STATEMENT OF SHERRIE R. SAVETT IN CONNECTION WITH THE THIRD CIRCUIT TASK FORCE ON SELECTION OF CLASS COUNSEL

I. INTRODUCTION

It is a pleasure and an honor to appear here today before the distinguished members of the Task Force, and I thank you for the opportunity to opine on the issues raised.

I am a senior shareholder of Berger & Montague, P.C. as well as Chairperson of the firm's Securities Litigation Department. My practice is predominantly a class action practice, and I specialize in plaintiffs' class action securities litigation. I have also been actively involved in class litigation outside of the securities context, especially with regard to consumer class litigation involving defective products and commercial practices. A brief biography is attached hereto.

II. OPENING STATEMENT

Utilizing an auction process to select class counsel is fraught with problems, and is a poor approach for several reasons. An auction for the selection of class counsel is too focused on only one factor – price. The interests of class members are not necessarily best served by utilizing the least expensive attorneys. When a client selects an attorney, there are numerous factors taken into consideration. Above and beyond price, a client is focused on such factors as the attorney's experience, reputation, resources, accessibility and demeanor. However, when an auction is undertaken by a court, these other important factors tend to get subordinated to the issue of price. A court is ill-equipped to evaluate these subjective factors. Based on the submission of resumes, virtually any counsel submitting a bid proposal to a court will appear qualified. But the qualitative differences of the competing applicants can be highly significant, and are difficult for a court to gauge. Even where two applicants appear qualified, the class is not necessarily best served by utilizing the services of the attorney seeking the lower fee. The most important factor in selecting class counsel is not counsel's fee, but rather counsel's ability to maximize a recovery on behalf of the class. Additionally, imposing an auction for the selection of class counsel is problematic because it undermines the plaintiff's selection of counsel. This problem is especially evident in securities cases, where Congress has specifically vested the Lead Plaintiff with the responsibility to select and retain counsel. An auction is simply inconsistent with the intent and language of the PSLRA. Rather than determining counsel fees blindly via auction at the outset of a case, a more sensible approach is to award a percentage based fee at resolution, when a record has been developed which can provide a framework for evaluating an appropriate percentage based fee.

III. ANSWERS TO THE TASK FORCE'S SPECIFIC QUESTIONS

A. Auction of Class Counsel Appointment As An Alternative To Traditional Appointment

1. Q: Does Auctioning tend to create a better result for class members than traditional appointment? Or do the lower attorney's fees associated with the auctioning cases correspond to a proportionately lower recovery for the class?

A: Auctioning does not tend to create a better result for class members. While in theory, selecting class counsel via a low bid would seem to allow a larger share of any recovery to benefit the class as opposed to the class's lawyers, that scenario is too simplistic. First, that presupposes that all class counsel would achieve the same result. Clearly a class is better served by counsel who maximize its recovery, than by counsel who agree to litigate the claims at the lowest possible cost. The most important element of any class recovery is the total amount of that recovery obtained from defendants – not the total savings possibly achieved by utilizing the least expensive lawyers. The least expensive lawyer is not necessarily the lawyer best equipped to maximize the class's claims. Indeed, one would expect that the least expensive lawyer is the least expensive for a reason. If the goal is to approximate market forces, as the 1985 Task Force concluded, one must realize that attorneys are not fungible, and that in a truly competitive market a client is highly likely to take into account various subjective factors in selecting an attorney. Beyond mere price, a client looks to such factors as expertise, experience, resources, reputation, accessability and demeanor. A client may rationally select the most expensive attorney as an indication of quality, or the least expensive attorney to save money, or may choose some middle ground. Simply put, in a real market for legal services, "you get what you pay for." Second, there is a real risk in separating the goals of class counsel from the goals of the class. Where class counsel knows in advance precisely what the maximum fee award will be, there is little incentive to pursue the class's claims towards a result beyond one which maximizes such fee. Results in the litigation could become skewed by the fee which is structured at the outset. To the extent defendants are aware of a predetermined fee structure, that too presents an element of danger for the class, as any settlement proposals will be designed to appeal to class counsel's interests rather than the class's interests.

2. Q: The lodestar formula has been criticized for providing an incentive for class counsel to expend unnecessary hours, sometimes with the permission or even encouragement of the defendant. Is there any empirical evidence to indicate that such an incentive is operating? Does auctioning reduce that incentive? Does it instead create a contrary incentive to settle the claim at the earliest possible opportunity?

A: The lodestar formula is inherently flawed precisely because it does provide an incentive to bill. Where a fee determination hinges on the amount of hours expended, it is in counsel's interests to maximize such billing. This is especially true in the best of cases, where counsel believes the chance of not obtaining any recovery is remote. While there is probably no empirical evidence to support this assumption, common sense indicates that as a practical matter, counsel is far better off litigating fiercely than achieving a quick settlement where the lodestar method operates. In some cases, auctioning may reduce that incentive. However, auctioning reduces the incentive to bill only beyond the threshold point at which counsel's fees have been maximized in a particular case. At that point, the contrary incentive to settle quickly kicks in. When counsel has maximized its fee pursuant to an auction for legal services, there is little incentive to further pursue the class's claims, and the risk of an insufficient settlement rears its ugly head. Counsel is incentivized to settle quickly and move on to new matters where there is a possibility of payment for services rendered. As the 1985 Task Force concluded, the best approach is a percentage approach – one that keeps the class's and class counsel's interests aligned from beginning to end.

3. Q: Why isn't the judge's ability to set the fee at the end of the case sufficient to address all issues that bidding is used to address?

A: The judge's ability to set the fee at the end of the case is sufficient to address the issues that bidding has been used to address, and is, in fact, quite preferable. Where the judge sets the fee at the resolution of a case rather than at the outset, there is an adequate record developed from which to make a decision. In the bidding context, a judge necessarily has to make certain assumptions about the case on the basis of only the pleadings. The judge, with the assistance of counsel, must evaluate the potential value of the case, the likelihood of settlement, the amount of time and effort necessary to litigate the case, and the quality of representation – all without a record.

Essentially, the bidding process asks the judge to make certain assumptions blindly or with incomplete vision. In no other context is a judge asked to make critical determinations without the benefit of a factual record. On the other hand, at the resolution of a case, the judge knows exactly how much the case was worth, whether the settlement was quick and easy or the result of a hard fought effort, how much time and money counsel has invested in the case, and how effective the representation was. Even where a percentage fee award has been negotiated at the outset, the judge still retains the ability to modify any fee award, and with the benefit of hindsight, is able to evaluate the issues intelligently. When a judge predetermines those issues with a bidding process, he is necessarily doing so while still in a state of ignorance.

4. Q: Does the auction process unfairly benefit large firms over small firms?

A: This question is difficult to answer. The auction process necessarily requires a firm interested in representing a class to spend time and money at the outset of a case in order to determine a case's value, so as to prepare an appropriate bid. Large firms are probably better equipped to handle this initial effort, since other revenue streams are available to compensate for the time and effort which will ultimately go unrewarded except for the firm who submits the winning bid. Small firms may choose not to participate in an auction procedure because the costs associated with evaluating and preparing an appropriate bid are simply too high. On the other hand, a small firm often operates without the substantial overhead necessitated by a large firm, and may be better positioned to submit bids in selected cases. There is also the risk that a small firm will be able to submit a lower bid, but be unable to achieve a result comparable to that of a large firm. Where defendants know that they are up against a large firm with substantial resources, they are less likely to attempt to spend plaintiffs to death as a litigation strategy.

5. Q: Does the auction process discourage plaintiff's attorneys from conducting a thorough pre-complaint investigation? Will lawyers invest money to work up class actions if there is a significant risk that they will not be selected as counsel for the class?

A: The auction process does deter some plaintiff's attorneys from working up class actions. There can be little doubt that a lawyer is less willing to devote the time and money necessary to thoroughly

investigate and develop a class action where the prospect of being selected as counsel remains in serious jeopardy. The auction process gives plaintiff's attorneys an incentive to sit back and let others do all of the work, so as to swoop in at the last minute and submit a bid. An auction process discourages the filing of initial complaints, but encourages the filing of duplicative or copycat complaints where most of the work has already been performed by others.

6. Q: It has been suggested that one benefit of an auction is that it allows firms that have not previously had the opportunity to serve as lead counsel to do so. Is there any evidence to suggest that this has happened or are the same firms continually winning the bidding process?

A: While an auction process will likely result in presenting new firms with an opportunity to serve as lead counsel, it is, at best, unclear as to whether such a result can be characterized as a "benefit." Obviously it is a benefit to the inexperienced firm which can gain an opportunity to serve as lead counsel, but it is doubtful that such a result can be considered a "benefit" for the class itself. Of particular importance to class members is counsel's ability and experience. To the extent that an auction process results in the appointment of an inexperienced firm or one with limited resources to serve as lead counsel, the process has been a disservice to the class. The marginal benefit of obtaining legal representation at a discounted rate is outweighed by the detriment of appointing litigators unaccustomed to the intricacies of complex class litigation and without the resources to wage a real battle on behalf of the class.

7. Q: Are the costs associated with traditional appointment of class counsel (e.g., ex post fee determination) eliminated or reduced by auctioning?

A: It is doubtful that an auction process will eliminate or reduce costs. Undoubtedly, there will be less supervision necessary for the court at the resolution of a case to determine a fee award. However, the costs are merely shifted from the end of a case to the beginning. A court ordered auction process will require substantially more involvement and supervision by the court at the outset of a case, in developing the auction process and reviewing competing proposals. In fact, in the auction situation, the court is likely to bear more costs, as it must evaluate fee and expense proposals from a potentially unlimited number of plaintiff's firms, whereas in the traditional appointment context, the court must only evaluate the reasonableness of lead

counsel's request for fees at resolution. While the costs to the judiciary are somewhat unclear, it is certain that the costs to the plaintiff's bar will be increased by an auction format.

8. Q: What costs are imposed by auctioning? (e.g., determining the worth of the claim ex ante, scrutinizing bids, etc.)

   A: The costs imposed by auctioning include the development of a bid format, the evaluation of an unlimited number of potential bids, an investigation by the judge so as to determine an estimated value of the case, etc... Essentially, the same costs present in the traditional end of case fee award are shifted to the beginning of the case. Additionally, there is the added burden for the court to evaluate the merits of the case, the likelihood of success, and the quality of representation -- without the benefit of a record.

9. Q: Are the costs associated with auctioning greater or less than those associated with traditional appointment?

   A: While evidence on this subject is lacking, it seems likely that the costs associated with auctioning will be greater on the judiciary than the costs associated with traditional appointment for the reasons expressed above. In traditional appointment, the court has a record from which it can make determinations upon resolution. In the auction context, assuming the court is prepared to make its own investigation so as to reach inferences necessary to properly evaluate competing bids, the costs are likely to be higher. In addition, theoretically, a court could be faced with evaluating an unlimited number of proposals instead of a sole fee request supported by a record.

B. Professional Responsibility Questions

1. Q: Which procedure, auction or traditional appointment, better promotes counsel's loyalty to the class by aligning the interests of class counsel with those of the class?

   A: Traditional appointment better promotes counsel's loyalty to the class. In the auction context bids are often made, in an ad hoc manner, that set various caps or ceilings at various stages of the litigation, that only serve to disassociate counsel's interests from that of the class. While this may result in the undertaking of representation at a reduced rate, it necessarily separates counsel's

incentive from that of the class at the predetermined crossover points. Additionally, the auction process requires a judge to make certain assumptions about the value of a case before it has begun – assumptions that, even if sealed from defendants, will undoubtedly influence plaintiff's counsel. The best way to align the class and class counsel's interests is on a straight percentage basis. The percentage can best be set at the resolution of the case when the judge can evaluate the benefit rendered, the risks of the case, and the skill and effort expended by class counsel.

2. Q: Some winning bids have included caps on fees or costs. Do these caps affect counsel's independent judgment on behalf of the class?

A: Caps are dangerous. Counsel will be less likely to spend resources above the level at which they cannot seek reimbursement. To the extent the expenditure of additional sums could result in a larger recovery for the class, counsel should not be dissuaded from making them. The expense of litigation is something that is not entirely within plaintiff's counsel's control. Much depends on how the defendants decide to litigate and spend money. It is important for the defendants to know that they will not have the luxury of spending plaintiffs to death. If defendants believe that litigation expenses are capped (even if they do not know the precise value of the cap) they will be tempted to spend more, so as to force plaintiff's counsel to reach the point at which they are no longer comfortable spending money which cannot possibly be reimbursed. Caps on fees are equally as dangerous, because they produce an artificial motivation to settle claims quickly after such a cap has been reached. It is in the class's best interest to be represented by attorneys who share in their motivation to maximize a recovery at all levels.

3. Q: Some winning bids have included a promise not to take a fee if the settlement is below a certain number. Does this arrangement create a conflict of interest for class counsel?

A: Potentially. In the weakest of cases, it could cause class counsel to reject a settlement proposal that was theoretically as good as the class could hope for, where the figure was below the threshold necessary to implicate a fee. Bidding necessarily requires making uninformed evaluations. A case that looks good at the outset may result in a bid of this nature. But what happens when discovery does not bear out the allegations of the complaint? What happens when a subsequent, more informed evaluation of the case leads counsel to believe that a

small settlement is the best course of action for the class? Counsel may be tempted to reject a reasonable settlement where no fee is implicated and risk everything on a trial. It is a bad idea for the class and class counsel to have diverging interests at any point in time. An additional concern is that bids of this nature create a chilling effect, as few lawyers would be interested in litigating a case where there was a substantial possibility of obtaining a good result for the class without obtaining a fee for its services.

4. Q: How might the auction procedure be structured to best preserve class counsel's independence and loyalty on behalf of the class?

   A: The best way to structure an auction that preserves independence and loyalty to the class is to provide for bids as a straight percentage. Expenses should not be considered in a bidding process, and should be reimbursable at the resolution of a case provided they are reasonable. Fees bids could be auctioned as a straight percentage, without regard to the stage of the litigation, and without regard to any threshold recovery levels. This still leaves the subjective problems of evaluating the expertise, experience, and reputation of the competing bidders, but at least resolves the conflicts inherent in disassociating counsel's interests from that of his client's at various stages of the litigation or at various recovery levels.

5. Q: Are there other professional responsibility concerns raised specifically by the auction procedure?

   A: Not that I am aware of at this time.

C. Auction Procedures and Implementation

1. Q: Assuming that auctioning is a viable alternative to traditional appointment, is it more appropriate in some circumstances than others (e.g., antitrust actions, mass tort actions, small claimant actions)? Should there be different procedures for different types of cases? Are there some kinds of cases in which auctioning is never appropriate? For example, if the contemplated recovery is something other than money (e.g. equitable relief, coupons, ADR), would an auction procedure be unworkable?

   A: While auctioning is generally a poor idea in all cases, it is particularly inappropriate in securities cases. There, through the PSLRA, Congress explicitly empowered the lead plaintiff to select and retain

counsel (subject to court approval). Rather than a race to the courthouse, in the securities context, Congress has determined that the class is best served by having the class member with the largest financial stake in the litigation select and retain counsel. Where the presumptive most adequate plaintiff (by virtue of his financial interest in the litigation) has come forward, negotiated with and retained counsel, it is particularly inappropriate for the judiciary to step in and order an auction. The appointment of a lead plaintiff -- to whom the litigation is most important -- was specifically intended by Congress to promote the use of market forces in selecting counsel. Rather than having class counsel control the litigation, through the PSLRA, the lead plaintiff controls the litigation. Among the lead plaintiff's responsibilities is to determine which attorney's to hire to bring the class's claims. The courts are empowered to approve or disapprove of the lead plaintiff's selection of counsel, but should not substitute their judgment for that of the lead plaintiff's. Where a lead plaintiff has reasonably selected counsel, the court should not strip such lead plaintiff of his most important responsibility simply because another attorney is willing to handle the matter at a reduced rate. The lead plaintiff is better positioned to evaluate the universe of potential counsel and select and negotiate a fee than is the court.

2. Q: What considerations other than price, if any, should the court take into account in awarding the appointment? Should the court attempt to replicate the considerations that a client would take into account in addition to price, e.g., experience, financial resources, etc.? If so, how?

A: The subjective considerations, other than price, are crucial to a client. Experience, resources, and other factors such as accessibility, demeanor, reputation, etc... are all elements that an individual client takes into consideration in selecting an attorney. It is exceptionally difficult for a court to take these factors into consideration when conducting an auction. One cannot easily quantify an unquantifiable element. For this reason, the court should avoid an auction process altogether. There are simply too many intangibles that cannot adequately be accounted for in attempting to simulate a market.

3. Q: How should court and counsel obtain enough information about the claim to determine its value for bidding purposes?

A: If an auction is mandated, the court and counsel should perform whatever investigation is possible, and cost-effective, to determine an

appropriate value. Sometimes, even with expensive expert advice, it is difficult to evaluate the case because the facts are not known and can only be assumed. Thus, no really accurate evaluation is possible by either the court or counsel. The court is much better positioned to determine a reasonable fee after the conclusion of the case. At that point there will be no need to guess at a value for a case. The court will know exactly what the case was worth.

4. Q: Should a court consider the degree of concentration in the market of class counsel? Should it be an objective of the bidding process to expand the field of attorneys who serve as lead counsel?

A: No. The court's responsibility should be to the absent class members whose claims are before it. The court should not take any position on the field of attorneys who serve as lead counsel. If Congress wants to encourage more plaintiff's attorneys to file cases and apply for leadership positions, it has the ability to do so. The court should limit its inquiry to whether or not the class's interests are served – not whether a particular firm or attorney should receive preferential treatment. Sometimes, it may be appropriate for a court to include several co-lead counsel to increase resources available to the class and to give several qualified firms the opportunity to serve.

5. Q: Is there evidence of collusion or incentives to collusion in the auctioning process? If so, what procedures can be employed to prevent collusion?

A: Beyond a court order not to collude, nothing more is necessary to prevent collusion. In the event that strikingly similar bids produce an appearance of collusion, the court could conduct a further inquiry to determine whether firms colluded or whether they simply reached similar conclusions about the value of the case and the market for legal services.

6. Q: What are the advantages or disadvantages of the following features of auction procedure?

a. *Sealed bids*. Sealed bids help to prevent collusion, and more importantly, prevent defendants from gathering too much knowledge about the financial incentives and disincentives of plaintiff's counsel.

b. *Disclosure of the terms of the winning bid.* Bid terms must not be disclosed. Defendants may be influenced to make settlement proposals designed to appeal to class counsel rather than the class itself.

c. *Permitting or prohibiting bids from a consortium of firms.* There should be no prohibition on allowing a consortium of firms to bid together. Many cases involve a high element of risk, and to the extent that the risk may be spread around, plaintiff's lawyers are more likely to make bids. Additionally, allowing a consortium of firms to bid allows smaller firms to play an active role in cases in which they might otherwise feel too uncomfortable to submit a singular bid. Smaller firms would have an opportunity to take advantage of economies of scale.

d. *Caps on Expenses.* Caps on expenses should be avoided, for the reasons discussed above. An attorney should not refrain from spending money which might ultimately benefit the class because there has been a predetermination as to what expenses can be reimbursed. It is difficult to gauge the expense of litigation at the outset because it is a variable to which plaintiff's do not have total control. The expense of litigation is largely a function of defendant's litigation strategy.

e. *Caps on the fee.* Caps on the fee should also be avoided, because, as discussed above, it can create an incentive for counsel to settle when such fee has been maximized despite the possibility of obtaining a better recovery for the class.

f. *Modification of caps at the time of the fee award.* Where caps are used, they should be "soft caps," such that plaintiff's counsel have a reasonable expectation that efforts expended beyond the caps will be rewarded / reimbursed to the extent they are reasonable.

g. *Structuring the bids, e.g., time-escalators, stage of proceeding escalators, etc.* If bids are used at all, they should not be structured. A structured bid creates artificial incentives and disincentives to settle litigation at various points along the way. Where a straight percentage is used, class counsel and the class always have the same interests.

h. *Use of an x factor, i.e., a figure below which 100% of the amount goes to the class.* An x factor should also be avoided for the reasons discussed above. Counsel should never be placed in a situation where they are incentivized to turn away a reasonable settlement proposal because it has not yet crossed the x factor. Sometimes counsel's opinion as to the value of a case diminishes as the case proceeds. Having set an initial x factor in a bid, counsel will feel compelled to settle above that x factor even if later developments cause counsel's assessment of the value of a case to diminish. Counsel could thus be forced to try a weak or high risk case just to get a fee at all rather than accept a reasonable settlement which is below the x factor.

i. *Use of rising, falling or straight percentages as the basis for auctioning.* The straight percentage is the best choice. It is most fair, because it avoids the necessity of the judge making predetermined evaluations about the value of a case before it has started. It also keeps class counsel's and the class's interests aligned perfectly throughout all stages of the litigation. Rising and falling percentages can create instances where the incentive for the attorney becomes marginal when compared to the incentive to the class, and vice versa. A straight percentage eliminates all of these problems. While this will undoubtedly result in fee awards that some may characterize as "windfalls," it will also result in cases in which plaintiff's counsel receive less than the going rate, or no fee at all. By awarding a percentage fee at the end of the case, an appropriate percentage or a structured percentage can be awarded which avoids a windfall and appropriately awards class counsel.

j. *Permitting certain bidding counsel to have a right to match the best bid.* This is appropriate in certain situations. Especially under the PSLRA, where counsel has been selected and retained by the class member with the largest stake in the litigation, such counsel should have an opportunity to match the best bid. While the court should not substitute its judgment for that of the market forces, if it insists on doing so, at the very least it can offer the lead plaintiff's chosen counsel an opportunity to proceed on the low bidder's terms. Additionally, there is some merit to the argument that

initiating counsel should have an opportunity to match a low bid. Where counsel has expended considerable time and effort in developing a case, affording him the opportunity to match a low bid seems fair. This would help eliminate the chilling effect likely to be encountered by attorneys unwilling to invest time and resources into cases in which they have only a long shot at recouping their investment.

7. Q: How does the court determine whether the winning bid is "too good", i.e., such a "good deal" for the class that it raises a question about counsel's qualifications or ability to assess the case?

A: The possibility that a bid may be too good only serves to emphasize the problems associated with bidding in the first place. At the start of litigation there is simply no way for the court or plaintiff's attorneys to accurately gauge the value of the case. Obviously everyone will do their best to assess its fair value, but to the extent one firm comes in with a bid that is such a discount to the other bids, the court is left in a quandary. The question has no easy answer, except that the auction should have been avoided in the first place.

8. Q: Should the court compensate lawyers who conduct the initial investigation and file the initial complaint if they do not win the auction?

A: Yes. This will eliminate the incentive to sit around and let others develop cases, and will allow meritorious claims to be advanced by attorneys without fear that their efforts, even if successful, will go uncompensated. On the other hand, copycat work should not be credited. Sometimes, the initial filer may not investigate or prepare as good a complaint as a later filer. The later filer should be recognized for productive work.

9. Q: Are their any special considerations necessary for "coattail" or "follow-on" class actions?

A: See above answer regarding later filers who truly develop the case and do productive work. They should be compensated, even if not selected as lead counsel.

10. Q: Should the appointment of lead counsel go to a single lawyer or a single law firm?

A: It is highly unlikely that a single attorney would be able to effectively handle a class action absent the support of his firm. This issue seems of relatively minor importance, as the only time it would become relevant is when an appointed attorney decided to leave his firm. The best way to handle that is on a case by case basis, but as a general matter, it seems that appointing a firm or firms is preferable to appointing a single attorney. Two or three lead counsel from different firms is often beneficial to the class as it provides more resources.

D. Auctioning of Class Counsel and the Private Securities Litigation Reform Act

1. Q: Is auctioning class counsel consistent with the lead plaintiff provision of the Private Securities Litigation Reform Act? To what degree is the lead plaintiff's choice of counsel entitled to deference?

A: Auctioning class counsel is entirely inconsistent with the PSLRA. As discussed above, Congress intended to wrest control of securities class actions from attorneys in favor of "the presumptive most adequate plaintiff" – that is, the plaintiff with the largest financial interest in the litigation. Rather than asking the courts to select lead counsel, the PSLRA specifically authorizes the lead plaintiff to select and retain counsel. There is no need for the judiciary to simulate a market for legal services where Congress has provided a real market for legal services. The court must still approve of the lead plaintiff's selection of counsel, but should not hesitate to do so where the lead plaintiff has acted reasonably and has selected competent experienced counsel. The lead plaintiff's choice of counsel should be given deference to the extent the lead plaintiff has acted reasonably. Simply because the court would have conducted an auction where the lead plaintiff has chosen not to does not indicate that the lead plaintiff has acted unreasonably. The PSLRA would be completely undermined if the lead plaintiff was stripped of his responsibility to select counsel, as there is little other reason for large shareholders to come forward and actively participate. Moreover, knowing that the court is likely to conduct an auction removes any incentive for the lead plaintiff to actively evaluate and choose appropriate counsel. If it becomes clear that a good faith effort to select and retain counsel will be second-guessed by the courts, fewer and fewer class members with significant financial interests in the litigations will participate. Congress had the opportunity to empower courts to conduct auctions to simulate market forces, and instead chose to create an actual

market by vesting the lead plaintiff with the responsibility of selecting counsel.

2. Q: If the auction is won by counsel other than one chosen by the lead plaintiff, should or must the court accommodate the lead plaintiff's choice of counsel? For example, should lead plaintiff's counsel have a right of first refusal on the bid?

A: An auction should not be conducted where the lead plaintiff has reasonably selected counsel. The lead plaintiff's selection of counsel will depend on numerous factors in addition to price. However, if the court is intent on circumventing the PSLRA, and mandates an auction despite the lead plaintiff's having acted reasonably in choosing counsel, then the court should at least allow the lead plaintiff's chosen counsel to match the winning bid. On the other hand, where the court has mandated an auction because it determined that the presumptive lead plaintiff acted unreasonably in selecting counsel, then the presumption has been rebutted. In that situation, the class member with the greatest financial stake in the litigation can no longer be considered the "most adequate," and his choice of counsel should not be given deference. Rather than conducting an auction in this situation, the court should simply turn to the class member with the next largest financial interest in the litigation, and give deference to him assuming he acts reasonably.

3. Q: How does the timing of the initial counsel selection decision (well prior to Rule 23 certification) affect the propriety or appropriateness of auctioning? Is the judge too invested in the up-front selection if auctioning is used?

A: An auction does cause the court to become inappropriately invested in the up-front selection of lead counsel. Rather than conducting a Rule 23 certification analysis at the outset, the court should limit its inquiry to the typicality and adequacy of the presumptive lead plaintiff. If the presumptive most adequate plaintiff is typical and adequate, then his selection of counsel should stand, rendering an auction inappropriate.

E. Suggested Procedures for Traditional Appointment of Class Counsel

1. Q: What procedures can be suggested for improving the traditional process of appointing class counsel?

A: The "empowered plaintiff" model adopted by the PSLRA may be appropriate in cases outside of the securities context. Rather than racing to the courthouse, the selection of counsel could be determined by a real plaintiff with a real interest in the case. This model may improve the traditional method of appointing class counsel, but may be inappropriate in some situations (for instance, consumer classes) where all plaintiffs have suffered the same or similar relatively small losses.

F. Other Solutions

1. Q: Can the "empowered plaintiff" rationale of the PSLRA be applied to other kinds of class actions, so that appointment should be left in the hands of the plaintiff with the greatest stake in the action?

A: Yes, in certain situations. See above.

2. Q: Academics have suggested an auction of claims as opposed to an auction of class counsel. See, e.g., Macey and Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991). Is this a viable option? If so, should the defendant be permitted to bid?

A: Client elimination proposals acknowledge the reality of lawyer control over class litigation, and rather than attempting to eliminate that reality (such as the PSLRA has done), instead suggest giving in to it. Eliminating the requirement of a class representative could be a viable option, but it is a substantial departure from traditional litigation, and presents a host of new issues. There is the risk of excessive and frivolous litigation, the lack of client supervision, etc... How would a notice procedure work? There are also questions as to how defendants conduct discovery on a class with no representative. What is the burden on the judiciary? Bidding for claims is an interesting theoretical approach, but presents too many unanswered procedural questions for useful application at this time. To the extent claims could be bid for, a defendant should not be entitled to bid. It is hard to imagine how a defendant's bid for a claim could be in the best interest of the case.

G. Related Questions

1. Q: Do derivative actions pose special questions for appointment of counsel by the auction procedure?

   A: Not that I am aware of at this time.

2. Q: Does the use of steering committees create any special problems or concerns respecting the auction procedure?

   A: If an auction were permitted, a steering committee or executive committee could bid as a group so that this concept would not present an extra problem in the bidding context.

IV. CONCLUSION

For all of the above reasons, I believe that an auction for the appointment of class counsel is a poor alternative to traditional appointment and should thus be avoided. I thank the Task Force again for the opportunity to opine on the issues raised. To the extent I can be of any further service to the Task Force, I welcome the opportunity.

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