IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT J. DEVLIN, :

Petitioner, :

v. : No. 01-417

ROBERT A. SCARDELLETTI, ET AL.:

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Washington, D.C.

Tuesday, March 26, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

LAURENCE S. GOLD, ESQ., Washington, D.C.; on behalf of the Respondents.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting respondents

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next on 01-417, Robert J. Devlin versus Robert A. Scardelletti. Spectators are admonished, do not talk until they leave the courtroom. The Court remains in session. Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Mr. Chief Justice and may it please the Court: This is a case about the right to take an appeal. Over Petitioner's objections, the district court confirmed a class action settlement that substantially reduces Petitioner's individual pension. The Fourth Circuit held that Petitioner nonetheless may not appeal to argue that the district court abused its discretion in rejecting his objections. Our principal submission is that, as Justice Kennedy explained in oral argument in the Felzen case, Rule 23 class members such as Petitioner are bound by the district court's judgment and thus are parties to that judgment with the right to appeal from it. Because the Government, although seated at the opposite side of the table, actually agrees with us that class members are bound by the judgment, that objector appeals identify important legal errors, and that they

also deter collusive settlements, I will leave to the Solicitor General's representative any arguments to the contrary that my friend Mr. Gold may make.

QUESTION: Can I test your thesis that u are bound by a judgment, you are a party to it? I mean, there are cases where someone who has allied with a party and has used the same attorney and has maybe had some input into trial strategy, that that person will be bound by the judgment, but as far as I know, we have never allowed, no court that I know of has ever allowed such a person to take an appeal on the ground that well, since you would have been bound, you are a party.

MR. GOLDSTEIN: Justice Scalia, I think it depends on what we mean by bound. There are different, more expansive notions of collateral estoppel and res judicata. What I'm talking about here is that the judgment operates directly upon the class member. And let me be clear that our position is not to move beyond that. Our position is not that it's sufficient to be a party, but that it is a necessary condition. It is also necessary, and this is an important point for the distinction between appealing from an approved settlement and for appealing a litigated judgment.

QUESTION: You say that the judgment operates directly upon the class member, as if we are talking about

some sort of physical thing, but how is that operation on the class member different from, say, what might be res judicata or collateral estoppel in some other case?

MR. GOLDSTEIN: Mr. Chief Justice, the difference is that while you can have an application of collateral estoppel or res judicata that extinguishes a right to pursue an action, what I'm talking about here and let me put it in very practical terms. The Petitioner had a pension and that pension went down 40 percent when the district court in this case approved a settlement that said the COLA provisions of the pension plan are null and void, and that's the kind of direct operation I'm talking about.

Now, there is an unsettled area of the law stretching to precedents dating from the 1850s, the so-called quasi-party cases. We don't think it's necessary to apply those here because unlike a Rule 23.1 class member in the context of a derivative action, we are directly bound by the action. We are not talking about extinguishing a right of ours, for example, to sue on behalf of a corporation.

QUESTION: You are bound because a judge determined that you had an adequate representative. I agree with you that every person in that class is equally affected and indeed there is no opt out of this class that

we are dealing with. But the determination has been made that you are represented by someone who is an adequate representative of all members of the class who will fairly and adequately represent the class. So as long as the representative will fairly and adequately represent the class, why isn't it the end of it?

MR. GOLDSTEIN: Well, that's a good entry into the purpose and function of Rule 23(e). What happens is that at the point that it's acknowledged by the Respondents here that at the point settlement is agreed to, the class representative and be opposing named parties joined forces to oppose objections, and that continued at the stage of the case where you have to decide whether or not to take an appeal.

QUESTION: Well, Rule 23 what?

MR. GOLDSTEIN: 23(e).

QUESTION: And where do we find that?

MR. GOLDSTEIN: That would be in the appendix of the Council of Institutional Investors, Mr. Chief Justice.

QUESTION: It's not in your brief?

MR. GOLDSTEIN: No, Mr. Chief Justice.

QUESTION: Whereabouts in the Constitution of Institutional Investors?

MR. GOLDSTEIN: (A)(4) of the appendix to that brief.

QUESTION: Thank you.

MR. GOLDSTEIN: And I'll read it very briefly for the Court's benefit. A class action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. Now, let me detour for just a moment. The Court will notice it noticed in the Felzen case that this rule doesn't actually explicitly provide for objections. The advisory committee notes make clear that that was the intent of this provision, and in fact amended Rule 23(e) which will go into effect next year explicitly provides for the right to state objections.

To return to Justice Ginsburg's question, what happens is that this rule recognizes that the class representative is not speaking on behalf of the objectors at the point an objection is taken. They in fact litigate actively for the settlement. Mr. Gold here is on behalf of the class representative in this case and goodness knows, he will argue that we have no right to take an appeal.

The rule, 23(e), provides an opportunity for us to come in, advise the district court of a problem with the settlement. Our point is that nothing in these rules contemplates that the objector's role would be

extinguished at the district court, that someone uniquely in the context of a class action, who is bound directly by the judgment and participates as of right in the district court, would only participate at the district court.

QUESTION: But do you agree that you must intervene in the district court, or do you say you don't even do that?

MR. GOLDSTEIN: Mr. Chief Justice, we say we do not have to do that, that there is nothing about this Court's precedents --

QUESTION: Why not? That is, if this is open under the language, it seems to me there is no real difference between the parties as a practical matter, except you want to say the person all the time, no matter what, can bring an appeal, and they want to say what you should do is intervene and that gives the district judge a chance to act in an unusual situation as a kind of safeguard to make sure that it is fair.

I mean, this person could be anybody under the sun. It could muck up the litigation for everybody else. The extra time involved might be important, and it might be totally unfair, given the prior history, to allow this individual to bring the appeal. So all they are saying is that the judge should have a chance as a gatekeeper to make that determination.

Now why not, if it's open under the language, say there is a little more conservative position, gives us a chance to not get things mixed up?

MR. GOLDSTEIN: Well, let me, there are two parts to the question. The first is, is it open under the rules and second, why wouldn't it be a good idea to adopt it if it were? As to the first, it is not open under the rules, and let me take you again to the particular rule in question. That would be, it's suggested, rule 23(d)(2), and this rule says that the district court may in appropriate circumstances --

QUESTION: Where are you reading, where are you reading from?

MR. GOLDSTEIN: I'm going to read from (a)(3) in the carryover to (a)(4) of the same appendix of the Council --

QUESTION: And where are you starting on (a)(3)?

MR. GOLDSTEIN: At the bottom of the page D, orders and conduct of actions. Your Honors, it says in the conduct of actions to which this rule applies, the court may make appropriate orders and then I'm going to jump to 2. This is the suggestion of the other side: requiring for the protection of the members of a class or otherwise for fair conduct of the action that notice be given. So there is a suggestion, where it follows, notice

be given, and then there is a class that says -- I'll just continue to read it:

In such matters the court may direct to some or all members, of any step in the action or of the proposed extent of the judgment, or of -- and this becomes critical -- the opportunity of members to signify whether they consider the representation fair and adequate. And then the clause: to intervene and present claims or defenses or otherwise come into the action.

Our point is as follows, or is several fold. The first is that this is a different notice from the 23(e) notice. This is a discretionary notice that courts can employ in some cases, and I think it deserves to be emphasized that in the 35 years since 1966, not a single court has read this provision in the way that's suggested by the other side, that it's mandatory that there be an intervention for a screening function. The particular reason is that this (d)(2) notice refers to intervening to present claims or defenses, and that the not what an objector seeks to do.

An objector says there is a settlement on the table, I have a legal objection to it, it's either unlawful, as in Amchem, or it's unfair as in this case, and so it's a different kind of intervention. So I don't think it's open and no court has ever suggested that it's

how the rule should be interpreted. Now, assume the Court disagrees with me, Justice Breyer, why isn't it a good idea? It doesn't accomplish anything.

What happens is this. You move to intervene, the intervention motion is denied, so you appeal that, so you haven't really gained anything. What you have done is turn the objection into the application of the abuse of discretion standard. You just added another layer on top of it because then the court of appeals has to decide well, did the judge get the intervention motion wrong? If that was an abuse of discretion, then we'll reach the merits.

QUESTION: What if the court grants your motion to intervene?

MR. GOLDSTEIN: Mr. Chief Justice, then you haven't accomplished anything either. All you have done is permitted an appeal that under our theory would be permitted anyway.

QUESTION: Could we, could we go back just one step. You don't have to intervene to be an objector. That's very clear, isn't it?

MR. GOLDSTEIN: Yes.

QUESTION: And I thought that your basic argument was whatever your status is in the district court, that's what your status is on appeal. If you can

go into a district court, which is extraordinary, usually the district court doesn't let anybody come in without having intervened, but to object to a settlement, you don't have to do anything except say judge, I'm an objector. You don't have to be an intervenor. And I thought that your basic argument was whatever status you have in the district court, that you can come in and object, then you have that same status on appeal.

MR. GOLDSTEIN: Yes. I had taken an implicit premise to Justice Breyer's question that I'll come back to. This case will illustrate your point, Justice Ginsburg. In this case, we objected to the settlement. We moved to intervene. That intervention was denied. It is perfectly clear that if that intervention is properly denied, and as to our attempt to come in and take discovery, disqualify class counsel, that's not within the question presented. It's not here at the court. We would not have that power as an objector.

As an objector, we have only the right to pursue our individual objections, which is the distinction I take it you are drawing. Justice Breyer, I took the implicit premise of his question to be well, why don't we intervene for that limited purpose? And that's I think what I took Justice Breyer to be getting at. He is saying what's the big deal. Can't the district judge maybe help us out in

some cases where we might have a lot of different objectors and give you a limited intervention right. That is akin to the rule that is applied by the Seventh Circuit, and that is preserved by the question presented within the petition.

Now, the Government adds a patina on top of that that Justice Breyer referred to, and that is don't merely have pro forma intervention, but allow the district judge to actually do something and screen out the people we don't want appealing. So I came back to Justice Breyer and I said I don't think it will actually --

QUESTION: You have gained something. I mean, normally the judge would grant it, but let's say he didn't. It would be some pretty good reason. Maybe it would be very unfair, etcetera and you say well, he will just appeal that. That's true. But it's quite a different matter as an appellate court to decide whether the judge abused his discretion there than to have to go through what could be 15 years' worth of litigation to figure out whether this settlement nor the circumstances is a fair one.

MR. GOLDSTEIN: Justice Breyer, let me draw a distinction. My point is not that in an extraordinary case, that a district judge is faced with dozens upon dozens of objectors; the case has become completely

unmanageable; this is an important settlement to implement immediately; that a district court couldn't in that case exercise discretion under the broad language of subsection 23(d). My point is that in the mine run of class actions, in every case, we don't need to be doing this.

QUESTION: Well, what discretion would the district court have if your theory is right, Mr. Goldstein, that an objector doesn't even have to intervene? I mean, in a very complicated case the objector simply says I object, I'm not a party. What can the district court judge do?

MR. GOLDSTEIN: Well, I believe that under the language of the rule --

QUESTION: Of what rule?

MR. GOLDSTEIN: Of subsection D, and let me return to the introductory clause, Mr. Chief Justice. There is a, sort of the broad phrasing because we have all kinds of class actions. Justice Ginsburg pointed out we don't have opt outs here but in D 3 cases we might. Just in the broad phrasing in the conduct of actions to which the rule applies, the court may make appropriate orders. And I think the court of appeals would be very sympathetic to a district judge faced with an extraordinary circumstance of lots of adverse objectors. But I think --

QUESTION: So you are saying that I am reaching

out and bringing you into the case in spite of the fact you haven't moved to intervene?

MR. GOLDSTEIN: I apologize, Mr. Chief Justice. No. What I'm reacting to is Justice Breyer's suggestion that if there are actually a lot of objectors in the case, and it's become a mess, we have a district judge who says look, what in the world is going to happen with this case on appeal. I'm going to try and help the court of appeals out. My point is that I do believe that the district judge in that circumstance would have the discretion to say to the intervenors -- excuse me, the objectors, say to the objectors, look, if you all are going to take an appeal, we are going to have to handle this here and try and create some organization.

QUESTION: How does he give jurisdiction over people that are simply on the outside; they are not parties; all they are doing is objecting?

MR. GOLDSTEIN: I apologize, Mr. Chief Justice. They are parties. This is a rule 23 class action under Sosna vs. Iowa. At the point of class certification, they have come, they are both bound by the judgment and they have availed themselves of the court by appearing and making an objection.

QUESTION: Okay. Let's assume we agree with you. What does the judge then do? Does he say I'm going

to let X and Y speak for the rest of you, and I will not hear separate objections from the others?

MR. GOLDSTEIN: Well, no. I think the judge clearly is going to hear objections from everyone. The question is is the district judge going to exercise some gatekeeping determination about who goes up on appeal. But Justice Souter, I could not agree more.

QUESTION: How -- how can -- I'm lost. How does he exercise gatekeeping on who appeals?

MR. GOLDSTEIN: Justice Souter, that is our fundamental point, is that, let me just distinguish again with the Court whose position is what. We don't agree with this suggestion. It wasn't employed here. We think it's entirely unnecessary. I'm trying to achieve --

QUESTION: No, but you are suggesting it as an alternative to Justice Breyer's suggestion that maybe to avoid chaos, you ought to have discretionary intervention, permissive intervention, and if you've got to avoid the chaos, then I assume the judge has got to be able in effect to limit what some parties objecting can do in favor of what other parties, letting other parties objecting speak.

MR. GOLDSTEIN: Justice Souter, I agree with you. I don't know exactly how this is supposed to work. It has never come up in 35 years since the rule was

amended fundamentally in 1966. So far as we can tell, neither a federal district judge for a state trial court decided that he or she was presented with such an extraordinary case. I don't endorse this proposal --

QUESTION: Mr. Goldstein, I was very surprised to hear you say you agree with Justice Souter when he used the word permissive intervention. I mean, even the Government agrees with you that if you must intervene, you would be an intervenor of right, not a mere "permissive," because you are bound by the judgment.

MR. GOLDSTEIN: Justice Ginsburg, I didn't focus on that word in Justice Souter's question.

QUESTION: I retract my adjective.

MR. GOLDSTEIN: And so that's quite right. Now, let me just put on the table, Your Honors, the fact that we, here at the Supreme Court, the brief suggests oh, this will be so easy. District judges will always allow these sorts of interventions. This Court's opinion in Crown, Cork & Seal makes quite clear that isn't true. This judge said look, here's what's happening. And this is Chief Judge Motz in our case, said, I'm not going to let you intervene but if I'm wrong in rejecting your objections, you have got an appeal. That's how it has worked in several circuits without any difficulty at all, with the court of appeals having been confronted with any need for

the district judges to act as a gatekeeper.

And let me pick up, Justice Souter, if I might, on the specific problem that you identified and that is the district judge picking out one appellant versus another. There is the grave difficulty that in one appellant goes up and the others are not permitted to intervene in appeal, what happens when that person dismisses their appeal? This is an entirely untested rule.

QUESTION: Under your theory, any objector can appeal, I take it.

MR. GOLDSTEIN: Yes, Mr. Chief Justice.

QUESTION: And no matter how complicated the case in the district court, they don't have to intervene. You are going to have 15 or 20 appeals.

MR. GOLDSTEIN: But it has never happened. The courts -- that there would be that many separate briefs, for example, or separate appeals. Let me tell you how the courts of appeals deal with this problem. They deal with it here like they do in all multiparty litigation. They require consolidation. For example, in the Second Circuit, there can only be one appellant's brief. The people have to get together.

In addition, the Rules Advisory Committee has made a very specific point that I would like to draw to the Court's attention with respect to the amended rule

23(e) that will come into place in 2003, and the court says that once -- and I apologize: The advisory committee note, Mr. Chief Justice, this isn't reproduced anywhere, because it's a new rule that will come into play next year. But the advisory committee writes, once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector perhaps as part of the appeal settlement procedures or may remand to the district court to take advantage of the district court's familiarity with the action in the settlement. There is a great deal of flexibility built into the process.

QUESTION: How, in the Second and Third Circuits has, has the procedure been you can object, everybody lets you object, but you can then appeal without having intervened?

MR. GOLDSTEIN: In excess of several decades, Your Honor, and it stretches in the Ninth Circuit back to 1979, for example. And so let me point to the Court the language that is quoted against us from another court of appeals is the Guthrie decision from the Eleventh Circuit, 1985, in which that court predicted that there would be administrative difficulties, Mr. Chief Justice, with a system that allowed objectors to appeal. But it has been the rule in those other courts that Justice Ginsburg

identified for several decades, and they have not complained a whit about this.

QUESTION: Will your rule hold for certiorari petitions as well, so if, let's say, a named class member takes an appeal, but then the class petitions for certiorari, that any non-named class member can petition for certiorari?

MR. GOLDSTEIN: No, Justice Kennedy. This court's rule as I understand it is that you had to have been a party in the court of appeal, and so the failure to pursue your individual objection in the court of appeals would require, would mean that you drop out.

QUESTION: Well, but your rule is that you are a party.

MR. GOLDSTEIN: You are a party to the case, to the district court's judgment. That's correct. But this Court's cert proceedings turn on not whether you are a party in the district court but whether you are a party in the court of appeals, and I can --

QUESTION: But under your philosophy you are a party to the court of appeals because you are bound by the judgment.

MR. GOLDSTEIN: No, Justice Kennedy. Our point is this. When you appeal as an objector, as opposed to the class representative, you appeal in your individual

capacity to pursue your individual objections. That is our position why the Fourth Circuit had it wrong in saying that we were going to take over the case, usurp the role of the class representative. That's not correct.

We come into the court of appeals, Mr. Devlin does, on behalf of himself and when his, he is the only objector appellant that was in the court. It is true that he represents an organization, but his individual objections are the only ones that are in the court of appeals.

QUESTION: What you are saying then is not that he ceases to be a party, that the nonobjecting class member ceases to be a party in the court of appeals, but the nonobjecting class member has waived the right to be separately represented by himself, isn't it?

MR. GOLDSTEIN: Yes.

QUESTION: Yes.

QUESTION: And the objection, of course he couldn't petition for cert because all he can do, he can't question anything else in the case except his objections to the settlement. That's all he can pursue.

MR. GOLDSTEIN: That's right. That's what rule 23 sets up. It gives him a formal and important role in the process. And it's important not to let go of the reason that exists, and that is that the Rules Advisory

Committee notes that, and, understood that these objections are an important part of the process of identifying legal errors as in Amchem; deterring collusive settlements is another important role that they further.

Let me identify an additional difficulty and a reason why you should not have an intervention rule, and it applies, I'm trying to advise the court about rules that intersect its decision and rules that are going to come into place in 2003. In 2003, assuming the rules as proposed to be amended are actually implemented, there is going to be a real problem with the Respondent's suggestion and opt-outs. Right now, in a (b)(3) class action, we don't have the right to opt out, which I think is a point in our favor, as Justice Ginsburg noted, but in a (b)(3) class action you can opt out at the point of class certification.

Under the amended rule, there is going to be a second opt-out opportunity at the point of settlement. Our concern is that if you tell an objector, your role in the case may be cut off, if the district judge makes a terrible legal error, and the district judge then is a screen and gets to decide whether or not you are going to get to appeal, all that person is going to do is get out of the case and go litigate on their own by opting out.

The one thing this Court I would hope doesn't

want is to spread out all the parties. The point really is to keep everybody within the individual judgment. The premise of the Respondent's position, it seems to me, is fundamentally that we want a class action to be settled and over with, just the way a lawsuit of me against another person would be over.

With respect, I think that asks too much of rule 23. We, this is a case involving hundreds upon hundreds upon hundreds of people, and it's not surprising that it can't just be settled by one person or another.

QUESTION: Well, what's wrong with the Government's position, which is you have the right to intervene for purposes of appeal? Indeed you don't even have to file your motion to intervene until after the settlement has been entered as a judgment of the court. Just to make it clear that you are not someone who isn't even a part of this class, isn't even legitimately part of this class, you are not just somebody that walked in off the street. Why isn't that a problem?

MR. GOLDSTEIN: Because the judge already knows that. The only people contemplated by the Government's intervention proposal and screening function are those who have already stated objections at the fairness hearing, and we know who those people are. If they weren't members of the class and they weren't proper appellants, we would

argue no.

My point about all the different hypotheticals spun in a couple of pages in the government's brief where it discusses the screening function is that it doesn't actually add value and it does create collateral litigation. There will be a motion to intervene; there will be mandatory disclosures; there will be the opposition to the motion to intervene; it will be litigated and then it will appeal.

I could see, if the courts of appeals were actually experiencing a problem, that the advisory committee would revisit this issue and would interpose the district judges as a screen, but that hasn't happened.

QUESTION: The advisory committee could solve this either way, couldn't they, the Rules Committee?

MR. GOLDSTEIN: It actually could. And it hasn't. The amended rule the advisory committee notes, note the circuit split, and suggest --

QUESTION: Well, why hasn't it? Why hasn't it decided this?

MR. GOLDSTEIN: I think there is one good reason and that is that the advisory committee goes through, in cycles, of course, it revisits particular rules. Rule 23, rule 24. Rule 23 we believe has no role to play, as Justice Souter suggested, in screening appellants. That's

the rules of appellate procedure and so it's not surprising in amended rule 23 that they didn't take this on. If I could reserve the balance of my time.

QUESTION: Very well, Mr. Goldstein. Mr. Gold, we'll hear from you.

ORAL ARGUMENT OF LAURENCE S. GOLD

ON BEHALF OF THE RESPONDENTS

MR. GOLD: Mr. Chief Justice and may it please the Court: The well settled rule that we begin from and that the Petitioners accept is that only parties to a lawsuit or those that properly become parties may appeal an adverse judgment. The basic point of the Petitioners, the point from which everything else springs, is that the unnamed class members are parties to a class action suit. That premise is wrong. In a rule 23 case, the only litigating persons before the court are the persons who initiate and prosecute the case as parties opposing the class, the persons who are served with process and defend the lawsuit as representative parties, and the persons who move to intervene and are granted intervention. The very point of the class action is to provide for representative party suits where the class is so numerous that joinder of all the unnamed class members is impractical.

QUESTION: But couldn't any member of the class say judge, you looked like a representative. I'm not

adequately represented and at the point at which I'm not adequately represented, I have the right to come in and speak for myself. And isn't that exactly what's going on here? A representative of my class is fine, until the representative is together in a deal with the other side, and at that point, when I object to the deal, I'm not adequately represented.

MR. GOLD: The -- to the extent that that is your point, and you move to intervene to replace the representative party, that's a motion that has to be dealt with. The, the "fairness hearing" and the process of the district court --

QUESTION: Mr. Gold, may I go back to the statement, you said something, you moved to intervene. If you have seen class actions in the Seventh Circuit and the Third Circuit, you can come in and object without intervening.

MR. GOLD: But that wasn't --

QUESTION: And that, you come in and object and you say I object to the settlement. This representative is not adequate to represent me to the extent of the settlement.

MR. GOLD: Well, but you are not saying that the representative is not adequate to represent you for purposes of the settlement. Your objection is that the

settlement is not fair, proper and adequate.

QUESTION: Well, then let me put it in your terms, and I'm reading from page 30 of your brief. Once a proposed settlement is reached, it is axiomatic that the named representative party who has negotiated the settlement does not adequately represent either the interests or the viewpoint of those class members opposed to the settlement. You say it's axiomatic and I was just saying well, you said yourself it's axiomatic that they, the representative at that point does not adequately represent the class member who is opposed to the settlement.

MR. GOLD: In -- in the sense, Your Honor, what we are saying is not that the class representative in fact has not properly and adequately represented the class. It is that the individual can, has a proper argument for intervention on that theory. It isn't that the, the individual in making objections is necessarily challenging the propriety and adequacy of representation.

QUESTION: But Mr. Gold, if he is challenging the representative's fee, I think he is, which often is what the minority member of the class objects to, the large fee that the class representatives, the lawyers get. You can't say there is not a conflict there.

MR. GOLD: I'm not arguing that there is not a

"difference of opinion" or conflict. If --

QUESTION: Well, you are certainly not arguing that the lawyer adequately represents the person who is objecting to his fee either, are you?

MR. GOLD: No. I am not. No. But I am arguing that the making of objections, whether it is by a class member or the, a nonclass member who is interested and affected by the class action and the class action settlement, as was the case in Marino, by making an objection is not entering the case and litigating in the case. That is, as a party. That is the very point of the court's opinion in Marino vs. Ortiz.

QUESTION: That was somebody who was not a member of the class, right?

MR. GOLD: That is correct.

QUESTION: Here you are talking about members of the class and even in this case, people who are made to be members of the class even if they don't want to be because they can't opt out.

MR. GOLD: Well, they are the members of the class but they are not parties to the lawsuit. That is the whole --

QUESTION: They don't want to be. All they want to do is to say, as Justice Stevens suggests, you made the settlement deal and the lawyers are getting the lion's

share of it and I want to object to that, why can't they say that?

MR. GOLD: There is no argument here that you made a deal and the lawyers are getting the lion's share. Here the lawyers were paid on --

QUESTION: But we're are not dealing with the merits of it. We are dealing with first you have a right to come in and object, and you have agreed that you do have a right to come in and object. Now, the question is, what more? And what I took to be the principal difference between your position and the Government's is the Government is very clear that there is a right to intervene. The objector would have a right to intervene for the limited purpose of pursuing the appeal.

You seem to hedge on it. First you say it's axiomatic that there is a, no longer an identity of interest, but then I can't tell, and maybe you can tell me. The Government says of course they have a right to intervene, but we want them to be orderly so they make a motion, which must be granted. What is your view?

MR. GOLD: I don't understand the Government to argue that the motion must be granted, and I'll --

QUESTION: Do you understand the Government to say it is intervention of right, not permissive intervention?

MR. GOLD: It's intervention of, of right, but not automatic. Intervention of right is not a, a motion that has to be granted without a showing. Intervention of right is intervention of, to file, to participate in the litigation by doing something. And it's our view that since we are talking about a status to take an appeal in a representative action, it's a motion to press a case into court, into the court of appeals and to litigate the case in the court of appeals as, for the class and unnecessarily on behalf of the class.

The point of appeal --

QUESTION: I'm sorry. I'm sorry, Mr. Gold, I really don't understand what you are trying to convey because there are two kinds of intervention, intervention of right and permissive intervention. Intervention of right if you meet the terms, and in this case it would be when you claim an interest, which is the subject matter of the action, and you're so situated that the disposition of the action may as a practical matter impaired your ability to protect your own interests. So I give you one example is, well, this case. I will lose -- my pension is going to be, the COLA is going to be dead and gone, so I want to protect that interest, which the settlement takes away.

Isn't that, wouldn't that be, whether I have a good case on the merits is another question, but wouldn't

I have a right to intervene?

MR. GOLD: You would, you have a right to intervene, but your -- what you are doing if you seek to intervene to take an appeal is to proceed on behalf of the class and to invalidate and have vacated the, the settlement agreement which is not an agreement which either cuts your COLA, the trust, having acted --

QUESTION: The, the Government as I understand it says yes you have a right to intervene and you have a right to appeal to the limited extent that you are contesting the settlement. That's the Government's position. And you are saying that's a wrong position. Is that --

MR. GOLD: No. I am not saying that that is a wrong position. I am saying that it is our view first of all that it is a right position. And secondly, we would suggest that the, the standard for showing intervention is not simply that you are a class member, and that you have objections to the settlement, but also, a showing that you have colorable objections and that in, in pressing those objections, you are going to do so for and on behalf of the interests of the class. Now, that's our view of the proper standard for the proper showing on behalf of the intervention. We think that that standard is exactly the correct standard for maintaining the integrity of the

class action.

QUESTION: Mr. Gold, that's not the standard that applies to the right of a class member to participate in the district court proceeding, is it?

MR. GOLD: It isn't -- it is; it would be the standard for a class member to intervene as --

QUESTION: To intervene. I'm just asking to participate in the district court objecting to the settlement. Don't he have an absolute right to do that?

MR. GOLD: He has an absolute right to participate in the, in the fairness hearing. But that is not a litigating right. He is, objectors advise the court on their views of why the settlement is --

QUESTION: But he has that right, whether or not the district court may view his objections as colorable or frivolous.

MR. GOLD: That is true, Your Honor. But the making of objections is not coming into the action to litigate, but as if your objection is a motion, which the court passes on or not. The court is considering a question posed by the litigating parties, whether the settlement agreement is fair and proper in order to be approved. Objectors have the right to state their views for the court's consideration. The courts also --

QUESTION: And to have the court rule on the

objection.

MR. GOLD: No. Not to have the court rule on the objection.

QUESTION: Oh, you don't think that, they can file an objection, the court doesn't have to rule on?

MR. GOLD: No. The court rules overall, having considered --

QUESTION: Even approving the settlement in the face of an objection is the ruling that the objection is without merit. It seems to me. I don't know. Maybe you know something --

MR. GOLD: No. The objections can be of all shapes and sizes, Justice Stevens. They can be that the settlement doesn't provide enough for the X or Y class and the judge doesn't say that that's precisely what the X or Y class ought to get, and I reject that as an objection.

The judge's role is, is the settlement fair, proper and adequate? And the point is, our basic point is if a class member wishes to go further and take the case to another stage where he is litigating on behalf of the class, he ought to be an intervenor and a party, not simply someone who is not a party. We think that that's proper, whatever the right standard on intervention is, and we believe that the standard I have articulated makes sense in the class action.

QUESTION: You disagree with anything the government said in its brief about the objector has a right to intervene, he can do so even after judgment within the time allowed?

MR. GOLD: We think definitely that an objector or even a class member who hasn't participated in the objection process can intervene to take an appeal and to forward the objections made in the objection process by anyone, but we think that --

QUESTION: Then you are disagreeing with the Seventh Circuit. Seventh Circuit, as I understand it, says you have a right to intervene, but you must exercise it when you know about the settlement, and it's too late after judgment. So you are disagreeing with that?

MR. GOLD: Well, the Government -- neither, I don't believe the Seventh Circuit has passed on the, the propriety of intervention after judgment. Òur only point is --

QUESTION: It has. It has. It --

MR. GOLD: -- that only parties can -- no, they said that you can intervene after.

QUESTION: No. The Seventh Circuit has said; it has dismissed. It said you have a right to be here, but you should have intervened when you knew that you were objecting to the settlement. It's too late to do so after

the judgment.

MR. GOLD: Well, the Government doesn't take that position. We don't take that position.

QUESTION: Thank you, Mr. Gold. Ms. Millett, we'll hear from you.

MS. MILLETT: Mr. Chief Justice, and may it please the Court. We agree with Petitioners that objectors who have expressed objections to settlement agreements have important interests and often should be allowed to appeal. Our disagreement is on the mechanism by which someone gets to the court of appeals.

QUESTION: Is that a purely formal disagreement, or are there some distinct practical advantages that you can tell us to your rule so that the district judge, I assume, can give some shape and direction to the appeal? Is that the point?

MS. MILLETT: There is a practical significance to this process. I think it's important to keep in mind that class actions can come in many forms and shapes and can involve up to, as this Court knows from the asbestos cases, tens of thousands of people, any one of whom can express an objection. And it is actually incorrect and we disagree with the argument that you will know at the objection stage whether in fact that person even really is a member of the class action, who has a live claim that is

covered by the class. So what the intervention motion process allows is, we don't think a merits determination on the value of the objection, but we think it allows a district court in the first instance to make a record and address whether someone is a member of the class.

I mean, you could have a class action that's not as discrete as this one here, but the definition of the class is everyone employed by X corporation for a period of 10 years.

QUESTION: Beyond the determination that they are members of the class, are there any further purposes served by the intervention rule you propose?

MS. MILLETT: Whether or not there is stale claim. But it, you could have objections that really simply don't have any relevance to the issue that will be presented on appeal. For example, in this case, I think as Mr. Gold said, objections come in many shapes and sizes. And if I could refer the Court to Joint Appendix page 125, we have an objection that says please consider this letter my objection. That's it. It gives no elucidation to anyone on the basis for appeal. Now, how the court can deal with this, this deprives the district court of any opportunity to address this concern as a part of the settlement.

QUESTION: You think under Petitioner's view

that person would be able to appeal?

MS. MILLETT: That's my understanding of Petitioner's view, without having given the district court any opportunity, or the attorneys who are representing that person at that point, to address this concern is part of the fairness hearing.

QUESTION: Well, what is the practical difference? I mean, you take the position that intervention is of right, is that correct?

MS. MILLETT: Yes.

QUESTION: All right. Then the practical difference is that if they move to intervene, they simply have to come physically before the court, so the court can flush out the objection, as opposed to merely filing an objection saying I object in which case the court may not see them? Is that the difference?

MS. MILLETT: They don't have to be there physically, in person, but there is motions practice in district courts, and a district court would decide whether or not they want someone there in person or not. But intervention rights --

QUESTION: Well, why cannot the same thing be accomplished by saying flush out your objection?

MS. MILLETT: There is two answers to that. First of all, intervention of right doesn't mean the

district court doesn't have some final say. But when we need to understand, objections are coming before a settlement has been approved, and it may well be even if this objection is very vague, I have got enough other objections that in fact would capture what that person is concerned about without them having told me. And if they object -- the objection process, the fairness hearing is very flexible and informal at this point and allows the district court to gather information and make a decision whether to approve the settlement agreement.

It would be very unworkable, and I think unwise to adopt a rule that turns the fairness hearing, which is supposed to focus on the settlement agreement and dealing with serious objections, I think that's what courts want to do, into a fairness hearing/qualifications for appeal, where I have got to spend all my time not just deciding whether I should approve this settlement agreement or not, so that you would even be aggrieved, but in advance I have to decide whether you are part of the class and someone who could --

QUESTION: Ms. Millett, I would be very impressed with the argument you are making now about having the thing run neat and tidy, but for two things. Are you aware of any experience in the Second or Third Circuit that creates these, this pandemonium that you are

now describing? And second, when did the Government find out about the pandemonium? Because in Felzen, as I recall, you took the position that the objector can come in, object to the settlement, and can appeal for the limited purpose of challenging the settlement without intervening. What happened between Felzen and this case, and are you basing your prediction of pandemonium on any experience in the Second and Third Circuit that allowed objectors to appeal for years?

MS. MILLETT: Concrete evidence of pandemonium, no, there is no concrete evidence that intervention is a difficult barrier in the five circuits that have required -- in fact, the seven circuits that require this intervention motion. So our position is based on analysis of the rules. We have an established mechanism in the rules for dealing with deciding who will be a litigating party, not one of the 10,000 on the sideline, but a litigating party in a case.

Now at the time of Felzen, we didn't have as much experience with the limited intervention option for purposes of appeal. And it seems that now when we focus on the --

QUESTION: When was Felzen? How long ago was it?

MS. MILLETT: It was -- I'm sorry. I don't know. About seven years. But in the intervening time,

there have been some decisions from the Seventh Circuit that have propounded this notion, in particular, Seventh Circuit, that have propounded, and the Eighth Circuit, too, that have propounded this notion of limited intervention for purposes of appeal. And I have to say we have also just reviewed and reconsidered our position, and looking at the text of the rules, we have an answer to this problem.

QUESTION: Felzen was three years ago. I was --

MS. MILLETT: I'm sorry. But the point is that we have an answer, our position is that there is an answer in the rules to this problem and it's limited intervention for purposes of appeal. And the alternative is to make up an ad hoc rule cut out of out of whole cloth. That seems to collect a variety of factors that happen to have been present in this case --

QUESTION: May I ask you, because your time is so limited, could you tell us what is the difference between your view of this case and Mr. Gold's view of this case?

MS. MILLETT: I think, well, putting aside, we think there is more, we don't think that the objectors are parties but we are somewhat more sympathetic to the notion that they have the same interests as quasi parties, I think, than Mr. Gold is. Secondly, and I don't want to

put words in his mouth, but my understanding of their brief and argument here is that they would have some more rigid scrutiny of the intervention as a right motion, and in fact would require the person to demonstrate that they can represent the interests of the class.

QUESTION: May I ask you under your view of the requirement of an intervention for purposes of appeal, could the district judge in this case, in response to the intervention motion that was actually filed, have granted that relief?

MS. MILLETT: The intervention for purposes of appeal?

QUESTION: Yes.

MS. MILLETT: Could it have, I guess the district court would have had the power contingently to reserve judgment. Because, remember that motion was made before the settlement was even distributed and notice was given, so it would have been odd to grant intervention for a settlement judgment that had not yet been entered and the judge hadn't heard objections or had a fairness hearing. I mean district court can only say I'll reserve judgment and I will renew or revisit this question for limited purposes of appeal after I have judgment, if you are still interested, if your concerns are not addressed.

In this case, the intervention was, again,

before the settlement was even distributed to members of the class, and it was joined with a motion that asked to strike class counsel for preliminary injunction. And so I think, and it hasn't been contested that the district court was well within its discretion to deny.

QUESTION: But you could deny it in court. You could say to the extent that they wanted to intervene to contest the settlement, fine, to the extent that they want to take discovery, it's not fine. But to say that because they asked for too much they are not entitled to anything, is, I would think the Government would say the judge was right to say they can't engage in discovery. The judge was right to say they are not entitled to an injunction. But to say that they can't intervene --

MS. MILLETT: The district court never said that they can't intervene for purposes of appeal because they were never --

QUESTION: It denied the motion to intervene, which had many parts.

MS. MILLETT: Well, it just said to intervene. The motion itself just says to intervene and then was accompanied with this, other motions asking --

QUESTION: So, should not the proper ruling have been yes, you can intervene, but only for this limited purpose, instead of saying motion denied?

MS. MILLETT: Well, I think if this Court would adopt the rule and recognize that limited intervention for purposes of appeal is appropriate in this context, district courts will know that that's an option and be able to address it or raise it with attorneys. But the important thing here is I think --

QUESTION: This district judge certainly thought that his wording on the objection, he twice said if you don't agree, appeal it. And the "it" was his appeal of the settlement.

MS. MILLETT: He said that. He also twice told him that he wasn't a party to the case, as well. I think -- the point is, you may have thought he would ask, but our interest in this case is less the particular, we gave the court our best judgment of how the record --

QUESTION: Do you disagree with the Seventh Circuit, which would require the motion to intervene to be made prejudgment?

MS. MILLETT: If that's how one reads -- I assume you are talking about the Navigant opinion?

QUESTION: Yes.

MS. MILLETT: I think there is a prior opinion and I'm sorry, the name, escapes me from, which Judge Easterbrook also wrote, which we think adopted our position.

QUESTION: Thank you, Ms. Millett.

MS. MILLETT: Thank you.

QUESTION: Mr. Goldstein, you have five minutes remaining.

REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Thank you, Mr. Chief Justice. If I could make four points, please, about the Government's proposal starting with its applications to this case, because Justice Stevens and Justice Ginsburg wanted to know whether we do here, assuming what happened in the district court, assuming we were going to adopt the Government's position, the Government does not press, so far as I understand, any further whether or not it's presented in this court. We have the cert petition identifying the motion to intervene, the discussion of the Seventh Circuit's position. The question is what we did in the district court.

The argument, as I understand it, the textual basis for the Government's rule is that under subsection (d)(2) of rule 23 you move to intervene, and the language of the rule is that the district court can condition your right to intervene.

And Justice Ginsburg, if you would adopt the Government's suggestion, I think that's what you would

have to say was the appropriate result in this case, that the district judge should have seen our intervention motion and because he clearly did believe we had the right to take an appeal, he should have conditioned it.

So my principal point is that whatever the Court does in terms of its rule, we prevail.

QUESTION: Is that still before us, I mean, the denial of the intervention motion?

QUESTION: I don't think that was properly raised.

MR. GOLDSTEIN: Mr. Chief Justice, let me explain why I disagree. There are, the cert petition, and I need to distinguish between intervention for all purposes and intervention for purposes of taking an appeal. In the cert petition, the question presented flags the fact that we move to intervene and discusses at some length the Seventh Circuit's role which we are discussing here both in the petition and in the required brief, and to that extent it clearly --

QUESTION: But that's not, I don't think a fair interpretation of the question that you have presented. The question is whether you have standing to appeal.

MR. GOLDSTEIN: Justice Kennedy, the reason we used that formulation is because it's the formulation that the Fourth Circuit used. It's just picked up from the

court of --

QUESTION: Well, we'll decide that another time.

MR. GOLDSTEIN: I understand. The only other point, I would make, Mr. Chief Justice, about what's fairly included in the question presented is I ask the court to look at the question as the Government frames it, which it only could do if it believed our position was --

QUESTION: Well, we take it the question you presented and your petition for certiorari, that's what we granted.

MR. GOLDSTEIN: Yes, Mr. Chief Justice. Now, the second is, I'd like to address, Justice Ginsburg, with respect, I don't think that you got a comforting answer on the question of whether or not this has been a problem in the Second or Third circuits, i.e., is there a problem out there that requires the rules to be construed --

QUESTION: Why is it, has there been a problem the other way? The seventh circuits that have gone the other way?

MR. GOLDSTEIN: But they don't, Justice Breyer. Our point is that no circuit applies the Government's rule. It's a little unfair to say that I can't identify a problem with their rule, since no court has ever adopted or even suggested it.

Now, it is a problem to the extent that there

are circuits that require full party intervention. That you have to come in, you have to be a litigant in order to take an appeal. The problem is not an administrative one so much as that it cuts off appeals, appeals that are perfectly legitimate. The rule as we understand it under this Court's precedents is not that only named parties can take an appeal. That's why someone who sanctions can appeal and that's why it's uncontested that the denial of our motion to intervene gives us a right to appeal. It is persons who are directly affected by the judgment, directly bound by something that the district court did, and then what they can do is they can appeal to the extent that the arguments that they properly presented to the district court.

Now, someday, will there be unusual class actions that require a further screen? Perhaps. Our point is that in an appropriate case a district court could employ the Government's suggestion, but why we would want to add the burden of this intervention requirement in every single class action in order to avoid the hypothetical possibility, that again has never been suggested by any court, State or Federal, so far as we or the Government have been able to identify.

The other point I would like to make, just to, although again we believe we prevail under the

Government's suggestion, is to take you back to the text that's supposed to require this intervention, and I think a fair reading of the text is otherwise. There are two different provisions for notice that we are talking about. The one is the D provision that I quoted midway through the argument, and the other is E, which is the settlement notice. The point to recognize is that under (d)(2), which talks about intervening to present claims or defenses, there is no intervention requirement when it comes to presenting objections.

And we are not intervening to present any claims or defenses. There is just no textual hook here. To the extent the Court did want to look at subsection D, with respect, we think it's the end of that clause that says intervene to present claims or defenses or otherwise to come into the case. There is nothing in the text of the rule, there is nothing in the advisory committee notes that indicates that anyone contemplated the intervention to appeal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goldstein. The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)