May 30, 2001

REMARKS OF LAWRENCE SUCHAROW TO THE THIRD CIRCUIT TASK FORCE ON SELECTION OF CLASS COUNSEL

I would like to thank the distinguished members of the Task Force for the opportunity to address them on a matter of importance to the Bench and Bar.

I am a senior partner of Goodkind Labaton Rudoff & Sucharow LLP. I head the Firm's class action/contingent litigation department which comprises of more than 20 attorneys. The Firm's class action/contingent practice areas include: securities, consumer, antitrust, shareholder/limited partner, and mass tort actions, virtually exclusively on behalf of the injured plaintiff or plaintiff class. I have personally practiced in these areas for my entire career of some twenty-five years. I am generally familiar with the various approaches utilized by the Courts for the selection and appointment of Lead Class Counsel.

I am also the President of the National Association of Securities and Commercial Law Attorneys ("NASCAT") a membership association of approximately 80 firms whose practice areas include class action/contingent litigation on behalf of plaintiffs. However, NASCAT does not have a formal view to express here today. Within NASCAT there is no single view on the manner of selection of Lead Counsel that can be offered as the view of NASCAT. Therefore, my comments and observations reflect my views alone, and do not necessarily reflect the views of NASCAT.

I have read some of the written presentations which have been submitted to the Task Force. The observation that the Task Force must first define what it is looking to accomplish strikes me as a reasonable place to begin. Is the bidding process a means to try to achieve lower transaction costs for the Class or a proxy for an otherwise more fully informed selection of Lead Counsel?

THE AUCTION PROCESS AS LOWERING COSTS:

If it is to lower costs, the auction process simply does not achieve that result. While the anecdotal evidence is limited, partisans on either side of the issue can point to one or more cases where the Class has either purportedly "saved" significant dollars as a result of the auction process (e.g., *In re Auction Houses Antitrust Litigation ("_____)"* *Sotheby's*), or "lost" significant money as a result of that process (e.g., *Cendant*). The Task Force is familiar both with the cases and the arguments being made on each side of the question.

In *Sotheby's*, given the Court's later stated view of the low risk undertaken by Lead Class Counsel in light of the pending government criminal investigation, I cannot but wonder whether the Court would have adhered to its auction as a fee proxy approach had the winning bid been $100 million, resulting in a fee of in excess of $100 million on the settlement of approximately $525 million (25% of the settlement amount above $100 million). The *Sotheby's* Court did not have to reach that issue in light of the actual facts before it and the resulting fee request and award. However, in *Cendant*, where objections were raised to the fee request, the Court apparently found, among other things, that the auction process itself rendered the fee request, calculated in accordance with the winning bid, fair and reasonable. That fee

award, in an amount more than $250 million, is currently the subject of a pending appeal in the Third Circuit.[1]

I have often wondered why some judges believe that Fed. R. Civ. P. 23, fails to provide the Court with sufficient power and flexibility necessary to fix a fair fee so that other approaches (e.g., bidding) need to be created. I can think of no analogy in commercial transactions of fiduciary relationships which would provide better protection for the Class, and better comfort to the judges who are saddled with the responsibility of establishing a fee which is fair to both the counsel and the beneficiary of that counsel's work, labor and services, than allowing the Court at the conclusion of the litigation to evaluate all factors affecting a fair fee which it believes to be relevant. Thus, under existing law, the Court has the unique advantage of being able to evaluate with 20/20 hindsight: counsel's performance; the strengths and weaknesses of the claims; the time and effort expended; the risks incurred (including costs advanced); the benefits achieved; and all of the other factors enunciated by the Courts during the last 35 years of jurisprudence on this issue. A car dealer does not tell a purchaser, "Here take the car, drive it for five years, and then pay me what you think it's worth!" A Fortune 500 company does not hire a lawyer and say, "Defend me in this action for the next five years, and based upon your work and the results achieved, I'll determine what to pay you." It is only in the context of class actions that the legal fee, to be fixed by an independent third-party, can be determined with

[1] It is clear from the informed comments of other commentators, that the Courts, clients and practitioners do not yet understand the complex and sometimes perverse incentives that different auction processes may create. What if the best possible recovery in Sotheby's was substantially less than the Lead Counsel's bid? Should the last dollars achievable in a settlement be rewarded with a higher percentage legal fee or subject to a lower percentage as the settlement amount increases?

20/20 hindsight and be based on the actual work performed and results achieved. I respectfully submit that nothing more is needed and that no better or fairer substitute can be developed.[2]

USING THE AUCTION PROCESS TO SELECT LEAD COUNSEL:

The selection of Lead Counsel has been an area in which the Courts have not, until recently with the passage of the Private Securities Litigation Reform Act ("PSLRA"), been heavily involved in and, in my experience, have actively sought to avoid.

Typically, for better or worse, the organization of plaintiffs' counsel has been left to an inter se agreement among those plaintiffs' counsel who have appeared in related pending litigation. The Courts will usually only get involved if formal competing applications for the appointment of Lead Counsel are presented to the Court for determination. In my experience, most of those applications are met with the practical admonition from the Bench, to the effect "you really should work this out among yourselves, you don't want me getting involved." At which point most of the Lead Counsel disputes would, in fact, be resolved by further negotiation among plaintiffs' counsel.

The PSLRA:

The passage of the PSLRA has mandated that the Court get involved in the selection of Lead Plaintiff (which would then typically result in the Lead Plaintiff's selection of

[2] I do not address here the burdens placed upon the Court in making the fee determination and whether a percentage of the recovery or a lodestar/multiplier methodology is the better one to follow. Each of those approaches requires an informed decision by the Court and a fair and reasonable fee can be established under either methodology by either adjusting the percentage of recovery or the multiplier.

Lead Counsel subject to Court approval) in cases which are covered by the PSLRA. The criteria for the selection of Lead Plaintiff under the PSLRA, while fairly straightforward in the statute, has been the subject of numerous court decisions. The importance to the legislative scheme of allowing the Lead Plaintiff to then select its counsel as Lead Counsel (subject to Court approval), while clear to me from the language and legislative history of the PSLRA, has also now become the focus of several court decisions. Whatever the limited merit of the use of an auction process under those circumstances where a conflict may be suspected, it quickly, and in my opinion improperly, has morphed into a "quick fix" for the courts to deal with any and all criticism of the Lead Counsel selection process. I do not consider the auction process to be a fix, quick or otherwise, for any of the issues involved in setting plaintiffs' counsels' fees or the selection of Lead Counsel.

Earlier today you heard from a panel consisting of representatives of three public pension funds who have been selected by different courts to serve as Lead Plaintiff in significant PSLRA litigation. My firm has had the pleasure and opportunity to represent each of these panelists (Florida, the City of New York, and Connecticut) in their respective Lead Counsel capacity. From that representation I know that these institutions take their Lead Plaintiff role very seriously, both in their selection of counsel and their negotiation of fee arrangements. I believe you will hear from them today that if they are to be effective Lead Plaintiffs they must have the authority to retain - - and if necessary fire - - Lead Counsel.

That authority, in no way limits or restricts the Court's power to fix a fair fee or to properly supervise the Lead Plaintiff if a real conflict affecting Lead Counsel's performance develops. Although a proposed Lead Counsel may enter into a fee agreement with the Lead Plaintiff, there is nothing under the PSLRA or in the Federal Rules of Civil Procedure which

requires the Court to accept that agreement. Rather, the Court must, under Fed. R. Civ. P. 23, review that fee agreement and the fee application under applicable legal standards and award only a fair and reasonable fee to Lead Counsel regardless of the terms of its fee agreement with the Lead Plaintiff. In practical application, the fee arrangement between the Lead Plaintiff and Lead Counsel is much more likely to set a ceiling on fees than a floor.

I believe that these panelists will also inform you that the important relationship of trust and confidence between attorney and client cannot be mandated through a court-supervised auction process where the client is compelled to take the representation of the lowest bidder. If the Lead Plaintiff is, as Congress intended, to take a meaningful and active role in the supervision of Lead Counsel and the progress of the litigation, the attorney-client relationship must be voluntary and based on the client's evaluation of the competency of its counsel, the resources that counsel can bring to bear on the matters at issue in the litigation, and feelings of respect for and trust and confidence in that counsel's judgment. The Court cannot and, more importantly, should not, make a shotgun marriage of a relationship as sensitive as one of attorney-client.

In short, our experience with large institutional investors, shows that they frequently interview several firms before selecting one to represent them in a litigation and they often aggressively negotiate the maximum amount Lead Counsel may seek upon the successful conclusion of a litigation. There would thus appear to be no need for the use of an auction process to select Lead Counsel or to set a fee under a PSLRA case. In addition, I would note that other panelists have previously commented on the legal issues which may prevent the use of bidding in the selection of Lead Counsel in a PSLRA case.

Non-PSLRA Cases:

In a non-PSLRA action, I would also urge against the use of bidding as the sole or even the dominant criterion for the selection of a Lead Counsel or Lead Counsel organization. Bidding focuses on only one of the issues a Court should evaluate in order to properly select Lead Counsel should it chose to or be requested to undertake that task.[3] Other criteria which must be considered, if the objective of the Court is to provide the Class with the best (whatever that means) legal representation, include: the quality of counsel and the firm; the resources available to Lead Counsel; the fiscal stability and depth of Lead Counsel; the experience of Lead Counsel; the constraints on Lead Counsel's time by virtue of other engagements; and other qualitative factors which are not easily subject to evaluation, comparison or analysis.

There does not appear to be any magic bullet. Where counsel can agree among themselves upon a leadership structure, absent extraordinary circumstances, no Court intervention would appear needed or even beneficial.[4] The selection of Lead Counsel or a Lead Counsel organization is fact specific. At best, a list of non-exclusive criteria can be set forth for a Court's consideration with a Court weighing each as befits the case before it. In addition to the more obvious ones, I can suggest two others:

(i) Has counsel exhibited in the initial pleadings substantial non-public development of the case and facts?; and

[3] As discussed above, the issue of the amount of fees to be awarded to Lead Counsel is not an important issue at this stage of the litigation. From the perspective of both the Class and the Court, the 20/20 hindsight afforded by setting fees at the conclusion of a litigation appears to be without equal.

(ii) Does the Plaintiff (s) represented by the Lead Counsel applicant have a sufficient economic interest in the litigation to assure continuing involvement in the action and supervision over counsel?

I am sure there are more.

Lawrence A. Sucharow
Goodkind Labaton Rudoff &
Suucharow LLP
100 Park Avenue, 12th Floor
New York, New York 10017
212-907-0860

(... continued)

[4] Other commentators have adequately expressed concern over whether a Court's involvement in the Lead Counsel selection process might result in subtle prejudices during the prosecution of the case.