Oral History of
ALAN MORRISON
Sixth Interview - February 10, 2008

MR. MARCUS: This is Dan Marcus interviewing Alan Morrison on Sunday, February 10. Alan, now that we finished the legal profession cases, I think we were going to turn to class actions, and neither you nor I can remember what clever transition you had.

MR. MORRISON: Well I do remember one thing, though. You asked me the name of the lawyer and I went and looked it up—the lawyer from Crowell & Moring, Cliff Hendler.

MR. MARCUS: Oh, Cliff Hendler.

MR. MORRISON: Yes, Cliff Hendler, yes. He was the mediator who had the patience of Job in the Nixon tapes case.

MR. MARCUS: Well isn't that interesting because Cliff Hendler was in my old law firm at Wilmer, Cutler & Pickering as a young associate and then he went over to Crowell & Moring and had a very successful run there as an insurance coverage guy, I think. He was a good mediator, huh?

MR. MORRISON: He was—he got it done. He hung in there in the face of all kinds of adversity. Between the Nixons and the government and us it was quite—it was a three-cornered negotiation. At one time there was one group that was causing problems and he would both keep us in the room at the same time and then kick us out of the room.

MR. MARCUS: Okay, so why don't you tell us how you and Public Citizen got into the class-action world.

MR. MORRISON: We first got into the class-action world indirectly, and the reason we got into it was an outgrowth of our work on the legal profession. We're talking about the early 1970s, fairly soon after the '66 amendments to the class-action rule, Rule 23, got passed. You started to see class actions taking off and moving ahead and being engines for justice. I also started to see cases in which the lawyers saw this as engines for enrichment and started making a lot of money. Actually, our first foray into this involved stockholder derivative suits under 23.1, which are the first cousins of stockholder suits. They were all in one rule until '66 and then they got split out. We actually got into this indirectly.

In 1973, while Archie Cox was still the *Watergate* Special Prosecutor, he brought the first cases against corporations which had been making illegal cash contributions. They had set up slush funds and they slapped a small fine on the company. The first one was American Airlines. The first American Airlines case involved no fine for the corporate officers at all even though obviously a corporation can't siphon off money and deliver it

to candidates. I think Cox did that because American Airlines was the first and they may actually have come in to cooperate.

MR. MARCUS: I think my old firm may have represented them.

MR. MORRISON: Oh, yes, your firm had a matter and I'll tell a story about that matter involved in this situation.

When I saw this, I said, wait a second. Here you have corporate officers diverting money illegally for, presumably, their own political aims. Maybe they think they were helping the company, but who knows what they were doing. They were taking—it was clearly a crime as to what they were doing and not only didn't they get charged criminally, but they didn't have to pay back any money.

We brought a stockholders suit on behalf of American Airlines. We made a demand on the company to sue, they refused, so we brought a suit against American Airlines to require it to recover the amount that had been illegally diverted and the amount that had been paid in fines for the company and the legal bills.

MR. MARCUS: It's a terrific case.

MR. MORRISON: So we filed against American Airlines and it turned out that American Airlines had a relatively modest amount of money that they had actually given to candidates. It was something in the $125,000 range. Actually, you didn't even know how much money there was from the indictment, from the guilty plea. You knew that there was one contribution; they only hit them for one contribution. We brought the suit and I got a call from Lloyd Cutler and he said to me, "I'd like to come over and talk to you about the case and Cyrus Vance is coming also." I said, "Well whom do you represent?" He said, "We represent the situation." I said to him, "Well, okay." I had never met him before and so I said I'd be willing to meet with you. He said, "Cy will be coming down to Washington. Let me see if we can find some time." A few days later I got a call from his secretary. She said, "This is Mr. Cutler's office calling. Mr. Vance will be in Washington on Friday, how would 2:00 in the afternoon be?" I said, "That will be fine. Does Mr. Cutler know where my office is?" I said, tell him we'll see him then. So Lloyd and Cyrus Vance came up to our little offices on P Street with this beat up, ratty old furniture in what was called the Headquarters Building. They called it the Headquarters Building because that's where Richard Nixon had his first campaign headquarters. Bobby Baker had his offices there. Jimmy Carter had had his first campaign office in that building before. That was very early on. They came trudging up and sat with me in my office and explained to me why this was all very silly and we shouldn't do anything.

I explained to them that I thought that the officers should pay and they should be responsible and sure enough, we ended up, without any substantive litigation, with full disclosure. I got the disclosure, as I recall, of what they had given to the Special Prosecutor's office in terms of the total amounts. If they had lied to them, they had lied to them. I wasn't going to go taking a bunch of discovery and figuring out what they had

done. I assumed that they had done that and that's the prosecutor's job to get all the amount of money. I did that and they proposed a settlement. They came back to me and they said that they wanted the names and the amounts to be secret. I said no. First place, we had to go to court, because you have to get court approval of settlements in derivative suits as well as—and I said, "No." I said, "Are any of these people paying money on the Board of Directors?" They said, "Yes." I said, "Stockholders clearly have a right to know whether their directors having been doing things. We're not saying they can't serve as directors. That's somebody else's problem. But they can't do this." They said, "Well there is one guy who was a low-level person who was the bag man," as I recall. He said, "He's not an officer and not a director." They told me who it was and what his position was and I said, "We can list that as an 'other' contribution in it." The total payment, I think, was $125,000 and we took a small fee out of it, very small. The case was settled and approved.

MR. MARCUS: Did they ever say who they were representing?

MR. MORRISON: I think they were on behalf of the company and somebody else had an outside lawyer. They obviously didn't think this was a good way to spend their money and they were right. They did the right thing. That was fine. But they tried to talk me out of this and said, "They've already suffered enough." I said to them, "No, no, no. Just forget about it." They understood, of course, that we were economically irrational. As you said, it's a good case. It's exactly right, it's a good case and that we were prepared to go ahead and litigate this case. That was the first one.

At about the same time as that was going on; we brought a second case involving 3M.

MR. MARCUS: Also a campaign contribution?

MR. MORRISON: Same thing. This time, the Chairman of the Board, Harry Heltzer, had actually taken—had pled to a misdemeanor and paid a modest fine. I don't remember what it was. I had gotten some inside information that, although the amount reported in the press was a contribution of $30,000, that there was a huge amount more money at stake. More importantly, that there was a potential tax liability for fraud arising out of this because the way the tax law was written (and I hadn't known this) at the time is that fraud penalties, civil fraud penalties, are based on the amount of the deficiency in the year in which the fraud was committed whether it is fraud-related or not. Most companies have deficiencies every year with the IRS, particularly back then when the rate of interest the IRS was allowed to charge by law was less than people had to pay on the market. So the IRS was your favorite banker. They didn't ask any questions. So companies legitimately, more or less, would take every aggressive position that they could on their tax returns knowing that when they had to pay them, as long as they didn't do anything fraudulent, they were all right. So they would have routine tax liabilities of $10 or $12 or $20 million which was not much as far as the scheme was concerned. But, if you had a fraud penalty of fifty percent, that started to add up to money. And to the extent that the officers of the company were liable for the fraud—responsible for the fraud—they were arguably liable for the huge penalties as well.

We brought this case, they made a motion to dismiss on business-judgment rule, and we said we wanted to take the depositions of the officers, we wanted to see their investigative report that they had—an internal report that they had done and that we wanted to know how much. Well to make a long story—not so much a long story—short, they got smart and they gave us the disclosure. It turned out that there had been about in excess of a half a million dollars siphoned off—actually more than that siphoned off and put in pots of money, but only half a million dollars of three quarters of a million had gone into campaign contributions. They made a settlement offer of $475,000 which was very early in the case. The key question was what do we do about the tax liabilities, because they were unsettlable then because nobody knew what the substantive liability was. The IRS had told them that there was a potential fraud investigation.

MR. MARCUS: As a result of the Special Prosecutor, not as a result of you?

MR. MORRISON: It was because the money was siphoned off in years in the past. It was sitting in various kitties in various places. One was in Switzerland and they had a fancy way of doing it. They said that they were legal bills and other expenses when they were plainly not. It was real fraud. It was not done for defrauding the IRS; it was done so that you could make the illegal contributions. So we got the former Chairman of the Board, William McKnight, who had not been, insofar as anybody knew, involved directly, but he had a huge amount of stock. He put up a very large hunk of the $475,000, I think, probably, to protect his stockholding interest. He had the money to do it and he put up the money because he was afraid that all the bad publicity for 3M would drive down the value of his stock. Three corporate officers put in around, my recollection is, $100,000 each, $75,000 to $100,000 each, and we came up with that kitty.

We had filed the complaint, we opposed the motion to dismiss. We didn't actually end up taking any depositions because they turned over all the stuff that they had. But we'd gotten a terrific result so we took a ten percent fee.

MR. MARCUS: Your biggest fee.

MR. MORRISON: Yes, that was a big fee and for not much work, but we had a really good idea. At the same time as this was going on, I went back to Stanley Sporkin, who you may remember was the person with whom I had dealt on the ITT case over at the SEC. He was the chief of Enforcement by then. I said to him, "Stan, you know, these companies are not disclosing the full extent of the illegal payments and, equally important, they are not telling their stockholders who was involved. In almost all these cases, there were multiple people involved, including several who were corporate officers and directors." "Oh," said Stanley, "that's interesting." And so at the same time as we were going ahead, we got a pincer movement using the SEC. And the SEC did a thorough investigation of 3M, I now remember that, and they concluded, they confirmed the amounts of money that we had. And, of course, they had a big staff and they have subpoena power and all this other stuff that they can do. That turned the tide in terms of these cases because now the SEC was on top of every one of them. The SEC was going

to go after them. The SEC also made them do some other institutional reforms which we were fully supportive of. That made court approval of settlements much easier.

The third case we brought was involving Phillips Petroleum. Phillips Petroleum, the company, was represented by Clark Clifford's law firm—Clifford and a lawyer named Tom Finney. Finney was doing most of the work in the case. We quickly settled with them. Then there was another case and this one was brought by the Center for Law in the Public Interest, a firm out in California. They had spent—they spent a whole bunch of time and they had gotten all the money back, but the money wasn't a big issue in the case because there wasn't so much of it. They had put in a bunch of what they referred to as institutional reforms and a) they weren't very well done, and b) they didn't make much difference. Then they went in and applied for $500,000 - $300,000 in fees for accomplishing essentially nothing. I had been seeing some of these excessive fees cases in other situations and so I represented another stockholder and we objected to the fees.

MR. MARCUS: Was this this guy Phillips?

MR. MORRISON: It was John Phillips.

MR. MARCUS: CLPI.

MR. MORRISON: One of my law school classmates, Carlyle Hall, was in the firm and there was another guy—I've forgotten his name—who subsequently became a deputy counsel with the Defense Department. He's now with a firm here in Washington. I've forgotten his name. At any rate, they were furious. We objected to the settlement and said the settlement wasn't any good, the injunctive relief wasn't any good, and besides, they had this huge, excessive amount of fees. So I got to meet Finney first and eventually Clifford due to circumstances I'll tell you about in a second. They were so mad about this. At one point somebody said to me in one of our discussions, "Look, that's between Phillips Petroleum and us! Robin Hood. Why are you doing this? We should get the money. Everybody should have the money." I said to him, "No, it's a matter of principle. These cases are going to end up being subject to enormous criticism if the lawyers are the only people making the money." Fast forward, of course that's one of the big complaints now. I said, "We're going to kill off good devices," derivative suits being simply a variation on class actions and the same kind of thing happens in them as well. We said, "No, we are going to oppose it." As I was doing this, I wondered whether perhaps I was somehow jealous that they had somehow make all this money and we hadn't and that I was somehow letting my personal views about this influence what we were doing.

MR. MARCUS: Did you get any flak from the other elements of the public interest legal community on this?

MR. MORRISON: Well they actually went to Charlie Halpern and talked to him at some point. I can't remember exactly what point. But fairly early on in this thing, I called John Ferren. John was the pro bono partner at Hogan & Hartson and we had worked on a couple of cases, including the Howard Phillips case, that I mentioned earlier, when

Howard Phillips was the acting head of OEO, John was representing some people in the OEO case who wanted some money, but they were parallel cases. We were trying to get Phillips out of his job which, of course, they were too, but they didn't want to do that because it was too frontal an attack and they were trying to get some money and trying to do some other things. It also turned out that he lived quite near us and his wife and my wife, Anne, were car-pooling together to grade school with their son. So I called John and said to him, "John, can I ask you to do me a big favor? Will you look at these papers and tell me whether you think I'm off base in objecting to this fee—not as a political matter, but is this fee objectionable?" One of the things I had learned was that the defendants weren't objecting to these fees. Because they were small relative to the counsel fees that they were paying, if they objected to the fees, who knew what else would happen? All I knew was that they weren't objecting and so I thought maybe I'm mistaken in this.

John looked it over and got back to me a couple days later. He said, "You are well within your rights. This fee really appears to be excessive." Maybe then it was Charlie Halpern that came to me. Eventually we agreed to have somebody, an outsider, look at the fees.

MR. MARCUS: You agreed with CLPI?

MR. MORRISON: CLPI, yeah, and that they would make a recommendation to the court to look at the fees. My recollection is we had kind of an informal mediation-type of process. I think that the person was somebody at Paul, Weiss in New York. It may have been Arthur Liman, but I don't recall for sure. No, it was Morris Abram.

MR. MARCUS: As the mediator?

MR. MORRISON: As the mediator. I did this because I just didn't really want to have a big public fight about it and it was hard to object, but I knew in my heart of hearts that these guys were not in the business of cutting down fees and he recommended a small reduction in the fee which they accepted and I just said, "Okay, I'm not going to deal with it anymore." But it stuck in my craw and I just thought it was wrong because they were getting too much and it was a bad idea.

The last part of the story is there were some continuing monitoring responsibilities because they had a potential tax problem at Phillips Petroleum, like 3M did. Turns out in neither case did the IRS ever assert the fraud penalties about them so we didn't have to worry about this. Oh! I didn't tell you what happened in the 3M case. What we did with the 3M case is we wrote into the settlement agreement that the tax fraud issues related to penalty, interest and everything were expressly excluded from the settlement in both directions and so we didn't give up anything and they didn't have to pay anything for it because there was no number that we could have agreed upon. If we had agreed—there is no number that they would have paid, the individuals would have paid, because if they paid a low number ($10,000) it would have been ridiculous in comparison to the potential millions that might have been owed. On the other hand, they weren't going to pay a huge

amount of money, nor could we rationally expect them to do so, due to the fact that the IRS had not even firmly asserted the fraud penalty fees.

We ended up severing it out and in both that and the Phillips Petroleum case there were some continuing responsibilities to inform the plaintiffs. We actually had to write a provision in there saying that we had an absolute right to see their corporate tax communications with the IRS because otherwise stockholders wouldn't have had the right to do that. They would have raised that objection.

Anyway, in the Phillips Petroleum case, we had this continuing responsibility and the lawyer who I was working with for the company was Tom Finney, a partner of Clark Clifford. He was the third or fourth name partner in Clifford's law firm—really a smart, able guy. I'm pretty sure he was an aide to Senator Kerr from Oklahoma and then left to work with Clifford. He was a person who, although he was a name partner in a very outstanding law firm, did all of his own homework. He got out there and we'd be in meetings and he would grab the statute book out or the rule book out. He read the cases. He didn't have associates waiting on him. I'm sure they paid for it, but they got his advice. Unfortunately, during the process (this went on for several years) he developed ALS and ultimately he had to stop practicing law, and he died within a couple of years. It was a terrible thing because he was a lovely man and a superb lawyer and a really good person. He understood—he never said a word about my objection. He understood exactly why I was doing it and he—obviously, he couldn't say on behalf of the company, "We're delighted to have you do this," but that was implicit.

Clark Clifford took over the remaining responsibilities. We had, I guess, one phone call or one meeting and eventually we arranged to have a meeting and I was going to go to Clifford's office. I was supposed to be there at 9:00 one morning and I got there at 9:00 and his secretary said, "I'm sorry, Mr. Clifford is on a phone call and he can't see you now. He's terribly sorry. Could you please wait?" I didn't know how long I was going to wait. It turned out I waited at least an hour and I was really unhappy. Finally, Clifford comes out. He introduced himself, said, "Please come in," and he said, "I owe you the deepest apologies but I'm going to tell you why and I hope you'll understand." He said, "For many years we have advised Eastman Kodak and I got a call this morning from the chairman of the board who tells me that their lawyers just confessed in court yesterday that they had lied under oath about whether certain documents were destroyed. The case is in front of the jury now and he wanted to know what they should do." He said, "I thought I should take that call and discuss this with him then." He said, "It's a very difficult question, but I hope you will understand what happened." Of course, I understood and he was as charming as he could be. We discussed everything and I had some dealings with him after that.

The only other time our firm, I think, had any other matters with Clifford was in connection with the Detroit newspaper case which I'll talk to you about later on. But when Clifford himself, unlike with Lloyd Cutler, Clifford called Bill Schultz and said to him, "Mr. Schultz," he said, "my name is Clark Clifford. I'm a lawyer here in town." He

said, “I understand you’ve filed this case. I represent the Detroit newspapers. Could I come over and talk to you?”

So he understood what was going on. That was the beginning of our concern about attorneys’ fees. Then I read in one of the legal newspapers—maybe it was in another paper about a case involving the Ford Motor Company. Roy Cohn—*the Roy Cohn*—had brought a suit in state court against Ford over some matter. It had gotten thrown out. The reason now escapes me, but it doesn’t matter. Instead of re-filing the lawsuit again, Cohn negotiated with the Ford Motor Company to pay him and his firm and another firm a half a million dollars for not suing. I said, “They can’t do that!” So we brought a stockholders suit against that because this was the most abusive thing. We ended up getting a judgment affirmed by the Second Circuit requiring Cohn and his firm and the other firm to return the money—and the other firm actually probably bore the brunt of it because Cohn’s firm was dissolving and they were very good at hiding their money.

MR. MARCUS: How did you know about the payment to Cohn? Was it part of the settlement of the first case?

MR. MORRISON: No, no. The first case was dismissed and there was a story in the newspaper about it. And so we brought that case and that sort of got us going on these issues. Then we would get occasional calls from people sometimes—once there was a lawyer in our office whose wife owned twenty-five shares of some company and she gets this notice in the mail talking about there’s some huge big fee things for no gain. So we started doing a few of those cases in the early ‘80s.

MR. MARCUS: Were they all class action cases?

MR. MORRISON: Some of them were derivative suits and some of them were class actions, but essentially the same principles, as far as the fee actions were concerned and the settlements.

Then there was—and I think it was probably in the mid to late ‘80s—an airline antitrust suit. The airlines had been price fixing on fares and there was a big settlement. They had agreed to a coupon settlement. I’ve always thought that the coupon settlement, with exceptions I’ll discuss in a minute, was basically, in this context, okay because essentially there was no way they could get the money to all the people who flew in the past in proportion, without costing an arm and a leg. While the fit was not absolutely perfect between past fliers and future fliers, it was pretty close. The coupons were discounts on the price of future fares. I knew two things (although I know them better now). One is that, of course, coupons are not always redeemed; there are other things that are going on at the same time.

MR. MARCUS: So it doesn’t cost them as much as it looks.

MR. MORRISON: And it costs them over time. We were concerned about this, but we thought that given the possibilities, in principle, this was not a bad idea unlike some other

coupon settlements that we got involved in later on. But two things happened. The first thing that happened was there was a provision in the settlement agreement, and actually, this gets me to a point that we started with. Well before the Internet and, to a large extent, today, if you are a class member or a stockholder, you get a notice which is both pretty long and not very informative. You don't get the key documents. You don't get the settlement agreement. You don't get the release, you don't get the complaints, you don't get any discovery. We discovered quite early that, to say the least, class counsel was not terribly happy to see us show up, and they were extremely uncooperative and you would get things like, "If you want to go look at this, go down to the courthouse. They're all on file there." Which sometimes was in the District, but most of the time it was someplace else and you had to pay fifty cents a page and all sorts of other stuff. We discovered in the settlement agreement—and this could conceivably even have been in the class notice—that coupons were not redeemable through travel agents. Now, today most people never heard of a travel agent, but travel agents used to be—you'd call up your travel agent, you would book your fare and they would bill you. If the travel agent could keep the coupons on your behalf, then they would work it out. The settlement wouldn't allow coupons to go to travel agents, you had to have them, which meant that you had to send them over to your travel agent. It was an enormous pain in the ass. We thought that that would seriously cut down on the use of these.

We filed an objection and the class counsel said the airlines will never agree. We filed a formal objection. Guess what? They agreed, because what we were saying was perfectly reasonable and they thought that the whole thing could go down the tubes.

MR. MARCUS: They weren't dying to agree, but they agreed.

MR. MORRISON: Yes. They had no good explanation as to why, if they were doing this in good faith. They couldn't say, "We assumed that people wouldn't use them." They couldn't say the real reason. So one of the first lessons we learned is in some of these cases, although you think that they are settling too low, that's a very hard argument to sell. But where there are things structurally wrong with the settlement or where there are some misallocations, there is a possibility of getting the judge, who has no authority to change the deal, to say to the class representatives, "We're going to disapprove this unless you do such-and-such and so-and-so." We had leverage and we could make some improvements and, it turned out, incidentally, that we could tie up the fees for this. We had gotten some fees in Phillips Petroleum for making some suggestions to how to make this thing work. I think we took a very modest fee of $5,000 or $10,000 in that case.

The second thing we did in the class-action settlements—we said to the lawyers for the class, "Why don't you take your fees in coupons, too?" They didn't think that was too amusing.

MR. MARCUS: This airline case was a big case. Were you also challenging fees or not?

MR. MORRISON: We did raise some questions about fees. But that wasn't the principal issue in that case.

MR. MARCUS: So the fees for the plaintiffs' lawyers, the class lawyers, was just one of a number of issues that you were interested in in these cases.

MR. MORRISON: Yes. What we tended to find is that there was a rare case in which there was a really good settlement and a really high fee. That is, the exorbitant fees tended to go with cases in which there was nothing good coming out of the settlement.

MR. MARCUS: So they were attractive cases for you.

MR. MORRISON: Yes. So eventually—we may have done some cases where fees alone were an issue early on, but eventually—and it was partially an allocation of resources question—partially because we sort of made our point. If we didn't see something wrong with the settlement as well, we just didn't do it.

MR. MARCUS: So the classic kind of case you were going after was one—was the fee-driven case where the settlement for the class was not that great for any given member of the class. It was a $5 coupon or whatever, but there was a big fee for the lawyers.

MR. MORRISON: The best example of that case is the GM trucks case. GM trucks had a problem because they had the fuel tank in the wrong place. It was a safety hazard, but also, people didn't want to buy these cars and didn't want to keep them. They were worth less on the secondary market. There was a class action brought on economic damages alone, not personal injury.

MR. MARCUS: Based on the decline in value.

MR. MORRISON: Decline in value or the cost of removing it. The case was settled in a manner in which GM agreed to give every current truck owner a coupon worth $1,000 toward the purchase of a new GM truck. We said, "No. You can't do this!" And you can't do it for a whole bunch of reasons, which became part of our strategy and approach in later cases. Oh, and by the way, there was a huge fee for the lawyers which was, of course, driving all this.

The first thing was as a matter of principle, if you have a GM truck you don't like, you don't really want to go out and buy another one. And my recollection is it's only a year in which you could do it.

Second, it was not transferable so you couldn't find some other sucker who would pay you $500 to get $1,000 and there probably were some other restrictions on it as well. In addition, there were a large number of members of the class who were fleet owners of trucks. That is, the Department of Transportation buys a whole bunch of them, the police buy them, other people buy them—a lot of governmental entities and private companies.

Corporations buy them. This deal was no good for them; and they got discounts anyway and you couldn't use this one on top of the other discounts. So, in addition to the basic deal being bad, we saw this as an illustration of serious conflicts within the class. That is,

people had really divergent interests and the lawyers were trying to represent everybody at the same time because if you put everybody together, treat them all the same, they can settle the case and get a big fee. Of course, General Motors has no interest—not General Motors *qua* General Motors, but the defendants have no interest in worrying about these intra-class conflicts. All they want is to get rid of the case at whatever the total cost is and be done with it and then, of course, two things happen. Some of these cases where there was actually money, they didn't care, once they paid the money, whether the settlement went to the lawyers or the class. They were indifferent to that—they wrote a $5 million check, they didn't care what the internal allocation was. In these cases, even though the fees were separately negotiated and there were some cases involving when you had to negotiate—that was kind of the lesser of the problem. It was cheap because they figured that was just an added cost to it and even though it's outside what they figured they were going to have to pay, that was cheap and they, in my view, thought of this as buying goodwill with the plaintiffs' lawyers for the future. They were cooperative now, you be cooperative in the future and we have this nice, kind of long-term, cozy relationship. We couldn't ever prove that, but that was my sense of what was going on.

In any event, it was relatively modest amounts of money for them—for the companies—and it got rid of the cases. We objected and I was involved, but less so than other people were in the case, and we got the Third Circuit to set it aside. Approved by the District Court, set aside by the Third Circuit. *Cert.* was denied. It was the first really big class action that was rejected. It was rejected on multiple different grounds, but principally that they had thrown everything together and the class didn't work.

MR. MARCUS: Did you find in these cases that there was a problem with the trial judges being influenced too much by their sort of notion that settling is a good thing and getting rid of a case that would be a pain in the neck to try with all these discovery disputes and everything? Was that problem, do you think, in this whole system, or not?

MR. MORRISON: You did hear judges say, "Well, there is a policy in favor of settlements," and so forth and so on. You could not prove this, but there were very few district judges who ever rejected settlements.

MR. MARCUS: So you often had to go to the Court of Appeals.

MR. MORRISON: Absolutely. Absolutely. And I used to tell my students and others that we show up in these cases, we are the skunk at the garden party. Everybody—there is sweetness and light, happiness, everybody wants to settle and here you people show up and you want to make war. We want to make love. The first thing that happens was you can't get any information. Nobody will give you any information. Second, we discovered that the way to limit objections is by manipulating the scheduling. Here's the way they did it. The judges never stepped in and stopped them unless somebody was there or somebody had a proper notion of how to schedule. You would have a hearing set for, let's say, the fifteenth of May. The objections would be due forty-five days before and the documents supporting the settlement would not be filed until after your objections were due. Now this was bad enough with the settlement proposal itself because at least

you could look at the settlement agreement. But also the fees—all you knew about fees was the total amount that they were going to ask for, and the fee application was filed after you had to file your objections. So there was no way that you could do anything about this thing.

I remember one case, in which the fee application was filed three days before the settlement hearing. I showed up in court and I said, "We haven't had time to look at the papers." The Court says, "Well we'll put it off for a month." I said, "I came all the way here to do this. I want to—do it now." I always thought, why shouldn't they be required to do all this earlier? They wouldn't serve you anything. They would not give you copies of anything that you needed. Eventually you could get copies of things, but they would take a long time and you had a very tight deadline to get the stuff and to make objections. Then you would get this: "Well, of course, if Mr. Morrison had been there from the beginning, he would have known such-and-such and so-and-so," where, of course, it's not in any of the papers. The parties were hostile. Generally speaking, the plaintiffs' lawyers were more hostile than the defense lawyers. Defense lawyers, this is all part of the game and they are going to get paid anyway. Plaintiffs' lawyers know they may not get paid and they want to get paid and they negotiated a good fee. The courts are unhappy about seeing all of this.

I guess we'll talk more about it, but I would say that there has been a real revolution in the class-action world, a lot of it driven by cases in which we were involved—mostly the work of Brian Wolfman and others, although I was involved in all of them. To really make the court understand that it has a serious responsibility to see that these class actions are run for the benefit of the class and that settlements, while appropriate, have got to take into account significant differences within the class. There has been a real revolution on that and judges are now, certainly in the federal courts and to some extent in the state courts, much better about this. That is, they don't like us any more, but they understand that they do have a responsibility. They take it seriously and the Courts of Appeals and—not in every case, but a lot of them—and in the Supreme Court in the *Amchem* case and others really put their foot down and said, look, you've got to look at these things. These are big things.

There is a long footnote on the GM truck case. The case ended up getting re-brought and re-settled in Louisiana and on much better terms. GM fought forever and ever and I don't know that Public Citizen ever got any fees for having objected to the first settlement. One of the ironies was that when we objected to settlements, if we were completely successful and got the whole settlement knocked out, we didn't get paid. There was nothing to pay us from. On the other hand, if we got significant improvements, then there was a fund from which we could get the money. So we did that in some cases, taking some money from the plaintiffs' lawyers for very obvious reasons.

The next big case—and there were some others along the way, but the next big case that we got involved in was *Amchem*. This was the massive asbestos settlement case. There were two groups of people who were objecting to the settlement. We represented one group of objectors and Fred Barron, who was a very well-known plaintiff's asbestos

lawyer from Texas, was representing another group of people. Brian Wolfman did most of the work on this case.

MR. MARCUS: Was this in the ‘90s?

MR. MORRISON: This was in the early ‘90s—’92 and ‘93 it got started. I remember getting calls from some of the lawyers who said to me—I think I was actually teaching in Hawaii the semester when it got started. I got a call from a lawyer at Shea & Gardner whom I knew quite well, John Aldock, and he said to me, “You know, this is a really good settlement and everybody has agreed to it. The people are going to get the money,” and so forth and so on. And I said, “Brian has taken a very careful look at it. I’ve taken a look at it and I’m confident that these are issues that need to be resolved.”

MR. MARCUS: Was the posture of your litigation to improve the settlement or to kill it?

MR. MORRISON: No, this was to kill it. There were, in our view, multiple conflicts and the principal conflict was between the present claimants and future claimants.

MR. MARCUS: Does that mean that the class should never have been certified in the first place?

MR. MORRISON: Yes. That was our view. Yes, with a small caveat. The present claimants were people who had asbestos injuries of one kind. Some of them had very, very serious injuries, mesothelioma. Others had fairly significant injuries, asbestos, lung cancer. The vast majority of them had what is called pleural plaque thickening, which is a detectable change in the composition of the lungs which is due to asbestos. So there was question of causation on some of these injuries.

MR. MARCUS: Which may or may not lead to a disease later on?

MR. MORRISON: Right. In most cases, it doesn’t. Because they are small cases, but large numbers of them, they command modest, but because of their numbers, significant dollar total settlements in these cases. The plan was to treat everybody the same. That is, treat—they had disease categories and while we had some quarrels with disease categories and also with the notion that one group of lawyers can be essentially playing God by allocating among the disease categories, that was not our principal objection. Our principal objection was that the future-injury plaintiffs were told that they had to opt out now if they wanted to opt out at all. Of course they couldn’t make an intelligent choice about whether to opt out. First of all, because they didn’t know what disease they were going to get. Second, they didn’t know what condition they would be in in terms of their lifestyle and what they would need. Most significantly of all, of course, they didn’t, in most cases, even know that they were a member of the class because asbestos is a disease that has a twenty-, thirty-, forty-year latency period. Many people who were exposed working very casually in brake shops or auto repair places or other places have gone on to lead lives that have nothing to do with that kind of work at all and suddenly come down with the disease thirty or forty years later. So notice was completely meaningless

because even if they saw the notice they wouldn't even know they are part of the class or wouldn't be able to make an intelligent determination.

MR. MARCUS: I take it, playing devil's advocate here a little, the dilemma was that if you didn't have this global settlement, the people with diseases or the pleural plaque thing—the "current" people—would use up all the money in litigation.

MR. MORRISON: Of course, there was no total amount of money. This was not a fixed pot.

MR. MARCUS: I see.

MR. MORRISON: That was the *Ortiz* case. This was not a fixed pot, but they said the companies might go bankrupt or whatever else would happen and that everybody was treated the same. Well, one of the things showing they were not treated the same was there was no inflation adjustment so that you got the same face dollar amount now, as twenty years from now; you wouldn't have gotten any increase to take account of inflation. In addition, they had crafted the class—and although this was not a big point in the ultimate resolution, they had crafted the class so that anybody who had a lawsuit on file as of the day the class complaint was filed was excluded. There was a side deal with the plaintiffs' lawyers to get those people paid on a different basis. Most people thought it was a better basis. The only point was, in our view, that it was different. What we had here was one group of lawyers who had negotiated this settlement before the complaint was filed, actually, trying to represent a huge variety of people with different circumstances. We said that was unethical. Not unethical in the sense of potentially-losing-your-license unethical, but it was a conflict. The kind of conflict that Rule 23 doesn't allow whether you look at typicality, commonality or adequacy of representation. I teach this when I teach Legal Ethics. It's essentially the kind of conflicts that the Rules forbid in terms of ethical conflicts—representing a husband and a wife or the plaintiff and the defendant in a case. You can't do it. You can't expect one group of lawyers to put together a group of people and then decide how they are going to divide up the money by playing God. That was the essence of what these cases were all about. That's essentially what the Supreme Court said in *Amchem*. You can't do it. At the least you can't do it unless you have separate "futures" representatives and, perhaps, for other parts of the class as well. They have to be there at the bargaining table.

In the meantime, there had been a bunch of these cases that had gone into bankruptcy and a similar problem arose in bankruptcy. Congress had passed a law specifically directing that in asbestos cases you had to appoint a "futures" representative. We said, "That's the model, that's the way you've got to do this." Now we had also become involved in the Dalkon Shield corporate reorganization for the A.H. Robins Company and that happened in the early- to mid-eighties. I was first approached in that case by a lawyer for a group of victims who wanted access to the list of claimants in the case because he wanted to circulate a newsletter to the victims who had filed claims to make them more informed and get them activated in the negotiation process. There were representatives for the claimants who are, in essence, like class counsel. They were

calling the shots and the women didn't understand what was going on. This lawyer, with whom I worked on a number of cases subsequently, named Ralph Pittle, from Seattle, got me in there. It turns out that there are some interesting parts of the bankruptcy law and we ended up getting an order from the judge requiring them to make available a list of names which they then used to contact these people and make them more active.

The case then went ahead and the first thing that happened was I was asked to look at the notice that went out. In a bankruptcy case, it is analogous to a class action except it is a closed-end class in the sense that everybody's in it. There is no choice. They had this elaborate Plan of Reorganization, which is the functional equivalent of a settlement agreement in a class action. They had drafted a proposed notice to the class. It's called a Disclosure Statement. There was a hearing on this and it was sent to me. I looked at it and I said, "No person who is a claimant will be able to understand a word of this." And I said, "This just can't be right." A woman who—I can't remember how she got in touch with us, but had heard about us maybe through this newsletter—said she'd gotten this and she couldn't understand it at all. I think she had a Ph.D. We filed an objection to the Disclosure Statement saying we didn't object to the Disclosure Statement itself—this is sort of like a Registration Statement at the SEC. That's the functional equivalent of what they are. They read like that—or a bond indenture. I said, "Nobody's going to understand this. What we have to do is to draft a special notice for the claimants. The banks have theirs—the secured creditors, all the rest of those people, they can have all this fancy stuff, but these people need to know what they are doing." Judge Merhige agreed.

MR. MARCUS: You had a good judge.

MR. MORRISON: Yes, but— As you will see.

MR. MARCUS: It was a local company.

MR. MORRISON: Oh, yes. Oh, yes, there was a lot of home-towning going on there. He agreed and this was, to my knowledge, the first time that there had ever been a special notice for claimants and it was used in lots of other similar situations in the future. It was two or three pages.

MR. MARCUS: In more or less plain English.

MR. MORRISON: Yes! Yes! These things are complicated and it can't be Run, Spot, Run, but it was pretty plain English and then in some later things they had Frequently Asked Questions in kind of question-and-answer format that was helpful and they had toll lines set up. But this was a first step. Then Ralph Pittle said to me, "The Reorganization Plan provided that you could get $750 [my recollection is that's the number—but it was in that range] by just saying that you had worn a Dalkon Shield. You didn't have to do anything else besides that." The estimate was that there were about 200,000 claimants and something like 130,000 to 140,000 were likely people who had no serious injuries or they couldn't prove it. There was a second group for whom there was

payments of up to $2,500 or $5,000 who had to show only a minimum amount of injury and proof of use of a Dalkon Shield as opposed to something else. Then there was everybody else, who had to go through an arbitration process. I think there was a back-end right to go to court. There was a cap on the total amount of money that was put in, and the rest of the money was coming from an outside company, another drug company who was going to buy Robins. Robins was going to be merged and the stockholders of Robins were going to get a big hunk of stock in the company. There was also a related class action, and I've forgotten the details of it, but it was also settled as part of this whole thing. Anyway, I was asked to look at the legality of the reorganization. I struck me—it may have been a good plan, but it was not done the right way. They had an estimation hearing and at the end of the estimation hearing, Judge Merhige came up with a number which became the ultimate number. There was no justification for it at all.

MR. MARCUS: The number of how much goes into the pot?

MR. MORRISON: From that number they created the pot. There was no evidentiary record, there were no findings as to how you got—how many people would do this and how much and what the estimate was. Worse, the victims had no idea what they were going to get because the only thing they knew was these were the amounts, but there were no criteria for whether you fell in which category or not or how many people would have had to file claims before the total amount of money would be exhausted. It was a very incomplete record. Merhige had come up with the number at the estimation hearing, as he was required to do. We said, "Look, you've got to make findings of fact and conclusions of law." That was an objection. Objection number two was that the Bankruptcy Code, analogously to what we ultimately saw in *Amchem*, says that in a Reorganization Plan, you have to provide for the votes of each separate class and you have to get the approval of two-thirds of the members of the class and fifty percent of the total number of dollars. Or maybe it's the other way around. I think it's the other way around, I'm sorry. It doesn't make any difference for reasons you'll see in a second. The way they set it up is that all claimants were treated equally, even though the Plan specifically provided massive differences and so the people who had weak claims got the same vote as the people who had really big dollar claims.

MR. MARCUS: Of course the people with the weak claims are a larger group of people.

MR. MORRISON: Much larger. Everybody estimated there was 130,000 of them out of the 200,000. We said that that was illegal under the bankruptcy law. We had a third objection, the nature of which escapes me now. It doesn't matter. There was a hearing. It lasted a day or two. I was the skunk at the garden party; everybody was very unhappy, especially Judge Merhige. He quickly ruled against us and we took an appeal. Everybody went crazy. We were taking money from all these widows and from all these women and doing these terrible things, but I said, "No, look this is a bad Plan. This is a fine Plan for lots of people, but it's not a good Plan—you don't know what it's going to be and when the money is going to run out."

MR. MARCUS: Then you have the argument that the people who were really in jeopardy were the people with the greatest need.

MR. MORRISON: Right, right. The Fourth Circuit sat on it for a really long period of time and ended up affirming it. Then, to make people really even madder, we filed a *cert.* petition. They went bananas about that. *Cert.* was denied. I think Justice White could be counted on to vote to take these cases. There were the class-action issues related to whether it was a mandatory or an opt-out class. We lost all of them. But this was important in the development of our thinking for two reasons. One is that it really helped inform us about the conflicts within the class. Second, it got me to think about the relationship between corporate reorganizations and class actions. If you couldn't do something in one that you could in another, how was that possible, did it make any sense, what about the due process objections and so forth and so on.

We subsequently became involved in the silicone gel breast implant—

MR. MARCUS: Before you go on to that, I don't think you said when the *Robins* case was.

MR. MORRISON: Late '80s.

MR. MARCUS: Late '80s. So it was before *Amchem*.

MR. MORRISON: Yes, yes. Before *Amchem*. There were multiple problems with implementation of *Robins*. There was a provision in the agreement—in the Reorganization Plan—that allowed holdbacks to prevent the money from running out. Judge Merhige started imposing holdbacks on people. He issued an order imposing a blanket holdback for people who were not cooperating sufficiently with the Plan Administrator. I can't remember what it was—if you didn't accept the settlement amount, then when you got your amount—it went to arbitration—there was a holdback on it because there might not be enough to pay everybody. It was clear that if you were not playing ball with them—this was Merhige's problem and as he said from the beginning, "This is not going to be Johns Manville. They are not going to run out of money." And whatever he had to do to be sure they didn't run out of money, he'd do it. Meanwhile, the company stock was worth five times as much when it came out of bankruptcy as when it went into bankruptcy. So the stockholders did just great. Anyway, it was a very complicated thing. We objected to that and took an appeal to the Fourth Circuit when they didn't allow it and the Fourth Circuit sat on it for two-and-a-half years. After the oral argument, I thought I had some chance at least of winning on this thing—meanwhile, of course, all the holdbacks were going on and I finally had to file a *mandamus* petition in the U.S. Supreme Court against the Fourth Circuit. I figured the court wasn't going to do anything at this point. Sure enough, while the mandamus petition was pending, the Opinion came out and so it became moot. Of course, we lost that and we gave up on that.

We also understood clearly that this was a harbinger of what happens when you object to really big cases. We knew what we were getting into when we did this, but we felt that we had to do it.

MR. MARCUS: Yeah, there's a dynamic of once the thing is approved that there is a reluctance on the part of the courts to stop the train.

MR. MORRISON: One of the things they said was, "Look at all the interest that is being lost." We said to them, "Well why didn't you negotiate for post-judgment interest to take care of all these people?" At least it would have done something.

So the next one of these things we got involved in was the silicone gel breast implant class-action settlement. Unlike asbestos, where we had no substantive involvement in the underlying product, in silicone gel, Sid Wolfe, the doctor that runs our Health Group, was essentially responsible for getting this product off the market. There had been some cases here in the United States—one had been tried to verdict and settled on appeal, a secret settlement and all the papers had been hushed up. Studies started coming out and people started complaining and eventually the FDA took it off the market. There was a lot of multi-party litigation going on. There were three defendants and the cases had gotten consolidated before Judge Samuel Pointer in Birmingham, Alabama. I called up Ken Feinberg, who was one of the lawyers trying to mediate this case, and I said to him, "Do you want to talk to us now or do you want to talk to us later?" He quite sensibly said, "Let's talk now." Through all of this, we became involved initially as an *amicus* and then got some women to be parties to participate in the process of negotiating the settlement. Although the outlines had been negotiated, lots had not been done and Judge Pointer, to his complete credit, wouldn't ram through the pre-trial scheduling orders. He had a hearing on scheduling, he had a hearing on the notice and he developed a list of Frequently Asked Questions and we actually worked through the notice to make it friendly, to do all this stuff. We ended up saying, "Look, the settlement is okay, but here are some problems with it," and it ended up getting approved and then it fell apart because there were too many opt-outs. That was a problem with the settlement to begin with. Dow Corning then filed for bankruptcy in Michigan and the other two defendants, Bristol-Myers and I can't remember the other one kept the settlement offer open and they said, "We will pay anybody who wants a settlement. We will pay it on this basis, the basis that we would have done in the settlement because we think it is a good idea for us. If we have to litigate other cases, we'll litigate them or we'll settle other cases, but we're keeping this offer open. Not binding, no opt-out, just if you want to come to us." Very many people took those settlement offers. I learned from that that the notions about global peace which defendants always thought—we won't settle unless everybody in the world from the beginning of time until the end of time is settled—was a desideratum but it wasn't what was actually happening in the real world. If you got ninety percent peace you could deal with it and people would either not sue or you would find a way to do it. You got rid of your biggest problem. You got rid of your bad publicity, you probably didn't have to go to trial, and you controlled the number of litigations. In fact, in the Dalkon Shield case, the principal problem was not that they were losing so many cases (although they were losing a lot of cases), but that they couldn't stop the hemorrhaging

litigation because the cases were being brought by individual practitioners all around the country and they had key Robins executives who had to testify because they had actual knowledge of what had gone on there. Essentially, they were in the litigation business instead of the pharmaceutical business. Going to bankruptcy put an automatic stay on all those cases. That wasn't the situation in the class action, at least not officially, although they were stayed when they were MDL, multidistrict litigation, before Judge Pointer. Anyway, in the Dow Corning bankruptcy, I became involved to some degree in that, but I remember the day that it was filed, I was on the McNeil-Lehrer show with the president of the company who said, "We've done this because we want to accelerate the conclusion of all of this." I said to him, "There is one thing that is going to be clear is it will be five years from now and we still won't be done with all this." "Oh no, you're all wrong," he said. It turned out that it was seven or eight or ten years before these things finally got done. It's barely done today. I mean, they finally got through with it in bankruptcy and they had multiple disputes there, some of which were fairly resolved and some of which were not so fairly resolved.

Anyway, that got us involved in all these class actions. In many of them we objected to fees and in many we objected to the way in which the class was being treated. The notice was insufficient—inadequate. The class members were being arbitrarily shuffled around and had not gotten adequate protection. We started to make inroads into all this and, at the same time, we started doing things like writing Law Review articles and becoming very active in the rule-making process.

MR. MARCUS: How about the legislation process? Two questions about legislation: One is the asbestos legislation that almost got through Congress and didn't get through Congress, which I think may have been designed to impose, after *Amchem* and the other case, by legislation, the same kind of settlement. The second question is about the class-action legislation that did pass the Congress that was very controversial that may have been passed over President Clinton's veto. I don't remember.

MR. MORRISON: No, he didn't veto that. He wasn't in office.

MR. MARCUS: Oh, it was passed in the Bush administration, that's right. The legislation which makes it easier to remove class actions from state court to federal court, is widely regarded as a pro-defendant, anti-plaintiffs' lawyer kind of legislation. Did Public Citizen get involved in either of those battles?

MR. MORRISON: We were very definitely and significantly involved in the so-called Class Action Fairness Act.

MR. MARCUS: On which side?

MR. MORRISON: We opposed it but supported an alternative. Let me answer your first question. The asbestos litigation went on for many, many years and we were much less involved with that, in part because the parties themselves, the unions and the plaintiffs bar were on one side, and on the other side we had the defendant companies, which

actually were not monolithic at all because there were at least three generations of defendants—the ones who were sued who were in bankruptcy or getting out of bankruptcy, those who were being sued and had not yet gone into bankruptcy, and those who were just coming on the horizon. In addition, there were all kinds of conflicts between them and the insurance companies, including both the main insurers and the re-insurers. It was a God-awful mess.

MR. MARCUS: So basically, you decided to stay out of that.

MR. MORRISON: Well actually, we stayed out of it largely. And then a couple of years ago, in about 2003 or 4, it looked like it was going to actually pass—there was some chance it would pass. There were all these deals. I took a look at the bill because it was going to become a government program. There was going to be an agency set up and I said, "I'd better look at this thing." I looked at it as an administrative law lawyer, not as a class-action lawyer or a plaintiff's lawyer. It was a God-awful mess. It was just terrible. What I did was I put together a couple of memos for people, which had a number of things that got changed between that year's version and the subsequent version (neither of which ever got enacted), which at least made it a workable solution. They had some really bizarre things in there and then there were some other things that were really nasty. For instance, there was a provision that was in both versions that limited attorneys' fees to five percent of any amount that was recovered—a means to get back at asbestos plaintiffs' lawyers. In the meantime, I had known from Ken Feinberg's work on the 9/11 Fund, that these things are extremely complicated even when there is no issue about liability and that sometimes you really need lawyers to work these things through. This was plainly a measure designed to keep lawyers out and to screw the lawyers who were already in there. It was written by the defendants and the defense bar and we opposed that and a few other things substantively. But mostly it was to try to straighten it out. In the end, two things ended up—well there were three things. One, there was a very substantial disagreement between the Senate version and the House version as to how—what the substance of it was. There were also huge fights over how to allocate the money and who should pay what share and how to treat the companies that were already in bankruptcy versus the ones that were not yet in bankruptcy, ones who completed their Plans and ones who were down the road. Should you give people credit for what they paid a lot in the past or what they're going to pay in the future? The final dénouement was there were both fewer claims being made than were expected and, second, state law had changed in a number of jurisdictions so the pleural plaques that had been the significant numerical component were no longer viable as a matter of state law claims. The bankruptcy court supports only claims that have independent state or federal law viability, and so these claims were largely knocked out as a matter of state law in enough places to diminish the numbers to where they didn't really need to be in bankruptcy or if they did go in bankruptcy, they were relatively good.

I just happened to have dinner last night with a friend who does a lot of this bankruptcy work who said to me that there are virtually no new asbestos bankruptcies being filed these days.

MR. MARCUS: That's interesting.

MR. MORRISON: There is one that has been filed, but it is a special case having to do with some quirky things in the way it was set up before and has as much to do with insurance as it does with anything else. So that has really slowed all of that down.

MR. MARCUS: All right. So what about the class-action legislation? I would have thought, playing devil's advocate, that you guys, based on your experience, would think it would be better to have these cases in federal court than in state court because you've got better judges who might be tougher on the issues that you cared about.

MR. MORRISON: Okay. As you remember, when we started practicing law, the goal was to be in federal court if you were a plaintiff. You had better discovery, had better class-action rules and you had better judges. And other little things, like you could find a local counsel in a big city, but you couldn't in a small town and you could get there on an airplane relatively easily. Anyway, you wanted to be in a federal court. That drove a lot of people to get into federal court. The Supreme Court in *Snyder v. Harris* and in—I've forgotten the name of the other case—basically said that you could not aggregate claims to meet the jurisdictional amount which was, back then, $10,000. It is now $75,000. Not only that, you couldn't use a single claim that had $75,000 and drag in the lesser claims. Whatever the merits of those rulings were, they were the clearly established law. The second was in many cases you couldn't get the case removed—the plaintiffs couldn't get it to federal court and, of course, if the plaintiffs couldn't get it to federal court, the defendants couldn't remove to federal court because there was no original jurisdiction if they wanted to be there. The second problem was that if you sued any defendant who was a local resident, the removal statute forbade you from removing that case. It was not removable. So plaintiffs would join local defendants sometimes with justification, sometimes without, to prevent removal. There were other removal problems as well. What we started to see was that plaintiffs realized that there were advantages to being in state courts and in particular in some state courts, because the kind of progress that I mentioned to you about courts taking class-action settlements more seriously were honored to a much lesser extent in at least some state courts. You came to see things like drive-by certifications where the plaintiff would file a complaint and a motion for class certification, the class would be certified that afternoon or the next morning if the judge was on the slow side. Settlements—and we experienced this because we had gone to some state courts and state courts were very unsympathetic to class objectors. So that became a problem for us as well. Forgetting about whether we wanted to be in federal court *ab initio*, there were some cases in which we would rather be in federal court if we were going to object to the class action. We also knew that one of the bases at the beginning at least, for the Class Action Fairness Act was that there were at least some number of cases of multiple class actions. Although the companies and their lawyers had access to this data, we never saw any good studies on how much overlap there was between class actions that were filed in different state courts, none of which were removable to the federal court, and cases in the federal court. Sometimes you would see cases in the federal court and cases in the state court and they couldn't be removed, they couldn't be joined and so sometimes you would see a race to the class certification and

who could certify it. Then the question was whether the federal court could enjoin the state court from doing it under the Anti-injunction Act. There was a whole series of problems.

MR. MARCUS: It was very messy.

MR. MORRISON: It was messy and we, from the beginning, said, if that is what the problem is, we support a provision which would allow that to happen, to be able to remove these national cases, overlapping cases, even some that are national in scope, to be in the federal court. We didn't care. What we said was this bill—and this is essentially what happened in the end while they were still tinkering with it—essentially says that any class action with more than a hundred class members and more than $5 million in controversy with the most minimal diversity (which we weren't opposed to as such) was removable, period, to the federal court. This meant that the defendant could virtually be guaranteed of being able to select its choice of forum in the federal court. And equally important, if they wanted to keep some cases in the state court, they could keep them in the state court by not removing them. If they wanted to use that as a settlement vehicle, staying in the state court where they could do it easier, then they wouldn't have to go to the federal court.

I conceived of an idea that I called "discretionary removal." I modeled the idea on the proceedings under the Multidistrict Litigation statute under which there would be no right to remove, but a party, any party, could make a motion to the Panel on Multidistrict Litigation to remove cases, and the principal grounds for a removal were overlap or any other good reason. We were prepared to write it very broadly. My view was that it was a fact-specific approach as opposed to a categorical approach. The categorical approach was both under-inclusive and over-inclusive and the supposed remands which they put in this bill were made out of whole cloth. They weren't worth anything because the only time you could do a remand was where the defendant was the home state defendant—the case was in the defendant's home state. Of course, nobody ever sues a defendant in their home state, or virtually never does. So the remand provisions are essentially meaningless. We never could get anybody to focus on this. We needed—and I was never able to find—part of it, there were some internal battles about whether we should be proposing compromises in this or not. The class-action bar wanted no compromise. They wanted to fight and they thought they could win it. I thought that ultimately we were right and they couldn't win it. There were some reasons why they shouldn't win it across the board, but ultimately my idea never got any traction. I actually ran it by some defense lawyers at various times who, in confidence, said they could live with this.

MR. MARCUS: But they thought they could win too, and they did eventually.

MR. MORRISON: And they did eventually. I ended writing a Law Review article which if anybody cares about, it's in the *Stanford Law Review*, that lays out the proposal in some considerable detail including some actual statutory language. Maybe someday someone will decide this is the better approach. But it was a really bad idea to do this.

MR. MARCUS: Do you think it is worse than the status quo ante?

MR. MORRISON: Well, from whose perspective? From the defendant's perspective?

MR. MARCUS: No, from your perspective.

MR. MORRISON: Well—oh, there is one other thing. We said, "Look, sometimes class members want to have these things removed." We got a provision in the bill early on that would have allowed class members to remove at any time after they received notice, which would be notice of settlement so that if we had a collusive settlement we could get it to the federal court. Everybody thought that was fair and equal and if these are foreign cases—

MR. MARCUS: But it is not in there.

MR. MORRISON: It is not in there because the defendants understood and the plaintiffs' bar understood that if they got a collusive settlement, the last thing they wanted was Morrison and his skunks at the garden party showing up and throwing this out. And as I said at various times, I think in the article also, this is the clearest evidence that this is not about fairness. This is about forum shopping. We are not opposed to forum shopping, but there ought to be some limits on it.

Now how has it turned out? The answer is we don't know yet.

MR. MARCUS: Yeah, it's too early?

MR. MORRISON: I think it is too early to tell. There are supposed to be some studies done. It's hard to know—the studies, you won't really know until you see—I mean, it is clear that there are many more cases in the federal courts now. There have been fights about remand. There was an initial fight about the effective date provision. When the statute failed to pass in the fall of 2003 and when it came back in January 2004, there was a deal, that they would introduce the bill exactly as it was before. It had in it a provision about the effective date, which was already passed. It said the effective date shall be no sooner than December 27 and it was already February when it passed. There was a couple of other things in it that were plainly mistakes. But the deal was nothing should be changed.

MR. MARCUS: Not a word, not a comma!

MR. MORRISON: Not a word, not a comma. And of course the committee report—the deal had been so sewed up that the committee report was issued two weeks after the bill was signed by the president.

It is too early to tell. Clearly there are more cases in federal court now. I think some of the prior provisions forbidding the removal unless all defendants join was not a fair provision. In some cases you ought to be able to get these things into federal court. There

were clearly some overlap cases which should be in federal court. We were prepared to concede that even a case in which there was no overlap but, for example, a national class action like the GM trucks case could, regardless of the amounts in controversy, there was no reason why that shouldn't be in the federal court. We also provided, in my proposal, that the Multidistrict Panel had the authority to order the removal of cases so if, in fact, some were in federal court, they would all be in federal court so you couldn't have the hangers-on. If the theory is that they all belong in federal court, then you shouldn't have the opportunities for collusive settlements in the state court. So we don't know. Part of the theory is that federal courts will be less willing to certify classes. I'm not so sure. And I'm not so sure because I've talked to judges and have gotten the impression that in other situations they've said we'll send the case back to the state courts. It's a state court matter. Let the state court do it. Congress has said, no, we want these things in federal court and they ought to be in federal court. The federal courts are going to say, look, if it is the federal court or nothing, we'll do our best to do something. The jury is out, the jury hasn't even been impaneled yet.

And so we worked on stuff with the rules and made a bunch of suggestions along the way. We've objected to attorneys' fees in some cases, in some cases without success. In addition, both Brian and I are working on the American Law Institute's Aggregate Litigation Project which is going to set forth some principles and will be, I think, quite influential. So part of this is that we operate on multiple forums. That is, we have to worry about legislation; we're worried about the Rules Committee. We've spent a lot of time making detailed comments to the Rules Committee. Individual litigations in which we are objectors. We have some of our own class actions in which we did this. Mainly b(2) class actions. There are some issues that are still very much outstanding about efforts to turn b(3) classes into b(2) classes in order to make them mandatory. Public speaking, teaching, and writing, and so the class-action area is one of the particular areas where we saw that we really needed to have a broad range of tools in our arsenal to be able to attack all of these problems and we had to concede that the defendants were right from time to time. At least I thought we did. The plaintiffs' bar was less than perfect. Our job was to make the class action a workable doctrine so that people would get the money and we would be able to say, it's not all going to lawyers, which is the mantra that goes around. Of course, that sells newspapers; it sells votes and everything else.

We thought that we were protecting class actions although many of the people didn't like it. We got and still get these kind of calls. We come in and object and they call us up and say to us, "Well, we understand what is going on here." And they say to us—

MR. MARCUS: Who is "they?"

MR. MORRISON: They, usually the plaintiffs' lawyers. The plaintiffs' lawyers are the ones who are calling us, and they would say to us things like, "What are you guys really looking for here?" We'd say, "Well, we want to fix this." "No, no, no, what do you *really* want?" And "what do you really want" translated means, "What do we have to pay you to go away?"

MR. MARCUS: Yeah, and you're very frustrating to them.

MR. MORRISON: Yes, because we don't respond to economical, rational things. We'd say to them, "Whatever we take, of course, it has to be court-approved." One of our campaigns has been to prevent these side deals. We've actually gotten the rules fixed up to prevent these side deals from going forward. They are the most pernicious things of all because either you are buying people off who have no claim whatsoever which is essentially extortion, or you are buying people off who do have good claims, in which case the class is being screwed because they are getting less than they should be getting if the claim was litigated. So we've had those kind of problems, they are still going on today.

I advised on a class-action settlement. One of my former students—this case involving BAR/BRI where they had price fixing with West and they settled the case, they gave them a bunch of money. It turns out that the plaintiffs and defendants agreed to sealing the class certification motion, the summary judgment motions and the expert evidence on which the estimate of the value of the case was based. I advised these lawyers out there—one of them was a former student of mine—you've got to file the objections. I helped him with the objections and Judge Real approved the settlement and went ahead and refused to lift the secrecy, and the case is now on appeal. Our argument was how can you possibly make a judgment about whether you object or not or make an argument when you don't have the evidence? So that issue was going up—this was an issue that nobody can believe is actually around because it is so contrary to all notions about litigation.

MR. MARCUS: I think it is finally getting a lot of attention now, this whole practice of courts sealing records. That's a whole separate issue although it relates to a lot of these class actions.

MR. MORRISON: It's actually less in the class-action area than in other areas. In products liability. In fact, we brought a number of cases involving unsealing of court records and were very successful in some and less successful in others. One of the things that used to happen and doesn't happen anymore is that the defendants would say, "You can have the documents in this case, but you can't show them to anybody else, including to all the rest of the plaintiffs in all the other cases around. The price of this is we'll pay you more money, but your price is part of your secrecy." I have a little article, too, that I wrote about that. That practice, by and large, has gone away.

MR. MARCUS: There's a problem with the ethics rules on that, right? Restricting the practice of law?

MR. MORRISON: No, that's a separate problem.

MR. MARCUS: Not bringing cases.

MR. MORRISON: That was also true. But the other ones, when they wouldn't let information be shared, they wouldn't let you give somebody a copy of the deposition because it was under seal, that problem has largely gone away and they have not got a situation in which the second lawyer has to agree to the terms of the protective order. So that problem has gone away. The problem that hasn't gone away is that—take a drug case. The FDA doesn't find out about any of this stuff. It doesn't get information that turned up in discovery and there is no way to do it, and that continues to be the major problem with this. Of course, the secrecy orders played a major role in the priests and pedophile cases. When the original cases that were brought were all sealed and the amounts of the payments were sealed (I feel less strongly about that), the plaintiffs' lawyers were put in the untenable position of being forced to say you can't tell the other members of the parish about Father So and So or even worse, in the next parish to which they have now sent him to prey on kids whose families haven't even heard about this thing. If you do, you could be subject to discipline. So court secrecy is a major issue.