the game. Started in February of 15:49:33

18 2001. Stopped when the medicine was withdrawn from the 15:49:37

19 market. Now, here's a category you're going to see on all 15:49:43

20 of them. Other drugs while on Baycol. These are important 15:49:48

21 because other drugs can also have some of the same side 15:49:52

22 affects that Baycol can have, and anybody could find that 15:50:03

23 out by looking them up in the Physician's Desk Reference. 15:50:03

24 So, there's a whole bunch of drugs that he took 15:50:05

25 while taking Baycol, I can't pronounce most of them, and 15:50:08

1 statins that he took after Baycol. He took Zocor after he 15:50:13

2 took Baycol. This is also potentially significant, Your 15:50:17

3 Honor, if, for example, we were talking about aches and 15:50:23

4 pains which he now may say he is experiencing. And he 15:50:25

5 maybe attributing it back to when he took Baycol in August 15:50:31

6 of 2001. But then aches and pains also show up as a side 15:50:36

7 effect of Zocor which he's taking here in 2003. And it 15:50:42

8 also is relevant when we talk about medical monitoring. 15:50:48

9 There's a couple of tests that their expert says 15:50:52

10 comprise the medical monitoring program. One of them is a 15:50:57

11 blood pressure test. One of them is a creatinine-level 15:51:02

12 test. Well, you could have heightened creatinine for a 15:51:09

13 whole bunch of reasons, including that you took Baycol or 15:51:15

14 that you took Zocor. So, if you had medical monitoring 15:51:19

15 here in 2003 of somebody who stopped taking Baycol in 2001 15:51:23

16 and has been taking Zocor ever since, you know, there is a 15:51:31

17 real question of what is it you are monitoring. If you're 15:51:35

18 looking at his creatinine levels, what does it tell you? 15:51:40

19 Where do those come from? 15:51:43

20 Now, Mr. D'Agui's alleged injuries, he includes 15:51:47

21 Rhabdo, leg pain, and here's where we start to get into 15:51:55

22 some issues that actually are pretty important when you 15:51:59

23 talk about whether or not we're going to have a mass trial 15:52:02

24 on injuries and whether the individuals in the class are 15:52:09

25 then going to be bound by the outcome and collaterally 15:52:13

1 estopped when they go back for their individuals trials. 15:52:18

2 He also claims constipation and psychological injuries, 15:52:21

3 including sleep disruption. 15:52:27

4 Medical history. This is important for every 15:52:31

5 single plaintiff in the class because some of the 15:52:35

6 conditions that are -- can be caused by Baycol, I already 15:52:37

7 mentioned they can also be caused by other medications and 15:52:43

8 they can be caused by medical conditions. So -- and a lot 15:52:49
9 of these plaintiffs have serious medical histories because 15:52:54
10 they were sick people who had a lot of things wrong with 15:52:58
11 them. That's one of the reasons why they were taking 15:53:01
12 Baycol in the first place. 15:53:04
13 Here we have diabetes, spinal stenosis, leg 15:53:07
14 weakness. You know, this kind of thing when we talk about 15:53:12
15 individual injuries, inquiries are going to be important 15:53:19
16 when get to causation. You know, you can have a general 15:53:21
17 verdict that says Baycol can cause leg pains. And let's 15:53:25
18 say they win that one, and we go to trial with D'Agui and 15:53:33
19 he says I've got leg pains, and we take him at his word, 15:53:36
20 and we say, you know, that's because you had this spinal 15:53:40
21 stenosis with leg weakness, and it's not because of Baycol. 15:53:44
22 Similarly, he's got hypertension, prostate 15:53:49
23 cancer, heart palpitations, insomnia. These are conditions 15:53:53
24 that existed before he took Baycol. So, when he goes on to 15:54:00
25 his trial and says that Baycol has disrupted my sleep, 15:54:07

1 we'll say maybe it has something to do with the fact that 15:54:10
2 you've had insomnia for a long time. 15:54:15
3 Then on the post-Baycol testing, I mention, 15:54:17
4 Judge, that the expert hired by the class action lawyers 15:54:20
5 says that the medical monitoring that he's proposing should 15:54:24
6 consist of a single visit where you get your blood pressure 15:54:29
7 taken and your creatinine level tested. That's the 15:54:33

8 monitoring program -- one visit, blood pressure taken, 15:54:38

9 creatinine measured. 15:54:44

10 Now, this fellow, now he's from the personal 15:54:47

11 injury class, but he's already got his blood pressure 15:54:51

12 taken, and he already got his creatinine levels tested, and 15:54:54

13 he got those taken and tested for reasons having nothing to 15:54:59

14 do with Baycol because he had diabetes, and these are 15:55:04

15 standard things when you have diabetes. And you get your 15:55:09

16 blood pressure -- every time you walk into the doctor's 15:55:15

17 office you get your blood pressure tested, especially if 15:55:16

18 you have hypertension, which is high blood pressure. 15:55:20

19 And, so, when we look at the legal elements for 15:55:25

20 making out a medical monitoring claim, one of them is the 15:55:26

21 people are not already getting the same tests as part of 15:55:34

22 their routine medical care. So, here we see the very first 15:55:38

23 person is already getting the routine tests as part of his 15:55:43

24 normal medical care. So, that's just a snapshots of Mr. 15:55:46

25 D'Agui. 15:55:55

1 Here's Mr. Sample, and I must say that if you're 15:55:55

2 going to have a class rep, a name like Sample is good. I 15:55:59

3 was looking for Francis Typical or something like that, but 15:56:05

4 we have Edward Sample, personal injury class, 72, law of 15:56:08

5 Arkansas where we saw that there were some peculiarities 15:56:15

6 there. These are the kinds of facts that are going to 15:56:19

7 complicate cases. He took the .03 milligram in December of 15:56:22

8 '99, but his doctor on December 16th told him to stop 15:56:28

9 taking them. It's unclear whether he did stopped taking it 15:56:32

10 before January 20th when he was diagnosed with Rhabdo. So, 15:56:39

11 there's this gap in time. We don't know what happened. 15:56:43

12 Other drugs while he was on Baycol. One of them 15:56:46

13 that he took was Gemfibrozil. This was at a time when we 15:56:54

14 were telling people don't take Baycol when you're taking 15:56:58

15 Gemfibrozil. But he was taking Baycol when he was taking 15:57:00

16 Gemfibrozil. And his doctor was prescribing them. Maybe 15:57:07

17 his doctor had a good reason for it, but there was a 15:57:12

18 warning that said the possibility of Rhabdo increases if 15:57:15

19 you takes Baycol with Gemfibrozil, so watch out. 15:57:18

20 Now, the Plaintiffs will come back and they's 15:57:24

21 say, yeah, but the warning you had then wasn't as good as 15:57:27

22 the warning you had later. And they may have a point, but 15:57:29

23 all that does is underscore how each one of these cases is 15:57:32

24 going to turn on the individual facts, the intersection of 15:57:35

25 all of those facts about what we did when with intersecting 15:57:41

1 with the individual stories of the Plaintiffs who took a 15:57:44

2 bunch of other medicines. 15:57:48

3 Statins, after Baycol, he took Pravachol and kept 15:57:51

4 taking with Gemfibrozil. And Gemfibrozil, generally, is 15:57:56

5 not taken with any statin, but his doctor obviously felt 15:58:00

6 that his condition was such that even though there are 15:58:05

7 heightened risks of taking a statin with Gemfibrozil, given 15:58:08

8 his medical condition, the potential benefits of that drug 15:58:15

9 combination outweighed the risks. That's what doctors are 15:58:20

10 supposed to do for a living. 15:58:23

11 And I have to explain to the jury in Mr. Samples' 15:58:24

12 case the fact that somebody takes that combination of drugs 15:58:29

13 because they've got a serious condition that can't be 15:58:32

14 treated in some other way and ends up experiencing one of 15:58:37

15 the side effects that's warned about in the label doesn't 15:58:41

16 mean anybody did anything wrong. This is going to be a 15:58:45

17 highly individual case. 15:58:47

18 Alleged injuries, Rhabdo, renal insufficiency, 15:58:49

19 muscle pain, loss of strength, he's got a medical history 15:58:53

20 like so many do, heart disease, three heart attacks, bypass 15:58:58

21 surgery, diabetes, hypothyroidism, etc., depression, 15:59:03

22 arthritis. Maybe that contributes to the muscle pains. 15:59:08

23 Once again, he has gotten the two tests that 15:59:14

24 their expert says would comprise a medical monitoring 15:59:17

25 program, and he got them for reasons having nothing to do 15:59:23

1 with taking Baycol. He got them because of his other 15:59:25

2 conditions. And in that sense, he truly is typical of the 15:59:29

3 class. 15:59:33

4 Katherine Swearengin, 81 years old from Colorado. 15:59:40

5 I'm trying to remember whether Ms. Swearengin was the very 15:59:48

6 thin person or the very heavy person. She was the thin -- 15:59:53

7 we are going to have the heavy person later, but Ms. 15:59:59

8 Swearengin was thin, and, so, she was taking 8 milligrams 16:00:04

9 from October, 2000 for 29 days. So, she was in that 16:00:08
10 category -- 19 days. She's in that category where at some 16:00:18
11 point and time a warning specifically identified old, thin 16:00:28
12 ladies as people who are particularly susceptible. As I 16:00:28
13 sit here right now, I can't remember whether those warnings 16:00:32
14 were out before or after she was taking her medicine. 16:00:35
15 That's going to be important to her case. 16:00:39
16 But for today's purpose, what it illustrates is 16:00:41
17 how individual these cases are going to be, because if the 16:00:44
18 warnings were out before she took it, we are going to say, 16:00:50
19 gee whiz, we told her doctor you have to especially careful 16:00:51
20 with old, thin ladies, of if we didn't have it out in time, 16:00:58
21 they are going to say, they should have told her doctor to 16:01:03
22 be especially careful about old, thin ladies. What took 16:01:05
23 them so long. And we are going to be asking questions 16:01:09
24 about why she started on .8 because from day one we said 16:01:14
25 don't start on .8, start on .4. All of those are going to 16:01:17

1 be individual facts. She took a bunch of different kinds 16:01:22
2 of medicine while she was on Baycol. Her alleged injuries, 16:01:24
3 Rhabdo, muscle weakness, pain, fatigue, dizziness. Medical 16:01:29
4 history, coronary artery disease, degenerative arthritis, 16:01:36
5 bilateral knee replacement, osteoporosis, heart attacks. 16:01:43
6 She's had bilateral knee replacement and osteoporosis, 16:01:47
7 degenerative arthritis. We're going to point to these 16:01:52
8 things when she says muscle weakness and pain must be due 16:01:54

9 to Baycol rather than pre-existing medical conditions. And 16:01:57

10 once again, she's already gotten the two tests that their 16:02:02

11 doctor says people should get, and she got it for reasons 16:02:06

12 having nothing to do with Baycol. 16:02:09

13 Now on these two people, what we got here are -- 16:02:12

14 the two people I just went through. Mr. Sample, remember, 16:02:18

15 he took Gemfibrozil along with Baycol. And Ms. Swearengin, 16:02:20

16 she started at .8. Now, we told people don't start at .8. 16:02:28

17 And we told people don't take Baycol along with 16:02:33

18 Gemfibrozil. 16:02:37

19 So, in these two cases, two of the class reps for 16:02:38

20 personal injury cases, there are going to be some serious 16:02:43

21 questions about comparative fault. As I said, maybe the 16:02:47

22 doctors had great reasons for doing this, but maybe they 16:02:50

23 were asleep at the switch. And maybe the jury is going to 16:02:55

24 decide that it's the doctors fault, or some of the blame 16:02:59

25 belongs on the doctor. Or maybe we'll find out that the 16:03:02

1 doctor warned them and warned of the risk, but they said, 16:03:06

2 no, I still want to take it, so, the jury might say, you 16:03:10

3 bear some of the responsibility for the decision because 16:03:16

4 you really did have your eyes opened. So, we have serious 16:03:17

5 comparative fault, I hesitate to use the word fault, 16:03:22

6 comparative responsibility issues here with these two 16:03:28

7 plaintiffs, and what the cases have said, the Rink case has 16:03:30

8 said, and I'm quoting here, that when you've got the 16:03:35

9 existence of issues of comparative fault, it, "practically 16:03:38
10 guarantees a Seventh Amendment violation." And that would 16:03:47
11 be if you had a class trial on general causation or general 16:03:47
12 liability that focused only on us. You'd have one jury 16:03:54
13 deciding that. And then we got another jury deciding 16:03:59
14 comparative fault issues. And that jury would be looking 16:04:02
15 at the same evidence and making the same determination as 16:04:07
16 to whether we did something wrong. 16:04:09
17 So, when you've got comparative fault issues 16:04:12
18 lurking out there, it guarantees a Seventh Amendment 16:04:16
19 violation. And the District Court here in Minnesota in the 16:04:18
20 Christian case has said that the mere spector of a Seventh 16:04:23
21 Amendment violation -- excuse me, the mere spector of a 16:04:29
22 Seventh Amendment violation should lead a court not to 16:04:32
23 bifurcate under Rule 42, which, of course, is one of the 16:04:35
24 procedures that they have as advanced as an alternative to 16:04:40
25 certification. So that the Seventh Amendment issues 16:04:46

1 involved with comparative fault, knock out the class and 16:04:47
2 knock out bifurcation. And the Rome Polank case from the 16:04:51
3 Seventh Circuit is to the same effect. 16:04:59
4 Okay, let's move through. Here's Ms. Gupta. We 16:05:04
5 listed her. She was originally listed as a personal injury 16:05:17
6 class member, therefore, we got the fact sheet and took a 16:05:23
7 deposition and I think on the day before the deposition 16:05:26
8 they withdrew her as a class rep, but she's, of course, a 16:05:28

9 member of the class and may, in fact, be quite typical. 16:05:33
10 She's 54 years old, North Carolina. She took .4, other 16:05:38
11 drugs. You can see she took a lot of different types of 16:05:44
12 medicine. After Baycol, she took Lipitor. So, again, we 16:05:47
13 are going to have questions about whether if she gets 16:05:52
14 tested and there's heightened levels of creatinine and what 16:05:56
15 was that from. 16:06:00
16 Incidentally, Judge, their expert testified under 16:06:02
17 oath that if you take a measure of creatinine three years 16:06:06
18 after somebody stopped taking Baycol and you see a 16:06:10
19 heightened level of creatinine, you cannot draw any 16:06:15
20 conclusion whatsoever whether that heightened level of 16:06:20
21 creatinine was due to taking Baycol. Can't draw any 16:06:24
22 conclusion on that. Especially you can't draw conclusions 16:06:28
23 on it when, in the mean time, she has been taking other 16:06:31
24 medicine that can elevate your creatinine level. 16:06:35
25 She had an extensive medical history. Remember 16:06:42

1 now, she's in the class, anyway, as a personal injury 16:06:44
2 plaintiff. And if you have a general causation trial that 16:06:50
3 she's not going to participate anymore because they decided 16:06:55
4 to use somebody else, she is still going to have a trial 16:07:01
5 down the road on muscle pain all over her body and a sharp 16:07:07
6 pain in her lower stomach. She is going to go back under 16:07:10
7 the Plaintiffs view of the world with a verdict in her 16:07:14
8 pocket that Baycol can cause X, whatever it is. Let's say 16:07:18

9 they have a question about whether Baycol can cause muscle 16:07:28

10 pain all over somebody's body, and the jury says, yes, it 16:07:28

11 can sometimes, depends on the person. Or even a special 16:07:33

12 verdict on whether it can cause sharp pain in the lower 16:07:34

13 stomach. Maybe. 16:07:39

14 So, we got a maybe verdict that we take back to 16:07:41

15 North Carolina and then try the real case and we put in 16:07:44

16 evidence of her medical history, soft tissue rheumatism, I 16:07:46

17 can't pronounce, psychogenic rheumatism, neurogenic 16:07:56

18 myopathy, chronic pain syndrome. Here we've got somebody 16:07:59

19 with chronic pain syndrome complaining about pain, saying 16:08:02

20 it's our fault, myofascial pain, osteoporosis, recurring 16:08:05

21 bursitis, degenerative disease of the cervical spine, heart 16:08:10

22 disease, three heart attacks, bypass surgery, diabetes, 16:08:17

23 hypothyroidism, et cetera. And, of course, she's had tests 16:08:20

24 already because of these other conditions that the medical 16:08:25

25 monitoring experts says she needs because of Baycol. 16:08:29

1 Now, we are into the medical monitoring class 16:08:41

2 itself. These, now, remember -- you know, in fairness to 16:08:41

3 the Plaintiffs' lawyers, Judge, I've been pointing out that 16:08:43

4 as to these four red people, the ones who are personal 16:08:48

5 injury class members, that they already got these tests 16:08:53

6 that the experts say should be given for medical 16:08:58

7 monitoring. That they already got the blood pressure test 16:09:01

8 and they already got the creatinine level test independent 16:09:05

9 of any concern of that any doctors have with Baycol. And a 16:09:11
10 fair response to me is, well, be sure they were personal 16:09:15
11 injury reps, and maybe that's why they got the test, and 16:09:18
12 they are not representatives of the medical monitoring 16:09:22
13 class. And, in fact, the way that Mr. Chesley defined the 16:09:25
14 medical monitoring class is people who are asymptomatic. 16:09:29
15 There's nothing wrong with them because of Baycol, at least 16:09:35
16 nothing that we know of yet, although we are worried that 16:09:39
17 something might be wrong with them. Therefore, we need 16:09:41
18 these tests. 16:09:45
19 So, let's take a look at the histories of the 16:09:47
20 class representatives they were able to find for the 16:09:50
21 medical monitoring tests. Tina Coutain from my state, 16:09:54
22 Illinois, 43 years old. She took .3 milligrams, '98 16:09:59
23 through '01. She took it for quite some time. She had 16:10:07
24 some other medicines that she took. Alleged injuries -- 16:10:11
25 muscle pain, weakness and fatigue. I just want to stop 16:10:18

1 here. 16:10:22
2 The class that the class action lawyers say she's 16:10:23
3 representatives of is defined as people who have not yet 16:10:26
4 suffered any injuries because of Baycol who are 16:10:30
5 asymptomatic. But when she says what her story is when she 16:10:37
6 fills out her form and when gives her testimony, she says, 16:10:42
7 I've been injured, muscle pain, back pain -- wrong line. 16:10:44
8 Here we are, muscle pain, weakness, fatigue. So no matter 16:10:51
9 what the class action lawyers say about the class that she 16:11:02

10 represents, she's claiming injuries. And when we go back 16:11:02

11 to Illinois, and I might get to try this one if it's in 16:11:06

12 Illinois, she's going to be asking for money for these 16:11:09

13 injuries even though they say she is representative of the 16:11:10

14 class of people who weren't hurt. Here she is, she is 16:11:13

15 supposed to be the representative of a class of people who 16:11:17

16 are asymptomatic but might have problems and, therefore, 16:11:25

17 need one-time test of blood pressure and creatinine. Well, 16:11:30

18 she's already had that test after she stopped taking 16:11:33

19 Baycol, and she had that test for reasons having nothing to 16:11:38

20 do with Baycol. 16:11:42

21 So, our first class rep is not in the class, and 16:11:45

22 has already gotten the testing that they say the class 16:11:50

23 members haven't gotten but should get. 16:11:51

24 And then we have a little testimony because what 16:12:02

25 we have is a paid expert who's come up with this medical 16:12:02

1 monitoring program. I'm going to have more to say about 16:12:07

2 him later, but we also have doctors who treat patients for 16:12:11

3 a living. 16:12:14

4 Question: Did any doctor recommend to you that 16:12:17

5 you pursue any medical follow up as a result of your use of 16:12:17

6 Baycol? Could you repeat it? 16:12:22

7 The witness: No. 16:12:25

8 So, that's the first of the medical monitoring 16:12:29

9 representatives. 16:12:31

10 The next one, Pearl Dardar and she's from 16:12:32
11 Louisiana. This is an interesting one because they picked 16:12:38
12 her as a representative for the medical monitoring class, 16:12:41
13 and she lives in the state where the state legislature has 16:12:46
14 enacted a statute that says you can't have medical 16:12:53
15 monitoring unless you also have a present injury. And they 16:12:56
16 have defined the class as people who do not have present 16:13:01
17 injuries. 16:13:05
18 So, their next representative is a woman whose 16:13:08
19 situations such that the state legislature is saying what 16:13:14
20 her claim is about and her class action lawyers saying what 16:13:17
21 her claim is about. She doesn't have a claim. All right. 16:13:23
22 She took .4. She took some other drugs. She's taking 16:13:28
23 Lipitor afterwards. That's important because a lot of the 16:13:33
24 members of the class would have taken other statins, so 16:13:36
25 that if they get their creatinine tested and it's 16:13:39

157

1 heightened, we have no idea if it's from Baycol or Lipitor. 16:13:44
2 No matter what the class action lawyers say about her, she 16:13:48
3 says that she was injured. Wheezing which has since been 16:13:53
4 resolved, shortness of breath, cramping. Medical history, 16:13:56
5 she's insulin dependent, diabetes. She was the one who's 16:14:00
6 overweight and not the thin, old lady. That obesity might 16:14:07
7 have something to do with the shortness of breath, but that 16:14:12
8 will have to wait for the individual trial down in Baton 16:14:15
9 Rouge. Hypertension, that probably explains why she's 16:14:21

10 already got the blood pressure tests. Here she is a class 16:14:25

11 member that they say is typical of the people who have not 16:14:28

12 gotten this program but need it. She's gotten in the 16:14:30

13 program for reasons not having to do with Baycol. 16:14:36

14 Her testimony. Did Dr. Johnson recommend that 16:14:38

15 you receive any medical follow up as a result of your use 16:14:40

16 of Baycol? No, she didn't tell. 16:14:45

17 Question: Have you ever seen Dr. Johnson since 16:14:47

18 you went off Baycol? Yes. Have you seen any other 16:14:50

19 physicians since you went off Baycol? No. 16:14:54

20 So her doctor, treating physician, doesn't think 16:14:57

21 she needs these tests that are being imposed on her, but 16:15:00

22 happily for her, she's already had them anyway. So, she is 16:15:03

23 one of their class reps. 16:15:06

24 The next one -- and, of course, each one of these 16:15:08

25 is going to have different story as to liability issue as 16:15:13

1 to us that they start taking the medicine at different 16:15:18

2 times and different doses. 16:15:20

3 Ms. Swearengin who took .8 had a different story

4 from the next person we'll click on, Jack Hartman, 67. He 16:15:29

5 is from Minnesota, and in Minnesota federal courts have 16:15:33

6 rejected medical monitoring claims. So, he's a class rep 16:15:36

7 and he lives in the state where court says you don't have a 16:15:40

8 cause of action. He took Gemfibrozil after he took Baycol. 16:15:44

9 Gemfibrozil, incidentally, can cause Rhabdo and many of the 16:15:54

10 same conditions that can be caused by statins. 16:15:57

11 They say that he's asymptomatic like all the 16:16:01

12 other class members. He begs to differ. He says that he 16:16:07

13 was injured by Baycol even though they say he was not. 16:16:12

14 He's got a medical history of diabetes, pernicious anemia, 16:16:15

15 prostate problems, etc., degenerative disk disease that can 16:16:20

16 contribute to his weakness, bilateral leg weakness that 16:16:28

17 might explain the leg pain. And, again, like the others, 16:16:34

18 he's already gotten the test because they are routine 16:16:37

19 tests. Blood pressure tests, these are people who have a 16:16:41

20 lot of medical problems and they go to the doctor 16:16:45

21 regularly, and the doctor takes their blood pressure all 16:16:46

22 the time. Because of the nature of the problems that they 16:16:49

23 have, they always get this test, too. 16:16:53

24 His deposition. Again, we were contrasting real 16:16:59

25 life doctors who take care of patients to hired experts who 16:17:05

1 are designing a medical monitoring protocol. 16:17:09

2 Mr. Hartman, did any doctor recommend that you 16:17:12

3 receive any medical follow up as a result of your use of 16:17:17

4 Baycol? Answer: I don't think so. 16:17:21

5 William Krohn, 69 years old, another Minnesotan. 16:17:28

6 Unfortunately for him, the federal courts have decided that 16:17:34

7 he doesn't have a cause of action for the theory under 16:17:40

8 which they are holding him for as a class representative. 16:17:45

9 He took 3 milligrams from '99 to 2000. His story is going 16:17:50

10 to be a lot different from everybody else. Statins after 16:17:55

11 Baycol. 16:18:04

12 Here's an interesting one. He took Lipitor and 16:18:04

13 then he switched form Lipitor to Mevacor. Why did he 16:18:04

14 switch from Lipitor? Because while he was on Lipitor, he 16:18:08

15 experienced muscle soreness and complaints. Lipitor warns 16:18:10

16 about aches and pains just like we warn about aches and 16:18:14

17 pains. When he took Lipitor and he got aches and pains, he 16:18:20

18 switched to Mevacor. When he took Baycol, he claims to 16:18:23

19 have gotten leg pains. All of a sudden he's a class 16:18:28

20 representative in a 900,000-person lawsuit. 16:18:32

21 Medical history. You can see he's got heart 16:18:37

22 problems. Once again, forgetting about the fact that he 16:18:40

23 doesn't have a cause of action because he lives in 16:18:48

24 Minnesota. He, like the others, routinely gets the medical 16:18:48

25 tests that their expert claims are needed by the class 16:18:53

1 members. 16:18:59

2 Then, again, contrasting the expert who was hired 16:19:03

3 to come up with the monitoring program, real life doctor. 16:19:07

4 Sir, has any doctor told you needed any monitoring, any 16:19:12

5 testing for your prior use of Baycol? Answer: No. And if 16:19:15

6 we test him again and he's got heightened creatinine is 16:19:22

7 that Baycol, is that Lipitor, is it Mevacor? 16:19:26

8 Marsha Miller. If we just back up for a minute, 16:19:33

9 we see that Marsha Miller, she is one of the people who 16:19:36

10 took two different doses, so when it gets to her individual 16:19:41

11 liability claims, hers is going to be different from a lot 16:19:46

12 of others because she's going to be talking about what was 16:19:48

13 known when .3 was around and what was know when .4 was 16:19:51

14 around, and should we have come out with .4, and should we 16:19:55

15 have done something different. So, we're going to have 16:19:59

16 those kinds of individual facts. 16:20:02

17 And then when we get to her situation, she's 60 16:20:03

18 years old from Ohio. She's taken a lot of other medicines. 16:20:06

19 She is taken Lipitor after Baycol. So, we're going to have 16:20:12

20 that same question with creatinine, alleged injuries. Once 16:20:18

21 again, Judge, every single person that they have put forth 16:20:23

22 as class rep for the medical monitoring class, people who 16:20:25

23 are asymptomatic who have suffered no injuries as of yet, 16:20:32

24 every single one of them disagrees with the class action 16:20:32

25 lawyers and claims that they suffered injuries. 16:20:36

1 In Marsha Miller's case, ache and pains, fatigue, 16:20:38

2 urinary tract infection. She alleges that and all symptoms 16:20:43

3 have resolved except for the right arm and shoulder pain. 16:20:50

4 And all of this, according to her, is because of Baycol.

5 We looked at her medical history, musculoskeletal 16:20:54

6 complaints. That might have something to do with the aches 16:20:58

7 and pains when they get down to the individual case, torn 16:21:01

8 tendon in the shoulders. She says that she's got shoulder 16:21:05

9 pain because of Baycol. That might be because of a torn

10 tendon. Acute neck and right shoulder sprain. Once again, 16:21:09

11 the thing that she blames on Baycol. We're going to point 16:21:14

12 to some other potential causes. And I'm spending a lot of 16:21:21

13 time on this, but, it's her case that's going to be 16:21:23

14 advanced by a general verdict that says Baycol can cause 16:21:26

15 aches and pains. She's going to say -- go back to 16:21:31

16 Columbus, Ohio and I've got a verdict in my pocket that 16:21:37

17 Baycol caused aches and pains. And then the real trial 16:21:41

18 begins, and the individual issues are going to predominate. 16:21:45

19 Like the others, for reasons having nothing to do 16:21:54

20 with Baycol, she's already got the blood pressure tests. 16:21:55

21 She's already got the creatinine test. Like the others, 16:22:00

22 her real life doctor doesn't see a need for any of this 16:22:05

23 medical follow up that the class action lawyers would like 16:22:08

24 us to fund and then pay them for securing. 16:22:11

25 Now, we move to the refund class. Joan 16:22:23

1 Dobrowits, 66, from Illinois, .4. She took Baycol pretty 16:22:30

2 late in the game, last couple of months it was on the 16:22:39

3 market. She had some other medicines. She is taking 16:22:41

4 Lipitor. Since then she's hypertension and obesity. She 16:22:44

5 is not -- she's in the refund class. I don't know whether 16:22:50

6 or not, I can't remember off the top of my head whether 16:23:01

7 that's supposed to include people who were injured or not. 16:23:01

8 I guess it overlaps. So, anyway, she claimed that she was 16:23:07

9 injured, hypertension and obesity. She's already had the 16:23:09

10 tests that they say everybody should have. 16:23:13

11 She gave some interesting testimony. It's 16:23:17

12 interesting because they hold her out as a representative 16:23:23

13 of the refund class. Ma'am, do you feel cheated by what 16:23:25

14 you paid for Baycol? Answer: I don't feel cheated for 16:23:28

15 what I paid. Question -- and I need to give you a little 16:23:33

16 background. She had two prescriptions that cost $45 a 16:23:37

17 piece. One prescription she took the medicine. The other 16:23:42

18 prescription she got in August, and as soon as the 16:23:47

19 withdrawal was announced, she stopped take Baycol. So she 16:23:50

20 never took that prescription. Since she had a $45 16:23:55

21 prescription that she paid for and she never took the 16:24:00

22 medicine. 16:24:03

23 One of the things we did when we withdrew Baycol 16:24:04

24 from the market, because we said listen, if anybody is out 16:24:10

25 there who purchased Baycol, obviously, you're going to have 16:24:14

1 second thoughts about taking Baycol. We don't want you to. 16:24:16

2 You give us back your Baycol, and we'll give you a full 16:24:21

3 refund for what you pay. 16:24:25

4 So, and you were given the opportunity to get the 16:24:26

5 $45 for the second prescription by Bayer, correct? Answer: 16:24:32

6 That's correct. And you had chose not to do that at that 16:24:39

7 time? Answer: That's correct. By the advice of your of 16:24:41

8 your lawyer friends, correct? Answer: Correct. 16:24:47

9 She's a class rep and half of her claim we wanted 16:24:51

10 to give her the money back and she wouldn't take it because 16:24:57

11 the lawyer told her that maybe -- we don't know what the 16:25:00

12 lawyer told her, but on advice of counsel. 16:25:03

13 Last person is James Broadway, another member of 16:25:08

14 the refund class, 68, from Louisiana, taking Lipitor since 16:25:12

15 he came off of Baycol. Like every single person that we've 16:25:17

16 seen, he claims injury from Baycol. I don't know if they 16:25:25

17 want to have a general verdict form or general causation 16:25:32

18 verdict on whether Baycol can cause heart skip, but at 16:25:36

19 least we have to think about that because it's not going to 16:25:41

20 do any good if you don't include it. Weakness and pain in 16:25:43

21 hips and leg. Then he's got a medical history that might 16:25:50

22 explain some of this. Like everybody else that we've 16:25:54

23 looked at, every single class representative of every 16:25:56

24 single class, he, for reasons having nothing to do with 16:26:02

25 Baycol, has already received the tests that their hired 16:26:04

1 expert says is needed for medical monitoring. 16:26:08

2 And then the testimony. We heard that Baycol 16:26:11

3 doesn't work. It's not effective. And one reason that 16:26:15

4 everybody should get a refund is because the medicine 16:26:20

5 doesn't work, even if they are one of the lucky ones, as 16:26:23

6 one of the lawyers said, as I would say, one of the lucky 16:26:28

7 99 percent whom the medicine worked perfectly. They said, 16:26:31

8 you know, they weren't injured. She said nevertheless the 16:26:37

9 medicine didn't work, so they're entitled to a refund, and 16:26:40

10 the medicine doesn't work. It didn't do what it said it 16:26:45
11 was going to do, lower the cholesterol. Well, he said that 16:26:49
12 it did lower his cholesterol. So, he wants a refund for 16:26:55
13 medicine that did what it was supposed to do. And then we 16:26:55
14 are going to have a question of whether -- even though the 16:26:59
15 medicine did what it was supposed to do, which was lower 16:27:05
16 his cholesterol, whether he's entitled to a refund or 16:27:08
17 damages for personal injury because he says a heart skip 16:27:15
18 was caused by Baycol. And when we get to that one, we're 16:27:19
19 going to say, you know what, maybe that was because of your 16:27:22
20 abnormal heart rhythm because your pre-existing abnormal 16:27:24
21 heart rhythm is fancy way of saying heart skip. 16:27:30
22 So, those are the individual representatives of 16:27:36
23 the classes. And if I got -- if my tone turned dark, it's 16:27:40
24 not because these individuals have done anything wrong, 16:27:49
25 Your Honor. And it's not because of any ill-feelings that 16:27:54

1 we have towards them. It's because they have been ill-used 16:28:02
2 in this litigation when they have been held out as 16:28:05
3 representatives of classes that they don't even belong in. 16:28:08
4 Now, while which are talking -- 16:28:13
5 THE COURT: Before -- this is just on the side 16:28:25
6 dealing with the personal injury cases, if you could pull 16:28:25
7 one of those up for me. 16:28:30
8 MR. BECK: Sure. Any one in particular? 16:28:32
9 THE COURT: It doesn't matter. 16:28:38

10 MR. BECK: Gupta was a former one, so I'll take 16:28:38
11 the first one A'gui. 16:28:39
12 THE COURT: Dealing with the types of cases that 16:28:46
13 you are settling, and those are the serious Rhabdo cases. 16:28:47
14 MR. BECK: Rhabdo we define as serious for 16:29:01
15 settlement purposes. We're settling Rhabdo cases. 16:29:04
16 THE COURT: Rhabdo cases, are those the cases 16:29:06
17 where those individuals don't have any other problems or 16:29:11
18 are they -- is this typical? 16:29:18
19 MR. BECK: This is typical. We've got, you know, 16:29:22
20 everybody -- not everybody -- almost everybody -- 16:29:26
21 THE COURT: You see what I'm getting at? These 16:29:28
22 are elderly people that have a lot of problems. 16:29:31
23 MR. BECK: Absolutely. And we are not going to 16:29:37
24 refuse to settle with somebody because -- 16:29:38
25 THE COURT: If I asked the group here how many 16:29:42

1 are taking a cholesterol-lowered drug, I think we could get 16:29:47
2 a nice sampling. So, I'd like to get in my mind what kind 16:29:54
3 of cases are you settling. This person has a Rhabdo case. 16:29:59
4 If she came -- if he came to you, would he fit under your 16:30:05
5 criteria for settling. 16:30:09
6 MR. BECK: What I propose to do is to take two 16:30:11
7 minutes and click on each one of these and answer that, 16:30:14
8 give you a yes or not. Somebody who knows more about 16:30:17
9 settlement can tell me if I got it wrong. 16:30:20

10 If somebody -- if Mr. A'gui came to us or his 16:30:23
11 lawyer came to us and said my client has documented Rhabdo 16:30:26
12 here in the medical records and he got it in a time frame 16:30:32
13 that make sense to connect it with Baycol, we would say, we 16:30:36
14 want to settle your case. Let's talk about the right 16:30:42
15 amount of money. 16:30:45
16 If Mr. Sample came to us and said -- Mr. Sample's 16:30:47
17 lawyer came to us and said he had Rhabdo, and I'm assuming 16:30:53
18 incidentally, Your Honor, that this Rhabdo, is temporally 16:30:59
19 associated with Baycol, and his lawyer said, I've got to 16:31:04
20 come clean with you because he also took Gemfibrozil at the 16:31:08
21 same time, so there is a serious question of 16:31:14
22 co-administration, if you want to defend this case on the 16:31:18
23 merits, we'd say we don't want to defend this case on the 16:31:20
24 merits. If he had Rhabdo and he took our medicine and it's 16:31:21
25 associated, we want to talk about what amount of money is 16:31:24

1 fair for Mr. Sample. 16:31:27
2 Next, is Ms. Swearengin. Ms. Swearengin comes in 16:31:33
3 with Rhabdo. She took .8 at a time when we were warning 16:31:39
4 not to start on .8 but she started on .8 anyway, we would 16:31:45
5 say we are not interested in litigating that defense if we 16:31:49
6 can come to a fair resolution. That's the kind of case we 16:31:54
7 want to settle. It was our medicine. You got Rhabdo, and, 16:31:58
8 so, let's sit down and talk. 16:32:02
9 Ms. Gupta, even though she is no longer in the 16:32:08

10 class. She comes in and her lawyer says she's got muscle 16:32:08

11 pain all over her body. She's got sharp pain in her lower 16:32:10

12 stomach, and she'd like some money from you because she 16:32:15

13 took the Baycol. And we say, tell Ms. Gupta we'll see her 16:32:16

14 in court because we are not settling aches and pains case, 16:32:21

15 and we think that these aches and pains are due to all of 16:32:23

16 her other conditions and we are not going to pay that kind 16:32:27

17 of tribute. 16:32:30

18 THE COURT: The rest of them I don't think have 16:32:35

19 Rhabdo. 16:32:38

20 MR. BECK: I don't think they do either

21 THE COURT: No, just so I have a frame of 16:32:38

22 reference. 16:32:40

23 MR. BECK: That's the basic approach we would 16:32:43

24 take. 16:32:45

25 THE COURT: I was just making sure that the 16:32:46

1 people that you are settling with were pristine clean and 16:32:47

2 only taking Baycol and that was the only thing they were 16:32:53

3 taking. 16:32:57

4 MR. BECK: No, no. They could take a cocktail of 16:33:00

5 medications, any one of which could cause Baycol. They 16:33:00

6 could take them with Gemfib. They could have taken with 16:33:06

7 .8. They could have fallen down the stairs, but if they 16:33:11

8 have Rhabdo that's temporally associated with taking our 16:33:14

9 drug -- our whole point is we don't want to fight in those 16:33:18

10 cases. If somebody has an injury that fairly could be 16:33:22
11 said --
12 THE COURT: I didn't want to obstruct you. I 16:33:23
13 just wanted to --
14 MR. BECK: I get carried away when I start 16:33:28
15 talking the settlement program. I apologize. I don't have 16:33:31
16 quite the same positive passion when I talk about refund 16:33:34
17 class, however, which is what I would like to turn to now. 16:33:39
18 We were talking about refund Plaintiffs, the 16:33:43
19 green guide down here at the bottom. And I showed you the 16:33:44
20 testimony from Mr. Broadway who said that when he took 16:33:49
21 Baycol, his cholesterol went down. We also know that he 16:33:54
22 didn't get Rhabdo. He may claim whatever it is he's going 16:33:59
23 to claim about other ailments, but his cholesterol went 16:34:05
24 down, and he didn't get Rhabdo, and in our view, the 16:34:09
25 medicine worked for him, and they hold him out as someone 16:34:14

1 who is typical of those who should get refunds for what 16:34:18
2 they paid. 16:34:21
3 When I was listening to the economic analysis, I 16:34:24
4 was wondering how it would work in its full glory because 16:34:27
5 if he wasn't taking Baycol when he had this cholesterol 16:34:32
6 problem, he probably would have been taking Lipitor or some 16:34:37
7 other statin to lower his cholesterol. And let's hope and 16:34:42
8 assume that Lipitor worked for him. Let me put him up and 16:34:47
9 see if he took anything else so I can stop my guessing. 16:34:53

10 Lipitor, there we go. Let's say that he hadn't taken 16:34:58

11 Baycol because we never it put on the market, and instead, 16:35:02

12 during that period from October or November of '99 to 16:35:06

13 August of '01 he was taking Lipitor. And let's say that 16:35:11

14 Lipitor worked just as well as Baycol did and his 16:35:15

15 cholesterol was lowered. And let's say that Lipitor, like 16:35:20

16 Baycol, did not cause Rhabdo or any side effects. Well, 16:35:25

17 his economic condition would be as follows. His 16:35:29

18 medical/economic condition would be as follows. He'd have 16:35:42

19 low cholesterol because the medicine worked, but he would 16:35:42

20 be worse off economically because Lipitor is more expensive 16:35:47

21 than Baycol. 16:35:54

22 So, if we're going to do this kind of -- I just 16:35:55

23 say that to illustrate what I think is, frankly, the 16:35:55

24 silliness of trying to impose this kind of economic damages 16:35:59

25 class. These are not people who got ripped off when they 16:36:03

1 bought a BMW. These are people who were getting prescribed 16:36:10

2 medicine to lower their cholesterol and the medicine did 16:36:16

3 lower their cholesterol. And if they did not have our 16:36:21

4 medicine, they would have been taken somebody else medicine 16:36:28

5 and maybe it would have lowered their cholesterol, too, but 16:36:31

6 they would have had to pay for it, and they would have paid 16:36:37

7 more money for the other medicine. So nobody suffered any 16:36:38

8 economic damages here. Maybe that goes to the merits of 16:36:43

9 the claim, but since we heard an impassioned plea 16:36:46

10 concerning the cry for justice for this class, I think it's 16:36:51

11 worth pausing and reflecting that in real life, there are 16:36:55

12 no economic damages here. The only way there's damages is 16:36:59

13 if the medicine didn't worked and you got hurt, in which 16:37:04

14 case he's in the personal injury class. 16:37:09

15 Okay, so off we go. There is Mr. Broadway. 16:37:17

16 Lucky for him the medicine worked. And they may say Mr. 16:37:21

17 Broadway is the exception that proves the rule. If he is, 16:37:25

18 then I don't on know why they got him as the class rep, but 16:37:28

19 nevertheless, their class rep the medicine worked. 16:37:34

20 Let's see what his doctor said about whether the 16:37:36

21 medicine worked for other patients, because what we have 16:37:39

22 heard today is testimony from the lawyers who want to 16:37:43

23 represent the classes saying that the medicine was 16:37:49

24 ineffective. The lawyers' testimony, however, differs 16:37:52

25 substantially from the real testimony of the doctors who 16:37:59

1 prescribed the medicine. Here is his doctor, Dr. Murtor, I 16:38:03

2 think is how his doctor's name is pronounced. Out of the 16:38:10

3 hundreds of patient that you prescribed Baycol to, for how 16:38:14

4 many did Baycol reduce cholesterol? Answer: Practically 16:38:20

5 all of them unless I had to get into higher doses. 16:38:27

6 Question: Of the hundreds of patients that you prescribed 16:38:32

7 Baycol to, did any develop Rhabdo? Answer: No. 16:38:35

8 Let me also move up to Page 94 of his testimony, 16:38:42

9 and I'm actually going to basically take a minute and read 16:38:47

10 the whole page because it's worth contrasting sometimes 16:38:52

11 what the doctors say with what the lawyers say. 16:38:56

12 How many times patients did you prescribe Baycol 16:39:00

13 to? Answer: Practically -- eventually, almost everybody I 16:39:04

14 had. Question: Why did you prescribe Baycol to everybody 16:39:08

15 you had? Answer: Because it was like a little Lipitor, 16:39:12

16 except for about half the price. And a little Lipitor 16:39:17

17 means it was about as effective as Lipitor, except when you 16:39:23

18 got into the high numbers like 40's and the 80's. And but 16:39:23

19 at the level that we were using Baycol, and I think it was 16:39:29

20 .4 and then we went to .8, that was about equivalent to 16:39:33

21 Lipitor 10 and Lipitor 20. Now, once you got to .8, you 16:39:37

22 couldn't compete with Lipitor 40 and 80 because that was 16:39:42

23 the top of the line, and that's where we are today. That's 16:39:46

24 what we are still using. But Baycol was as effective as 16:39:50

25 Lipitor and it would improve the numbers dramatically, 16:39:55

1 better than all the others right along with Lipitor. 16:39:59

2 So, of course, his hundreds of patients, every 16:40:06

3 single one of whom benefitted from Baycol because their 16:40:07

4 cholesterol went down. And every single one of whom paid 16:40:12

5 less for their medicine than they would have paid if they 16:40:17

6 had been taking Lipitor. Every single one of his patients 16:40:21

7 are in their refund class, because according to the class

8 action lawyers, they got ripped off. 16:40:26

9 I want to show you now, Judge, what the Rezulin 16:40:32

10 court said about a similar claim for a refund class. This 16:40:35

11 is the Rezulin case, Your Honor, and the court says, "In 16:41:27

12 order to obtain restitution of the purchase price of 16:41:32

13 Rezulin, Plaintiffs and class members would be obliged, at 16:41:34

14 least in many jurisdictions, to prove some kind of harm. 16:41:37

15 In other words, although theories presumably could differ," 16:41:41

16 and, of course, that just gets, you know, the 51 state laws 16:41:45

17 issue, "but, in other words, although theories presumably 16:41:48

18 could differ, they would have to establish that they were 16:41:52

19 injured by detrimental reliance on a fraudulent or 16:41:55

20 misleading statement. That the defendants retention of the 16:41:58

21 price they paid for the drug would be unjust, and that the 16:42:01

22 value of the drug given if its allegedly concealed defects 16:42:05

23 was less than the purchase prices or some other variation 16:42:08

24 that would warrant the transfer of money from the 16:42:12

25 defendants to them. Every one of these theories would 16:42:15

1 involve issues individual --" where are we here. I've got 16:42:19

2 to move up a little bit. Excuse me -- "every one of these 16:42:28

3 theories would involve issues individual to the particular 16:42:35

4 class member. The New Jersey Consumer Fraud Act upon which 16:42:39

5 plaintiffs rely, for example, affords the right to 16:42:45

6 monetary relief only if there has been an ascertainable 16:42:50

7 loss in consequence of the consumer receiving something 16:42:52

8 other than what he bargained for and losing the benefits of 16:42:56

9 the product which he was led to believe he purchased. 16:43:00

10 Plaintiffs contention that everyone that took Rezulin 16:43:00
11 sustained an ascertainable loss, presumably that Rezulin 16:43:06
12 was worthless, but that is not a defensible position. Even 16:43:08
13 Plaintiffs' experts acknowledge that Rezulin was enormously 16:43:12
14 beneficial to many patients." And go over to the next 16:43:19
15 pages. And, incidentally, their paid expert also 16:43:25
16 acknowledged that. 16:43:28
17 The court goes on, "Those patient presumably got 16:43:31
18 their money's worth and suffered no economic injury. And 16:43:38
19 the question whether an individual class member got his or 16:43:38
20 her money's worth is inherently individual. Indeed, it 16:43:41
21 would involve very much the same questions as would a claim 16:43:43
22 for money damages for personal injury." 16:43:48
23 I've been focusing on the class representatives 16:43:52
24 that were chosen by the class action lawyers to represent 16:43:58
25 the classes. We also look through a whole stack of fact 16:44:00

1 sheets that were submitted by Plaintiffs -- excuse me, Your 16:44:08
2 Honor. We basically grabbed a handful of them, the first 16:44:16
3 900 or so that they gave us we looked at. And what we 16:44:20
4 found is there is just an amazing variety of injuries that 16:44:26
5 people claim they sustained because of Baycol. Let me see 16:44:36
6 if I can get the right slide up here. Here we are. 16:44:42
7 This is -- we just kind of picked some names at 16:44:46
8 random and looked at the injuries. These are injuries -- 16:44:49
9 these not pre-existing medical conditions. These are 16:44:55

10 injuries that these people when they fill out their claim 16:44:57

11 sheets blame on us, and they say I took Baycol and Baycol 16:45:01

12 caused the following problems, gas pain, constipation, 16:45:10

13 reflux, loss of sex drive, eye focusing problems, decreased 16:45:12

14 urine output -- sounds like my last week -- increased urine 16:45:18

15 output, depressed immune system, fatigue, cataracts, 16:45:25

16 sinusitis, drug help, drug-induced hepatitis, pain, weak 16:45:31

17 thumb joints, hearing voices, memory loss, confusion, 16:45:33

18 anxiety, reddish lesions. 16:45:38

19 Now, no matter what the class action lawyers say 16:45:42

20 about how they want to define their class, these were the 16:45:45

21 injuries that these people are claiming. These are the 16:45:49

22 injuries that class members say they sustained. And if 16:45:52

23 they're going do pursue these claims, we're going to have 16:45:54

24 trials over whether Rhabdo causes loss of sex drive or 16:45:59

25 whether it makes your urine output goes up or down or 16:46:07

1 leaves it the same. And none of this is going to be 16:46:10

2 advanced one inch by common issue trial on whether Baycol 16:46:13

3 caused Rhabdo. 16:46:20

4 Incidentally, Judge, I wouldn't bother convening 16:46:23

5 a jury to decide the issue of whether Baycol can cause 16:46:27

6 Rhabdo, which is one of the issues they pose. Of course, 16:46:29

7 it can cause Rhabdo. We've been saying that on our labels 16:46:32

8 forever. So, we don't need a verdict on that. The 16:46:36

9 question on injuries is going to be can it cause these 16:46:39

10 other things, and not just can it cause these other things, 16:46:43

11 did it cause these other things to these Plaintiffs. 16:46:47

12 Here's a summary of these slides. This touches 16:46:55

13 on, you were asking about percentages, Your Honor, to some 16:47:00

14 point this is a self-selected group because they are people 16:47:05

15 who filed suit. So, obviously, you are going to get a 16:47:11

16 higher percentage of Baycol users who had Rhabdo among 16:47:15

17 those who filed suit than you will among those who didn't 16:47:21

18 file suit. In fact, you would be pretty surprised if you 16:47:27

19 had anybody who suffered from Rhabdo that's associated with 16:47:29

20 Baycol who hasn't filed suit, or at least hired a lawyer. 16:47:31

21 So, anyway you look at these first 909, 70 are 16:47:38

22 Rhabdo, 3 you could say possible Rhabdo, 34 claim kidney 16:47:45

23 failure, 724 we put in generically the aches and pains 16:47:50

24 category. They were described using various types of 16:47:56

25 language. 38 in the miscellaneous physical ailments like 16:48:00

1 cataracts, 8 psychological injuries, and 32 of them said 16:48:09

2 they didn't suffer any injury at all. 16:48:15

3 So, when we look at the people who filed claims. 16:48:21

4 What we see is that the overwhelming majority of the 16:48:24

5 so-called injury claims are these aches and pains 16:48:28

6 situations. Now, what's going to be important, in the real 16:48:33

7 life trials is that there is going to be causation issues 16:48:42

8 about why do they have aches and pains. There may be an 16:48:46

9 issue about whether somebody really have aches and pains or 16:48:50

10 whether it's just cashing in on our misfortune. 16:48:54

11 Let's assume that all of them had aches and 16:48:59

12 pains, and the question is where did these aches and pains 16:49:00

13 come from? Did they come from Baycol. And, of course, we 16:49:05

14 warned against aches and pains. We said you saw every one 16:49:07

15 of our warning labels. If you experience aches and pains, 16:49:11

16 consult your doctor. And we did that because aches and 16:49:16

17 pains could be precursor to Rhabdo, an early warning signal 16:49:20

18 from Rhabdo. So, we said if you got any aches and pains, 16:49:24

19 talks to your doctor. Well, there's all these people that 16:49:25

20 got aches and pains, you know, didn't get Rhabdo and they 16:49:31

21 claim their aches and pains are our fault. 16:49:31

22 Well, what's going to happen at the trials, no 16:49:34

23 matter what happens in this court, no matter what happens 16:49:38

24 if they are able to persuade Your Honor to certify a class, 16:49:41

25 we were going to have questions about what really caused 16:49:47

1 the aches and pains. 16:49:51

2 What we've done here, now, is this is a list -- 16:49:55

3 we went through all the class representatives, the injury 16:49:57

4 class, medical monitoring class, and the refund class, and 16:50:05

5 we listed all of the medical conditions, the medical 16:50:05

6 conditions having nothing to do with Baycol that they had 16:50:09

7 listed on their record. And, now, what we did is we said 16:50:13

8 maybe the aches and pains could come from is these other 16:50:17

9 medical conditions. So, what I'm going to do here -- and 16:50:21

10 this is testimony that's going to have to come in in actual 16:50:25

11 trials. You know, we consulted with a nurse on this, so 16:50:28

12 I'm not going to pretend that this is based on a peer 16:50:33

13 reviewed article. But the nurse practitioner, I said, well 16:50:40

14 circle in red or highlight in red these medical conditions 16:50:41

15 that the class reps had that might account for the aches 16:50:47

16 and pains. 16:50:52

17 So, Your Honor, the injury class here is 16:51:34

18 overwhelmingly aches and pains, and they want you to 16:51:34

19 certify a class and get some kind of a verdict that says 16:51:37

20 Baycol can cause aches and pains and that is not going to 16:51:45

21 advance the ball because they all have a host of medical 16:51:52

22 conditions, all of which can result in aches and pains. 16:51:56

23 And you know what, Judge, a lot of them are old people and 16:51:59

24 old people get aches and pains. 16:52:04

25 THE COURT: I beg your pardon. (Laughter). 16:52:06

1 MR. BECK: I don't have any color treatment on 16:52:17

2 this one, but -- 16:52:20

3 THE COURT: The reason I said that is because my 16:52:21

4 kids think that I'm old. 16:52:26

5 MR. BECK: Well, I know better, Your Honor. My 16:52:30

6 kids are older than your kids. 16:52:31

7 THE COURT: And when I walk up the stairs and cry 16:52:34

8 out about pain, then I'm an old man. 16:52:38

9 MR. BECK: Well, I hope you didn't take Baycol, 16:52:42

10 because otherwise you would in the class. 16:52:45

11 THE COURT: No, I take Lipitor. (Laughter). 16:52:49

12 MR. BECK: Read the label because it can cause 16:52:51

13 it, too. 16:52:54

14 We also went and took a look at the medications. 16:52:56

15 Remember, we went through all those medications that they 16:53:00

16 all took. So, we listed here by referencing the 16:53:04

17 Physician's Desk Reference. Just looking at the class reps 16:53:07

18 now. All of these medicines that they took, including 16:53:13

19 Lipitor, like you're taking, and all these other medicines 16:53:18

20 that do other things, all of those can cause aches and 16:53:24

21 pains. So, this is going to be obviously overwhelmingly 16:53:33

22 individual questions on causation, and this goes to the 16:53:37

23 overwhelming majority of the claimants here. 16:53:42

24 This also gives you some indication, I hope, Your 16:53:46

25 Honor, of why it is we aren't writing checks to people who 16:53:49

1 show up and say, I saw a commercial on cable television 16:53:55

2 last night from a law firm where it said if you took Baycol 16:53:59

3 call this new number, you may have a claim. I've got aches 16:54:05

4 and pains. Write me a check. We are saying no to those 16:54:13

5 people. 16:54:15

6 There's even other causes for Rhabdo. Other 16:54:15

7 statins can cause Rhabdo. Gemfibrozil by itself can cause 16:54:21

8 Rhabdo. The single leading cause of Rhabdo in the United 16:54:29

9 States is alcoholism. It's a big problem. This comes from 16:54:33

10 the Annals of Clinical Bio-Chemistry -- trauma, you get in 16:54:36

11 an accident and fall down the stairs. You can have the 16:54:43

12 same -- when I say Rhabdo, I mean not just you were sober 16:54:46

13 and you get the real condition of Rhabdo, that leakage to 16:54:49

14 the muscular walls, crushed injuries, all kinds of things, 16:54:54

15 snake bites, lightning strikes. You know, there's a host 16:54:58

16 of potential causes. 16:55:03

17 This, you know, frankly, is unlikely to be a big 16:55:06

18 issue in any particular cause, certainly in our settlement 16:55:08

19 program. If somebody comes to us and there is a temporal 16:55:11

20 association between Rhabdo and taking Baycol, we are 16:55:21

21 treating that as established causation. But there may be 16:55:21

22 cases where, in effect, I think there are claims that have 16:55:28

23 been filed here where they stopped taking Baycol and they 16:55:30

24 start taking a different statin, or they start taking 16:55:35

25 Gemfibrozil and four months later, they come down with 16:55:38

1 Rhabdo and they're claiming it's because of us. And then 16:55:42

2 it doesn't make any sense because our drug then has been 16:55:47

3 flushed out of the body. They're taking other drugs that 16:55:53

4 can cause Rhabdo and they're trying to blame us. So, even 16:55:55

5 on Rhabdo in some cases there can be issues. 16:56:00

6 I want -- I've been talking about real life 16:56:10

7 individual causation. I want to spend a few moments now on 16:56:11

8 their arguments concerning general causation because their 16:56:19

9 response is, well, we don't want to try that cause over 16:56:22

10 whether is Ms. Swearengin's problems are really due to 16:56:25

11 Baycol. We just want a general causation verdict about 16:56:30

12 what problems can be caused by Baycol. 16:56:34

13 I mentioned already that at various points in the 16:56:39

14 class action briefing, they have talked about how they want 16:56:44

15 a class action to determine whether Baycol can cause 16:56:48

16 Rhabdo. We don't need a class action to determine whether 16:56:55

17 Baycol can cause Rhabdo. That's admitted. That's on our 16:56:58

18 labels. We agree that Baycol can cause Rhabdo. So, the 16:57:03

19 signal disease or condition that they hold out, there isn't 16:57:10

20 any dispute that it can be caused by Baycol. And, of 16:57:13

21 course, we told people that from the first day we put our 16:57:19

22 medicine on the market. 16:57:24

23 Then we get to the big aches and pains group. 16:57:25

24 And as I said, that is the vast, vast majority of claims, 16:57:28

25 aches and pains. And, then, probably more than Rhabdo, if 16:57:35

1 you really looked at it, if you got into the class and got 16:57:41

2 out of the people who filed claims already, if you got into 16:57:45

3 the class and did this sort of thing, you will find that 16:57:46

4 Rhabdo would be a pretty tiny percentage and there would 16:57:51

5 probably be a lot more people claiming whacky injuries than 16:57:56

6 claiming Rhabdo. You know, claiming silly, not silly, they 16:57:59

7 are not silly injuries, but it's silly to pretend they came 16:58:03

8 from Baycol. They are the kind of injuries that someone, 16:58:08

9 I'm sure, is going to stand up and say we don't pretend 16:58:11

10 those came from Baycol. We don't pretend that when that 16:58:15
11 lady started to hear voices that that was due to Baycol. 16:58:19
12 And we don't pretend that the loss of sex drive was due to 16:58:25
13 Baycol. But if you took a survey of the class, you have a 16:58:29
14 heck of a lot more people claiming things like that than 16:58:33
15 are going to be claiming Rhabdo. But the vast majority are 16:58:41
16 going to be claiming aches and because everybody has got 16:58:41
17 aches and pains. 16:58:44
18 As I said, Your Honor, in terms of the need for 16:58:46
19 general causation class here, we warned against aches and 16:58:47
20 pains, every statin warns about aches and pains, because as 16:58:52
21 I said, it can be a precursor of Rhabdo. We say go see 16:58:56
22 your doctor if you get aches and pains. We also know, 16:59:03
23 however, that there are hundreds of other causes of aches 16:59:07
24 and pains. The red chart that showed the medical 16:59:09
25 conditions that can cause aches and pains, the other 16:59:13

1 medications that can cause aches and pains. So, a general 16:59:15
2 verdict that Baycol could cause aches and pains is not 16:59:20
3 going to advance anybody's litigation because the question 16:59:24
4 isn't going to be could Baycol have caused it, the question 16:59:28
5 is going to be did Baycol cause it, given all these other 16:59:33
6 potential causes out there. And the individual causation 16:59:37
7 questions absolutely overwhelm any common question. The 16:59:41
8 courts recognize that it is not proper to certify a general 16:59:46
9 causation class where there are individual causation issues 16:59:51

10 that, in fact, are the core of the dispute. 16:59:55

11 Here's a list of some of those cases. Some of 17:00:05

12 them are cases that the Plaintiffs rely on for other 17:00:07

13 reasons. Some are cases that we rely on, but they all held 17:00:13

14 that where an individual causation is the real dispute in 17:00:20

15 the cases, it doesn't make sense to have certification of a 17:00:22

16 general causation class. Agent Orange, Paxil, Harding, 17:00:27

17 Tetracycline, Arch, Emig, Mertens, they all agree. 17:00:33

18 When I think about this general causation, 17:00:39

19 they've got Rhabdo, fine, not an issue, aches and pains on 17:00:42

20 the label. And then I think what else is going to be in 17:00:46

21 the general causation trial. And it's not an idle thought 17:00:49

22 because -- excuse me. Here we go. I looked through their 17:00:56

23 complaint in their briefs and what they said about general 17:01:06

24 causation, because I'm trying to figure out what is it that 17:01:10

25 we might be trying. What is it they're going to say was

1 caused by Baycol other than Rhabdo and aches and pains, and 17:01:17

2 they really don't pin it down. They say all person, you 17:01:21

3 know, the complaint says all persons who were physically 17:01:24

4 injured as a result of taking Baycol. That's their injury 17:01:29

5 class. So, if we are going to hold them true to their 17:01:32

6 word, then, if we're going to have general causation, are 17:01:36

7 we going to have general causation on all of these sore 17:01:42

8 thumbs, you nose, decreased urine output, sore elbow. They 17:01:46

9 are all in the class, and we don't have any idea of what 17:01:53

10 would be tried. 17:01:59

11 Similarly, they didn't limit it to their brief. 17:01:59

12 They didn't limit it to Rhabdo where there is no dispute. 17:02:08

13 They didn't limit it to aches and pains. They said they 17:02:08

14 have a personal injury class of all persons who claim 17:02:13

15 physical injury caused by Rhabdo -- Baycol, I'm sorry, and 17:02:17

16 the common issue proposed is whether Baycol causes injury. 17:02:22

17 That's how they framed it in their brief. 17:02:27

18 Now, we can go into that trial and say, yes, if 17:02:32

19 causes mean can cause, we'd probably get the court to agree 17:02:34

20 to rewrite the question so it's whether Baycol can cause 17:02:39

21 injury rather than causes injury. And then we would say, 17:02:43

22 good, we can all go home and answer that question yes. And 17:02:48

23 then we'll give that verdict to Ms. Swearengin and send her 17:02:53

24 back to wherever she came from and we'll have a real trial 17:02:56

25 over whether her claimed injuries were caused by Baycol. 17:03:01

1 And this trial isn't going to mean anything to her. This 17:03:05

2 general causation trial. 17:03:09

3 The -- just to remind the court, you know, here 17:03:17

4 are the kinds of injuries that the Plaintiffs were -- the 17:03:24

5 Plaintiffs themselves are saying are caused by Baycol and 17:03:28

6 all of these, presumably, I mean they are class in any 17:03:32

7 injury. So, just picking this tiny selection of 17:03:40

8 Plaintiffs, I guess we would have evidence here in 17:03:44

9 Minnesota on whether Baycol can cause each one of these 17:03:46

10 things which would be a colossal waste of time. And then 17:03:51
11 we turn around and go back to all of their hometowns and we 17:03:56
12 try the real case. Okay, let's say it can cause sinusitis 17:04:00
13 and did it cause sinusitis. Or do we need to look at Mr. 17:04:06
14 Hendricks' medical records and find out that he had it long 17:04:13
15 before he took Baycol and it's caused by something else. 17:04:16
16 And then there are real problems in terms of the 17:04:19
17 end game here in terms of what happens after the class 17:04:22
18 trial. And I do try a lot of cases, so I tend to think in 17:04:26
19 intensely practical terms about what happens then. We have 17:04:35
20 this trial that they are proposing, and I think to myself, 17:04:37
21 what happens to Delores Cantor. Delores Cantor is a member 17:04:42
22 of a class and we had a trial and the trial determined that 17:04:51
23 Baycol can cause Rhabdo, and Baycol can cause aches did 17:04:54
24 pains. And now we go back to wherever Delores Cantor is 17:05:01
25 from and is she estopped from arguing that Baycol can cause 17:05:07

1 these other things because it wasn't put in the class 17:05:12
2 trial. She's, after all, a class member bound by the 17:05:14
3 judgment about what injuries are caused by Baycol, and they 17:05:17
4 didn't prove that her injuries could be caused by Baycol. 17:05:22
5 So, is that res judicata, and do we get to take that back 17:05:26
6 to wherever she lives and say, too bad for you, it should 17:05:33
7 have been litigated along with the other issues as to what 17:05:37
8 injuries Baycol can cause. That would be nice for us if 17:05:40
9 that were the result, but my guess is that there would be 17:05:46

10 judges out there who would say no, you were not going to 17:05:51
11 get the benefit. You are not going to get some kind of res 17:05:54
12 judicata benefit just because the class action lawyers 17:05:59
13 didn't do anything about Ms. Cantor and didn't put any 17:06:03
14 evidence in about her injuries. She gets to try her own 17:06:05
15 case.
16 So, where does that leave us? Let's say we win 17:06:09
17 one of these general causations, instead of limiting it to 17:06:14
18 aches and pains of Baycol, they throw in some other 17:06:17
19 injuries and we win. We still go back to all of these 17:06:20
20 hometowns and try the real life cases where the people say, 17:06:24
21 yes, that's fine but that wasn't my injury. Cardiac 17:06:30
22 myopathy, you won on cardiac myopathy, Bayer. You don't 17:06:36
23 cause cardiac myopathy. I don't have cardiac myopathy. 17:06:36
24 The thing that I have that looks a little bit like cardiac 17:06:42
25 myopathy. In fact, that's something else. It's not really

1 cardiac myopathy. And you don't have a judgment that's 17:06:48
2 going to be preclusive against me on that, let alone on 17:06:50
3 memory loss or reddish lesions. So, we don't stand to get 17:06:54
4 any kind of benefit at all from winning one of these 17:07:03
5 trials. 17:07:06
6 As I said, the idea that other judges hearing 17:07:09
7 individual cases of class members are going to give any 17:07:14
8 sort of preclusive effect in our favor, I think is 17:07:16
9 exceedingly unlikely, and that the easiest thing in the 17:07:23

10 world for a skilled lawyer to plead around whatever 17:07:27

11 favorable verdict we got. And we are not going to get a 17:07:32

12 verdict that says we don't cause Rhabdo because we wouldn't 17:07:36

13 ask for one. And we get to these other injuries, any 17:07:40

14 injury we win on can be redescribed as a different injury. 17:07:45

15 And we try that case back in Canton, Ohio. 17:07:49

16 The same kind of unfairness problems, and I don't 17:07:54

17 mean to be a whiner about it, Judge, but after all, Rule 1 17:07:58

18 does say the just, speedy and inexpensive resolution. The 17:08:02

19 same kind of fairness problems plague their general 17:08:07

20 liability class. I've been talking now about their 17:08:10

21 causation, general causation class, but then they say we 17:08:14

22 got this general liability class, also. And I can put the 17:08:21

23 timeline up again. We're going to -- I don't know how in 17:08:24

24 the world that can possibly work. In fact, I will put it 17:08:28

25 up. 17:08:32

1 You're not going to get a verdict that says was 17:08:36

2 Baycol negligent in the design, testing and marketing -- 17:08:41

3 I'm sorry, was Bayer neglect in the design, testing and 17:08:48

4 marketing of Baycol because,when, what dose, what period of 17:08:52

5 time. This is not a plant explosion. It's not a boat 17:09:00

6 sinking, even if it did spill a lot of oil. It's a course 17:09:06

7 of conduct that differed over time where they say there's 17:09:10

8 increasing levels of culpability. So, I think it's just 17:09:15

9 incorrect. I think you can answer a question like that. 17:09:19

10 But then they posed some more specific questions. 17:09:25
11 Did Bayer lie to the FDA? They posed a bunch of loaded 17:09:29
12 questions, and that is kind of beside the point because if 17:09:36
13 we ever did have one of these, I'm confident that Your 17:09:39
14 Honor wouldn't let them write all the questions. But let's 17:09:43
15 take, did Bayer lie to the FDA? And let's said we win that 17:09:46
16 case. We did not lie to the FDA. We could get yes answers 17:09:50
17 in our favor all or almost all of these questions that they 17:09:58
18 pose. And then we would go back and the liability trials 17:10:02
19 aren't going to go away. The liability theories are going 17:10:06
20 to be recast. The good lawyer, and they are really good 17:10:10
21 lawyers out there -- the good lawyer is going to say, lie 17:10:15
22 to the FDA. My case is not about lying to the FDA. My 17:10:20
23 case is about the fact that your detail man from Woodlawn, 17:10:27
24 Illinois came and visited the doctor, and your detail man 17:10:32
25 told the doctor things that weren't true. Told the doctor 17:10:36

1 things that were inconsistent with what you told the FDA. 17:10:40
2 You know, it's not enough to be up front with the FDA if 17:10:43
3 your detail man is lying to the doctors. We get no 17:10:49
4 benefit, zero, by winning on these issues that they pose. 17:10:53
5 I wrote on my memo, my last subject, but it's not 17:11:00
6 my last subject because I added one when Your Honor asked 17:11:03
7 the question about what's the trial plan. So, my second to 17:11:08
8 the last subject is medical monitoring. 17:11:12
9 The Plaintiffs cannot avoid the myriad of 17:11:16

10 individual questions posed by resort to a medical 17:11:19
11 monitoring class. I want to put up for you, Your Honor, 17:11:25
12 what they say the standards are for medical monitoring. 17:11:30
13 This is from their brief. I think it's their opening 17:11:40
14 brief. Anyway, one of their briefs, and they're talking 17:11:47
15 about medical monitoring, they being the Plaintiffs. And 17:11:49
16 down in Footnote 49, they set forth the medical monitoring 17:11:53
17 elements under Pennsylvania law. So, it may have been back 17:12:03
18 when they were saying everything was Pennsylvania. 17:12:08
19 But, anyway, let's just take a look at 17:12:10
20 Pennsylvania as representative, because if it's not, then 17:12:16
21 that's a whole different issue. We got a whole bunch of 17:12:18
22 different laws on medical monitoring with different 17:12:21
23 elements. That means that common issues do not 17:12:24
24 predominate. But let's just pretend that the law of 17:12:29
25 Pennsylvania governs on medical monitoring. 17:12:33

1 One of the things I wanted to point out here is 17:12:36
2 that according to the case cited by the Plaintiffs, there 17:12:37
3 has to be exposure greater than normal background levels to 17:12:50
4 a prudent hazardous substance caused by Defendants' 17:12:58
5 negligence. So, incorporated into the medical monitoring 17:13:07
6 cause of action is a cause of action for negligence, and 17:13:12
7 all of the individual questions that we talked about in 17:13:20
8 terms of the law on negligence in different states, and 17:13:25
9 negligence win along our time line and all of myriad of 17:13:29

10 individual questions, different state laws, different 17:13:34

11 doses. You know, there is one story with .2. There's 17:13:36

12 another story with .8 in terms of what kind of a case 17:13:41

13 somebody can make on negligence. Different time periods. 17:13:46

14 One story before a study came out, a different story after 17:13:50

15 the study came out. Different warnings were given. If 17:13:54

16 it's a negligence failure to warn, that's why somebody was 17:13:56

17 exposed, then that's one story. If it's the day before the 17:13:59

18 label came out saying don't take Gemfibrozil when you're 17:14:05

19 taking Baycol, the warning against that, it's another story 17:14:10

20 if it comes out the day after. And it's still a different 17:14:14

21 story if it comes out after the next label is released, 17:14:19

22 not just a warning, but a contraindication. That's a 17:14:24

23 different story still if it comes out after the dear doctor 17:14:28

24 letter is sent out. So, there's all these individual 17:14:29

25 questions. Individual questions, incidentally, are going 17:14:32

1 to include, I haven't spent much time on this, but believe 17:14:35

2 it or not, but the individual questions would also include 17:14:40

3 the different levels of knowledge of the doctors. That's 17:14:44

4 the learned intermediary concept that comes into play in 17:14:49

5 most states. And if the doctors know from medical 17:14:54

6 literature and elsewhere about all of the risks, and if the 17:14:56

7 doctors have an understanding about different levels of 17:14:59

8 risks with different statins, then that's all going to come 17:15:03

9 into play. Then and all of these things all going to be 17:15:07

10 swept into the case because they had to make out a 17:15:12
11 negligence case in order to make out a medical monitoring 17:15:15
12 case. 17:15:20
13 Another couple of things I want to focus on here. 17:15:23
14 Item Number 6, we're talking now, of course, about whether 17:15:29
15 medical monitoring is appropriate for class treatment, and 17:15:32
16 one of the things, you know, to look at is what are the 17:15:40
17 elements of medical monitoring. And one of the elements of 17:15:41
18 medical monitoring is that the prescribed monitoring 17:15:45
19 regimes is different from that normally recommended in the 17:15:54
20 absence of the exposure. 17:15:54
21 So, what we have here are the class 17:15:54
22 representatives for the medical monitoring class. All -- 17:15:58
23 let me back up because I've got several points to make. 17:16:12
24 First of all, their expert, Dr. Kaysen, actually never 17:16:15
25 looked at the medical records of the class representatives 17:16:22

1 for the medical monitoring class. He testified under oath 17:16:28
2 that one thing he did not examine was the medical records 17:16:32
3 of the people that the class action lawyers hold forth as 17:16:38
4 representative of the medical monitoring class. So, he's 17:16:42
5 never looked at the medical records of the class reps. 17:16:46
6 Well, we have. And it ends up as we walk through on the 17:16:50
7 time line when I clicked on each one, there were five of 17:16:55
8 them, and all five of the class representatives in the 17:16:59
9 medical monitoring class already got the prescribed 17:17:03

10 monitoring regime, and they got it because it was normally 17:17:12

11 recommended for other reasons. So, the only people they 17:17:18

12 have sent forth as representative of the class have already 17:17:22

13 gotten the monitoring that their expert says they should 17:17:25

14 get. And they got it for reasons having nothing to do with 17:17:30

15 their exposure to Baycol. So, that's an important element 17:17:34

16 to consider. 17:17:39

17 We also looked at all of the other class 17:17:46

18 representatives. Again, this was the time line with the 17:17:49

19 different colored bars, and I think Your Honor will recall 17:17:53

20 that when you look at medical monitoring, personal injury 17:17:56

21 or refund, every single person that they hold forth as a 17:18:03

22 representative of any class received the blood pressure and 17:18:07

23 creatinine tests for reasons having nothing to do with 17:18:15

24 their use of Baycol. It's the prescribed monitoring regime 17:18:18

25 that they have come up with is exactly the same as what the 17:18:25

1 class members get in their normal medical treatment having 17:18:30

2 nothing to do with Baycol. 17:18:34

3 They then picked 30 or 31 Plaintiffs who are not 17:18:37

4 class reps, one of the lawyers picked out 30 or 31 17:18:44

5 Plaintiffs from their files. We don't know how they picked 17:18:49

6 them. They file an affidavit, but we don't get to cross 17:18:53

7 examine the lawyers about how they went about selecting. 17:18:57

8 And I found over the years that it's pretty interesting to 17:18:59

9 find out how people select a sample. But we don't know. 17:19:03

10 Anyway, they picked 30 or 31 who aren't class reps. Their 17:19:09

11 doctors looks at them. Only 5 of the 31 does he say are 17:19:15

12 in need of medical monitoring. He looks at the 5 and he 17:19:18

13 says these 5 should get a blood pressure test and a 17:19:25

14 creatinine test. The other 25 or 26 don't even need the 17:19:28

15 tests. Well, all 5 of the people that he said should get a 17:19:33

16 blood tests or creatinine test, just like all the class 17:19:43

17 reps, they already got it. All 5 of the people that he 17:19:46

18 says should receive a test have received a test, and he 17:19:51

19 doesn't pretend that they should receive a second test. 17:19:56

20 So, the medical monitoring -- well, let's go on 17:20:00

21 to the last factor. The medical monitoring class, Your 17:20:06

22 Honor is a way to set up a -- well, I'm not going to say 17:20:12

23 that. 17:20:13

24 Last point, Point 7. The prescribed monitoring 17:20:16

25 regimen is reasonably necessary according to contemporary 17:20:23

1 scientific principles. So, we're not just going to do this 17:20:28

2 on a lark. We're not going to just spend an enormous 17:20:33

3 amount of money and create a big pool of legal fees when 17:20:37

4 the test isn't necessary according to contemporary 17:20:40

5 scientific principles. When you listened to Mr. Arsenault 17:20:46

6 this morning, he basically said that it's generally 17:20:49

7 accepted in the scientific community that medical 17:20:53

8 monitoring is appropriate for Baycol. At least that was 17:20:58

9 the message that I heard from him. Their paid expert's 17:21:01

10 testimony is to the contrary on that. I've got to switch 17:21:06
11 over to this other computer for a moment, Your Honor. 17:21:10
12 This is Dr. Kaysen. He was hired by them to 17:21:51
13 develop the medical monitoring protocol. And one of the 17:21:53
14 questions is is the prescribed monitoring regime reasonably 17:21:55
15 necessary according to contemporary scientific principles, 17:22:01
16 and here's his testimony. 17:22:06
17 (Video showing) 17:22:19
18 THE COURT: Would you start this over. 17:22:31
19 MR. BECK: Yes. Your Honor, not only will I, I 17:22:31
20 was going to no matter what. 17:22:36
21 THE COURT: The reason why is I want to make sure 17:22:37
22 we keep the ventilation going because they shut it off at a 17:22:40
23 certain time. 17:22:47
24 MR. BECK: Are you suggesting there's some hot
25 air that's -- (Laughter)

1 THE COURT: I'm suggesting that GSA controls 17:22:49
2 this building. They want to save on the heating bill. 17:22:52
3 MR. BECK: Here's Dr. Kaysen. Again, the context 17:22:57
4 is whether the prescribed monitoring regime is reasonable 17:23:01
5 necessary according to contemporary scientific principles. 17:23:03
6 (Video showing)
7 THE COURT: Let's take a stretch break. Mr. 17:34:30
8 Beck, if you hear a thump in the back behind you, Mr. 17:34:30
9 Goldser is falling over because of a lack of sleep because 17:34:39

10 he had a flight from Maui, and he may fall over for a lack 17:34:41

11 of sleep. (Laughter) . 17:34:53

12 MR. BECK: I'm trying to remember whether state 17:34:53

13 of the art evidence is admissible in Maui. 17:34:55

14 MR. GOLDSER: I know Your Honor gave me an 17:35:01

15 opportunity to serve, and I'm delighted to do so. 17:35:03

16 THE COURT: I sent out a message that he would 17:35:08

17 have to stay until ten o'clock to vacuum. (Laughter). 17:35:10

18 MR. BECK: Well, Your Honor, believe it or not, 17:35:15

19 we are in the home stretch. 17:35:18

20 THE COURT: What we are going to do is stop when 17:35:20

21 you are finished and we'll start up tomorrow because the 17:35:22

22 status conference is not going to be that long. 17:35:25

23 MR. BECK: I really appreciate the patience and 17:35:31

24 forbearance you have shown today, and I'm in the home 17:35:34

25 stretch. 17:35:45

1 THE COURT: My comments about Mr. Goldser had 17:35:45

2 nothing to do with your presentation. I'm just giving Mr. 17:35:45

3 Goldser a hard time because I would be coming back from 17:35:48

4 Hawaii. 17:35:51

5 MR. GOLDSER: I have thoroughly enjoyed Mr. Beck. 17:35:53

6 MR. BECK: Well, we are on Dr. Kaysen. He's 17:35:58

7 their medical monitoring expert, and the question that 17:36:03

8 we're talking about is whether the prescribed monitoring 17:36:04

9 proceedings are reasonably necessary according to 17:36:16

10 contemporary scientific principles. We saw the first clip,

11 and here's the second clip.

12 (Video played)

13 MR. BECK: And the last clip. 17:37:41

14 (Video played)

15 MR. BECK: In sum, Your Honor, on the medical 17:38:20

16 monitoring side, we have a class, all of whose 17:38:23

17 representatives have already gotten the prescribed regime 17:38:28

18 for reasons having nothing to do with Baycol, and then we 17:38:32

19 have a complete absence of any sort of consensus that 17:38:36

20 anyone should get it because of Baycol. 17:38:43

21 Now, the last -- truly the last issue that I want 17:38:49

22 to discuss is the issue that Your Honor raised early on 17:38:52

23 about what would happen in this trial you want me to have. 17:38:59

24 And I think the question also included a component about 17:39:05

25 what's going to happen in the other trials, the trials when 17:39:11

1 they remand these cases or if there is a class action that 17:39:17

2 obviously would include people who are in state courts as 17:39:22

3 well. What happens in the state courts after we have this 17:39:25

4 trial that you envision, what's the plan. And I was 17:39:29

5 listening for a plan, and I think that what I heard were 17:39:39

6 very skillful lawyers who did their best to talk about a 17:39:46

7 lot of things, but they didn't talk about a plan. They 17:39:57

8 didn't say, well, here's what we'll do. Here's how long 17:39:59

9 the case will take. Here's the issues that'll be 17:40:01

10 presented. Here's the way it'll work. Here's how we'll be 17:40:04

11 able to frame them. Here's how we are going to handle the 17:40:08

12 jury instructions from 51 different jurisdictions. Here's 17:40:13

13 how we can do a manageable verdict form, that kind of 17:40:15

14 thing.

15 It's interesting because when I was in Boston on 17:40:17

16 trial up until yesterday, and when I came into town and I 17:40:20

17 was talking with the members of our team, I asked the same 17:40:27

18 question, a little different way. I had just gotten back 17:40:32

19 from this trial in Boston. It was a patent case, and the 17:40:38

20 only issue was infringement. Didn't involve willful 17:40:44

21 infringement, didn't involve validity, didn't involve 17:40:47

22 damages that had been bifurcated and trifurcated and 17:40:50

23 quarterfurcated down to just infringement. And the Judge 17:40:54

24 said he wanted a special verdict form involving three 17:40:58

25 claims from two different patents. And the special verdict 17:41:03

1 form that the plaintiff submitted had 328 questions and 17:41:05

2 covered a hundred pages. 17:41:07

3 Now, he didn't do a very good job on the special 17:41:09

4 verdict form. But even doing a good job on that case, the 17:41:14

5 special verdict form was an enormous challenge. So I asked 17:41:20

6 Susan Weber and others of my colleagues, I said, I'd like 17:41:23

7 to see some special verdict forms that were actually used 17:41:26

8 in cases where classes were certified on common issues 17:41:30

9 where if it's a pharmaceutical product or some kind of 17:41:36

10 situation where there is a course of conduct, there is 17:41:43
11 variations in the product or different product over time, 17:41:46
12 different communications to the public where you have this 17:41:48
13 kind of continuum of facts where they claim life gets worse 17:41:52
14 and worse and worse, how in the world do you pose a special 17:41:58
15 verdict and what kind of instructions. So, and I was 17:42:05
16 especially interested in how do you handle a situation like 17:42:09
17 that when there are multiple causes of action, and the 17:42:11
18 causes of action are governed by 51 different state laws 17:42:19
19 because to me the issues are a mind boggling one. So, I 17:42:24
20 wanted to see how it's been done. And the answer as best 17:42:31
21 as I've been able to find out is that almost nobody ever 17:42:34
22 does it in real life. 17:42:38
23 What happens is that sometimes -- well, when 17:42:41
24 Plaintiffs move for class certification, they promise that 17:42:43
25 a trial plan -- and sometimes a trial plan can be put 17:42:51

1 together because it's not this kind of case. It's the 17:42:54
2 train fell off the tracks and the fumes were released and 17:42:59
3 everybody was exposed to the same thing at the same time. 17:43:04
4 But in a case like this, people talk about, well, we'll be 17:43:08
5 able to do a trial plan. Lawyers are creative and we all 17:43:15
6 work together in the right spirited kind of keep in mind 17:43:20
7 rule one. We'll be able to come up with trial plan. And 17:43:22
8 let's not look at the glass as half empty. Let's look at 17:43:26
9 it as half full. And they make arguments for the trial 17:43:29

10 plan like that and sometimes judges agree with them. And 17:43:31

11 they talk about I think we'll be able to do a trial plan. 17:43:36

12 We'll be able to do special verdicts. We'll be able to do 17:43:37

13 instructions. I have a lot of faith in the jury system. I 17:43:37

14 think the jurors are smart enough to understand 17:43:40

15 instructions. 17:43:44

16 But then what happens is, at least in cases like 17:43:45

17 this, we never see any plans get implement. We see people 17:43:48

18 talk in the abstract about how they can do it. We don't 17:43:55

19 see plans, and we certainly don't see the implementation of 17:43:59

20 plans in cases that have this kind of intersection of so 17:44:03

21 many different competing legal jurisdictions on multiple 17:44:08

22 causes of action with this sort of continuum situation 17:44:13

23 where you have different slices of fact that are going to 17:44:16

24 be relevant to different people's causes of action. In a 17:44:19

25 situation like that, you know, maybe tomorrow morning 17:44:23

1 they'll show us a plan, but I haven't seen one. 17:44:28

2 What happens, in fact, is in situations like 17:44:31

3 that, historically, certification of a class leads to 17:44:33

4 settlement because the Defendants cannot afford to let the 17:44:42

5 company, even if they think they're right because there is 17:44:46

6 this enormous looming potential disaster, and that's the 17:44:52

7 leverage that class action lawyers have, and it's the 17:44:58

8 leverage that they seek when they want to get a class 17:45:02

9 certified because their focus is not, frankly, on how are 17:45:05

10 we going to try this case. Their focus is how are we going 17:45:09

11 to get a class certified so we never have to try this case. 17:45:13

12 Historically, defendants have made an economic 17:45:20

13 calculation and said we can't afford to take the risk. We 17:45:23

14 can't afford to bet the company. 17:45:29

15 As Professor Miller said, things change. And 17:45:36

16 while Defendants have been saying to themselves for years, 17:45:44

17 we can't afford the class trial. Life has changed a little 17:45:47

18 bit recently, and now Defendants are starting to think we 17:45:52

19 can't afford a class settlement. 17:45:59

20 Diet drugs, one of their cases that they rely on 17:46:03

21 heavily is an excellent example for Your Honor to follow, 17:46:11

22 one of Professor Miller's examples. 17:46:15

23 After class certification, the defendant felt 17:46:19

24 compelled to settle. I'm sure this is American Home 17:46:23

25 Products. I'm sure they felt that they were paying an 17:46:26

1 enormous amount of money to get rid of a lot of claims, 17:46:29

2 only a very few of which involved real injuries, but it was 17:46:35

3 the cost of doing business to get rid of the other claims 17:46:40

4 because they couldn't get out of that litigation. They 17:46:42

5 couldn't buy peace. They couldn't put it behind them 17:46:46

6 unless they came up with a settlement that paid everybody 17:46:51

7 off. So, I think the amount was $4,000,000,000 that they 17:46:55

8 paid hoping to get global peace. As I said, I'm sure they 17:47:00

9 felt they overpaid, but nevertheless, I think that's the 17:47:08

10 amount they paid. 17:47:11

11 But all they did was buy war and not peace. 17:47:14

12 People that have lousy cases, in our case, the aches and 17:47:17

13 pains ones, the cataract cases, the decreased urine cases, 17:47:23

14 they all jumped in and took their piece of the 17:47:29

15 $4,000,000,000. And the people who's real injuries opted 17:47:33

16 out. And a whole bunch of people who did not have real 17:47:37

17 injuries opted out because their lawyers figured that these 17:47:41

18 guys are willing to pay $4,000,000,000 for global peace. 17:47:46

19 The people who are willing to hold out and play poker, 17:47:48

20 we'll get even more than our share of the $4,000,000,000. 17:47:53

21 And sure enough $8,000,000,000 later, American Home 17:47:56

22 Products was on the brink of bankruptcy, finally, and only 17:48:02

23 because there was so little meat left on the carcass to 17:48:06

24 pick over was there a global resolution that put those 17:48:10

25 claims to rest. 17:48:16

1 Well, we agree with Professor Miller that that 17:48:18

2 case is instructive. But what's instructive to us is what 17:48:26

3 happened to the defendant after certification and 17:48:32

4 settlement rather than the analysis that went into the 17:48:36

5 certification opinion. And we have decided as we have said 17:48:40

6 before that we are not going to cave in on cases that we 17:48:43

7 think involve no injury in an attempt to buy global peace. 17:48:50

8 And you've heard that from us when we talked about our 17:48:57

9 settlement approach when we were down in Louisiana. I 17:49:01

10 stood up and announced it and that may have been the first 17:49:05

11 time we publicly announced it. And I said we wanted to be 17:49:07
12 reasonable and, in fact, want to be generous with those who 17:49:12
13 have been injured. We don't want to argue about things 17:49:15
14 like causation, concomitant causes or comparative fault. 17:49:17
15 If there is a contemporaneous case of Rhabdo with Baycol 17:49:24
16 use, we want to settle it. 17:49:28
17 Now, so far we have settled at last count about 17:49:31
18 430 cases. We have a lot more cases under discussion, and 17:49:34
19 sometimes we are able to agree with Plaintiffs' lawyers on 17:49:40
20 what the cases are worth, and sometimes we are not able to 17:49:44
21 agree. And those cases are going to go to trial. We're 17:49:46
22 going to learn something from those cases. And the 17:49:50
23 Plaintiffs' bar is going to learn something from those 17:49:52
24 cases. And once we have several of those cases under our 17:49:56
25 belt, and, frankly, we're playing in their home courts, but 17:50:00

1 once we -- and I can't do anything about that. Once we get 17:50:04
2 several cases under our belt, everybody will be able to 17:50:06
3 take a deep he breath and say, okay, what are the value of 17:50:09
4 these cases. And, then, for the people who you suffered 17:50:13
5 injury, either they'll figure out that the value is lower 17:50:17
6 than they hoped, or we might figure out it's higher, or we 17:50:20
7 might say we would spot out. But we'll continue to talk to 17:50:26
8 Plaintiffs' lawyers and settle the cases where people were 17:50:30
9 hurt, and we're not going to settle the cases where people 17:50:32
10 were not hurt. We are not going to settle the vast 17:50:35

11 majority, whether I'm right or wrong about 99 percent or 96 17:50:40

12 or 90 percent, we're not going to settle the cases where 17:50:43

13 people bought our cases, it lowered their cholesterol and 17:50:47

14 they suffered no side effects and they benefitted rather 17:50:53

15 than were hurt. We are not going to pay money for those 17:50:56

16 cases unless some jury tells us that we have to. 17:51:00

17 We have the same plan for trial. We're going to 17:51:05

18 try to resolve the cases that have real injuries. We're

19 going to try to settle those right up to the courthouse 17:51:10

20 steps and during trial, and we'll be talking to juries 17:51:13

21 about what's reasonable compensation. But we're going to 17:51:15

22 be defending ourselves when people did not suffer and 17:51:18

23 instead benefitted from our product. And the reason we're 17:51:21

24 going to do that is because I, too, believe in the jury 17:51:31

25 system. And I believe that when juries hear these cases 17:51:31

1 that if somebody benefitted from our product and was not 17:51:38

2 hurt a jury is not going to say they deserve a lot of 17:51:41

3 money. 17:51:46

4 And one of the reasons that we are resisting 17:51:46

5 class certification is because the intended end gain of 17:51:51

6 class certification is us paying a lot of money to people 17:51:58

7 who were not hurt and who, in fact, benefitted from our 17:51:58

8 medicine. 17:52:02

9 So, especially given our resolve, the Court's 17:52:04

10 question about what happens at trial becomes very, very 17:52:10

11 important because unlike in most cases where common issue 17:52:14

12 classes have been certified, here they're going to be 17:52:22

13 trials. 17:52:25

14 What would be a real-life trial like in this 17:52:29

15 case? We would have an incomprehensible verdict form. 17:52:33

16 Professor Miller, who acknowledges that he's been in 17:52:42

17 academia for several decades, allowed us how the verdict 17:52:50

18 form might take several pages. It's going to take a lot 17:52:54

19 more than several pages, Your Honor. 17:53:01

20 When we have each of those relevant slices of 17:53:06

21 time, however, finally they end up getting sliced, the laws 17:53:10

22 of 51 states and 7 or 8 causes of action under the laws of 17:53:15

23 51 states, that's a mind boggling task for a jury to try to 17:53:19

24 answer those kinds of questions. And I try a lot of jury 17:53:27

25 cases and I have enormous respect for juries, but I don't 17:53:30

1 hold out any illusions that a jury can handle that kind of 17:53:35

2 a task. And one of the reasons they couldn't is because 17:53:40

3 juries have to be instructed on these special verdict 17:53:43

4 forms, and the instruction would be unparalleled nightmare. 17:53:49

5 I've touched on some of this before. 17:53:53

6 Here we have a jury of 12 Minnesotans, and we 17:53:56

7 have this book like special verdict form and they're told, 17:54:01

8 when you're applying Virginia law, you must consider this 17:54:06

9 factor, Factor X. But when you're applying Illinois law, 17:54:11

10 it's up to you whether to consider Factor X. When you're 17:54:16

11 applying the law of Arizona, you have to pretend that you 17:54:21

12 never heard these instructions about Factor X because it's 17:54:25

13 reversible error for me to talk about Factor X with you. 17:54:30

14 And you're applying the law of Montana, you have to forget 17:54:34

15 not only what I said about Factor X, you have to forget 17:54:40

16 Factor X because it's reversible error to admit that 17:54:47

17 evidence in support of this cause of the action. 17:54:49

18 Those are not, I think the phrase was, imaginary 17:54:52

19 horrors. Those arte not imaginary horrors. People who try 17:54:59

20 cases for a living and try and defend negligence cases and 17:55:00

21 product liability cases and insufficient warning cases, we 17:55:07

22 appreciate that there are sometimes subtle, but 17:55:10

23 nevertheless substantial differences from state to state in 17:55:14

24 terms of the elements of the cause of action. And then 17:55:18

25 they get more subtle because really the law of Minnesota, 17:55:21

1 when you think about it, includes not just the standard 17:55:28

2 verdict form, but it includes the standard instructions 17:55:32

3 because they give meaning and life to the verdict form and 17:55:36

4 they evolve over a long period of time and are subject to 17:55:39

5 countless lawsuits where they get refined, and courts 17:55:42

6 appoint commissions to come up with model jury 17:55:47

7 instructions, states take this seriously and they take it 17:55:52

8 personally if that's possible to do by a state. 17:55:55

9 So, there is no way in the world that common 17:55:58

10 issues could be severed from the overwhelming predominant 17:56:00

11 individual issues. And whatever ended up getting sliced 17:56:09

12 off at the end of the sausage, there is no realistic plan 17:56:14

13 that could be proposed by Plaintiffs to handle it in this 17:56:19

14 case. And that says nothing about what happens when we go 17:56:21

15 back to the other trials -- when we go back to the other 17:56:26

16 courts. 17:56:30

17 Whatever we come up with, people are going to 17:56:31

18 look at and it's going to be so finely sliced and so finely 17:56:35

19 tuned, that any plaintiff whose disappointed in any one of 17:56:39

20 the answers pleads around it and we are off to the races. 17:56:45

21 Thank you again nor your patience, Your Honor. 17:56:50

22 THE COURT: Thank you. We'll adjourn until 9:30 17:56:53

23 tomorrow morning. 17:56:57

24

25

1 REPORTER'S CERTIFICATE

2 I, Brenda E. Anderson, Official Court Reporter,

3 in the United States District Court for the District of

4 Minnesota, do hereby certify that the foregoing transcript

5 is a true and correct transcript of the proceedings in the

6 above-entitled matter.

7

8

9 CERTIFIED: ____________________

10

11

12

13 ______________________________
Brenda E. Anderson, RPR

14

15

16

17

18

19

20

21

22

23

24

25