COMMENTS OF H. LADDIE MONTAGUE, JR., ESQUIRE
TO THIRD CIRCUIT TASK FORCE ON
APPOINTMENT OF COUNSEL IN CLASS ACTIONS

My comments are based upon thirty eight years of experience in litigating class actions, primarily in the area of antitrust. I have also litigated other types of protracted litigation, including the Exxon Valdez Oil Spill Litigation. The two areas in which I have no direct experience are securities litigation and employment discrimination litigation. Therefore, I do not intend any of my views to influence these latter two areas. I personally have never participated in a case where lead counsel has been selected by a court through an auction process (although my firm has). Lastly, throughout my entire experience, I have never participated in a case wherein I concluded that lead counsel or co-lead counsel did not perform ably for the class and litigate the class action in the best interests of the class. And that includes cases in which initially I did not support the attorney or attorneys who were ultimately appointed to lead the class action. I personally have been lead or co-lead counsel or assisted David Berger of our firm as lead or co-lead counsel in over 30 antitrust class actions and have participated actively in many more antitrust and other types of class actions in which I was not lead counsel.

While I will never say never, I am opposed to the auction process for the selection of lead counsel in the types of cases I have litigated. In the overwhelming majority of class actions in which I have participated, lead or co-lead counsel have been selected by all the plaintiffs' counsel who filed cases. In those few other instances when no agreement could be

reached, the court made the decision between the two or three counsel who had the support of the remaining plaintiffs' counsel. I believe that the latter was no more an onerous task for the court than sorting through an auction process. I further believe that allowing plaintiffs' counsel to choose lead or co-lead counsel is the procedure most likely to result consistently in the best representation for the class. After all, those plaintiffs' attorneys who are not lead counsel have an interest in having the best result obtained, both for their client and the class and for themselves.

Not all class actions have the same characteristics and thus the selection of lead counsel and the role of lead counsel in the litigation needs to be flexible. For an example, some of the variables in antitrust class action include, inter alia:

1. Whether the first complaint filed was based upon a prior or current governmental investigation or proceeding or whether it was the product of independent investigation by the client and attorney or group of attorneys who filed the first complaint. Even where there may be a governmental investigation at the time the first private suit is filed, it may turn out that the grand jury is dismissed without issuing an indictment.

2. Whether there are one or two defendants or multiple defendants (some cases may have 20 or 30 defendants, while most have between 3 and 10). This affects whether one firm (even one large firm) can adequately prosecute the case on behalf of the class.

3. Apart from the number of defendants, whether the issues are such that the case can be best prosecuted on behalf of the class by having several firms actively participate in the pretrial activities.[An example, although not an antitrust case, is the Exxon Valdez Oil Spill Litigation where there were four defendants and one third party defendant and the discovery was very extensive and the issues were many, varied, complex and involved

several specialized areas of law. There were two co-lead counsel, yet the majority of the work was done by 8 or 9 law firms with important ancillary help from many other firms. The case was tried in three parts spanning four months. The plaintiff class' verdict was followed by extensive post-trial motions and appeals. There was no way that that case could have been as effectively prosecuted on behalf of the class without the collective participation of the plaintiffs' law firms. However, that massive effort may not have been apparent at the inception of that case.] Small firms as well as large firms have the opportunity either to be lead counsel or to otherwise participate.

4. The risks involved differ, although all cases have some risks. In order to succeed, plaintiffs must succeed in: defeating a motion to dismiss; obtaining class certification; overcoming a Daubert motion; overcoming summary judgment, winning at trial, and sustaining that win through post-trial motions and appeal. Of course, along the way, to accomplish all this, class counsel must effectively conduct discovery, often being required to prevail in one or more crucial discovery motions. A loss in any of these endeavors can doom any class action.

I have perceived the focus of this Task Force to probe the various ways to select lead counsel in class litigation in order to promote the best results for the class and to protect the class against excessive attorneys' fees while at the same time allowing successful class counsel to be fairly rewarded in light of all the circumstances.

I respectfully submit that the most reliable procedure to assure the best representation for the class is to allow the plaintiffs' attorneys involved in the class litigation to select the lead counsel or co-counsel, subject to court approval. If no agreement can be reached,

then the court should request applications and make a decision. Through those applications, the court will most likely be apprised of all the relevant factors that should affect the selection of class counsel.

With respect to the setting of attorneys' fees, I respectfully submit that the presiding judge is best equipped to award a fee fair both to the class and class counsel at the end of the case, when the judge knows the result, the risks encountered or yet to be faced at the time of settlement, the effort and performance of class counsel and the reaction of the class both to the result and the fee being requested. Having plaintiffs' counsel submit to the court under seal periodic time and expense reports and having the court monitor those reports with lead counsel encourages lead counsel to control time and expenses throughout the litigation. I recognize that a 1985 Third Circuit Task Force Report, 108 F.R.D. 237, 255, suggested that the earlier in the case a fee is fixed the better for both class and counsel. The optimum time for this to occur is after the court has ruled on class certification. At that time the issues, the risks and the complexities should be reasonably known to both the attorneys and the courts.

In contrast to the foregoing, I believe the auction process to select lead counsel is vastly inferior for the following reasons:

1. It may be too early in the case to make a reasonable evaluation of the risks, all the issues, the complexity and the litigation position to be taken by the defendants[1]

[1]If an auction process is to be utilized, it is important that class counsel have as much relevant information as possible before bidding. Thus, class counsel should not be required to bid until there has been some preliminary disclosure by defendants. For example, in an antitrust price-fixing case, defendants might disclose for each relevant year their sales, their market share, their intercompany sales and any price lists or price announcements. Of course, each case should be treated on the basis of the allegations involved as to what information should be preliminarily disclosed.

(i.e., whether scorched earth or move toward resolution by settlement);

2. The auction may not produce the best result for the class, particularly where the attorney has misjudged the difficulty and the protracted length of the case and its relationship to the attorney's winning bid;

3. It creates a disincentive for counsel who uncovered the violation by his own investigation but may not end up representing the class. All that attorney may be doing is creating a case for another attorney to litigate.

4. One does not know at the commencement of the case how much help will be needed from other plaintiffs' counsels' firms. Thus there is uncertainty if the fee in the bid is to cover the bidder only or all the firms who contribute to the case. That may have a substantial impact on other counsel's willingness to participate where they believe the successful bidder has submitted too low a bid. Without the assistance needed from additional counsel (and where there is no incentive for additional counsel to participate), it is the class which ultimately suffers.

Hopefully, the goal of this Task Force is to recommend procedures which will render the best opportunity for the class to realize the best results and for plaintiffs' counsel to be rewarded with a fair fee, given all the circumstances. My views as expressed above are intended to help you achieve that result.

Respectfully submitted,

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