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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JOHN LAURIELLO VS CAREMARK RX INC ET AL
01-CV-2003-006630.00

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C004 CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM

C002 FINNEY JAMES O. JR.

C003 JOHNSON SAM

C001 LAURIELLO JOHN

MOTION FOR CLASS CERTIFICATION

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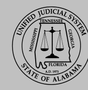
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CASE NO. CV-2003-6630-TK

JOHN LAURIELLO, individually; and
JAMES O. FINNEY, JR., SAM JOHNSON,
and CITY OF BIRMINGHAM RETIREMENT
AND RELIEF SYSTEM, for themselves,
individually, and on behalf of a class of all
others who are similarly situated,

Plaintiffs,

vs.

CVS CAREMARK CORPORATION; AMERICAN
INTERNATIONAL GROUP, INC.; NATIONAL UNION
FIRE INSURANCE COMPANY OF PITTSBURGH, PA.;
AIG TECHNICAL SERVICES, INC.; and AMERICAN
INTERNATIONAL SPECIALTY LINES INSURANCE
COMPANY,

Defendants,

and

VIRGINIA GREENE HOFFMAN,

Intervenor.

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May 4, 2012

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I. SUMMARY AND OVERVIEW OF PLAINTIFFS' POSITIONS

This brief, though long,[1] is intended to be in the nature of an overview of the facts, applicable law, and plaintiffs' positions. When the defendants respond, and plaintiffs see what objections to certification defendants have, plaintiffs will be able to reply in greater depth to those specific objections. This brief, however, will demonstrate a prima facie case for class certification and will supply enough information for the Court to be able to perform a "rigorous analysis" of the class action facts and principles. Plaintiffs' position is that the question of whether the fraud claim is appropriate for class treatment is a very simple "yes." It is defense counsel's job to make the issue seem complicated and to confuse the process with "rabbit trails." Thus, this brief is long and seems complicated only because plaintiffs are anticipating as many of defendants' objections as possible and addressing them herein.

The named plaintiffs, shown in the caption, above, seek an order that certifies the fraud claim (filed in 2003) to proceed as a class action claim against all named defendants. Plaintiff Lauriello does not seek appointment as class representative, but the other three plaintiffs seek appointment as co-class representatives. And, undersigned counsel seek appointment as co-class counsel.

The corporation known in 1999 as MedPartners, Inc., later became Caremark RX, Inc., and then merged with CVS to form the presently-styled defendant, CVS Caremark Corporation. For convenience, this defendant will often be referenced herein as just, "CVS," though we all understand that the company at issue was known as "MedPartners" during the relevant 1998-

[1] It is the defendants who are insisting on a "rigorous analysis" of the question of whether to certify the 2003-filed fraud claim for class action treatment.

1999 time period, and the name "MedPartners" is used herein when it makes better sense, as when speaking historically of what happened in 1998-99. The remaining named defendants are all related companies within the AIG group. These AIG defendants will usually be referenced herein by the singular designation of "AIG."

The three putative class representatives seek to represent an already-certified class. Technically, that class is the sole "plaintiff" in this action.[2] Previous briefs have usually referenced Judge Wynn's class action settlement case as the "1998 MedPartners Securities Litigation," and the ultimate settlement class that was certified as the "1999 class" or the "1999 settlement class."

The Alabama Supreme Court has already ruled that the 1999 class is a properly-certified class that is a presently-existing separate legal entity. The Supreme Court reversed and remanded with instructions because it held that the new "claim," the fraud claim pleaded in 2003, must be certified as a class "claim."[3] That is now the central issue before this Court in May 2012: i.e., whether the 2003 fraud "claim" should be certified to proceed on a class action basis.

The Supreme Court held that CVS is estopped to deny the existence of an already-certified class, the 1999 settlement class. See *Ex parte Caremark RX, Inc.*, 956 So.2d 1117, 1126

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[2] But a class can only act and litigate through court-appointed representatives and court-approved class counsel.

[3] The Supreme Court held that "the claims of the purported class members as well as the purported class members themselves must be analyzed before an action may proceed as a class action. . . . However, the trial court did not consider the elements of Lauriello's new claims, the potential defenses of Caremark and the insurers, the relevant facts, or the applicable law. Lauriello's claims of misrepresentation and suppression have not been analyzed by the trial court or any other court to determine whether they are appropriate for class treatment." *Ex parte Caremark RX, Inc.*, 956 So.2d 1117, 1126 (Ala. 2006).

n. 4 (Ala. 2006): "Caremark is judicially estopped to now challenge the existence of a validly certified class . . . ." The Supreme Court, in footnote 4, also explained that it was not ruling on the issue of whether the AIG defendants are also similarly estopped. The Supreme Court said that it was not foreclosing "consideration of such a claim . . . by the trial court."

The first, and primary, argument presented in this brief (see section III, *infra*) is that the fraud "claim" should be certified to proceed on behalf of the already-certified 1999 class. This argument assumes that *all* defendants are estopped to deny the existence of a class. Thus, the only issue is whether the fraud "claim" may proceed on a class basis. The usual beginning factors of Rule 23(a) have already been decided as to whether or not to certify a "class," and that decision is law of the case. Plaintiffs' position is that the fraud claim (pleaded in October 2003) is tailor-made for class certification, and that the certification process ought to be relatively straightforward: i.e., all members of the 1999 class should either win or lose, as a class, and there is no factual or legal basis for some class members winning on an individual fraud claim and other class members losing.

In section IV, *infra*, plaintiffs show why AIG is also estopped to deny the existence of a class; e.g., because AIG controlled and was a party to the 1999 class settlement. Plaintiffs contend that the estoppel question is also obvious and easy. However, in the alternative to estoppel, section V, *infra*, details the existence of sufficient Rule 23(a) and (b)(3) factors for this Court to certify, in the first instance, the existence of a plaintiff class against AIG.

In 1998-99, culminating with Judge Wynn's approval of the $56M settlement, the legal entity that was defrauded was the 1999 class. The last act that completed the tort (injury) was Judge Wynn's approval of the settlement (in July 1999); and, at that moment in time, a certified

class existed and it was the class's settlement that was approved and it was the class that was the injured legal entity. That is, CVS/AIG did not defraud thousands of individual MedPartners stockholders; instead, they defrauded the 1999 class. The class, not thousands of individuals, is the legal entity whose rights are sought to be vindicated via the 2003-filed fraud claim.

Therefore, plaintiffs urge certification of the fraud claim as a "mandatory" class action claim, under Rule 23(b)(1). There was either a fraud committed, or not. The class will either recover, or not. There is no legal or logical basis for some MedPartners stockholders to recover in this action, but others not. Today, in this 2003-filed fraud class, each class member has an identical and equal claim[4] and must, therefore, be treated equally. Thus, plaintiffs contend that there is no appropriate basis for a certification of the fraud claim as a Rule 23(b)(3) opt-out class.[5] The stockholders had their chance to opt out in 1999. And, those who do not wish to participate in this 2003-filed fraud action can simply ignore their notices of settlement or judgment and decline to file a claim at the end of this case.

For purposes of more efficiently managing this fraud action, plaintiffs urge the Court to divide the already-certified 1999 class into subclasses (A) and (B), based on whether the class member filed an approved claim after the $56M 1999 settlement. This is an administrative (i.e., not a "substantive" or "liability" distinction) tool:

> (A) Those who filed claims in 1999, and had them approved, have already been identified as class members and their loss amount has already been

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[4] We mean legally "equal," as to liability. Obviously, each individual's pro rata portion of money damages will vary, depending on how many shares of stock they owned and when they bought and sold.

[5] Though, in the alternative, the Court could conceivably reject 23(b)(1) and, instead apply 23(b)(3).

calculated and approved. If plaintiffs are successful in this fraud action, via settlement or judgment, this Court may decide then that subclass (A) members need do nothing in order to receive their pro rata percentage of the common fund.

(B) However, members of the 1999 class who chose not to file claims in 1999 will presumably be required by this Court (after settlement or judgment) to file claim forms to prove their membership in the class and prove the amount of their loss (because those issues have not yet been determined for this subclass).

For simplicity, this brief refers to "the fraud claim" in the singular. Technically, two counts are pleaded: misrepresentation and suppression. Paragraphs 80 and 84 of the First Amended Class Action Complaint of June 4, 2004, allege, as follows:

> Defendants intentionally, recklessly, and/or negligently misrepresented and conspired to misrepresent that MedPartners had fifty million in insurance coverage limits that were available to pay a settlement or judgment in the 1998 MedPartners Securities Litigation.
>
> Defendants intentionally, recklessly, and/or negligently suppressed material facts relating to the LMU, that AIG would pay any judgment, no matter how large, and regarding the insurance coverage limits that were available to pay a settlement or judgment in the 1998 MedPartners Securities Litigation.

When plaintiffs seek class certification of "the fraud claim," they mean both counts of the complaint. Plaintiffs contend that - for class certification purposes - there are no significant factual or legal distinctions between the two counts that could result in one count being certified and the other not. The legal distinctions, in this particular case, between misrepresentation and suppression, if any, are "merits" issues to be discussed and briefed later in this litigation.

II. FACTS AND PROCEDURAL HISTORY

This Court is well-familiar with the underlying facts of the 1999 fraud, the fact that the Hare, Wynn and North firms represented John Lauriello against MedPartners in 1998-99, and the somewhat tortured procedural history of this 2003 case. In this section, we summarize these facts again so that the class certification record can be thorough and demonstrate a rigorous analysis by this Court. This section also outlines a few of the discovery responses and deposition excerpts that have been produced in class discovery over the past few months. Note that plaintiffs have filed (on May 2, 2012) a separate Evidentiary Submission containing copies of cited depositions, discovery responses, 1998 MedPartners Litigation documents, etc.

The Alabama Supreme Court, in 2006, wrote this summary:

> In his complaint, Lauriello asserts the following: In 1998, the Jefferson Circuit Court certified a nationwide class action styled *Griffin v. MedPartners, Inc*. (Jefferson Circuit Court; CV-98-00297 et al.). The parties refer to that action as "the MedPartners securities litigation." In that action, MedPartners was alleged to have misrepresented to the public its current and future financial status. Damages in that action were estimated to be approximately $3.2 billion. The trial court certified the complaint for class treatment.
>
> According to the briefs filed with this Court, more than 20 similar class actions were filed in 1998 against MedPartners in various jurisdictions around the country. All of those actions arose out of the same alleged acts and omissions. Lauriello was the named plaintiff in one of those actions; however, his action was dismissed on April 17, 1998.
>
> According to Lauriello, when the MedPartners securities litigation began MedPartners represented that it was near bankruptcy and that the coverage limits of its insurance was $50 million. On January 15, 1999, counsel for the plaintiff class and MedPartners' insurers entered into a "Memorandum of Understanding" to settle all claims asserted in the MedPartners securities litigation, including any other pending class action against MedPartners, for $56 million. Lauriello alleges that counsel for MedPartners represented to the trial court that MedPartners lacked the financial means to pay a more substantial judgment.

On May 3, 1999, at a hearing before the trial court on the proposed settlement, counsel for the plaintiff class represented to the trial court that the proffered settlement agreement was the best recovery the plaintiff class could obtain because of MedPartners' limited financial resources. Attorneys for MedPartners were present and heard these representations to the trial court; they did not attempt to correct, clarify, or rebut these statements. Based on the representations made at that hearing, the trial court conditionally approved the settlement and directed that notice of the proposed settlement be given to the class.

On June 30, 1999, counsel for the plaintiff class submitted an affidavit to the trial court in support of final approval of the proposed settlement in the MedPartners securities litigation. Among other representations, this affidavit provided:

> "The principal factor considered by plaintiffs' counsel in determining to settle the [MedPartners securities litigation] for $56 million was MedPartners' serious financial straits....
>
> "....
>
> "Plaintiffs' counsel, while confident of the strength of plaintiffs' claims, entered into settlement negotiations with the understanding that MedPartners was facing serious problems, including the risk that the company might have to file for Chapter 11 bankruptcy protection. . . . Plaintiffs' counsel also learned that the insurance coverage available provided for maximum benefits of $50 million, and that the policies were wasting assets, meaning that certain defense counsel fees had to be paid out of the policies, thereby reducing the total amount of recovery that might ultimately be collected from the insurers."

The trial court conducted a fairness hearing on July 9, 1999. Counsel for the plaintiff class submitted affidavits and presented arguments to the trial court to the effect that MedPartners lacked the means to pay an amount greater than the amount proposed in the settlement agreement. Attorneys for MedPartners were present and heard these arguments but, again, did not respond to, correct, or clarify the statements. The trial court approved the proposed settlement based on the representations made to it by the parties and their counsel. The trial court entered a final judgment in the MedPartners securities litigation on July 10, 1999, awarding the plaintiff class $56 million. The trial court awarded the class counsel attorney fees in the amount of $18,783,311.11; this amount was to be deducted from the settlement proceeds. Lauriello was a member of the settling class.

In a subsequent and unrelated action between MedPartners and one of its

former officers, there was testimony concerning the assertions made in the MedPartners securities litigation, the damage sustained as a result of the alleged wrongdoing, and the settlement agreement entered into in the MedPartners securities litigation. Documents produced in connection with that subsequent litigation revealed that, during the course of the MedPartners securities litigation, MedPartners had obtained significant additional insurance coverage that had not been revealed to the trial court in the MedPartners securities litigation.

The discovery in the unrelated litigation revealed that, in October 1998, after the MedPartners securities litigation had been commenced but before a settlement agreement had been reached, MedPartners paid $22.5 million for an insurance policy providing excess coverage. The excess policy provided "unlimited" coverage, that is, the insurer agreed to pay, without limitation, the damages awarded in the MedPartners securities litigation or the full amount required to settle that action. The excess policy was dated October 22, 1998, but indicated an effective date of September 30, 1998.

Lauriello asserts that he learned of the existence of the excess-insurance policy in September 2003. Counsel for Lauriello asserts that the existence of this additional insurance coverage was not revealed in the course of the settlement negotiations in the MedPartners securities litigation. On October 22, 2003, Lauriello sued Caremark and the insurers in the Jefferson Circuit Court. Lauriello asserted (1) a claim of misrepresentation based on MedPartners and its insurers' alleged affirmative statements that the coverage limits were $50 million when, in fact, MedPartners had in place an excess-insurance policy with unlimited coverage, and (2) a claim of suppression based on MedPartners and its insurers' alleged failure to reveal the existence of the excess-insurance policy.

The *Lauriello* plaintiffs' appellees' brief in that appeal (specifically in ASC case No. 1040908) included this more detailed overview of the factual background [footnote numbers in the original appellate brief have changed to match up with this brief; citations are to the appellate record prepared by the circuit clerk from the file in this action] [these appellate brief excerpts are not indented, but are single-spaced to indicate they are quotations from one of Lauriello's previous briefs] :

[FN 1] Though not a party defendant in the securities fraud cases, AIG did participate in the negotiation and drafting of the class settlement documents and AIG is a signatory thereto. The "Stipulation of Settlement" dated January 15, 1999, was made between all the parties to the

Griffin action. (C742-89). The preamble, at p. 2 (C743), notes that defendant MedPartners's "Insurance Carrier" is a party to the Stipulation of Settlement. Paragraph 1.12 defines "Insurance Carrier" to mean National Union Fire Insurance Company and all of its successors "and all present and former parents, subsidiaries, divisions or related or affiliated entities." This would include AIG and the present "AIG defendants." AIG's attorney, Richard George, signed for the "Insurance Carrier." (C788). The parties jointly [this means MedPartners and AIG, too] requested the Court to certify a class, pursuant to Rules 23(b)(3) and 23.1. ¶3.1 (C770-72). The parties jointly moved the Court to approve the proposed settlement. ¶3.2 (C772). The parties jointly propounded the recommended form of notice to class members about the proposed settlement. ¶3.1 (C770-72). Richard George (for AIG) was one of those served with Judge Wynn's order of May 10, 1999 (C738-40), that required the Court to be provided with information about MedPartners' "financial ability . . . to withstand a greater judgment." (C739).

. . . .

The following time line may aid the Court in understanding Lauriello's preliminary jurisdictional issue:

December 1997	--	MedPartners/ PhyCor merger breaks apart (C795)
January 1998	--	Securities fraud lawsuits filed against MedPartners (C795)
October 1998	--	AIG sells LMU to MedPartners providing **unlimited** liability coverage (C418) . . . . [After Lerach's recent deposition, we now know Lerach sent George a fax (Item 20 in Evid. Sub.) on Nov. 6, 1998, detailing the final terms of the $65M settlement]
December 17, 1998	--	MedPartners announces excess coverage purchased from National Union in press release, without disclosing the **unlimited** coverage or the premium paid (C341)
January 15, 1999	--	AIG (for Defendants) and Bill Lerach (for Plaintiffs) execute memorandum of understanding resolving securities fraud claims for $65 million (C797-98)
April 15, 1999	--	MedPartners files Form 10-K which discloses purchase of "excess equity protection insurance coverage" from National Union for a premium of $22.5M, but does not disclose the **unlimited** liability coverage (C112)
May 3, 1999	--	Preliminary approval hearing (C454): Judge Wynn is

told that the $56 million settlement represents MedPartners' policy limits.

May 3, 1999 -- Preliminary Class Certification Order (C239)

May 10, 1999 -- Judge Wynn order directing proponents of settlement (including AIG) to provide any evidence of any ability by MedPartners to pay an amount greater than the $56M settlement (C737)

July 9, 1999 -- Final fairness hearing: Judge Wynn is not told of **unlimited** coverage.

July 10, 1999 -- Final class action certification and $56 million settlement approved by Judge Wynn (C238)

September 2003 -- Discovery production in a different action results in disclosure, for the first time, of transcripts of an arbitration hearing, etc., that reveal the existence of the **unlimited** insurance policy

October 2003 -- Lauriello files this fraud-in-the-settlement suit.

. . . .

1. GENERAL FACTUAL INTRODUCTION

AIG and MedPartners (n/k/a Caremark)[6] paid only $56 million[7] to settle the 1998 MedPartners Securities Litigation - when their own damage experts valued the claims at between $450 million and $650 million, and when MedPartners' CEO and one of its directors testified under oath [in another proceeding] that the damages were as much as $3.25 Billion. Defendants were able to settle the securities claims for only $56 million because, as alleged by Lauriello, they fraudulently suppressed and misrepresented the amount of insurance coverage that was available to pay the securities claims. Plaintiffs' 1999 settlement class counsel and, more

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[6] The multiple state and federal lawsuits, which were ultimately rolled up into a settlement class in Jefferson County Circuit Court, are referenced as the "1998 MedPartners Securities Litigation." The ultimate settlement class, approved by Circuit Judge Wynn, is the "1999 class" or "1999 settlement class."

[7] See the last section, 2.O., of this statement of facts, *infra*, for a further explanation of the $50/56/65 million figures: MedPartners started off with $50 million in insurance coverage; additional insurance was procured; defendants represented the additional insurance to be $15 million; $9 million was paid to settle a California case; leaving $56 million to settle the 1998 MedPartners Securities Litigation in Jefferson County, Alabama, in 1999.

importantly, Circuit Judge Wynn, were told that the $56 million settlement exhausted MedPartners' coverage limits. Actually, AIG had issued insurance to MedPartners that provided **UNLIMITED** liability coverage.

Lauriello alleges that the defendants intentionally misrepresented and suppressed the true amount of insurance that was available in order to settle the 1998 MedPartners Securities Litigation because they knew that: (1) no plaintiff would have accepted a settlement that paid pennies on the dollar if they knew that insurance coverage was **unlimited**; and (2) Judge Wynn, who owed a fiduciary duty to the class, would never have approved a settlement that paid pennies on the dollar if he had been told that insurance coverage was **unlimited**.

MedPartners made a secret purchase of **unlimited** liability insurance. As a part of that transaction, MedPartners and AIG entered into a secret side letter agreement, dated October 22, 1998.[8] MedPartners and AIG agreed to keep the LMU and the unlimited insurance confidential. If the unlimited liability insurance had become public, AIG could have terminated the insurance. *Id.*

An agreed-upon press release was attached to the side letter agreement as Exhibit A. (C341).[9] However, the press release -- which was the only way that the insurance could be disclosed after December 15, 1998 -- did **not** disclose that coverage limits were unlimited and it did **not** disclose that policy exclusions in the original insurance had been waived. In fact, the press release even misrepresented which company issued the additional coverage.

This case is also about an insurance company (AIG) that allegedly was willing to defraud class members **and the Court** to maximize its profit on a $22.5 million premium. AIG has **admitted** that it hid the truth about unlimited insurance coverage to keep the settlement value low. AIG's employee – Peter Eastwood – admitted **under oath** [in another proceeding] that the unlimited insurance was kept secret so that the plaintiffs' lawyers would not discover the truth:

Q: Why was AIG so insistent that a confidentiality clause be included in this side letter?

A: It is consistent with every transaction that we work on, there is a confidentiality agreements that are signed. **Specifically on the MedPartners transaction; <u>we were concerned that the existence of the</u>**

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[8] The secret side letter agreement is attached to the Plaintiff's Evidentiary Submission in Opposition to Defendants' Motion to Dismiss (C332 et seq.) as Exhibit 1 (C338-40). Exhibit 1, at page 3 (C340): "The Company and the Insurer shall maintain the confidentiality of the issuance and provisions of the Insurance Agreement; provided, however, that commencing December 15, 1998 MedPartners shall be entitled to make an announcement in the form attached hereto as Exhibit A."

[9] The press release came out on December **17**, 1998 (not on the 14th).

> **additional insurance would change the motivation of the plaintiffs' attorneys, potentially the settlement value of the case would be driven up, and we wouldn't have the opportunity to settle the case at a reasonable number**.[10]

Specifically, this case alleges a calculated, deliberate, and premeditated fraud perpetrated on the 1999 class and on the Court by defendants Caremark/MedPartners and AIG. The obvious purpose of the fraud was to settle for a fraction of their true value numerous securities class actions filed in 1998 against MedPartners (the "1998 MedPartners Securities Litigation"). Such fraud was accomplished by defendants' misrepresentations regarding, and concealment of, the fact that MedPartners had **unlimited insurance coverage** with respect to the claims made in the 1998 MedPartners Securities Litigation.

Unlike the vast majority of fraud cases, proof of the fraud here is direct, not circumstantial. AIG's **sworn testimony** has admitted to the fraud. **Richard George**, an **attorney** for defendant AIG, **testified** in a subsequent but related arbitration proceeding, that the defendants' motive in not disclosing the fact of unlimited coverage was to secure a lower settlement of the MedPartners Securities Litigation. George testified, as follows:

> Well, our primary concern was that **if it [the policy providing unlimited coverage] had become widely known or even if it had become known to any more people than had to know about it, that ultimately would get to the plaintiffs and if the plaintiffs were to suddenly realize that there was this insurance above the $50 million that they were previously aware of, that was going to cause them to drive the settlement value to a much higher level than they would otherwise**. From the plaintiffs' perspective, they were faced with a company that had $50 million of insurance and a very uncertain financial condition in the future, that was a constraint on the settlement value that they could ultimately expect to derive and we were not going to do anything to disrupt that perspective. **We were not going to let them know that there was this insurance on top**. **And so we kept it within as tight a group as we possibly could for fear that somehow it would come to the plaintiffs' attention**.

Exhibit 2, pp. 4904-4905. (C354). (emphasis supplied).

2. PROCEDURAL HISTORY AND MATERIAL FACTS

The Complaint in this action was filed on October 22, 2003, and arises out of the 1999 settlement of the 1998 MedPartners Securities Litigation.

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[10] Exhibit 2 (C343-55, excerpts from arbitration transcript between MedPartners/AIG and Chubb), Tr. pp. 2435-2436 (C345) (emphasis added).

A. The 1998 MedPartners Securities Litigation.

In the 1998 MedPartners Securities Litigation, class claims were filed against MedPartners that, in substance, alleged securities fraud. A total of more than twenty class actions were filed against MedPartners.[11]

B. MedPartners' Own Attorneys and Experts Estimated That The MedPartners Securities Claims Were Worth Hundreds of Millions of Dollars.

Notwithstanding that MedPartners had denied the allegations made in the 1998 MedPartners Securities Litigation, MedPartners' own lawyers – including Edward L. Hardin, its general counsel – and damage experts estimated that the claims were worth hundreds of millions of dollars.

During an arbitration proceeding that later took place between MedPartners/AIG and Federal Insurance (which is Chubb) over an excess layer of insurance, Ed Hardin testified under oath regarding the value of the 1998 MedPartners Securities Litigation. He described the Securities Litigation as "**Maybe the worst case I have ever seen**." Exhibit 2, at 2790 (C347) (emphasis added). Hardin further testified that the value of the claims made in the MedPartners Securities Litigation was at least $500 million.

Q. What was your evaluation of the potential liability in dollars of the cases?
A. **I thought realistically the verdict could be as high as $500 million**.
Q. What was the evaluation that you arrived at in July (1998) or so?
A. Just as I told you.
Q. **500 million**?
A. **Yes**.[12]

Furthermore, Jack Newman, a lawyer from the law firm of Jones, Day, who was hired by MedPartners to defend the MedPartners Securities Litigation, hired a damage consultant, Cornerstone Research, to prepare a damage calculation so that MedPartners would know the extent of its exposure as a result of such lawsuits. Cornerstone Research estimated that the damages suffered by class members in the MedPartners Securities Litigation were between **$450 and $650 million**. *Id.*, at 3381 (C350).

Significantly, this damage calculation was prepared without the worst information of MedPartners' wrongdoing. In that regard, Hardin testified that he did not share the worst

[11] Lauriello was the named plaintiff in one of the numerous class action lawsuits. Lauriello's case was dismissed, however, on April 17, 1998, and he was no longer involved in the prosecution or settlement of the claims against MedPartners.

[12] *Id.*, at pp. 2787-2789 (C347) (emphasis added).

information with Jack Newman for fear that it would be given to AIG and would be used to deny insurance coverage:

> Question: The reason you withheld these various categories of information from Mr. Newman was because of your concern if the insurance companies ever found out about it they would have a basis for denying coverage, is that right?
> Answer: That was my primary concern with regard to the systems in California.[13]

Hardin summed up the potential liability of MedPartners by stating: "And I know that if the plaintiffs' lawyers ever get the facts, it is history. . . . For anybody to say that this case is defensible and that sort of thing, they better get their seat belts on." *Id*., at 2794 (C348).

C. Lawyers for the Class Requested Insurance Coverage Limits and the Defendants Had a Duty to Produce Such Information.

Soon after the MedPartners Securities Litigation was filed, the attorneys in the lead case before Jefferson County Circuit Judge William Wynn -- *Griffin v. MedPartners, Inc.,* CV 98-297, which was the case that was ultimately settled and certified -- propounded document requests that specifically requested that all insurance information be provided. On March 12, 1998, MedPartners filed responses to this discovery. Exhibit 3 (C357 et seq.). Plaintiffs' counsel specifically requested that defendants produce **"All documents constituting or concerning any insurance policy under which any defendant may claim coverage to satisfy . . . any possible liabilities as a result of any of the claims asserted in this litigation."** Exhibit 3 (C367) (emphasis added).

Ed Hardin, as attorney for MedPartners, served responses to the document requests. In his responses, Hardin stated that, subject to general objections, "**Defendants will produce, at a time consistent with any scheduling order to be issued by the court, nonprivileged documents constituting contracts of insurance applicable to the period determined to be pertinent for coverage purposes**." Exhibit 3 (C367) (emphasis added). Thus, MedPartners stated that it would produce the insurance policies.

Neil Selinger, counsel for the 1999 settlement class, testified that he learned from defense counsel that available coverage limits were $50 million: "**Plaintiffs' counsel also learned that the insurance coverage available provided for maximum benefits of $50 million**." Exhibit 4 (C371 et seq.), ¶ 34 (C395). (emphasis added).

The Alabama Rules of Civil Procedure require that insurance agreements be produced. Rule 26(b)(2) ("A party may obtain discovery of the existence and contents of any insurance agreement...."). Michael Atchison, counsel for MedPartners, recognized in a subsequent arbitration that "if requested" MedPartners had an obligation to produce the LMU. Exhibit 2,

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[13] *Id*., at 2975 (C349).

page 2608-2609 (C346).

D. MedPartners Purchased Unlimited Insurance.

In October 1998, AIG's Loss Mitigation Unit agreed to provide MedPartners with **unlimited** insurance coverage (the "LMU") with respect to the 1998 MedPartners Securities Litigation. Exhibit 5 (C418 et seq.). The premium for the unlimited coverage was $22.5 million. (C418). The LMU also provided for a waiver of all policy exclusions (except the insured versus insured exclusion). (C426).

When it purchased the unlimited coverage, MedPartners entered into a secret side agreement with AIG. (C338). MedPartners and AIG both agreed in this secret side agreement that there would be no disclosure of the LMU until mid-December of 1998. Even then, the only disclosure that would take place would be in the form of a press release (C341) that was attached to the secret side agreement.

E. The Unlimited Insurance Was Not Adequately Disclosed.

On October 12, 1998, as a part of negotiating the secret side agreement and the LMU, Ed Hardin sent to Richard George a proposed press release that would have disclosed the LMU and its unlimited coverage. Exhibit 6 (C432-33). This initial draft discloses,[14] clearly and unambiguously, that coverage was unlimited, that all policy exclusions had been waived, and that the premium was $22.5 million.

From this exhibit, together with a fax from Ed Hardin (C432), it is evident that AIG edited the proposed press release. Most telling is the information that was deleted. **AIG deleted** from the proposed press release the disclosure of the unlimited amount of insurance, the waiver of all policy exclusions, and the premium of $22.5 million. The original press release, Exhibit 6 (C433), contained a paragraph that explained, fully, the nature of the LMU coverage:

> Under the terms of the National Union agreement, National Union has agreed to provide excess insurance coverage beyond the company's existing D&O coverage with respect to the shareholder litigation in exchange for a total non-refundable premium payment of $22.5 million. There is no liability cap or limit on the National Union coverage and the insurance company has waived all exclusions.

Exhibit 7 (C435), which is a separate copy of this proposed press release, shows the deletions. Comparing these two documents, it is evident that the following language was **deleted** from the proposed press release:

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[14] **"There is no liability cap or limit** on the National Union coverage and the insurance company has waived all exclusions." Quoting draft press release (emphasis added) (C433).

> in exchange for a total non-refundable premium payment of $22.5 million. There is no liability cap or limit on the National Union coverage and the insurance company has waived all exclusions.

Exhibits 6 & 7.[15]

In response, MedPartners' general counsel Ed Hardin sent the e-mail that is marked Exhibit 8 (C437). Hardin noted that the information contained in the original press release was necessary for adequate disclosure of the LMU:

> Rich,
>
> The press release was prepared by Bill Spaulding of King & Spaulding, telephone number 404-572-5145. ***He advises that the portions deleted by AIG are necessary components in order to satisfy disclosure obligations.*** For example, he advises that the failure to disclose the consideration paid for the catastrophe equity protection would constitute a material omission. Please call Bill and see if there is a mutually satisfactory solution.

(C437) (emphasis added). Hardin notes in his e-mail that there is inadequate disclosure without all the information that he proposed. The final press release (C341) did **not** contain the information suggested by Hardin and did **not** adequately disclose the contents of the LMU.

Several months later, MedPartners filed its annual statement -- a Form 10K -- with the Securities and Exchange Commission. (C112 et seq.) In that annual statement, MedPartners disclosed that it had paid a $22.5 million premium for excess insurance. However, MedPartners NEVER disclosed that the coverage limits were "unlimited" or that all policy exclusions had been waived.

F. Misstatements in the Press Release and the SEC Filing Relating to the Identity of the Insurer Were Allegedly a Part of the Fraud.

The press release and SEC Filing also incorrectly stated that "National Union" was the AIG entity that issued the LMU (which only now do we know contained **unlimited** liability coverage). In what is, allegedly, a deliberate part of the scheme, it is now clear that another AIG company -- American International Specialty Lines Insurance Company -- actually issued the LMU. Exhibit 5 (C418).

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[15] Lauriello contends that it is absurd for AIG and Caremark to argue [see, for example, p. 13 of appellants' brief] that they fully disclosed to the whole world the existence of the LMU, when they intentionally **deleted** that very information from the initial draft of the press release. If they had truly desired disclosure, they would simply have left that language in the press release and repeated it in the 10-K.

The press release and SEC filing (noted above) state that "National Union" issued an excess policy to MedPartners. When challenged about this excess coverage in a bad faith lawsuit brought against National Union by Jay Johnston, National Union responded that it had exhausted all policy limits for all insurance that it issued. Indeed, National Union has claimed that it exhausted its policy limits in litigation before this very Alabama Supreme Court.

On February 7, 2002, National Union and AIG asserted that Johnston's claims against AIG and National Union for bad faith should be dismissed because policy limits had, supposedly, been exhausted; "Since the policy limits of the D&O Policies have been exhausted, National Union has no further duty to indemnify any insured pursuant to the D&O Policies or Mr. Johnston in the Johnston litigation." Exhibit 9 (C440-41).

Subsequently, in a brief filed with the Supreme Court of Alabama on March 21, 2002, National Union and AIG argued that Johnston's petition for writ of mandamus should be denied because policy limits had been exhausted and Johnston had no claim against National Union and AIG: "Further, National Union has fulfilled all of its duties and obligations to Mr. Johnston as an insured by payment of its full policy limits." Exhibit 10 (C440).

Further, in oral argument before Jefferson County Circuit Judge Houston Brown, on November 21, 2003, lawyers for National Union insisted that National Union had paid policy limits:

> The issue before Your Honor is did and were [sic] the policy limits of the National Union D&O policies exhausted, yes or no. And the National Union policies, the only two policies issued by National Union, the 25 million dollar policy and the 10 million dollar excess on top of CHUBs [sic] 15 million was exhausted, that is true.

Exhibit 11, at transcript pages 67-68 (C448-49).

When National Union has been asked on the record about the excess coverage, it has consistently responded, substantially, as follows: "Policy limits . . . have been exhausted." The point is this: Even if, in December 1998 and spring 1999, one had read the press release and 10-K, one could not have known that MedPartners had procured **unlimited** insurance coverage. The public was told that "National Union" had issued the additional coverage. We know as a 100% fact that, if one approached National Union and asked, National Union would have answered that, yes, it had exhausted its policy limits in the 1999 settlement of the 1998 MedPartners Securities Litigation. So, the fraud, the non-disclosure of the **unlimited** coverage, was further facilitated when the press release and 10-K wrongly identified National Union as the AIG insurer that had issued additional coverage to MedPartners.

G. Defendants Misrepresented the Amount of Available Insurance.

During settlement negotiations in the 1998 MedPartners Securities Litigation, plaintiff class counsel were informed that the limit of insurance coverage with respect to the litigation was $50 million. In that regard, Jack Newman testified that the plaintiffs were informed of the coverage limits "fairly early on," probably during the summer of 1998, but that he did not inform them of the LMU. (C352-53, at pp. 4249-4252.) Further, the sworn Joint Affidavit of plaintiffs' class counsel Neil L. Selinger and Steven E. Cauley, that was filed in support of the proposed settlement of the 1998 MedPartners Securities Litigation, provided: "**Plaintiffs' counsel also learned that <u>the insurance coverage available provided for maximum benefits of $50 million</u>, and that the policies were <u>wasting assets</u>, meaning that certain defense counsel fees had to be paid out of the policies, thereby reducing the total recovery that might ultimately be collected from the insurers**." Exhibit 4, Affidavit of Selinger and Cauley, at ¶ 34 (C395).

In addition, defendants never informed the 1999 class plaintiffs or the Court of the fact that MedPartners had **unlimited insurance coverage**. Further, even after the LMU was issued and provided that AIG would pay any settlement or judgment, no matter how large, defendants perpetrated the misrepresentations that MedPartners was in financial difficulty and could not pay any significant judgment.

H. <u>Defendants Suppressed the Amount of Insurance From the Plaintiffs and Court.</u>

On January 15, 1999, class counsel and counsel for the defendants entered into a Memorandum of Understanding with defendants to settle all claims alleged in the MedPartners Securities Litigation, subject to the required court approval. (C797-98). On May 3, 1999, the Circuit Court for Jefferson County, Alabama, held a preliminary hearing with respect to the proposed settlement of the Class. (C454). At the preliminary hearing, counsel for the plaintiffs made representations[16] to the Court (in the presence of defense counsel familiar with the LMU) regarding available insurance coverage and the financial condition of MedPartners.

> MR. YEAROUT: ". . .but the settlement for each separate class of people was $56,000,000, . . .and it was all insurance money. **<u>MedPartners, it's my understanding, doesn't have any money, but these lawyers got all the insurance money that was available</u>**."[17]
>
> * * * *
>
> MR. Selinger: "We submit that **<u>$56,000,000 which constitutes the entire amount of insurance proceeds available in this action</u>** and in the context of a company which just disclosed in its most recent annual report that it has a negative net worth of more than 1.1 billion dollars is an extraordinary recovery

[16] Lauriello asserts that it is an obvious logical conclusion that the only source of this information [i.e., that $56 million represents all available insurance coverage] is the defendants themselves, AIG and Caremark.

[17] Exhibit 13, Hearing Transcript of May 3, 1999 (C454 et seq.), at Page 18 (C470).

and certainly one that is on its face sufficiently reasonable to warrant the entry of this order."[18]

* * * *

MR. YEAROUT: "**we've got all the insurance money. We're not going to get any money from a dry hole. That's another reason we want this settlement approved**. We want this thing to go through. If something else is going to come out and they're going to put them out of business or put them in bankruptcy or do those kinds of things, we want to get our clients the $56,000,000.
THE COURT: So you're saying you've got the limit, that is –
MR. YEAROUT: **We've got the limits**.
THE COURT: –**as plaintiffs you've got the limits and there's simply no way that you can avoid saying that this must be in the best interest of your plaintiff**.
MR. YEAROUT: **Yes, sir**."[19]

* * * *

MR. Selinger: "**we've gotten all the insurance coverage** plus some and on the other hand you have a company that's a financial extremist, and if we're - absent this settlement we could well be faced with a situation down the road where we go ahead, **we obtain a judgment and we could be looking at a bankruptcy**. . .and delayed for any longer with a company in a dire financial situation for the tens of thousands of class members out there."[20]

Counsel for both MedPartners and AIG had reviewed the proposed settlement papers. Exhibits 14 (C529-49) & 15 (C551-57). In attendance, as well, was attorney Jack Newman. Exhibit 13, page 5 (C457). Though technically the attorney for MedPartners, Newman had been on the AIG preferred counsel list for years and had been hand-picked by AIG to handle this type of litigation. Exhibit 2, at pp. 2427-2429 (C344). From Newman's time records, it is clear that he spent substantial time reviewing and revising the proposed settlement documents. Exhibit 14 (C529-49).

That Newman played a central role in drafting the settlement documents is also evident from the memoranda that he drafted [Exhibit 16 (C559-61)], and the drafts that he sent to other MedPartners and AIG counsel. Exhibit 17 (C563-66). It is undisputed that Newman was present at the preliminary hearing before Judge Wynn and **did not inform the Court** that MedPartners had **unlimited** insurance coverage and consequently no actual financial exposure. Exhibit 13 (C454 et seq.).

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[18] *Id*., at Page 26, lines 15-23, through Page 27, line 1 C 478-79).

[19] *Id*., at Page 67, lines 15-23 through Page 68, lines 1-12 (C519-20).

[20] *Id*. at Page 72, lines 9-23 through Page 73, lines 1-5 C524-25).

Newman had to know that the papers he was drafting contained misstatements relating to the financial position of MedPartners and its ability to pay a judgment. Exhibit 18 (C568). Newman was involved in efforts to finalize the settlement even after he technically withdrew[21] as counsel for MedPartners. Exhibit 14 (C529).

After the preliminary settlement hearing on May 3, 1999, a Class Notice was prepared and mailed to Class Members in the 1998 MedPartners Securities Litigation. In the Class Notice, the parties represented that:

> Plaintiffs also recognize and considered the uncertain financial resources of the Defendants that might be available if plaintiffs were successful at trial as compared to the substantial present cash benefit that is being made available from this Settlement.

Exhibit 19 (C727, at 729).

[AIG and CVS knew what was said at the preliminary hearing in May. Defendants knew that Judge Wynn was being told that insurance was limited and MedPartners had no financial ability to pay more. Yet, up to and through the July final hearing, defendants never attempted to correct the false information being given to the Court - even though the order of May 10th put them under a specific obligation to disclose to the Court what they knew about MedPartners ability to pay a higher judgment.]

I. Defendants Participated in the Presentation of the Settlement and The Court Expressly Requested Information Regarding MedPartners' Ability to Pay Any Damage Award.

On May 10, 1999, one day after the Preliminary Settlement Hearing, the Court entered an order directed to counsel for both plaintiffs and defendants (including AIG's counsel), requesting that the parties provide the Court with certain information. Exhibit 20 (C737-40). That order required the proponents of the settlement -- meaning MedPartners **and AIG,** and the plaintiffs -- to provide all relevant evidence of the ability -- through insurance or otherwise -- of MedPartners to pay a greater judgment. Needless to say, the LMU was not disclosed to 1999 plaintiffs' class counsel or to the Court.

AIG and Caremark continue to suggest that no misrepresentations to the Court came from

[21] Jack Newman withdrew from representation of MedPartners (but not Wagar) on May 3, 1999, at the preliminary approval hearing before Judge Wynn. Nevertheless, MedPartners' new counsel -- the law firm of Alston & Bird -- knew about the unlimited insurance (R82) and knew -- in the May 3, 1999 hearing -- that Judge Wynn was not being provided all the information. Attorney Michael Kenny of Alston & Bird attended the May 3, 1999, hearing, representing MedPartners. (C457).

their lawyers. That is a sophistic argument that is not legally[22] accurate.

- AIG and MedPartners' were joint proponents, with plaintiffs' class counsel, of the class action settlement. Exhibit 21 (C742 et seq.).

- AIG's and MedPartners' lawyers reviewed and revised settlement documents that contained references to the amount of insurance and to the precarious financial position of MedPartners. Exhibit 18 (C568 et seq.).

- Defense counsel jointly presented the proposed settlement to the court. Exhibits 13 (C454 et seq.) & 21 (C742 et seq.).

- Defense counsel joined in forming the strategy of presenting the settlement to Judge Wynn, including, presumably, highlighting the precarious financial position of MedPartners. Exhibit 14 (C529 et seq.).

Defense counsel demonstrably knew why Judge Wynn and the plaintiffs' attorneys approved a settlement for pennies on the dollar. They also undeniably knew that, if the LMU was disclosed, there would be no $56 million settlement. This is an incontestable inference from the known facts.

[MedPartners and AIG ("the Insurance Carrier") are signatories and defined "Parties" to the Stipulation of Settlement (see § 1.14, at p. 15 of the Stipulation, defining "Parties"). Section 3.1, at pp. 30-31, requires that "the Parties (meaning AIG, too) shall submit this Stipulation together with its Exhibits to the State Court and shall <u>jointly apply</u> for entry of an order . . . substantially in the form of Exhibit A hereto, <u>requesting</u> preliminary <u>approval</u> of the Settlement set forth in this Stipulation, the <u>certification</u> of the Consolidated Class Cases, for settlement purposes only, as a class action pursuant to Rules 23(a) and 23(b)(3) of the Alabama Rules of Civil Procedure . . ., the <u>appointment . . . of their counsel as counsel for the Settlement Class</u>, the

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[22] Alabama law is settled that liability for fraud is **not** limited to the party who actually makes the false representation, but also rests on the party who **caused** the misrepresentation to be made in the first place. See, e.g., *Thomas v. Halstead*, 605 So.2d 1181, 1184-1185 (1992). See also *Daniels v. Alander*, 268 Conn. 320, 330-31, 844 A.2d 182, 188 (2004) (a lawyer disciplinary case holding that an associate attorney had a duty to correct a false statement the associate's employer-attorney made to the trial court in the associate's presence) ("Essentially, he argues that because Daniels made the misstatements, only Daniels could be held accountable. . . . Rule 3.3(a) of the Rules of Professional Conduct . . . can pertain to an attorney who fails to correct a misstatement to the court that was made in his presence by another attorney. . . . Daniels made representations to the trial court . . . that the plaintiff knew from his own personal knowledge to be false. . . . [T]he plaintiff, as an officer of the court, was duty bound to correct the misstatement.").

holding of the Settlement **hearing**. . . ." (emphases added). AIG should be estopped to deny that AIG was just as much involved and responsible for the 1999 class settlement and all of its components, including the evidence to be presented to the Court at fairness hearings.]

J. Defendants Misrepresented and/or Suppressed Facts With Respect to the Final Settlement Hearing Held in July 1999.

In response to the Court's Order of May 10, 1999, counsel for the class filed materials in support of the fairness of the settlement, including sworn affidavits of plaintiffs' counsel detailing the amount of insurance that was available, as follows:

> The **principal factor** considered by plaintiffs' counsel in determining to settle the litigation for $56 million **was MedPartners' serious financial straits**. . . . Also according to the 10-Q, as of March 31, MedPartners had total liabilities of more than $2.5 billion, and a negative net worth of $1.33 billion, even without regard to the company's potential liability in these class actions.[23]
>
> * * * *
>
> Indeed, as plaintiff's counsel entered into settlement negotiations, we were aware that MedPartners's potential exposure for the various claims asserted in the litigation was huge, and that **it was facing a serious risk of bankruptcy. If the case had been litigated through judgment, MedPartners would likely have sought protection from a bankruptcy court rather than pay a judgment**. Moreover, plaintiffs' counsel knew that it was highly unlikely, given the company's public disclosures of its cash flow and outstanding debt, that MedPartners would be able to contribute any significant amount of cash to a settlement, **a fact which counsel for MedPartners confirmed**. **Plaintiffs' counsel also learned that the insurance coverage available provided for maximum benefits of $50 million**, and that the policies were wasting assets, meaning that certain defense counsel fees had to be paid out the policies, thereby reducing the total amount of recovery that might ultimately be collected from the insurers.[24]
>
> * * * *
>
> As detailed herein, plaintiffs also have considered that the settlement was arrived at in the face of a serious risk that plaintiffs would obtain very little value - or even nothing at all - **if MedPartners was forced into bankruptcy** at any time during the litigation.[25]
>
> * * * *

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[23] (C393) (emphasis added).

[24] (C394-95) (emphasis added).

[25] (C406) (emphasis added).

> **The major risk associated** with plaintiffs' case was the risk that plaintiffs would not be able to collect any judgment from MedPartners. . . . [MedPartners] had massive exposure to damage claims in the litigation. Even assuming MedPartners could survive financially up until final adjudication and appeal, it is **likely that a multi-million dollar judgment would force MedPartners into bankruptcy**, in which case plaintiffs would receive little or no recovery. Therefore, even if the case were successfully litigated to conclusion, there would be no means of satisfying a judgment or obtaining anywhere near as much value as was achieved by the Settlement.[26]
>
> * * * *
>
> In achieving the proposed settlement, plaintiffs' counsel carefully considered several factors, **the most significant of which was MedPartners' severe financial constraints**.[27]

Thus, numerous false and misleading statements were made to the Court regarding MedPartners' insurance coverage and its ability to pay a substantial judgment. Lawyers for MedPartners and AIG reviewed the Joint Affidavit of Selinger and Cauley and other settlement documents before they were filed, but they did not attempt to alert plaintiffs or the Court to the false representations contained therein. See, e.g., Exhibits 14-18 (C529-725: defense attorney time sheets, letters, memos, etc.). In addition to the false representations contained in the Joint Affidavit of Class Counsel, material misrepresentations were made **during** the final fairness hearing conducted on July 9, 1999:

> Mr. Selinger: In other words, the company has a negative worth of more than one point one billion dollars. . . .
>
> And that there was a substantial question, that given the massive exposure that the company was subjected to as a result of these twenty class actions pending in this Court and the Federal Courts, that if we were able - ever able to proceed to trial and obtain a judgment against this company, **it is likely that it would not be collectible.** It was very clear, given what is set forth in those financial statements that had we recovered a multi-million dollar judgment against this company, we would likely be faced with Chapter 11 filing.
>
> We also had a situation that we learned of during the course of our negotiations **that the company maintained fifty million dollars of director's and officer's liability insurance, but that was the face value of those policies**. And those policies were what we referred to as **wasting assets. In other words, cost of defense came out of the policy limit,** so that the more the litigation proceeded, the amount available to pay for satisfaction of a recovery here decreased, so that the fifty million dollars as the end of years of litigation and the

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[26] (C407) (emphasis added).

[27] (C415) (emphasis added).

> end of trial could have been millions of dollars less. What we have been able to obtain here is not only payment of the complete fifty million dollar base amount of that coverage, we were able, through our negotiations, to obtain millions of dollars in excess of the originally policy limits in settlement of this action. **The monies are all coming from the insurance carrier.** So we have a situation where we have not only obtained the best possible recovery we could get under those policies, we've maximized them beyond the original scope of the policies. . . .
>
> We cite cases in our memorandum that stand for the proposition that **the financial ability to pay a judgment, or withstand a judgment greater than the settlement amount, can in some circumstances be the most significant, if not the only factor, that the Court should take into account in looking at the fairness of the settlement**.[28]

MedPartners and AIG were present and knew that false and untrue statements were being made to the Court but never once alerted the Court to the falsehoods. Instead, despite the fact that the Court had placed a requirement on both the plaintiffs and the defendants to provide accurate financial information, the defendants and their counsel sat silently while the plaintiffs' counsel provided the Court with information that only certain defense lawyers and AIG/MedPartners knew to be false. On July 10, 1999, the Court approved the settlement and entered its Order and Final Judgment. (C238).

When Judge Wynn approved the settlement, he commented that his decision to approve the settlement was based upon the precarious financial condition of MedPartners: "And then, from the remarks that I've heard this morning, I feel very comfortable, I think, it's a settlement that is almost too good to be true **<u>in light of the condition of the Defendant</u>**." Exhibit 22, at page 61 (C936) (emphasis added). However, as a result of the **unlimited** insurance that was bought from AIG, the financial condition of MedPartners should have been absolutely irrelevant. AIG was bound to pay any judgment rendered against MedPartners, no matter how large. Defendants knew that Judge Wynn was in the dark about available insurance. They knew he was basing his decision to approve the settlement on the assumed poor financial condition of MedPartners. Based upon these comments, MedPartners and AIG knew that the settlement of the 1998 MedPartners Securities Litigation was based upon misrepresentations and suppressions.

K. <u>Defendants Concede That Plaintiffs Were Not Informed Of The Unlimited Amount Of Insurance</u>.

Richard George, an attorney for defendant AIG, admitted in sworn testimony that 1999 plaintiff class counsel were intentionally not informed of the **unlimited** insurance coverage. See George's testimony quoted at the end of section 1., pp. 10-11, *supra*.

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[28] Exhibit 25, July 9, 1999, Hearing Transcript, at Page 34, line 11, through Page 39, line 16 (C909-14) (emphasis added).

In the December press release (C341) and the subsequent Form 10K (C112), the wording of the disclosure was very carefully crafted so that the public and 1999 plaintiffs' class counsel were told only that National Union was handling the defense. Even this was not true: we now know that another AIG company -- American International Specialty Lines Insurance Company -- actually issued the LMU. (C418).

Jack Newman, the lawyer paid by AIG to represent MedPartners, testified that he did not tell plaintiffs about the LMU: "I don't believe I told them about the LMU, they just knew that AIG was handling the settlement." *Id.*, at 4234 (C351).

Further, Caremark CEO Crawford continued to misrepresent and suppress information relating to AIG's agreement to pay any settlement or judgment, no matter how large. When asked about the consequences of losing the 1998 MedPartners Securities Litigation, CEO Crawford testified that, "Depending on the magnitude and the size of the awards, the company could have been put into bankruptcy." (C863). This statement was totally untrue because AIG had agreed to pay any award, no matter how large.

L. MedPartners' Officers, Directors, and Experts Testified that the Damages Were Billions.

MedPartners/Caremark and certain of its officers, directors, and experts later admitted, **under oath**, to the magnitude of the fraud in the 1998 MedPartners Securities Litigation. This testimony occurred in a later trial between Caremark and one of its former officers. According to Mac Crawford, Caremark's current Chairman and CEO, the wrongdoing that was the basis of the 1998 MedPartners Securities Litigation is "the biggest disaster in health care in current time." (C859).

Crawford testified under oath that the assets of MedPartners were overstated by over $2 billion and had to be written off as a result of the wrongdoing alleged in the MedPartners Securities Litigation. (C860).

Chuck Newhall, who was a director of MedPartners/ Caremark, also testified under oath in that same trial that the wrongdoing underlying the 1998 MedPartners Securities Litigation was a "**public scandal**" of "**major proportions**" that involved "**billions of dollars**." (C864-65) (emphasis added). Newhall specifically testified that damages resulting from the wrongdoing totaled $3.2 billion: "**As a result of the gang's operations, the company lost $3.2 billion**." (C867) (emphasis added). Mr. Newhall admitted under oath that the "gang" - former management - was responsible for this multi-billion dollar fraud on the shareholders: "**I am saying, sir, that the management [of MedPartners] perpetrated a fraud on the board of directors, on their auditors, on their legal advisors, on their shareholders, and for that reason, the company lost $3 billion** . . . ." (C868-69) (emphasis added).

In May of 2001, MedPartners' accounting expert, Stewart Dudley, testified under oath that the fraud underlying the 1998 MedPartners Securities Litigation exceeded $3 billion: "[I]t

ultimately wound up taking over $3 billion in losses to clean the company up." (C871). Dudley reiterated this point under questioning from MedPartners' lawyers: "By the time you restate and put things in the proper year and carry them forward and actually clean this company up, you're going to recognize in excess of $3 billion in loss." (C873). During the same trial, Mr. Dudley confirmed that such losses were actually $3.2 billion, stating: "But the history of this case bears out their conclusion because of the $3.2 billion in losses. . . ." (C872). More importantly, Dudley confirmed, under oath, that the circumstances underlying the 1998 Medpartners Securities Litigation "is a three billion dollar fraud." (C874).

Thus, MedPartners' own officers, directors, and expert witnesses have admitted that MedPartners' assets were overstated by over $3 billion during the class period embodied in the 1998 MedPartners Securities Litigation and 1999 settlement class.

M. MedPartners' Fraud Was Continuing.

MedPartners/Caremark also wanted to conceal the fraud. In that regard, in early 2002, the CEO and Chairman of Caremark continued to misrepresent and suppress material facts and information relating to the LMU. CEO Mac Crawford testified under oath in another proceeding that MedPartners paid approximately $22 million to settle the 1998 MedPartners Securities Litigation. (C862). Crawford did ***not*** mention the LMU or the fact that AIG had actually paid for the settlement of the 1998 MedPartners Securities Litigation.

Earlier, in December 1999, certain lawyers for AIG and MedPartners attempted to hide the scope of the LMU from federal Judge Ed Nelson at a hearing that preceded the AIG/MedPartners/Chubb arbitration. Well after the MedPartners class settlement was approved, MedPartners and AIG were still concealing the existence of the LMU from everyone. They initially told Judge Nelson that the LMU provided only $15 million in additional coverage: "As a result of the lawsuits and its concern over exposure, MedPartners purchased, after these suits were filed, a third layer of excess coverage from National Union of an additional 15 million dollars." (C797). This characterization of the LMU as providing only $15 million in additional coverage was not accurate. This mis-characterization was only corrected when Judge Nelson, himself, asked a follow-up question about the coverage. (C832). This transcript was part of the documents that Lauriello's counsel herein first obtained in September 2003.[29]

N. Plaintiff Discovered The Fraud In September 2003.

Lauriello contends that AIG and MedPartners conspired (and even contracted) together to

[29] Judge Nelson did not know that a fraud had been committed in the 1999 class settlement because he did not know that Judge Wynn had been told that insurance was limited to $56 million. No representative of Lauriello's or of the 1999 class was present at or involved in Judge Nelson's case (or in the arbitration proceeding with Chubb), so discovery of the fraud did not occur until September 2003.

keep the LMU secret. They suppressed information relating to the LMU from the Court, plaintiffs, plaintiffs' class counsel, and others (including Chubb, another insurer for MedPartners). [The fraud did not begin to come to light] until the LMU was produced in discovery [after responses to discovery were ordered by Judge Brown] in the case of *Johnston v. National Union,* CV 01-6123, pending in the Circuit Court for Jefferson County, Alabama. Said documents were produced in September of 2003.

O. An Explanation of the $50, $56, and $65 Million Figures.

. . . some of the pleadings, testimony, arguments, and documents cited have variously used the figures of $50, $56, or $65 million as representing the total amount of insurance that the 1999 class and the Jefferson County Circuit Court thought MedPartners had available to it for settling the 1998 MedPartners Securities Litigation. . . .

The only thing that is important for this Court to understand is this: It is undisputed that the 1999 class settled for $56 million and that Judge Wynn was told that the entire $56 million was being paid by insurance and that $56 million represented all of the insurance available to MedPartners.[30] Thus, the claim is: AIG AND MEDPARTNERS SETTLED THE 1999 CLASS FOR $56 MILLION BY REPRESENTING [and suppressing] THAT THIS WAS THE LIMITS OF INSURANCE WHEN THE TRUTH WAS THAT AIG HAD ISSUED AN UNLIMITED INSURANCE POLICY TO MEDPARTNERS.

The December 1998 press release (C341) represented that MedPartners had procured "excess insurance coverage" from "National Union." MedPartners' lawyers represented that the additional coverage was $15 million (meaning a total of $65 million).[31] The reason that only $56 million of the $65 million was available to pay the 1999 class is that $9 million had been paid to settle a California case with the well-known plaintiff class action lawyer William S. Lerach. R40-41, 51, 190.[32]

. . . .

[NOTE: The foregoing appellate excerpt is substantially identical to the evidence and facts presented to this Court in plaintiffs' opposition to motion to dismiss, filed February 23, 2004.]

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[30] See 1999 hearing transcript passages quoted, *supra*, at pp. 22-23, 30.

[31] For example, see C797.

[32] Prior to 2003, Lerach was in the west coast office of Milberg Weiss Bershad Hynes & Lerach LLP.

One of the issues before the Court is whether AIG is estopped to deny the existence of an already-certified class. (The Supreme Court has already held that CVS is estopped.) On April 20, 2012, AIG and CVS separately answered a set of requests for admissions. Many of those requests and responses relate to the facts of AIG's control of and participation in the 1999 class settlement. Here are some selections from CVS's and AIG's responses:

> REQUEST FOR ADMISSION NO. 29:
> That Richard George, counsel for AIG, was authorized to negotiate the terms of the settlement with counsel for plaintiffs in the late summer and fall of 1998.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 29:
> . . . Caremark admits that, according to the excess insurance policy MedPartners purchased from American International Specialty Lines Ins. Co. effective September 30, 1998, American International Specialty Lines Ins. Co., including its counsel, had "the exclusive right and obligation to . . . negotiate directly and control the terms of any settlement by the defendants of the Actions, subject to any conflicting obligations of the Company with respect to any other directors and officers insurance and company reimbursement insurance policies or any other insurance policy which may be applicable to its directors, officers or employees with respect to the Actions." Caremark further admits that Richard George served as counsel for AIG with respect to the negotiation of the settlement in the 1998 MedPartners Securities Litigation. . . .
>
> REQUEST FOR ADMISSION NO. 34:
> That pursuant to the LMU, AIG had the exclusive right and obligation to negotiate directly and control the terms of any settlement of the 1998 MedPartners Securities Litigation by the defendants.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 34:
> Without waiving the foregoing general objections, the AIG Defendants admit that the AISLIC Policy provides that:
>
> > The Insurer shall have the exclusive right and obligation to assume the defense of the defendants in the Actions, control the strategy for defense of the defendants in the Actions and to negotiate directly and control the terms of any settlement by the defendants of the Actions, subject to any conflicting obligations of

> the Company with respect to any other directors and officers insurance and company reimbursement insurance policies or any 'other insurance policy which may be applicable to its directors, officers or employees with respect to the Actions. The Insurer agrees that any settlement of any of the Actions shall include a release of all claims asserted therein. . . .

REQUEST FOR ADMISSION NO. 36:

That AIG deleted the suggested language, "there is no liability cap or limit on the National Union coverage and the insurance company has waived all exclusions" from the original press release drafted by MedPartners to disclose the LMU.

RESPONSE TO REQUEST FOR ADMISSION NO. 36:

. . . Caremark admits that Richard George has testified that he requested that the quoted language be deleted from a draft of the press release that had been proposed by MedPartners because he thought it was "potentially misleading," and the language was, in fact, deleted in the version of the press release that MedPartners and American International Specialty Lines Ins. Co. ultimately agreed to in connection with MedPartners' purchase of the excess insurance policy.

REQUEST FOR ADMISSION NO. 40:

That on September 9, 1998, Richard George had a telephone conference with William Lerach and others regarding possible settlement.

RESPONSE TO REQUEST FOR ADMISSION NO. 40:

. . . Caremark . . . admits that time records maintained by Richard George contain an entry for September 9, 1998 identifying a telephone conference with William Lerach regarding possible settlement. . . .

Without waiving the foregoing general objections, the AIG Defendants admit that Richard George's time records, dated September 9, 1998, reflect that he had "[telephone conferences with] P. Eastwood, W. Lerach, J. Newman, and P. Lavelle re possible settlement," and otherwise deny Request No. 40.

REQUEST FOR ADMISSION NO. 50:

That Richard George, counsel for AIG, had authority to sign the Memorandum of Understanding on behalf of all defendants in the litigation.

RESPONSE TO REQUEST FOR ADMISSION NO. 50:

. . . Caremark admits that Richard George signed the Memorandum of Understanding as counsel for National Union Fire Ins. Co. "on behalf of all Defendants in the Litigation," as that term was defined in the Memorandum of Understanding. . . .

The AIG Defendants . . . admit that Richard George signed the Memorandum of Understanding as counsel for National Union Fire Insurance Co. "on behalf of all Defendants in the Litigation," refer to the Memorandum of Understanding for the precise content thereof, including, but not limited to, the definition of "Litigation" set forth therein, and otherwise deny Request No. 50.

REQUEST FOR ADMISSION NO. 51:

That the Stipulation of Settlement dated as of January 15, 1999, Bates numbers LAU002883 through LAU003345, was entered into by the Insurance Carrier, which was defined as "Nation Union Fire Insurance Co. and all of its predecessors, successors, and all present and former parents, subsidiaries, divisions or related or affiliated entities."

RESPONSE TO REQUEST FOR ADMISSION NO. 51:

. . . Caremark admits that the Insurance Carrier, as that entity was defined in the Stipulation of Settlement, was a signatory to the Stipulation of Settlement, which was signed as of April of 1999 and made effective as of January 15, 1999. . . .

The AIG Defendants . . . admit that the Stipulation of Settlement, which was signed in or about late April 1999 and made effective as of January 15, 1999, was entered into by the Insurance Carrier, as defined in the Stipulation of Settlement, note that the correct spelling is "National Union Fire Insurance Co.," and otherwise deny Request No. 51.

REQUEST FOR ADMISSION NO. 52:

That the Stipulation of Settlement dated as of January 15, 1999, Bates numbers LAU002883 through LAU003345, was signed by the Insurance Carrier through its counsel, Richard George.

RESPONSE TO REQUEST FOR ADMISSION NO. 52:

. . . Caremark admits that the Insurance Carrier, as that entity was defined in the Stipulation of Settlement, was a signatory to the Stipulation of Settlement, which was signed as of April of 1999 and made effective as of January 15, 1999, through its counsel, Richard George. . . .

Without waiving the foregoing general objections, the AIG Defendants admit Request No. 52.

REQUEST FOR ADMISSION NO. 54:

That, as a party to the Stipulation of Settlement, the Insurance Carrier, as that term was defined in the Stipulation of Settlement, knew that the Jefferson County Circuit Court would be asked to certify the Settlement Class.

RESPONSE TO REQUEST FOR ADMISSION NO. 54:

. . . Caremark admits that the Stipulation of Settlement provides for submission of the Stipulation "to the State Court" and application for entry of an order requesting, among other things, "the certification of the Consolidated Class Cases, for settlement purposes only, as a class action pursuant to Rules 23(a) and 23(b)(3) of the Alabama Rules of Civil Procedure on behalf of a class consisting of all Settlement Class Members." . . . .

Subject to the foregoing general objections, the AIG Defendants admit that the Stipulation of Settlement provides for submission of the Stipulation "to the State Court" and application for entry of an order requesting, among other things, "the certification of the Consolidated Class Cases, for settlement purposes only,

REQUEST FOR ADMISSION NO. 55:

That the Insurance Carrier, as that term was defined in the Stipulation of Settlement, never objected to certification by the Jefferson County Circuit Court of a Settlement Class.

RESPONSE TO REQUEST FOR ADMISSION NO. 55:

. . . Caremark admits that the Insurance Carrier, as that term was defined in the Stipulation of Settlement, did not object to the certification of the Settlement Class in the 1998 MedPartners Securities Litigation. . . .

The AIG Defendants object to Request No. 55 on the ground that it is misleading. Specifically, the Insurance Carrier was not a party to the 1998 MedPartners Securities Litigation, did not make an appearance in the 1998 MedPartners Securities Litigation, and was not present[33] at the May 3, 1999

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[33] A finder of fact in the ultimate trial of this case could find that AIG was present. Under the LMU, the insurers (AIG) controlled the 1998 MedPartners Securities Litigation and controlled the settlement process. Defense attorney Jack Newman was present. He had appeared as counsel for MedPartners, but he was picked by AIG, whom he had represented for years, and Newman's time records disclose that he had substantially engaged in drafting and revising the

preliminary approval hearing, the July 9, 1999 final approval hearing, or at any other court hearings in connection with the 1998 MedPartners Securities Litigation. Without waiving the foregoing general and specific objections, the AIG Defendants admit Request No. 55, except aver that, had the settlement not been approved, the Settlement Class would by the terms of the Stipulation of Settlement, no longer have been certified.

REQUEST FOR ADMISSION NO. 61:

That AIG did not object to certification of a Class in the 1998 MedPartners Securities Litigation.

RESPONSE TO REQUEST FOR ADMISSION NO. 61:

. . . Caremark admits that AIG did not object to the certification of the Settlement Class in the 1998 MedPartners Securities Litigation. . . .

The AIG Defendants object. . . . Without waiving the foregoing general and specific objections, the AIG Defendants admit Request No. 61, except aver that, had the settlement not been approved, the Settlement Class would by the terms of the Stipulation of Settlement, no longer have been certified.

REQUEST FOR ADMISSION NO. 62:

That pursuant to the Stipulation of Settlement dated as of January 15, 1999, Bates numbers LAU002883 through LAU003345, the Insurance Carrier, as that term was defined, was included within the definition of "Parties" to the Stipulation of Settlement.

RESPONSE TO REQUEST FOR ADMISSION NO. 62:

[CVS]: Admitted.

Without waiving the foregoing general objections, the AIG Defendants admit Request No. 62.

1999 settlement documents even after he technically withdrew from the case. The facts support a finding that Newman was hired by AIG, and that he reported to and conferred with AIG about AIG's interests that were AIG's sole obligation and responsibility under the LMU. He was present in Judge Wynn's courtroom and he did not speak up to correct the misinformation being given to the Court about MedPartners' supposedly shaky financial health and its supposedly limited insurance coverage. The finder of fact in this fraud and suppression case could find that the AIG defendants were actually physically present in Judge Wynn's courtroom when the false information was presented to the Court.

REQUEST FOR ADMISSION NO. 71:

That AIG (either directly or through counsel) received a copy of the Joint Affidavit of Neil Selinger and Steven Cauley marked in this case as deposition exhibit 18.

RESPONSE TO REQUEST FOR ADMISSION NO. 71:

. . . Caremark admits that the certificate of service regarding the Joint Affidavit of Neil Selinger and Steven Cauley, which has been marked as deposition exhibit 18 in this case, indicates that the document was served on counsel of record for AIG upon by U.S. Mail on July 6, 1999. . . .

The AIG Defendants object to Request No. 71 on the grounds that it is overbroad, is not limited as to time frame, and as written covers the receipt of the document at any time, even in connection with the pending action. Without waiving the foregoing general and specific objections, the AIG Defendants admit Request No. 71 as written, except aver that the certificate of service regarding the Joint Affidavit of Neil Selinger and Steven Cauley, which has been marked as deposition exhibit 18 in this case, indicates that the document was forwarded to Richard George by United States Mail on July 6, 1999, and otherwise state that, having made reasonable inquiry, the information known and readily obtainable by the AIG Defendants is insufficient to enable the AIG Defendants to admit or deny that the AIG Defendants (either directly or through counsel) received a copy of the Joint Affidavit of Neil Selinger and Steven Cauley marked in this case as deposition exhibit 18 prior to the July 9, 1999 Final Approval Hearing.

REQUEST FOR ADMISSION NO. 73:

That AIG (either directly or through counsel) received a copy of the Memorandum of Law in Support of Final Approval of Class Action and Derivative Settlement and Award of Attorneys' Fees and Expenses filed on July 6, 1999.

RESPONSE TO REQUEST FOR ADMISSION NO. 73:

. . . Caremark admits that the certificate of service regarding the Memorandum of Law in Support of Final Approval of Class Action and Derivative Settlement and Award of Attorneys' Fees and Expenses, which was filed on July 6, 1999, indicates that the document was served on counsel of record for AIG by U.S. Mail on July 6, 1999. . . .

The AIG Defendants object. . . . Without waiving the foregoing general and specific objections, the AIG Defendants admit Request No. 73 as written, except aver that the certificate of service regarding the Memorandum of Law in Support of Final Approval of Class Action and Derivative Settlement and Award

> of Attorneys' Fees and Expenses filed on July 6, 1999 indicates that the document was forwarded to Richard George by United States Mail on July 6, 1999, and otherwise state that, having made reasonable inquiry, the information known and readily obtainable by the AIG Defendants is insufficient to enable the AIG Defendants to admit or deny that the AIG Defendants (either directly or through counsel) received a copy of the Memorandum of Law in Support of Final Approval of Class Action and Derivative Settlement and Award of Attorneys' Fees and Expenses filed on July 6, 1999 prior to the July 9, 1999 Final Approval Hearing.

Some of the April 20, 2012, responses are relevant to other class certification issues. For example, Request for Admissions 20 through 27 asked defendants to admit that neither CVS (MedPartners) nor AIG informed the Court or any plaintiff lawyer about the unlimited liability insurance coverage at either Judge Wynn's May 3, 1999, preliminary approval hearing or his July 9, 1999, final approval hearing. CVS responded that, according to the transcripts, this is correct. AIG's responses admit that no such disclosures were made at the hearing, but AIG disavows being present at the hearings.

In answer to # 28, defendants admit that the "Order Regarding Preliminary Approval and Notice," entered May 3, 1999, appointed as class counsel for the 1999 class: Gusty Yearout; Steven Cauley; William Lerach and Keith Park of Milberg Weiss Bershad Hynes & Lerach; Neil Selinger; and Roger Kirby (not John Haley or Jim North). And, No. 56 says:

> REQUEST FOR ADMISSION NO. 56:
>
> That, pursuant to the LMU, the Insurance Carrier, as that term was defined in the Stipulation of Settlement, had control over the negotiation and final terms of the settlement of the 1998 MedPartners Securities Litigation.
>
> RESPONSE TO REQUEST FOR ADMISSION NO. 56:
>
> Without waiving the foregoing general objections, the AIG Defendants admit that pursuant to the AISLIC Policy, AISLIC had "the exclusive right and obligation to assume the defense of the defendants in the Actions, control the strategy for defense of the defendants in the Actions and to negotiate directly and control the terms of any settlement by the defendants of the Actions, subject to

> any conflicting obligations of the Company with respect to any other directors and officers insurance and company reimbursement insurance policies or any other insurance policy which may be applicable to its directors, officers or employees with respect to the Actions," refer to the AISLIC Policy for the precise content thereof, and otherwise deny Request No. 56.

AIG's 1998-99 lawyer, **Richard George**, was deposed on May 11, 2011. He said he was retained in June 1998 to defend the 1998 MedPartners Securities Litigation. George depo. p. 22. He admits he gave sworn testimony as a witness in the later arbitration proceeding between MedPartners and Chubb Insurance Group. p. 24. [NOTE: A defense expert purports to contend that the arbitration proceeding, and its transcript, is confidential, secret, or privileged and should not be used or considered in this proceeding. That would be an absurd position. AIG voluntarily produced the transcript and exhibits (including the LMU). The original complaint quotes extensively from the transcript. The transcript has been quoted and discussed and parties deposed, all without objection. Any privilege was waived years ago. See Alabama Rule of Evidence 510 (entitled "Waiver of privilege by voluntary disclosure"): "A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter."]

At pp. 67-72, George discusses the fall 1998 press release and the original draft presented to him by Ed Hardin (on behalf of MedPartners). The purported purpose of press release was to announce the LMU, because MedPartners was a public corporation with a duty of disclosing material financial issues. George and AIG requested that MedPartners take out (which it did) the words: "there is no liability cap or limit on the National Union coverage." Thus, AIG controlled what information MedPartners disclosed to the public (and, thus, to plaintiff lawyers). At p. 72,

George says that he “thought that language was potentially misleading because it ignored the existence of limitations that were inherent in the agreement.” The finder of fact, as the judge of George’s credibility, could find this a subterfuge for continuing to hide the existence of the unlimited coverage.

George admits that the “AIG defendants” herein are, as a practical matter, a single legal unit. At pp. 75-76, he says: “First of all, the term sheet is on the stationery of AIG and it is executed on behalf of American International Companies as a strictly legal matter that is not a legal entity and this distinction that you are making between American International Companies and National Union and AISLIC is really meaningless. AISLIC and National Union are both member companies of the American International Group. They have intercompany agreements that make each liable for the obligations of the other. From an insurer’s standpoint, the coverage is the same whether it is issued by AISLIC or National Union and so it was never an issue as far as MedPartners was concerned. They knew they were getting an AIG member company coverage and it was of no moment to anyone whether it was provided by National Union or AISLIC.”

At pp. 80-81, George admits that, when asked at the arbitration hearing “why was the LMU agreement kept confidential,” he answered: “Well, my primary concern was that if it had become widely known or even if it had become known to anymore people than had to know about it, that ultimately it would get to the Plaintiffs and if the Plaintiffs were to suddenly realize that there was this insurance above the 50 million that they were previously aware of, that was going to cause them to drive the settlement value to a much higher level than they would otherwise. From the Plaintiffs perspective they were faced with a company that had 50 million

of insurance and a very uncertain financial condition in the future. That was a constraint on the settlement value that they could ultimately expect to derive and we were not going to do anything to disrupt that perspective. We were not going to let them know that there was this insurance on top. So we kept it within as tight a group as we possibly could for fear that somehow it would come to the Plaintiffs' attention."

At pp. 87-88, George admits that he previously testified that he never told Lerach about the LMU: "We never discussed with Mr. Lerach the announced transaction, the transaction, the LMU transaction that had been announced by MedPartners on the 17th. Clearly, he understood that we were speaking for someone who had the ability to contribute more than $50 million to a settlement, but there was never a discussion of the specific structure of that authority, the transaction that gave rise to that authority."

George admits that he signed the 1998 MedPartners Securities Litigation "Stipulation of Settlement" on behalf of AIG, the insurer. pp. 100-01. At p. 102, he admits that, on behalf of AIG, he reviewed, at least to some extent, the settlement documents and the Stipulation of Settlement. Lerach understood, during settlement negotiations, that George was speaking for AIG, not MedPartners. p. 122.

See the following, at pp. 108-09:

> Q. Are you convinced that Judge Wynn proceeded under misapprehension of what the true facts were?
> A. Yes, I believe he received a misrepresentation from Plaintiffs' Counsel in the course of that hearing and the misrepresentation was to the effect that the Plaintiffs got all the insurance.
> Q. And that's not true?
> A. That's just not true. . . .
> Q. Did you tell Bill Lerach that he did not get all of the insurance that was available?

A. No. . . .
Q. Did you tell Neil Selinger that he got all the insurance that as available?
A. I never told anybody that.. . . .
Q. Did you ever tell Bill Lerach the amount of insurance coverage that was referred to in the press release?
A. No. . . .

At p. 116, when asked, "Did you ever tell Bill Lerach that the insurance was unlimited?," George says: "No, I believe I answered that this morning. I never did tell Mr. Lerach that there was no cap on the financial coverage under the policy."

Attorney **John M. "Jack" Newman, Jr.**, was deposed on June 13, 2011. Newman represented MedPartners in the 1998 MedPartners Securities Litigation. Newman, of the Jones, Day, firm, became the lead defense counsel in the 1998 MedPartners Securities Litigation in early 1998. Newman depo., pp. 23, 27, 29.

At pp. 46-47, he admits understanding that the rules of civil procedure require that the amounts of liability insurance must be disclosed. At p. 55, when asked whether he ever supplemented his discovery responses to disclose the unlimited LMU, Newman said, "Not that I recall." See also p. 225. He admits that discovery requests were made which asked for the disclosure of insurance. pp. 55, 226. At p. 260, Newman admits that he testified at arbitration that, prior to the issuance of the LMU, he had told plaintiff lawyers that MedPartners had only $50M of insurance.

At p. 104, when asked at the arbitration hearing why the release of the press release [that came out Dec. 17, 1998] was delayed, Newman testified that: "The reason for the delay was that AIG wanted a period of time before the LMU became public knowledge, and, therefore, the plaintiffs would find out about it, to work on the settlement so that it would not have to work on

the settlement in the context of the plaintiffs knowing that it wasn't MedPartners that would have to fund above the then existing insurance but rather it would be someone with money." AIG and CVS contemplated having settlement negotiations with plaintiffs' counsel without them knowing about the LMU. p. 116. After the LMU in the fall of 1998, settlement negotiations were turned over to AIG, via attorney Richard George. p. 119. AIG was a proponent of the settlement. p. 183.

Chubb held a $15M middle layer of MedPartners coverage, and Chubb was represented by Wally Christensen. p. 121. George told Newman that, if Christensen ever asked Newman about the limits of insurance coverage for MedPartners, to tell him to contact George. p. 122. Newman told Christensen that any settlement money above $50M would come directly from MedPartners. pp. 123-25. Newman never told Christensen about the LMU, e.g., at a November 1998 meeting. p. 124. In December 1998, Chubb asked about the existence of excess insurance, but Newman does not recall ever disclosing the LMU to Chubb. In fact, George told Newman not to disclose the LMU to Chubb. pp. 145-47. At p. 226, Newman admits: "I did not tell outsiders about the LMU."

Newman admits he never told Lerach, Selinger, Drake, or anyone at Milberg Weiss about the unlimited coverage. pp. 142, 221. See pp. 142-43:

> Q. Did you tell any of the plaintiffs' lawyers that there was an unlimited excess insurance policy issued by AIG to MedPartners?
> A. I don't think I -- I did not have a personal discussion with any of the plaintiffs' lawyers about the insurance policy from October of 1998 that I can recall and I'm pretty sure I didn't have one.

Newman attended the May 3, 1999, preliminary hearing in Judge Wynn's court. He withdrew from representing MedPartners that day, pp. 148, 153, but was not yet released from

representing individual defendant Wagar. The hearing transcript (Item 22 in Evid. Sub.) shows that Newman continues to speak on the record before and after the plaintiffs' lawyers (Yearout, et al.). Newman heard and understood that the plaintiff lawyers were telling Judge Wynn that they had gotten all of MedPartners's insurance coverage in the settlement. p. 223. Newman says that AIG had control over the settlement and how much would be paid in settlement. p. 224.

The primary settlement negotiator for the 1999 class was **William S. "Bill" Lerach**, who was deposed on January 27, 2012. In 1998, Lerach was associated with Milberg Weiss, which firm, at the time, was lead plaintiff counsel in about 50% of all securities class actions in America. Lerach depo., p. 18. In relation to Cauley's testimony, *infra*, Lerach had a fund-raiser for President Clinton at his house on September 26, 1998, but he does not remember talking to Cauley at that event. pp. 72, 75-76.

Lerach's recollection is that George never disclosed to him the existence of the LMU. p. 95. At p. 111, Lerach says that he and the plaintiff lawyers were never told about the LMU or unlimited coverage. The plaintiff lawyers thought they were getting all of the insurance. p. 96. At p. 113, Lerach explained why the press release was consistent to their thinking there was $50M in insurance: "It was not unusual in the context of settling a case, securities litigation where National Union was a carrier and there was an insured issuer or the Ds and Os, where as part of the settlement -- not just part -- where in conjunction with the settlement, National Union and the insureds would negotiate something. Whether it was the purchase of future D&O over future years at the higher premiums or whether it was an outright excess insurance, LMU insurance, in – in the time frame to the extent I'm able to get my mind back to '98, that wouldn't be all that unusual. And as I look at all of this, I -- I just think that it would have -- it appears

consistent with the fact that somebody was putting in some extra money to get this case settled above the 50-." The settlement of the 1998 MedPartners Securities Litigation was negotiated with Richard George. p. 111. At p. 117, Lerach says: "So it would not be unusual for me to have an arrangement with National Union or Richard George. We have a handshake on a dollar amount, where he goes to get the money, and how he does it, and it isn't necessarily my concern. And we would agree to keep our conversation between ourselves until he had had an opportunity to do whatever he wanted to do, which is what happened here, I think." Item 20 in Plaintiffs' Evidentiary Submission is a **November 6, 1998**, fax from Lerach to George detailing all material aspects of the $65M settlement.

Another plaintiffs' settlement lawyer, **Steven E. Cauley**, was deposed on May 10 and June 28, 2011, and he testified that Lerach told him as early as late September 1998 that the case was settled. Cauley recalls being at Lerach's Clinton fund-raiser in September 1998, and pressuring Lerach to get the settlement documentation going for the MedPartners Settlement. That is, Cauley understood that an agreement, in principle, already existed to settle the case. See Cauley depo. at pp. 280-82, 303-04, 342, 352-55. Cauley says Lerach told him he had the case settled ("in his pocket"). p. 282. At p. 280, Cauley says that the agreement to settle for $65M was made well before the press release date of December 17, 1998. He is positive the case was settled before November 1998. pp. 344-45. At p. 346, Cauley agreed that "the fact that AIG agreed to pay interest on the $50 million beginning on December 15, 1998, indicate[s] that they -- the agreement was in place at least by that time." Item 19 in Plaintiffs' Evidentiary Submission is a fax from Cauley to Lerach sent on **October 5, 1998**, which outlines the "tentative" MedPartners settlement.

Cauley filed the *Schacter* case (one of the components of the 1998 MedPartners Securities Litigation) in January 1998, before he later got in the *Griffin* settlement case. p. 41. He became the lead negotiator for the state court TAPS case. p. 89. He believed that the MedPartners settlement got all of the insurance, and he is 99% sure Lerach told him that. pp. 187, 191. At p. 96, Cauley says: "I have a clear recollection of us being told that there was $50 million in insurance coverage." At pp. 278-79, Cauley explained that the December 1998 press release was not contradictory to him: "But again, you have to understand that our thinking at that time, what we were told, was it's not inconsistent with what I've said about the 65-. We were told that we got all the insurance coverage. So when these discussions about excess insurance coverage, additional insurance coverage presenting no material risk to the company -- well, if you have a $65 million insurance and the -- insurance policies in total and a $65 million settlement that everybody's agreed to, that presents no material adverse risk to the company. That, I can assure you, was what my thought was. And I would be -- well, I can say without fear of contradiction that is exactly what Clay would testify to, and that is exactly what Gusty would testify to."

At p. 288, Cauley denies thinking, as of December 1998, that Lerach and Milberg Weiss were "associated with the Hare Wynn firm and the Jim North [firm]." He viewed Lerach as being in breach with his and Milberg Weiss's contract with Hare, Wynn and North by that time. *Id*. At p. 289, Cauley explains: "Well, again, back to my previous testimony, originally Milberg Weiss got involved in the case because they were referred the matter by the Hare Wynn firm. . . . Later on, when there became an opportunity to get involved in the settlement of the case when we were making progress, that's when Bill approached me. And when he approached me,

shortly thereafter, they breached their agreement, and they were no longer partners with the Hare Wynn firm. That's my understanding. . . . But they agreed to partner with the Hare Wynn firm in the case. They did that through the New York office of Milberg Weiss. Okay. We were direct competitors of the Hare Wynn firm on this case. And so, subsequently, when Bill says he's going to work with us -- a direct competitor of the Hare Wynn firm -- in the MedPartners case, that in my mind is a breach." "I don't see how Bill could be -- Bill's firm, Milberg Weiss, could be still honoring his relationship to both my firm, Gusty's firm, and Clay's firm on the one hand and the Hare Wynn firm on the other, because their interests were diametrically opposed. . . . So when Bill -- our interests were diametrically opposed to the Hare Wynn firm, so I don't see . . . how in the world Bill could have been able to meet his obligations to both of those groups." pp. 292-93.

Defendants may seek to raise some issue about John Somerville's post-1999 representation of **J. Brooke Johnston**, MedPartners's former general counsel (May 1996 - July 1998). Johnston testified, on October 21, 2010, that he never gave Somerville or Haley any confidential or formerly-confidential information. Johnston depo, p. 194. MedPartners started its employment-related litigation by suing Johnston in August 1998. p. 150. Johnston first hired the Powell firm in Atlanta. p. 57. Toward the end of 2000, he hired Somerville. p. 59. The first trial ended in a mistrial, and Somerville associated John Haley and the Hare firm, in the later half of 2001. pp. 60-61. Johnston later sued National Union (AIG) for bad faith in refusing to defend his interests under its D&O insurance. p. 62.

John Q. Somerville was also deposed in this case, on November 11, 2010. He also testified that he never received any such confidential or formerly-confidential information from

Johnston. Johnston hired him in early 2001, and the Hare firm was associated in fall 2001. Somerville depo., pp. 82-84. See page 96:

> Q. And at any point during your representation, did he decline to share any information with you because he told you he thought it was confidential and propriety – proprietary to MedPartners, or it was in some way privileged?
> A. That just never came up. Ultimately it was nothing that was confidential or privileged or proprietary that came up in – you know, what he told me was privileged in terms of what he told me, but there was nothing that ever came up that would have been privileged or proprietary or confidential from the time he had been at MedPartners. That just wasn't an issue.

See also pp. 97, 107-08 (same).

Somerville also testified about the *Lauriello* plaintiffs' arrangements (the "Lead Counsel Agreement") with Lanny Vines, attorney for the *McArthur* intervenors. pp. 164-69, 172-78. Somerville said, "Ultimately, as recited in the Lead Counsel Agreement, this was entered into in the best interest of the class. That's really -- that was entered into in the best interest of the class, and I think both we and Mr. Vines concluded, and it's recited in our agreement, that that was the tantamount goal." p. 169. See also p. 172 (same). "Ultimately our goal and what we accomplished was to quit squabbling with Mr. Vines about the control of the case, and move the case forward in the best interest of the class, and that's what we accomplished." p. 188.

Lanny Vines was deposed on March 22, 2011, and he admitted that, based on what he knows and understands today, he was wrong to ever have alleged any sort of wrongdoing on the part of *Lauriello's* counsel (Somerville and the Hare and North firms). See Vines depo., throughout, e.g., pp. 63-72. When he filed the *McArthur* case and his motions in *Lauriello*, Vines thought *Lauriello's* counsel had been "in cahoots" with AIG in 1999 to conceal the unlimited coverage; but, from further understanding of the facts, he realizes he was wrong. *Id.*

The three putative class representatives are well-qualified and would make excellent representatives for the class. **James O. Finney, Jr.**, was deposed on September 15, 2011. Dr. Finney sold his medical practice to MedPartners. Finney depo., p. 26. He is now retired and working part-time reviewing files for the Social Security Disability Administration. p. 31. John Somerville does various legal work for him, and the topic of MedPartners came up in conversation. p. 69. In relation to the 1999 class settlement, Finney says: "I assume that all the lawyers were honest and giving proper, correct information to the judge on which the judge could make a judgment. . . . I assume that all the lawyers were honest and giving proper, correct information to the judge on which the judge could make a judgment. . . . Including the lawyer for the plaintiff and the defense, and giving the right information to the judge." pp. 63-64. Dr. Finney understands the basics of this lawsuit. At p. 76, he says: "The claim is that MedPartners and their legal team hid from the plaintiff attorneys, from the judge, and from the class the fact that there was an unlimited liability policy that could be -- that could have been used to pay everyone in full at the time of the original litigation and that this needs to be corrected. . . . Yeah, they lied. . . . Whoever those lawyers were. . . . They lied to the judge. They lied to us. They lied to the plaintiff attorneys, or at least withheld the truth." Dr. Finney knows Sam Johnson socially, and as a patient, but he had nothing to do with Johnson being a plaintiff in this action. pp. 28-29.

Sam Johnson was deposed on October 11, 2011. Johnson lives in Mountain Brook and is in the real estate business. Johnson depo., p. 8. John Haley and Hare, Wynn were representing his father in a partnership lawsuit when he died and Sam Johnson stepped into the litigation as executor. pp. 24-25. The MedPartners situation and the 2003 Lauriello case came up in

conversation, and Johnson told Haley to call him if Johnson could ever assist in the case against CVS/AIG. p. 56. He had read in the press about Lauriello's 2003 complaint. pp. 56-57. Johnson also knows Terrell Wynn and Alex Newton, and Jim North is a distant cousin he has known for 50 years. pp. 25-27. At p. 49, in regard to the 1999 settlement class, Johnson says: "Again, my investment is not sufficient to warrant hiring an attorney and filing suit on my own. My only chance to recuperate anything would be to join the class." Johnson agreed that he relied "on the attorneys who were representing the class to do whatever diligence they needed to do to make sure that the settlement was fair," and he added, "and I relied on the court to do the same." *Id.*

Marty Leonard testified on October 11, 2011, as the representative of plaintiff City of Birmingham Retirement and Relief System (a/k/a the Pension Board). Leonard lives in Shelby County and has had his own C.P.A. practice since 1974. Leonard depo. pp. 9-10. He is the Chairman pro tem of the City of Birmingham Retirement and Relief System, and has been on the Board for 25 years. p. 12. John Haley approached Pat Burns, a lawyer representing the Board, about the Board's possible interest in joining this action. p. 52. Haley, Cook, North, and Francis made a presentation to the Board about the case. pp. 52, 102. At p. 58, Leonard describes this case, thusly: "It was the fact that the original case involving MedPartners had been settled some years before, I think, in probably the late '90s. We were told that MedPartners was in financial straits, there had been an accounting fraud, and that this class action suit had been initiated. We were told that the settlement involved the fact that there was only a limited amount of insurance available to settle the case, and the attorneys for the plaintiffs agreed that the company was -- had no other assets to settle, I think $50, $55 million. And it had been later been determined that that

was not true, that there was unlimited insurance coverage, and that this suit involved resurrecting the case based on these new facts."

Michael Joaquin was deposed on April 5, 2012, as the representative of Gilardi & Company. Plaintiffs contend, *infra*, that the primary issue - in regard to certifying the fraud "claim" as a claim appropriate for class treatment - may be the "manageability" of handling a fraud class action. In that regard, Joaquin's deposition and affidavit about the 1999 claims administration by Gilardi & Co. are convincing. Gilardi & Co. was the claims administrator for the 1999 class. Joaquin depo., p. 7. Gilardi & Co. made the determinations of whether a filed claim fit within the class definition and, if so, the amount of that claimant's allowed loss. pp. 12-13. Gilardi & Co. mailed 78,871 copies of the settlement notice to potential claimants. p. 18. Claims were filed on behalf of 23,520, and 17, 904 were ruled to be authorized claims (amounting to a total of $760,893,007.17 in authorized claims). p. 19. From the $56M settlement, the common stock and option claims received a pro rata share of about 3% of their allowed losses. p. 26.

Joaquin also filed an affidavit on April 5, 2012. He describes the 1999 court-approved formulas for calculating allowed losses, etc. In paragraph 8, Joaquin explains that Finney, Johnson, and the City of Birmingham Retirement and Relief System were determined to be members of the 1999 class, and each had amounts of allowed losses.

Defendants will apparently continue to assert that John Haley, Jim North, and their respective firms are today (in 2012) incompetent and inadequate lawyers and firms because they somehow did not do enough in their representation of John Lauriello in 1998-99. Because John Somerville never represented Lauriello in 1998-99, defendants invent other "inadequacy"

arguments against him regarding his representation of J. Johnston. These facts have been hashed and rehashed, ad nauseam.[34] However, to fulfill the duty of "rigorous analysis," here we go again:

In January 1998, John Lauriello filed suit in Jefferson Circuit Court (Judge Rogers) against MedPartners on behalf of a putative class of similarly situated stockholders of MedPartners, Inc.'s. Lauriello was represented by John Haley and Jim North. John Somerville never represented Lauriello or anyone in the 1998 MedPartners Securities Litigation. Discovery was served by Haley and North. Specifically, Haley and North sought information from MedPartners relating to its insurance. Unfortunately, the *Lauriello* action was dismissed on the merits by Judge Rogers (Rule 12(b)(6), failure to state a claim) before discovery responses were provided. (Note that defense counsel in the 1998 MedPartners Securities Litigation never disclosed the unlimited coverage despite requests from both counsel and the Court. Newman admitted under oath that he never supplemented his discovery responses seeking insurance information after the LMU was issued.)[35]

Dismissal took place well before AIG entered into the LMU transaction in October 1998. Lauriello appealed the dismissal to the Alabama Supreme Court, where it was pending through the first half of 1999. After their case was dismissed, Haley and North were prevented from engaging in discovery, and they were excluded from settlement discussions.

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[34] One of the many places these facts, and supporting exhibits, already exist are in "Plaintiff's Consolidated Objection and Response to Intervenors' Motion to Intervene and Motion to Disqualify," filed in this case on February 17, 2005.

[35] Plaintiffs argue that, if the defendants were willing to suppress information from Judge Wynn, it is clear that they would have similarly suppressed those facts from counsel for Lauriello.

Ultimately, all of the claims asserted in litigation filed against MedPartners in 1998 were consolidated and settled before this Court (Judge Wynn) 1999 in four consolidated actions, *Isabel Griffin v. MedPartners, Inc.,* CV 98-00297, *Linda Idlebird v. MedPartners, Inc*., CV 98-02671, *Yuri Bronstein v. MedPartners, Inc*., CV 98-06364, and *Kevin and Linda McBride v. House*, CV 98-05677. Haley and North and Somerville never represented any of the plaintiffs in any of these consolidated actions. The Stipulation of Settlement that resolved the 1998 MedPartners Securities Litigation identified various lawyers to serve as "Plaintiffs' Settlement Counsel." Haley and North and Somerville were never named as Plaintiffs' Settlement Counsel. The first *Lauriello* action (the 1998 case with Judge Rogers) was never consolidated with these actions. John Lauriello was never a Class Representative of the Settlement Class.

No class was ever certified in the 1998 *Lauriello* case [*Lauriello v. MedPartners*, CV 98-98, Jefferson County, Judge Rogers]. As a part of the global settlement that resolved the 1998 MedPartners Securities Litigation, Lauriello was an absent class member - nothing more. At the time of the announced settlement, he had two choices: either participate in the class as an absent class member or opt out of the class and pursue the appeal of his already dismissed claims. He decided to participate as an absent class member and his appeal was dismissed. Nevertheless, Lauriello was never a class representative in connection with the 1998 MedPartners Securities Litigation. He played no role in the class settlement.

In August 1998, in a lawsuit styled *MedPartners, Inc. v. Wagar*, CV 98-04984, MedPartners sued Harold Knight, its former CFO, and J. Johnston, its former General Counsel, and others, seeking a declaration that their employment agreements with the corporation were never properly approved and were, therefore, invalid. John Somerville, then with the Lightfoot,

Franklin firm, represented Harold Knight in that lawsuit. Although Knight was a named defendant in the 1998 MedPartners Securities Litigation, he was represented by other counsel in that litigation (first Ed Hardin and Jack Newman and then Richard Ogle). Haley and North never represented Harold Knight in any action. Somerville did not represent Johnston at that time.

In October 1999, MedPartners amended its complaint against Knight and Johnston to seek recovery for fraud and misrepresentation and breach of fiduciary duty. These tort claims against Knight and Johnston allegedly arose out of their employment with MedPartners. Specifically, MedPartners sued Johnston for his actions and conduct as general counsel of MedPartners. Knight settled his claims with MedPartners in March 2000. One year later, in March 2001, Johnston retained Somerville to represent him. Then, in the fall of 2001, John Haley and Ralph Cook entered an appearance as additional counsel for Johnston. North never represented Johnston. Johnston never provided any confidential information to Somerville, Haley, or Cook relating to the LMU or the 1998 MedPartners Securities Litigation. Moreover, the claims asserted by MedPartners against Johnston related to the services that he provided as general counsel of MedPartners.

In representation of Knight in 2000, Somerville took a deposition of Mac Crawford, the CEO of MedPartners, and asked questions relating to insurance. After the settlement of the 1998 MedPartners Securities Litigation, the fact of some excess insurance was known. Somerville asked about the additional insurance and was told nothing about unlimited coverage. Crawford testified, under oath, that the additional limits were "another 22 million or 20 million."

In late September or early October of 2003, National Union and AIG finally produced

documents in Johnston's bad faith case against National Union. In connection with that production, a copy of the LMU was produced for the very first time. Prior to that time, none of Lauriello's 1998-99 attorneys (Hare and North firms) had any inkling that AIG or AISLIC or National Union had issued a policy that provided unlimited liability coverage to MedPartners prior to the 1999 settlement approved by Judge Wynn. Within days after John Lauriello and his counsel learned of the unlimited coverage, they brought to light the fraud that was perpetrated upon the 1999 settlement class and this Court (Judge Wynn) by bringing the claims in this action (in October 2003).

On June 12, 2009, in this action, Lauriello filed "Plaintiff John Lauriello's Responses and Objections to Defendant Caremark RX's First Set of Interrogatories," and stated, as follows:

> INTERROGATORY 5:
>
> Describe in detail all benefits, financial or otherwise, Plaintiff received as a result of the settlement of *Lauriello v. MedPartners, Inc., et al.*, Case No. CV 98-98. This description should include a discussion of how Plaintiff's benefit is the same as or different from, whichever is appropriate, the benefit that other members of the settlement class of the MedPartners Securities Litigation received.
>
> RESPONSE:
>
> . . . Plaintiff was paid $2,356. In addition, Hare, Wynn, Newell & Newton and James L. North and Associates reduced their settlement fee by an amount equal to his unrecovered loss.

Ken Randall, Dean of the University of Alabama School of Law, was deposed on March 9, 2012, as a plaintiffs' expert witness. He does not see any ethical or professional violations in connection to the Hare and North firms' representation of Lauriello in 1998-99 or in Somerville's representation of Johnston. See, e.g., Randall depo., p. 60. It is anticipated that Dean Randall will primarily serve as a rebuttal witness, once the defendants flesh out exactly what they claim undersigned counsel did wrong in relation to representing Lauriello and Johnston. At p. 59 of his

deposition, Randall says that, in judging a lawyer's adequacy to represent a class, a court primarily looks at the factors of "competence, ethics, resources, prior work in the case and investigation," and he admitted that it is appropriate to consider past violations of the Rules of Professional Conduct. Conflicts of interest and whether the lawyer would "need to be a substantive witness in the lawsuit" are also relevant issues. p. 61.

Randall intends to opine "[t]hat the Hare and North receipt of a fee and subsequent reduction of their fee to compensate John Lauriello for his losses in connection with MedPartners stock is not a violation of any ethical standard, is not a basis for disqualification and does not render them inadequate to serve as class counsel." p. 62. In regard to J. Johnston, Randall says, at pp. 66-67: "I don't see a conflict where the plaintiffs' counsel has been representing a party always adverse to MedPartners. The focus of the instant litigation is about the unlimited insurance, insurance which the obtaining of that occurred after the termination of Mr. Johnston, and MedPartners did sue Mr. Johnston. So, if they felt they had a privilege, they would have waived it. I think any privilege, though, really would work between Mr. Johnston and the plaintiffs' counsel. . . . I'm having trouble on researching this to find -- to even determine what kind of a, what kind of a potential conflict there is. Mr. Somerville -- and I don't know, maybe Mr. Somerville and Mr. Haley -- I can't remember -- represented Mr. Johnston. They did not represent MedPartners or Caremark." And, once MedPartners sued Johnston, it waived its privileges, anyway. p. 74.

At p. 71, Randall opines that: "There's no reasonable basis for plaintiffs' counsel to be called as witnesses at trial. There's no basis for disqualification pursuant to Rule 3.7 of the Rules of Professional Responsibility, and it would be improper and untimely to disqualify plaintiffs'

counsel pursuant to Rule 3.7." At p. 73, he explained that "the courts look at whether a lawyer is going to be a necessary witness on relevant matters, and often the necessity and the relevance cannot be determined until the trial actually gets underway." In regard to the payment to Lauriello, at pp. 98-99, Randall says: "Well, that was a transaction between the Hare Wynn and North firms in reducing their fee from the case, and that the amount of it is based on what Mr. Lauriello's stockbroker accountant said was the value of his MedPartners/Caremark stock during the relevant time period. . . . [T]here's not really a problem with the firm deciding to reduce their fee, particularly at this juncture in the lawsuit. There's no indication that money was given earlier, that there was any level of a quid pro quo, but this matched exactly the amount of money that he had lost on the stock." As to general duties, in 1998-99, Randall says, at pp. 88-90:

> Q. So, what duties did the Hare and North firms have in analyzing on behalf of the class whether the settlement was fair to the class?
> A. Well, the way the, the cases proceeded and from the depositions I've seen that Mr. Lerach had not been overly forthcoming with what was happening in the cases outside of *Lauriello*, I think it was reasonable for the Hare Wynn and North firms to rely upon what they were being told by Milberg Weiss, other defense lawyers, and that they showed up at the fairness and settlement hearings, and they heard the same things in court that I suppose the other lawyers did and that the Court did.
> Q . Does the law allow the Hare and North firms to delegate whatever duty they have to the class to make sure the settlement is fair to the class to somebody else?
> A. I think under Rule 1.5, yes, the lawyers have a great latitude in who does the work, what type of work at different juncture in the case, and that they attended the hearings where the settlement was discussed and heard the same things that the defendants' lawyers told the Court as the other attorneys did.
> Q . So, is it your testimony, Dean Randall, that Hare and North had no obligation to this class to see that the settlement was fair?
> A. No, sir, that's not my testimony. I think their -- after the *Lauriello* case had been dismissed, I think their primary duty was to work on an appeal, discuss with their client an appeal, and on some reasonable basis have a level of communication with Milberg Weiss. Although when I read the depositions, it sounds like Mr. Lerach really had not kept -- done a good job at keeping these firms informed, even though he was lead counsel, that they were as close to

settlement as they were.

Item 27 in Plaintiffs' Evidentiary Submission is an excerpt from Johnston's "Motion for Default Judgment Against AIG and National Union," filed on November 14, 2003, in *Johnston v. National Union*, Jefferson Circuit case no. CV-2001-006123. The unlimited LMU had just been produced in discovery by AIG in the separate *Johnston* litigation and seen by Haley and Somerville for the first time - and this action had just been filed, in October 2003. Throughout the course of CV-2001-006123, and even in appellate briefs to the Alabama Supreme Court, National Union (AIG) had continued to assert that all of AIG's insurance coverage had been exhausted in the $65M MedPartners settlement in 1999 (so there was none left over to benefit Johnston). As of November 1998, Johnston, Somerville, and Haley knew that contention was a lie, and they moved for sanctions against AIG (the case then settled).

The relevant point to Item 27 is this: all the known evidence leads to the inescapable conclusion that, in late 1998, and up to July 1999 (and beyond), AIG and MedPartners would NOT have disclosed the unlimited LMU, no matter who had asked or how demanding the requests had been. So, all this mishmash about what Haley and North should have done is a red herring argument. No one would have gotten the truth out of CVS/AIG at the time. As further proof, AIG continued to lie throughout case no. CV-2001-006123 - until Haley and Somerville's brilliant detective work finally uncovered the truth, in October 2003. Newman admits discovery questions were propounded, but that he never fulfilled his duty of supplementation. Newman admits he told plaintiffs' counsel there was $50M of insurance, he knew they were relying on that figure, and he never told anybody (not even Chubb's counsel) about the LMU. George admits that AIG kept the information close to the vest so that the plaintiffs' lawyers would not find out

about it. Can anyone seriously stand before this Court with a straight face and assert that AIG and MedPartners would have gladly sent a copy of the LMU to Haley and North (in, for example, January 1999) if they had only asked for it? Such a contention is preposterous.

On March 15, 2012, plaintiffs filed a Rule 26 Submission from expert witness William B. Rubenstein (copy at Item 14 of Plaintiffs' Evidentiary Submission). Rubenstein is the Sidley Austin Professor of Law at Harvard Law School. His declaration says: "My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of four books and more than a dozen scholarly articles, as well as many shorter publications. . . . Much of this work concerns various aspects of class action law. I am [since 2008] the sole author of the leading national treatise on class action law, Newberg on Class Actions. I also publish a monthly column entitled, Expert's Corner, in the publication, Class Action Attorney Fee Digest. My work has been excerpted in casebooks on complex litigation, as noted on my c.v." Much of Prof. Rubenstein's opinions about why the fraud claim is properly certifiable to proceed as a class action is quoted or paraphrased in the argument sections, *infra*. "The use of expert testimony, including expert reports and affidavits, is common in support of and in opposition to the class certification motion. Expert testimony is most frequently used to assist the court's determination in securities, antitrust, employment, consumer and other actions of whether plaintiffs' claims may be proven by common evidence, or will necessitate individualized proofs." 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 3:14 (8th ed.) (database updated Nov. 2011).

III. ARGUMENT ON BEHALF OF ALREADY-CERTIFIED 1999 CLASS

Introductory Comments. The issue is not exactly the certification, vel non, of a "class," but, instead, whether the existing class will be permitted to prosecute the new fraud "claim," first pleaded in October 2003, on a class basis. In the ordinary "class" certification scenario, the plaintiffs must present sufficient evidence to satisfy the court that all of the requirements of Rule 23(a), and at least one of the additional requirements in Rule 23(b), have been met. See Rule 23(a) & (b), Ala. R. Civ. P.; *Ex parte Green Tree Financial Corporation*, 684 So.2d 1302, 1305 (Ala. 1996). Plaintiffs, below, apply these "general" class action principles to the more narrow question of whether the fraud "claim" should be certified. First, plaintiffs discuss some general principles as to how a class certification hearing is conducted.

Although Rule 23 certification cannot be presumed without a "rigorous analysis" on the part of this Court, there are no specific requirements as to the types of evidence that must be submitted to support an order granting class certification. See *Ex parte First National Bank of Jasper,* 717 So.2d 342 (Ala. 1997). In fact, the Alabama Supreme Court has held that the issues of class certification "may be plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim." *Ex parte National Bank of Jasper*, at 346, citing *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (Ala. 1982). In this case, plaintiffs have always contended that the complaint alone is sufficient to support certification, e.g., because we already have a certified class and sworn testimony from defendants' own lawyers prove a uniform scheme to commit a uniform fraud on the class as an entity (i.e., the class as a whole).

But, since class discovery has been allowed, plaintiffs now have far more than pleadings:

see Plaintiffs' Evidentiary Submissions. The record in this case now easily establishes the requisite factual and evidentiary bases to support an order granting class certification to the fraud claim, under Rule 23(b)(1) and/or (3).

Deposition excerpts and affidavits are admissible and sufficient at class certification hearings. *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1183 (Ala. 2000), says: "The defendants claim the trial court abused its discretion in certifying the action as a class action because, they say, the plaintiffs failed to prove facts necessary to find liability. However, at this stage of the proceedings, the kind and level of proof are distinctly different from those required at a trial on the merits. A plaintiff seeking to represent a class need not prove its entire case in order to satisfy the requirements of Rule 23, Ala. R. Civ. P. *Ex parte Government Employees Ins. Co.*, 729 So.2d at 303; *Ex parte AmSouth Bancorporation*, 717 So.2d 357, 366 (Ala. 1998)."

Federal cases examining Rule 23 are persuasive in Alabama state courts. "In examining the several prerequisites for class certification contained in Rule 23, we must keep in mind that 'Rule 23 of the Alabama Rules of Civil Procedure reads the same as Rule 23 of the Federal Rules, and we consider federal case law on class actions to be persuasive authority for the interpretation of our own Rule 23.' *Adams v. Robertson*, 676 So.2d 1265, 1268 (Ala. 1995)." *Ryan v. Patterson*, 23 So. 3d 12, 17 (Ala. 2009).

"Ordinarily, affidavits and counter-affidavits, together with legal briefs, are sufficient to ready these issues for disposition by the court. 2 Newberg & Conte, Newberg on Class Actions § 7.08, at 7-26 (3d ed. 1992)." *Blihovde v. St. Croix County, Wis*., 219 F.R.D. 607, 614 (W.D. Wis. 2003). "A district court may certify a class only if the court is 'satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' *Gen. Tel. Co. Sw. v. Falcon*,

457 U.S. 147, 161 (1982). To that end, the Court 'must receive enough evidence, by affidavits, documents, or testimony,' to enable it to make an appropriate determination . *In re Initial Pub. Offering Sec. Litig*., 471 F.3d 24, 41 (2d Cir. 2006)." *Santoro v. Aargon Agency, Inc*., 252 F.R.D. 675, 680 (D. Nev. 2008). "In determining whether to certify a class, the Court assumes the existing allegations in the complaint to be true, and takes a liberal rather than a restrictive approach in determining whether the plaintiff satisfies these requirements." *Cassese v. Washington Mut., Inc*., 255 F.R.D. 89, 95 (E.D. N.Y. 2008). "On a motion for class certification, the court may consider evidence that may not be admissible at trial." *Mazza v. American Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D. Cal. 2008).

"In ruling on a motion for class certification at the present stage of the litigation, the court accepts the factual allegations of the Complaint as true. *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n. 15 (2d Cir. 1978). It may also consider affidavits that a plaintiff has submitted in support of her motion for class certification, see *id*., and affidavits a defendant has submitted in opposition to the motion for class certification." *Richards v. FleetBoston Financial Corp*., 235 F.R.D. 165, 168 (D. Conn. 2006). "To determine whether the requirements of Rule 23(a) have been satisfied, the court must examine the factual basis for the plaintiff's claims and may examine not only the pleadings but also the evidentiary record, including any affidavits and results of discovery. *Sanft v. Winnebago Indust., Inc*., 214 F.R.D. 514, 519 (N.D. Iowa 2003) (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 165 (3rd Cir. 2001)). <u>The court should not, however, decide the merits of the case</u>. See *In re Buspirone Patent Litigation*, 210 F.R.D. 43, 56-57 (S.D. N.Y. 2002)." *Sample v. Monsanto Co.*, 218 F.R.D. 644, 647 (E.D. Mo. 2003) (emphasis added).

"However, Rule 23 does not give the Court 'authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action,' *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)." *Ault v. Walt Disney World Co.*, 254 F.R.D. 680, 685-86 (M.D. Fla. 2009). "Plaintiff has the burden of proving that the Rule 23 requirements have been met. *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997). See also *Schwab v. Philip Morris USA, Inc.,* 449 F.Supp.2d 992, 1097-98 (E.D. N.Y. 2006). Plaintiff needs not, however, show that it is likely to prevail on the merits of their claims at the stage of class certification. . . . On a motion for class certification, however, the court makes no findings of fact and announces no ultimate conclusions on Plaintiffs' claims. Therefore, 'the Federal Rules of Evidence take on a substantially reduced significance, as compared to a typical evidentiary hearing or trial.' *Fisher v. Ciba Specialty Chem. Corp*., 238 F.R.D. 273, 279 (S.D. Ala. 2006) ("the Federal Rules of Evidence are not stringently applied at the class certification stage because of the preliminary nature of such proceedings"); see also *Selzer v. Bd. of Ed. of City of New York*, 112 F.R.D. 176, 178 (S.D. N.Y. 1986) (motion for class certification is not a mini-trial on the merits).

In *Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama*, 42 So.3d 1216, 1221–22 (Ala. 2010), the Supreme Court stated (internal quotation marks omitted):

> A Rule 23 determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail. *Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 241 (E.D. Mich. 1997). We also note that, in examining the several prerequisites for class certification contained in Rule 23, it should be kept in mind that Alabama's Rule 23 and the corresponding federal rule (Rule 23, Fed.R.Civ.P.) are virtually identical, and federal authorities are persuasive when a court is interpreting the Alabama Rules of Civil Procedure. *Mitchell v. H & R Block, Inc*., 783 So.2d 812, 816 (Ala. 2000) (quoting *Marshall Durbin & Co. v. Jasper Utils. Bd.*, 437 So.2d 1014, 1025 (Ala. 1983), and *Rowan v. First Bank of*

> *Boaz*, 476 So.2d 44, 46 (Ala. 1985)).
>
> The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156, 164 (C.D. Cal. 2007). . . . We have previously noted that a number of these criteria, such as the Rule 23(a) requirements of commonality and typicality and the Rule 23(b)(3) requirement of predominance, are analytically similar. *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So.2d 1111, 1116 (Ala. 2003) (citing *Heartland Commc'ns, Inc. v. Sprint Corp.*, 161 F.R.D. 111, 117 (D. Kan. 1995)).

Quoting federal cases, 3 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 7:9 (4th ed.) (Dec. 2008), says: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." "[A] trial court may not properly reach the merits of a claim when determining whether class certification is warranted." *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

And, it may be relevant to note that an order certifying a class is interlocutory, is not irrevocable, and can be modified or withdrawn as later facts or situations present themselves. "After certifying a class, the court retains broad power to modify the definition of the class if it believes that the class definition is inadequate." 32B Am. Jur. 2d Federal Courts § 1601 (database updated Feb. 2010). "A district court has discretion to modify a class definition." *Gwiazdowski v. County of Chester*, 263 F.R.D. 178, 184 (E.D. Pa. 2009).

A. A CERTIFIED CLASS, FROM 1999, ALREADY EXISTS

"Rule 23 sets forth the criteria for the certification of a class action. . . . [T]he Rule requires that a party moving for class certification demonstrate that the proposed class and class representatives meet all of the requirements of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and that the case fits into one of the categories of Rule 23(b). Additionally, . . . courts have grafted on to it two additional criteria, often referred to as the 'implicit requirements' of class certification: that the class be 'definite' or 'ascertainable' and that the class representative be a member of the class. Courts occasionally opine that these extra, judicially created criteria are justified because they are inherent in the structure of Rule 23 and are therefore an 'axiomatic' part of class certification." 1 William B. Rubenstein, Newberg on Class Actions § 3:1 (5th ed.) (database updated Nov. 2011). [Note that Prof. Rubenstein, the country's preeminent class action scholar,[36] is plaintiffs' expert witness in this action.]

"The first implied requirement directs plaintiffs to propose a definite class." *Id*. In this case, we can skip this initial step because we already have a certified class. The defendants are estopped to deny the present existence of the already-certified 1999 class. The same class definition (from 1999) still applies.

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[36] Harvard's press release, says, in part: "Professor William Rubenstein '86 has accepted a tenured offer to join the Harvard Law School faculty. He is an expert in civil procedure whose scholarship focuses on class action law, and he is a celebrated teacher who has won several teaching awards. 'Bill Rubenstein is one of the leading procedure scholars in the nation, known especially for his influential work on class action suits and other complex litigation,' said Dean [now Justice] Elena Kagan '86. 'He is also one of the most acclaimed teachers in the legal academy. Both his scholarship and his teaching benefit from his longtime experience as an innovative and remarkably successful litigator. It is truly a pleasure to add someone of so many and varied talents to our faculty.'" www.law.harvard.edu/news/2007/08/06_rubenstein.html (emphasis added).

Plaintiffs now (in 2012) propose to divide the existing 1999 class into two subclasses, depending upon whether the class member filed an approved claim in 1999 or did not file a claim. The membership of subclass (A) (those who filed and were approved) has already been decided. Using the same methods and criteria used by Gilardi in 1999, the membership in subclass (B) can thus be determined. "There are three linguistic formulations commonly used to express the test for definiteness: first, that the class must be 'precise, objective, and presently ascertainable'; second, that the class must be 'adequately defined and clearly ascertainable'; and third, that the class can be ascertained 'by reference to' or 'based on' 'objective criteria.' . . . All courts essentially focus on the question of whether the class can be ascertained by objective criteria." 1 William B. Rubenstein, Newberg on Class Actions § 3:3 (5th ed.) (database updated Nov. 2011). The same "objective criteria" used in 1999 to identify subclass (A) members can just as easily be used today to identify subclass (B) membership. "In addition to asking whether there are objective criteria by which class membership may be determined, courts also ask whether an analysis of this criteria is administratively feasible. . . . Using this test, courts have held that defining a class is manageable if inspection of a corporation's books and records would reveal the owners of common stock and thus furnish class members' identities. . . ." *Id*.

Subclasses are most commonly used to cure actual or potential conflicts of interests among class members - - - that is, the named class representative might have some interests antagonistic to some class members. In that conflict situation, each subclass would need its own representative(s). That is not the situation here: there is no "conflict" between A and B. For example, there is no "limited fund" that class members will be fighting over about how to divide the limited "pie." Therefore, the three present putative class representatives can represent

subclass B members as well as those in A. See 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:45 (8th ed.) (database updated Nov. 2011) (emphasis added):

> Fed. R. Civ. P. 23(c)(5) broadly states that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under" Rule 23. The Rule is designed to provide courts with flexibility in handling complex cases by allowing them to create subclasses to isolate atypical issues or claims and resolve conflicts of interest that otherwise would preclude class certification because a single class representative cannot represent the entire class. Adequate representation by a plaintiff representative has two components: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must not have interests antagonistic to the interests of other class members. The putative class representative must be part of the class, i.e., possess the claim alleged, and "possess the same interest and suffer the same injury" as other class members. Class members frequently are not identically situated in all relevant respects. But not every divergence of interests between the putative representative and class members will bar a finding of adequate representation or typicality. A conflict must be actual and fundamental, i.e., go to the heart of the class members' interests in the claims, to preclude a finding of adequate representation. . . .
>
> Where subclasses are certified for class members with slightly different profiles but who do not have conflicting objectives, however, *Amchem* [*Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997)] does not require that separate adequacy findings be made for each subclass.
>
> > FN. 24. See *Joel A. v. Giuliani*, 218 F.3d 132, 140 (2d Cir. 2000) ("Without the sort of conflicting goals among the subclasses that would require separate representation, we find nothing in *Amchem* that requires a district court to make specific findings, when approving a settlement, that each subclass received adequate representation.").

Plaintiffs request two subclasses purely as an end-case administrative matter. Those who have already filed approved claims (subclass A) presumably will not be asked to perform a useless act and re-file. This present request for subclasses is not urgent and is not of great significance. The Court can rationally decide to continue or table this request until a successful settlement or judgment is attained. Then the Court, as a matter of administering and dividing the

common fund, can decide whether "subclassing" advances judicial economy.

At least one other, creative approach exists. If the Court has any pause about the use of a mandatory class action, the Court could logically certify subclass A as a mandatory (b)(1) class, and certify subclass B as only an opt-out (b)(3) class. Members of subclass A have already let their opt-out period (in 1999) go by, and, in a sense, they affirmatively "opted in" into the class when they filed claims (which were approved and paid on a pro rata basis). It would not seem to serve any logical purpose to notice those persons and entities again and purport to give them the opportunity to opt out of a class that they have already opted into. Plaintiffs still strongly believe that (b)(1) should apply to subclass B, too, e.g., because those class members have already had their chance to opt out. However, since the Court and the claims administrator has never affirmatively heard from these stockholders, the Court might logically draw this distinction.

Certification of multiple classes or subclasses under different subdivisions of Rule 23 is a permissible and accepted procedure in appropriate cases. See *Fogie v. Rent-A-Center, Inc.*, 867 F. Supp. 1398, 1407 (D. Minn. 1993) (equitable relief class certified under Rule 23(b)(2) for state consumer protection statute, separate monetary relief class certified under Rule 23(b)(3) for federal RICO), aff'd in part and vacated in part on other grounds sub. nom. *Fogie v. THORN Americas, Inc.*, 95 F.3d 645 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997).

B. THE FRAUD CLAIM, FIRST PLEADED IN 2003, SHOULD BE CERTIFIED AS A CLASS CLAIM

1. A CLASS CERTIFICATION HEARING IS NOT A MERITS HEARING

The decision to certify a class (or claim) is a purely procedural one, completely divorced from the merits. Although the trial of the merits of this case might be more involved (though we think that, too, will be simple), plaintiffs assert that the procedural class action issue presently before the court is actually very simple. It is, in fact, self-evident that this fraud claim should proceed as a class action. The defendants either committed the alleged misrepresentations and suppressions, or they didn't; either the class as a whole (every class member) was defrauded, or not. Either way, it is a class-wide result. The defendants did not negotiate with each class member individually; instead, each class member is identically situated vis-a-vis CVS and AIG. There are no individual issues. If this fraud claim is not appropriate for class treatment, then Rule 23 should be deleted from the rule book.

A class certification hearing is not a hearing on the merits. It is not even a "mini-trial" on the merits, as an injunction hearing is, where the movant has to show a likelihood of success on the merits. The "rigorous analysis" requires the court to consider the cause in action(s) in some detail - - - but, not in order to determine if the plaintiffs might win, instead, to determine if the claim, win or lose, can be presented on a class-wide basis. In other words, is the fraud claim manageable as a class-wide claim?

In this unique case, the answer is "yes." The defendants did not deal with or make representations to tens of thousands of stockholders. Instead, only a very few individuals were involved in what information was given or withheld to class counsel and Judge Wynn. Actually,

most of the pertinent facts are admitted and not controverted. We already know that plaintiff lawyers were told that insurance coverage was $50M, and we know that defendants did not tell anyone (class members, class counsel, the court, Chubb Insurance) about the LMU issued in September-October 1998. Whether defendants had a duty to tell is a "merits" issue that, once decided, applies to the class as a whole. And, whether the press release and SEC filings adequately exhausted their duty to tell is another class-wide issue. Even the defendants will not contend that they had differing duties to different stockholders. That is, there is no basis in law or fact to contend that defendants had duties to tell "group one" stockholders about the LMU, but did not have a duty to tell "group two" stockholders. There are no individual issues in this case, and, thus, no valid grounds for refusing to certify the fraud claim to proceed as a class claim.

The purpose of class actions is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [Class Member] to be litigated in an economical fashion." *Jenkins v. Raymark Indus*., 782 F.2d 468, 471 (5th Cir. 1986). "The decision to certify is within the broad discretion of the court." *Culpepper v. Inland Mortgage Co*., 189 F.R.D. 668, 670 (N.D. Ala. 1999). In making a certification determination, "Rule 23 is remedial and should be liberally construed to permit class actions." *Kalodner v. Michaels Stores*, 172 F.R.D. 200, 204 (N.D. Tex. 1997); *Longden v. Sunderman*, 123 F.R.D. 547, 550 (N.D. Tex. 1988). In close cases, "[j]udges should err in favor of certification." *United Farmers Agents Ass'n v. Farmers Ins. Exchange*, 1994 U.S. Dist. Lexis 19449, at *4 (W.D. Tex. 1994) (quoting *Horton v. Goosecreek Ind. Sch. Dist*., 690 F.2d 470, 487 (5th Cir. 1982).

In determining whether plaintiffs have satisfied their burden under Rule 23, the Court is to "regard all substantive allegations contained in the Plaintiffs' complaint as being true."

Keasler v. Natural Gas Pipeline Co. of Am., 84 F.R.D. 364, 365 (E.D. Tex. 1979); see also *Transamerican Refining Corp. v. Dravo Corp.,* 130 F.R.D. 70,74 (S.D. Tex. 1990). Additionally, "factual disputes arising at the [certification] hearing and in the pleadings are to be resolved in the Plaintiffs' favor." *Keasler*, 84 F.R.D. at 365-66 (citing *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1976). Thus, the Court need not assess the "merits" of the plaintiff's case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163, 177 (1974) (court should not "conduct a preliminary hearing into the merits of a suit"); *Culpepper v. Inland Mortgage Corp*., 189 F.R.D. 668, 670 (N.D. Ala. 1999). "The class representative need not show a probability of success on the merits to maintain a class action." *Ex parte Gold Kist, Inc.*, 646 So. 2d 1339, 1342 (Ala. 1994) (quoting 1 H. Newberg, Newberg On Class Actions § 3.16 (3d ed. 1992)).

Consider, as analogous, in this fraud-in-the-settlement-of-a-securities-class case, the fact that underlying security fraud cases are commonly certified. "Numerous courts have held that cases alleging securities law claims arising out of a common course of conduct over a particular period are appropriate for class treatment, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.' Courts have also favored certification of cases alleging securities fraud because such cases 'frequently involve hundreds or thousands of class members who often possess small claims. Such persons are in a particularly poor position to seek redress because the cost of a suit would be disproportionate to an individual's claim.' In fact, the Fifth Circuit has held that there is a presumption that Rule 23(a) is satisfied in securities suits involving nationally traded stocks. Consequently, '[t]he commonality requirement has been applied permissively in securities fraud litigation.'" 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:8 (8th ed.) (database updated Nov. 2011). "In

the securities law context, the purported representative's claims may be typical of those of class members if they 'arise from the same event or practice or course of conduct that gives rise to the claims of the class members, and are based on the same legal theory.'" *Id*. at § 4:20. "The Supreme Court has stated that '[p]redominance is a test readily met in certain cases alleging … securities fraud. …' . . . The linchpin to satisfying the predominance requirement for claims under the securities laws is proof that <u>the defendants allegedly engaged in a common course of conduct</u> over the class period, typically involving <u>uniform or standardized material misrepresentations or omissions</u> and that the conduct was directed at and relied upon by all class members." *Id*. at § 5:24 (emphasis added). "Echoing the Supreme Court's observation that '[p]redominance is a test readily met in certain cases alleging consumer or securities fraud,' the superiority of the class action device is widely recognized in securities fraud actions alleging that all shareholders were defrauded by <u>the same false or misleading material statements or omissions</u>. . . ." *Id*. at § 5:69 (emphasis added).

2. A RIGOROUS EXAMINATION OF THE FRAUD CLAIMS PLEADED HEREIN

So, to determine whether the plaintiffs' claims can be presented within the procedural vehicle of a class action, the court is supposed to examine the claims being pleaded. In Alabama, the elements of fraud are well-established:

> Alabama Pattern Jury Instructions Civil, Second Edition
> Database updated December 2011
> Chapter 18. Fraud
>
> APJI 18.01 Intentional false statement

Plaintiff (name of plaintiff) says that Defendant (name of defendant) intentionally made a false statement that harmed [him/her]. To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1 That (name of defendant) intentionally stated to (name of plaintiff) that a present or past important fact was true;
2 That (name of defendant)'s statement was false;
3 That (name of defendant) knew that the statement was false when [he/she] made it and (name of plaintiff) did not know it was false;
4 That (name of defendant) intended that (name of plaintiff) rely on the statement;
5 That (name of plaintiff) reasonably relied on the statement; and
6 That (name of plaintiff)[acted/did not act] and was harmed.

APJI 18.02 Reckless false statement

Plaintiff (name of plaintiff) says that (name of defendant) recklessly made a false statement that harmed [him/her]. To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1 That (name of defendant) recklessly stated to (name of plaintiff) that a present or past important fact was true;
2 That (name of defendant)'s statement was false;
3 That (name of defendant) made the statement without knowing whether it was true when [he/she] made it and (name of plaintiff) did not know it was false;
4 That (name of defendant) intended that (name of plaintiff) rely on the statement;
5 That (name of plaintiff) reasonably relied on the statement; and
6 That (name of plaintiff)[acted/did not act] and was harmed.

APJI 18.03 Mistaken false statement

Plaintiff (name of plaintiff) says that Defendant (name of defendant) by mistake and innocently made a false statement that harmed [him/her]. To recover damages on this claim, (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1 That (name of defendant) stated to (name of plaintiff) that a present or past important fact was true;
2 That (name of defendant)'s statement was false;
3 That (name of defendant) intended that (name of plaintiff) rely on the statement;

4 That (name of plaintiff) reasonably relied on (name of defendant)'s statement; and
5 That (name of plaintiff)[acted/did not act] and was harmed.

APJI 18.05 Concealment

Plaintiff (name of plaintiff) says that [he/she] was harmed because (name of defendant) hid or withheld important fact(s) from [him/her]. To recover damages on this claim (name of plaintiff) must prove to your reasonable satisfaction all of the following:

1 That (name of defendant) hid or withheld an important fact from (name of plaintiff);
2 That (name of plaintiff) did not know of the important fact;
3 That (name of plaintiff)[acted/did not act] and was harmed.

Notes on Use

Use this instruction in actions for suppression. . . .

Generally, the relationship of the parties from which an obligation to disclose arises is not a jury issue. State Farm Fire and Cas. Co. v. Owen, 729 So. 2d 834 (Ala. 1998). Should there be a dispute of fact about the relationship of the parties; the above instruction will not be applicable. When there is a dispute of fact whether the circumstances created an obligation to disclose, Concealment-Obligation to Make Known (§ 18.07) should be given instead of this instruction.

The evidence must show a duty or obligation on the defendant to disclose the material fact which the plaintiff's complaint alleges was suppressed. The duty or obligation to speak depends upon the fiduciary or other relationship of the parties, the value of the particular fact, the relative knowledge of the parties, and other circumstances of the case.

The elements of an action for suppression of the truth are: (1) duty to disclose facts; (2) concealment or nondisclosure of material facts by the defendant; (3) to induce plaintiff

APJI 18.06 Concealment—Obligation to Make Known As Jury Issue

Plaintiff (name of plaintiff) must prove to your reasonable satisfaction that Defendant (name of defendant) was under an obligation to make known the important fact to (name of plaintiff). In deciding whether (name of defendant) was under an obligation to make known the important fact, you can consider the parties (intelligence, educational background, experience, knowledge and power and whether (name of defendant) had knowledge, power or expertise not shared

by (name of plaintiff).

Notes on Use

Use this instruction only in cases when the existence of the duty to disclose depends on resolution of disputed factual issues and the court has determined, as a question of law, that there is substantial evidence of facts that would, if proven, rise to such duty. See Restatement (Second) of Torts, § 551 cmt. m stating as follows:

> Court and jury. Whether there is a duty to the other to disclose the fact in question is always a matter for the determination of the court. If there are disputed facts bearing upon the existence of the duty, as for example the defendant's knowledge of the fact, the other's ignorance of it or his opportunity to ascertain it, the customs of the particular trade, or the defendant's knowledge that the plaintiff reasonably expects him to make the disclosure, they are to be determined by the jury under appropriate instructions as to the existence of the duty.

When the relationship of the parties from which a duty to disclose arises is not a jury issue (generally where confidential or fiduciary relations are involved), Concealment (§ 18.06) should be given instead of this instruction. . . .

APJI 18.10 Reliance

A plaintiff suing for fraud must have reasonably relied on the important fact(s) by [acting/not acting] on the important fact(s). You must take into account all the circumstances that existed at the time in deciding if Plaintiff (name of plaintiff) reasonably relied on the important fact(s). Among the circumstances you may consider are [see examples in Note on Use and References].

Notes on Use

Use this instruction in cases filed after March 14, 1997, when the claim is based on false representation or suppression.

The court should instruct on the relevant circumstances suggested by substantial evidence. The references give examples of circumstances that are relevant in a particular fact situation. They are not inclusive or exclusive. This instruction does not define the descriptive terms or phrases, e. g., "the relative bargaining power of the parties." . . . .

1 Ally Windsor Howell, Alabama Rules of Civil Procedure Annotated, Rule 23, § 23.5 (4th ed.) (database updated Sept. 2011), notes: "Misrepresentations to class members at various times will not defeat the availability of a class action where the misrepresentations are 'basically the same …' and 'redressable under the same theory of recovery.' *Harbor Ins. Co. v. Blackwelder*, 554 So. 2d 329, 335 (Ala. 1989)." That is our situation here: the defendants' misrepresentations were uniform and made to a small group of class fiduciaries (the court and class counsel); and the defendants' suppressions, by definition, were uniform (they never told anybody).

Plaintiffs do not presently have to prove the "merits" of their case; but, in an abundance of caution, and to fulfill the requirement of a "rigorous analysis," plaintiffs reiterate here some of their previously-stated support for the legal validity of their fraud claim. The fraud issue in this case is identical to the issue presented to a Missouri Appellate Court, which framed it, as follows:

> **When [a] lawsuit's defendants lie about insurance coverage and induce plaintiff to settle, should the courts permit the plaintiff to enforce the settlement but sue for damages growing out of the fraudulent inducement**.

*Roth v. La Societe Anonyme Turbomeca France***,** 120 S.W.3d 764 (Mo. App. W. Dist.), *cert. denied* (Mo. 2003).

In *Roth***,** the underlying facts involved a helicopter crash that killed two people and critically injured two others, including Sheila Roth. Four lawsuits were consolidated for discovery. In response to plaintiffs' interrogatories, the product liability defendant, Turbomeca, responded that it had only **$50 million** of liability insurance coverage. Afraid that $50 million "would not be sufficient to satisfy all of the plaintiffs' judgments" (120 S.W.3d at 769), Roth

agreed to a settlement that was smaller than she otherwise would have agreed to.

After executing the release and settlement agreement, Roth discovered that the defendant really had **$1 billion** in insurance coverage. Roth sued the defendant and its insurers for fraud. At 774, the Missouri Court held that "the Roth's release was voidable at their election because of the nature of Turbomeca's alleged fraud. They could enforce their settlement agreement with Turbomeca and still maintain an independent tort claim for fraud."

At 773, the *Roth* Court rejected defendants' "buyer's remorse" type of argument, thusly: "We first disagree with the underlying assumption that the releasor would be reneging on the bargain. He would not be reneging because he would not be pursuing the released tort claim, but an independent claim created by the fraud. Second, damages for the fraud are not 'inextricably bound' to the nature and extent of the injuries involved in the underlying tort. They are conceptually different."

Also at 773, *Roth* rejected any res judicata-type argument: "[A]llowing the releasor to maintain an action for a tort unrelated to the underlying tort does not grant the releasor a reprieve from the release. Moreover, the underlying tort claims are not inextricably involved, but essentially irrelevant. A party suing for fraud in the inducement of a release is not suing for the tortious conduct underlying the released claims, but for the contractual damages that he suffered as a result of the subsequent fraud foisted upon him."

At 775-76, the Missouri Court explained why Roth could sue for fraud and would not be limited to a Rules of Civil Procedure remedy that would merely set aside the settlement and put the underlying tort case back in its original posture:

> Turbomeca argues that . . . the circuit court could have employed

appropriate sanctions pursuant to Rule 61.01 and could have allowed the Roths to take their underlying tort claims to trial. But at what cost to the Roths? Were they to proceed to trial, they would risk recovering nothing, even if the case went to trial on the issues of damages only. . . . Because the Roths had secured some recovery, they should not be forced to forfeit it at the risk of recovering nothing. Rule 61.01 surely was not intended to punish a party who has already suffered prejudice while potentially rewarding the non-compliant party's fraud.

A federal court considered an analogous situation in *Cresswell v. Sullivan and Cromwell*, 668 F.Supp. 166 (S.D. N.Y. 1987). In that case, the court considered whether or not a party alleging fraud during discovery should be required to seek to set aside a judgment, tender back a settlement's proceeds, and go to trial on the underlying claim. The court declared: "If this were the rule, few plaintiffs would choose to enforce their claims of fraud in connection with a settlement, no matter how valid their cause of action. A plaintiff who must give up any benefit he has gained and risk receiving nothing in return will be reluctant to enforce his rights as a victim of fraud. Of course, he may ultimately gain more than he received in settlement the first time, either by going to trial this time around or settling for more. But this chance of receiving more does not justify the deterrent effect of requiring a plaintiff to give up the settlement he received. Even plaintiffs who have settled should not have to run still more risks in recovering their damages." *Id*. at 172.

Whether or not the Roths can establish the elements of their fraud claim is wholly another matter. What we determine here is only that they have stated a claim upon which relief may be granted against Turbomeca and the respondent insurance companies.

Except for the fact that *Roth* was not a class action, the facts, procedures, and issues are virtually identical to our case. The jurisprudence of the Alabama appellate courts indicates that an Alabama court would decide these issues in identical fashion to the Missouri Court in *Roth*.

Just as the Missouri court decided in *Roth*, Alabama law is clear that a defrauded releasor may affirm the contract containing the release and sue for damages for the fraud. *Lampton v. Allstate Ins. Co., Inc.,* 586 So.2d 205, 208-09 (Ala. 1991) ("However, 'the longstanding rule in Alabama is that a defrauded releasor may affirm the release and sue for damages for the fraud without returning or tendering the consideration for the release.' *Coastal Concrete Co. v. Patterson*, 503 So.2d 824 (Ala. 1987)."); *Mutual Savings Life Ins. Co. v. Osborne,* 245 Ala. 15,

21, 15 So.2d 713, 718 (1943) ("[a] defrauded releasor is not limited to an action to set aside the release, but may affirm it, sue for damages for the fraud, and such suit may be brought without returning, or offering to return, the consideration for the release. 53 Corpus Juris, § 47; *Mutual Savings Life Ins. Co. v. Osborne*, 30 Ala. App. 399, 7 So.2d 314."). Put simply, a fraud committed to induce a release is itself a completed tort giving rise to damages separate and apart from the damages flowing from the released claims.

Specifically, this case involves a calculated and premeditated fraud perpetrated on plaintiff and others similarly situated and on the Court by defendants CVS and AIG. The purpose of the fraud was to settle for a fraction of their true value numerous securities class actions filed in 1998 against MedPartners (the " MedPartners Securities Litigation"). Such fraud was accomplished by defendants' misrepresentations regarding, and concealment of, the fact that MedPartners had **unlimited insurance coverage** with respect to the claims made in the MedPartners Securities Litigation.

Jenelle Mims Marsh, Alabama Law of Damages § 17:9 (6th. ed.) (database updated April 2012), summarizes Alabama law this way: "When a release is based upon fraud, the claimant may rescind the contract as having been fraudulently obtained. Generally, it is a condition precedent to such action that the claimant have returned the consideration received under the release. There are exceptions to such required return, as when return is impossible. A second alternative remedy of the claimant is to affirm the release and to sue in fraud for damages. It is no condition precedent to such a claim for damages that the claimant have returned the consideration received."

Alabama law comports with general American jurisprudence on this point. "A defrauded

releasor is not limited to an action to set aside the release, but may affirm it and sue for damages for the fraud. Such a suit may be brought without returning or offering to return the consideration for the release." 76 C.J.S. Release § 36 (database updated March 2012). "Since an action for deceit is based on the theory of an affirmance of the contract or other transaction, a rescission is not a condition precedent to maintaining an action to recover damages occasioned by the fraud, nor is it necessary that the plaintiff, as a condition precedent, return or offer to return what he or she has received." 37 C.J.S. Fraud § 114 (database updated March 2012). See also 37 Am. Jur. 2d Fraud and Deceit § 51 (database updated Feb. 2012):

> Where a right of action exists, and the defendant, or someone for him, by fraudulent representations induces the plaintiff to make a settlement or release of his cause for an inadequate sum, the plaintiff may either avoid the settlement or release and sue on his original right of action, or may sue in fraud and deceit and recover such amount as will make the settlement an honest one. It is also said to be a general rule that where a wrongdoer fraudulently conceals this wrong from the injured person, who agrees, in ignorance of the wrong, to a settlement of the accounts of the wrongdoer and the entry of a judgment or judicial decree in accordance with the agreement, the decree does not defeat an action for damages resulting from the fraud. In the absence of knowledge of fraud in the inducement of a compromise agreement, such agreement cannot be set up by the defense to an action for the fraud, on the theory that the agreement released the defendant from the fraud. Moreover, a compromise agreement settling a judgment is held not to defeat a cause of action for damages for fraud in inducing the settlement, even though no affidavit is taken as to the financial condition of the judgment debtor.

In addition to suppression, plaintiffs claim misrepresentation. Plaintiffs intend to prove that defendants made direct representations to class counsel, and plaintiffs intend to claim that defendants are liable for the representations made to Judge Wynn under the theory of "third-party fraud." Defendants concede that Judge Wynn was mislead; they just contend that they are not responsible because plaintiffs cannot identify any representation made **by them**. Instead, they say, plaintiffs rely only on statements made to Judge Wynn by plaintiffs' class counsel. Such

distinction is of no legal relevance.

First, note that plaintiffs do allege that defendants directly misrepresented the amount of insurance coverage. Then, in addition, plaintiffs contend that Alabama law holds that liability for fraud is **not** limited to the party who actually makes the false representation but also rests on the party who **caused** the misrepresentation to be made in the first place. See, e.g., *Thomas v. Halstead*, 605 So.2d 1181, 1184-1185 (1992):

> "If a third person is injured by the deceit, he may recover against the one who made possible the damages to him by practicing the deceit in the first place." 37 C.J.S. Fraud § 60, p. 344 (1943). See *Sims v. Tigrett*, 229 Ala. 486, 158 So. 326 (1934).
>
> In Alabama, it is not always necessary to prove that a misrepresentation was made directly to the person who claims to have been injured. In *Sims v. Tigrett*, 229 Ala. 486, 491, 158 So. 326 (1934), this Court stated:
>
> "But we may observe that if defendant caused the representations to be made, and the public were intended to be thereby induced to act upon them, and plaintiff was within the class of those so contemplated, the action for deceit against defendant may be maintained by plaintiff, though defendant did not sell the bonds to plaintiff, but sold them to another, and he to plaintiff, both in reliance on the truth of the representations. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 126, 60 So. 143; 26 C.J. 1121, §§ 47, 48."
>
> *Sims*, 229 Ala. at 491, 158 So. at 330.

The Alabama Supreme Court continues to apply and follow ***Thomas***:

> Although Alabama law recognizes that persons who are not parties to a particular transaction generally have "no right of action [for fraud occurring during that transaction], there is an exception to this general rule: *'If a third person is injured by the deceit, he may recover against the one who made possible the damages to him by practicing the deceit in the first place.*' " *Thomas v. Halstead*, 605 So.2d 1181, 1184 (Ala.1992) (quoting 37 C.J.S. Fraud § 60 (1944)).' (Emphasis added [in *Potter*].)

Kinney v. Williams, 886 So. 2d 753, 755 (Ala. 2003) (quoting *Potter v. First Real Estate Co.*, 844 So.2d 540 (Ala.2002)).

"*Thomas v. Halstead*, 605 So.2d 1181 (Ala. 1992), held a jury question was presented

where a patient sued his dentist for fraudulently submitting a claim form to Blue Cross, the patient's insurer, for services that had not been rendered. The court explained that, in Alabama, it is not always necessary to prove that a misrepresentation was made directly to the person who claims to have been injured." 1 Michael L. Roberts, Alabama Tort Law § 20.9, p. 1034, n. 1 (5th ed. 2010). "In *Thomas v. Halstead*, the Alabama Supreme Court held that a plaintiff may have standing to sue on a fraud claim even though the misrepresentation was made to a third party, as long as the plaintiff suffered injury from such misrepresentation." Survey of 1992-93 Developments in Alabama Case Law, 45 Ala. L. Rev. 317, 377 (1993).

LaCoste v. SCI Alabama Funeral Services, Inc., 689 So.2d 76, 80 (Ala. Civ. App. 1996), *cert. quashed* (Ala. 1997), explains:

> It is not necessary for a party to prove that a misrepresentation was made directly to the person who claims to have been injured in order for that person to recover for fraud. *Thomas v. Halstead, supra* at 1184; *Danley v. Murphy*, 658 So.2d 483 (Ala. Civ. App. 1994). There exists a duty not to make a false representation to those whom a defendant intends, for his own purposes, to be reached and influenced by the representation. *Colonial Bank of Alabama v. Ridley & Schweigert*, 551 So.2d 390, 396 (Ala. 1989). "If a third person is injured by the deceit, he may recover against the one who made possible the damages to him by practicing the deceit in the first place." *Thomas, supra*, at 1184, (citing, 37 C.J.S. Fraud § 60, p. 344 (1943); *Sims v. Tigrett*, 229 Ala. 486, 158 So. 326 (1934)).

This is the understanding of the federal court, too:

> The court notes that under Alabama law it is not always required that a plaintiff prove that a misrepresentation was made directly to him, so long as his injuries resulted from the misrepresentation. *Thomas v. Halstead*, 605 So.2d 1181, 1184 (Ala. 1992) ("If a third person is injured by the deceit, he may recover against the one who made possible the damages to him by practicing the deceit in the first place") (citations omitted). Therefore, "[t]here is a duty not to make a false representation to those to whom a defendant intends, for his own purposes, to reach and influence by the representation." *Wheelan v. Sessions*, 50 F.Supp.2d 1168, 1174 (M.D. Ala. 1999) (DeMent, J.) (quoting *Colonial Bank of Ala. v.*

Ridley & Schweigert, 551 So.2d 390, 396 (Ala.1989)).

Chase v. Kawasaki Motors Corp., *U.S.A.,* 140 F.Supp.2d 1280, 1291 n. 8 (M.D. Ala. 2001).

This principle of "third-party fraud" has always been a part of Alabama law. For example, see *Englehardt v. Clanton*, 83 Ala. 336, 3 So. 680, 681-82 (1888): "the principle that when a representation as to the fitness of an article for a particular purpose, made by a dealer, to one person, in respect to a sale for such purpose, is communicated to a third person, who, acting upon it, makes a subsequent purchase of the same article, such communication being known to the dealer and he remains silent, it will be treated as if directly made by him to such third person." See also *Hulsey v. M. C. Kiser Co.*, 21 Ala. App. 123, 124, 105 So. 913, 914 (1925): "When the statement is made to be used for a particular class, and it is so used and acted upon by one of that class, it is as if the statement had been made to the party injured. *Davis v. Louisville Trust Co.*, 181 F. 10, 104 C.C.A. 24, 30 L.R.A.(N.S.) 1011; *Willcox v. Henderson*, 64 Ala. 535." (emphasis added.)

The law of Alabama is within the mainstream of American jurisprudence on this point. See Restatement (Second) of Torts § 533 (1977):

> § 533. Representation Made To A Third Person
>
> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

[The principle of "third-party fraud" applies to suppression claims as well as misrepresentation claims. That is, if defendant, in his dealings with "A," is silent on a subject - to which he has a

duty to speak - and defendant intends "B" to rely upon that silence, defendant is liable to "B" for suppression. See *Pegram v. Hebding*, 667 So.2d 696, 703 (Ala. 1995) ("The same rationale applies to cases involving allegations of suppression.").]

Accordingly, defendants' position that they made no misrepresentation to the Court is irrelevant. Instead, the relevant inquiry is whether defendants **caused** such representations to be made. Surely defendants do not deny having made such representations to, or having concealed the LMU from, class counsel, especially in light of the testimony of Richard George, attorney for AIG, that the LMU was intentionally concealed from plaintiffs' counsel. Also, remember that there is compelling circumstantial evidence that defendants' counsel reviewed the affidavit of Selinger and Cauley prior to the final July 1999 hearing, and that such affidavit is replete with false representations regarding insurance and MedPartners's ability to pay a judgment.

(i) **In summary as to Misrepresentation**: The complaint (accepted as true, for class certification purposes) alleges direct, affirmative misrepresentations. "The Plaintiff avers that each of the Defendants represented to counsel for the settling class that the limit of insurance available to MedPartners was fifty million dollars and further represented that MedPartners did not have the financial ability to pay a substantial judgment." Complaint, par. 59, p. 21. "Defendants wrongfully misrepresented that the policy limits were only $50 million." *Id.* at par. 3, p. 2. "During negotiations leading to that settlement . . . MedPartners and its insurance carriers [AIG] represented that the coverage limits for available insurance were $50 million." *Id*. at par. 1, p.2 (emphasis added). Paragraph 50 of the complaint again alleges that the $50 million figure was represented by defendants to plaintiffs' class counsel during settlement negotiations. It quotes from the Selinger/Cauley affidavit that says they "learned" that insurance was limited to

$50 million. Obviously, they "learned" that supposed fact from the defendants. The affidavit (par. 34) also specifically states that "counsel for MedPartners confirmed" to them that MedPartners could not pay a judgment and would be bankrupted. "Defendants misrepresented the actual policy limits, saying they were only $50 million." Complaint, par. 51, p. 19. Paragraph 52 alleges that these misrepresentations were made with the intent for the class and class members (and Judge Wynn) to rely upon the representation of $50 million in insurance coverage.

Paragraph 54 of the complaint quotes testimony of AIG attorney George. He explains that plaintiffs' class counsel were "aware" of only $50 million of insurance. Obviously, that knowledge had to come from the defendants (i.e., in representations that there was only $50 million in coverage). Paragraph 56 quotes AIG lawyer Newman (arbitration Tr. at p. 4234) as admitting that he never told plaintiffs' class counsel about the LMU. At p. 4249-52, Newman says that he told plaintiffs' class counsel that there was $50 million in insurance. Lauriello has sufficiently alleged a direct misrepresentation, and a uniform type of representation that was between only a very small group of individuals, so the claim can be presented adequately at trial as a class-wide claim. The class was operating through its counsel and the court.

Representations to plaintiffs' class counsel, and to the class action judge (Wynn) (who represents the interests of the absent class members[37]), are representations directly to the class[38]

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[37] For example, Rule 23(e) "interposes the court between the interests of absentees and the temptation of class representatives to misappropriate the leverage of a class action to achieve favorable outcomes for themselves at the expense of absentees." Jerome A. Hoffman, Alabama Civil Procedure section 5.83, p. 5-149 (2d ed. 2001). "There can be no settlement without the trial court's approval. Rule 23(e). Requiring the trial court's approval of the settlement protects the class from unjust settlements. . . ." *Adams v. Robertson*, 676 So.2d 1265, 1272 (Ala. 1995). One of defendants' experts in this case wrote: "Judicial approval at key steps in the case –

and to class members. Alternatively, the principle of third-party fraud applies. The complaint alleges that defendants' representations to class counsel and to the court were intended to reach the class and class members and for them to rely.

Plaintiff herein also alleges that defendants are directly responsible for the representations that were made to Judge Wynn and to the class in the summer of 1999. MedPartners and AIG were **proponents** of the proposed class settlement [signatories to the Stipulation of Settlement, etc.], along with plaintiffs' class counsel (e.g., Selinger, Cauley, Drake, Lerach, and Yearout). Judge Wynn directed the proponents, including MedPartners and AIG to educate the Court about MedPartners' financial status. MedPartners and AIG reviewed the Selinger/Cauley affidavit before it was filed, and reviewed and participated in the class notice. On the issue of gaining court approval of the proposed settlement, MedPartners and AIG were joint venturers[39] with

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including settlement – is required *as a substitute for individual consent* by class members." Thomas D. Morgan, Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements, 79 Geo. Wash. L. Rev. 734, 734 (2011) (emphasis added).

[38] "[O]nce certified, a class acquires a legal status separate from that of the named plaintiffs." *Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331, 1336 (11th Cir. 2003) (citing *Lynch v. Baxley*, 651 F.2d 387, 388 (5th Cir. Unit B July 1981), and *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)). See also *Corbitt v. Mangum,* 523 So.2d 348, 351 (Ala. 1988): "Additionally, it is well settled that when the court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the named representative."

[39] "The elements of a joint venture have been held to be: a contribution by the parties of money, property, effort, knowledge, skill, or other assets to a common undertaking; a joint property interest in the subject matter of the venture and a right to mutual control or management of the enterprise; expectation of profits; a right to participate in the profits; and usually, a limitation of the objective to a single undertaking or ad hoc enterprise. While every element is not necessarily present in every case, it is generally agreed that in order to constitute a joint venture, there must be a community of interest and a right to joint control." *South Carolina Ins. Co. v. Bishop*, 683 So.2d 985, 986-87 (Ala. Civ. App. 1995) (internal citations and quotations

plaintiffs' class counsel. Under these circumstances, whatever class counsel said, and the contents of the class notice, are legally as if spoken directly by defendants themselves. (And, again, viewed under the law of third-party fraud, it was AIG and MedPartners who "caused" these representations to be made. Alabama law does not allow defendants to shield themselves from legal responsibility by using a "front man" or "mouthpiece" to make their representations for them.)

(ii) **In summary as to Suppression**: It is undisputed (no matter the "spin" put on the press release and SEC filings) that defendants never disclosed the actual text of the LMU or its unlimited nature. That much will be stipulated at trial, or at least very easy to prove as a class-wide fact. The contested "merits" issue will be the duty to disclose. Either way that issue shakes out, it is a uniform, class-wide issue.

Plaintiffs' positions can easily be presented as a single, uniform, class-wide issue, not requiring individualized evidence from class members. On the merits, plaintiffs will contend, for one, that defendants had a legal duty to disclose the existence of the LMU because, if for no other reason, discovery requests for insurance information had been made. Newman admits this and admits he never supplemented, even though he knew that class counsel was proceeding on the mistaken idea of a $50M limit. Having once responded to plaintiffs' class counsel that insurance was limited to $50 million, Ala.R.Civ.P. 26(e)(2)(B) required supplementation once it was apparent that the representation of $50 million was materially false and misleading and that

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omitted). Courts have enforced oral agreements among lawyers held to be joint venturer arrangements. Examples are *Jorgensen v. Cassiday*, 320 F.3d 906 (9th Cir. 2003); and *Davies v. Grauer*, 684 N.E.2d 924 (Ill. App. 1 Dist. 1997).

plaintiffs were relying on the faulty $50 million figure.[40] "[A] person has a duty to disclose all relevant information if someone inquires about a relevant matter." *Boswell v. Coker*, 519 So.2d 493, 495 (Ala. 1987). Further, note that "[a]ll attorneys, as officers of the Court owe duties of complete candor and primary loyalty to the Court before which they practice." *Malauta v. Suzuki Motor Company, Ltd.*, 987 F.2d 1536, 1546 (11th Cir. 1993). Accordingly, it is easily apparent that plaintiffs have stated a suppression claim to which both the affirmative and defensive evidence can be presented in a class action format.

(iii) **The Law of "Half-Truths."** Additionally, plaintiffs will assert that there was an affirmative duty to speak and disclose all of the insurance available because defendants "opened the door" to full disclosure by making the partial disclosure of $50 million in insurance coverage. "Even though one may be under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiry, he is bound not only to state the truth but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated; if he speaks at all, he must make a full and fair disclosure." 1 Michael L. Roberts, Alabama Tort Law § 20.17[2], p. 1144 (5th ed. 2010) (emphasis added). "It also is fairly clear that if a plaintiff asks a defendant for information, then the defendant is obligated to provide it. Moreover, once the defendant has supplied some information to a plaintiff regarding a particular topic, the defendant is required to make a full disclosure. *Lucas v. Hodges,* 589 So. 2d 154, 158 (Ala.

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[40] On a related note, FRCP 26(a) was amended in **1993** to add the initial disclosure rule, including the duty to voluntarily and initially disclose all insurance coverage. FRCP 26(e) requires anyone who has made a Rule 26(a) disclosure to supplement or correct disclosures. When lawsuits like Lauriello were filed in federal court in early 1998, $50M would have been a truthful initial disclosure, but MedPartners had a duty to supplement that disclosure after the Oct. 1998 LMU. Also note that ARCP 26(b)(3) was amended in Oct. **1995** to provide that the limits of liability insurance is discoverable. See *Ex parte Badham*, 730 So. 2d 135 (Ala 1999).

1991) (once pest control company 'undertook to issue a letter concerning the last inspection' of the plaintiffs' house, company had 'a duty to disclose the full situation.'); *Jackson Co. v. Faulkner*, 55 Ala. App. 354, 315 So. 2d 591 (1975)." Madeline H. Haikala, Fraudulent Suppression's Duty to Disclose, 56 Alabama Lawyer 231, 231-32 (July 1995).

Defendants spoke a "half-truth" when they disclosed the existence of $50 million in coverage. After that representation became no longer true (i.e., after the LMU was issued), defendants knew that the class and the Court were continuing to operate under the mistaken assumption that only $50 million was available. Defendants' silence was an affirmation that insurance coverage was limited. See *Ford New Holland, Inc. v. Proctor-Russell Tractor Co., Inc.*, 630 So.2d 395, 399 (Ala. 1993) (internal citations and quotations omitted):

> The type of interest protected by the law of deceit is the interest in formulating business judgments without being misled by others--in short, in not being cheated. Fraudulent suppression is not actionable merely because a duty to disclose existed; rather, it is actionable because the very propositions of a party imply that certain things, if not told, do not exist. In other words, silence is fraudulent, because the silence amounts to an affirmation that a state of things exists which does not, and the party is deprived to the same extent that he would have been by positive assertion.
>
> Moreover, the telling of a half-truth or the making of an ambiguous statement will constitute fraud if it is intended to create a false impression and does so. If an ambiguous term is used in making a representation in a business transaction, and the other party, to the knowledge of the one making the representation, interprets the term in the sense in which it is false, there is liability for fraud if the erroneous impression created by the ambiguous representation is not corrected.

Jackson Co. v. Faulkner, 55 Ala. App. 354, 363-64, 315 So.2d 591, 599-600 (Ala. Civ. App. 1975), states:

> Our supreme Court has quoted with approval the following:
>
> "Where one responds to an inquiry, it is his duty to impart correct information, and he is guilty of fraud if he denies all knowledge of a fact which he

> knows to exist, or if he gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though literally true as far as they go, or if he fails to disclose the whole truth.
>
> "Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all, he must make full and fair disclosure. To tell half a truth has been declared to be equivalent to the concealment of the other half. A partial and fragmentary disclosure, accompanied by the willful concealment of material and qualifying facts is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is. Therefore, if one willfully conceals and suppresses such facts, and thereby leads the other party to believe that the matters to which the statements made relate are different from what they actually are, he is guilty of a fraudulent concealment." (*American Bonding Co. of Baltimore v. Fourth Nat. Bank*, 206 Ala. 639, 641, 91 So. 480, 482, 483, quoting from 12 R.C.L., ss 70--71) See also 37 Am.Jur., Fraud & Deceit, s 151.

Interpreting Alabama law, the old Fifth Circuit said: "Nevertheless, even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiry, he is bound not only to state the truth but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated; if he speaks at all, he must make a full and fair disclosure. *Jackson Co. v. Faulkner*, 55 Ala. App. 354, 315 So.2d 591 (1975)." *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1313 (5th Cir. 1977). More recently, the Eleventh Circuit explained that:

> In order for the suppression of facts to be actionable, there must be a duty to speak. A duty to disclose often arises when there is a confidential or fiduciary relationship between the parties. The Alabama courts do not seem to focus on the designation of the relationship, such as vendor-vendee, etc., but instead look to the relative bargaining positions of the parties. Even when a confidential relationship between the parties does not exist, the particular circumstances of a situation can give rise to an obligation to disclose. When the accused has superior knowledge or expertise not shared by the plaintiff, the obligation to disclose is compelling. In order to determine whether a duty to disclose exists, we must examine the facts of each individual case; a rigid approach is impossible, and, indeed, the words of the statute itself counsel flexibility. <u>Finally, even if one is not under a duty to speak,</u>

> if he decides to do so, he must make a full and fair disclosure, without concealing any facts within his knowledge.

First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., Inc., 899 F.2d 1045, 1056 (11th Cir. 1990) (emphasis added) (internal citations and quotations omitted).

Defendants, of course, will, on the merits, contend that nothing was suppressed because full and adequate disclosure was made in the December 1998 press release and later SEC filings. These are merits issues, but the point here is that the validity, vel non, of that defense can appropriately be determined on a class-wide basis. For example, the press release either told the whole world that MedPartners had unlimited liability insurance, or not. Either way, it is a single class-wide issue, and not one that involves individualized proof. On the merits, plaintiffs will contend that the release and 10-Q and 10-K do not disclose the existence of unlimited coverage. They state only that excess protection was purchased from "National Union." Even this identification of the insurer is incorrect (it was AISLIC). And, National Union at all times claimed that it had paid its policy limits (another half-truth). The internal memos preceding the press release show that defendants recognized this was inadequate disclosure. Whether the disclosures were adequate to disclose or to put anyone on notice are fact questions for a jury that will bind the entire class.

In a legally analogous case, the Court held that a car dealer's disclosure that the front end had been hit did not insulate the dealer from a fraud claim alleging that the car had been significantly wrecked. See ***Danley v. Murphy***, 658 So.2d 483, 486 (Ala. Civ. App. 1994) (emphasis added):

> In the present case the sellers argue that because they informed Murphy that the automobile had been wrecked, they made no false representations to

> Murphy which would support a fraud claim. However, as noted above, the sellers indicated to Murphy that the automobile had been "smacked" in the front end. When the sellers revealed that the automobile had been wrecked, they were under an obligation to make a full and fair disclosure, without suppressing or concealing any material facts of which they had knowledge. *Jackson Co. v. Faulkner*, 55 Ala. App. 354, 315 So.2d 591 (Ala. Civ. App. 1975). In this case the sellers made a partial disclosure, which concealed material facts. Therefore, the statements made by the sellers were only a half-truth and, thus, were a misrepresentation of the facts. When the sellers willfully concealed certain material facts, which led Murphy, and ultimately the buyer, to believe that the history of the automobile was different from what it actually was, the sellers were guilty of a fraudulent concealment. *Jackson Co.*, 55 Ala. App. 354, 315 So.2d 591. In view of the above, the buyer is not precluded from asserting a fraud claim in the present case.

(iv) **The Law of Active Concealment**. Lastly, almost everything the defendants assert could be true, but a valid fraud claim would still exist - under the theory of active concealment. By contract, MedPartners and AIG agreed not to disclose the existence of the LMU, and then to disclose only what was in the public release. The facts detailed in this brief show a knowing, active, fraudulent concealment - which is actionable, even in the absence of an affirmative duty to speak. "A duty to disclose may arise from the particular circumstances of the case, from a confidential relationship, or from a request for information. *Hardy v. Blue Cross & Blue Shield of Alabama*, 585 So.2d 29, 32 (Ala. 1991); *King v. National Foundation Life Ins. Co.*, 541 So.2d 502 (Ala. 1989). One may also recover for fraudulent concealment by showing active concealment of a material fact with an intent to deceive or mislead. § 6-5-103, Alabama Code 1975; *Soniat v. Johnson-Rast & Hays*; *Cornelius v. Austin; Harrell v. Dodson*, 398 So.2d 272, 276 (Ala. 1981)." *Dodd v. Nelda Stephenson Chevrolet, Inc.*, 626 So.2d 1288, 1293-94 (Ala. 1993).

Soniat v. Johnson-Rast & Hays, 626 So.2d 1256, 1258 (Ala. 1993) (some internal citations and quotations omitted), says:

> The defendants contend that they had no duty to disclose any facts relating to old termite damage because the Soniats never inquired about prior termite damage. However, proof of knowing concealment with intent to deceive may establish the obligation to disclose in an action claiming fraudulent concealment. In other words, a defendant who has no duty to disclose arising from his relationship with the plaintiff or the special circumstances of the transaction may nevertheless be liable for fraudulent concealment if he knowingly takes action to conceal a material fact with the intent to deceive or mislead the plaintiff. See §6-5-103, Ala. Code 1975 ("Mere concealment of ... a fact, unless done in such a manner as to deceive and mislead, will not support an action [for deceit]."; §6-5-104(b), Ala. Code 1975 ("A deceit within the meaning of this section [includes] (3) The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact...."). Therefore, proof that the defendants knowingly concealed the graph with the intent to deceive the Soniats will establish the first element, a duty to disclose.

Ex parte Farmers Exchange Bank, 783 So.2d 24, 28 (Ala. 2000), restated the *Soniat* holding, thusly: "A defendant who has no duty to disclose arising from his relationship with the plaintiff may nevertheless be liable for fraudulent concealment if he knowingly takes action to conceal a material fact that has been requested of him by the plaintiff and does so with the intent to deceive or mislead the plaintiff." This fits our case because, through formal discovery and otherwise, the material fact of insurance limits had been requested from the defendants. This passage from 37 Am. Jur. 2d Fraud and Deceit § 215 (database updated Feb. 2012) is also pertinent to our case: "A person who has knowledge of particular facts upon which the person intends to rely to exempt himself or herself from a pecuniary obligation about to be contracted with another, of which facts the other is ignorant, and which the other can learn only from the former or from documents in the former's keeping, is under an obligation to disclose them."

Plaintiffs recognize that *State Farm Fire and Cas. Co. v. Owen*, 729 So.2d 834 (Ala. 1998), held that duty to speak is generally a question of law for the court. Still, whoever makes

this "merits" determination (judge or jury) will decide a class-wide issue that is binding on the class as a whole. There is no legal or factual basis for finding that the defendants had a duty to speak to some class members, but not others. The duty to speak is a class-wide issue.

3. PROFESSOR RUBENSTEIN EXPLAINS WHY THIS IS NOT AN "ORDINARY" FRAUD CASE AND WHY THIS UNIQUE FRAUD-ON-THE-CLASS CLAIM IS SUITABLE FOR CLASS CERTIFICATION

Professor Rubenstein, who literally "wrote the book" on class actions, is one of plaintiffs' expert witnesses in this action. His report ("declaration") is Item 14 in Plaintiffs' Evidentiary Submissions. Here is his summary, from pp. 26-27:

I have stated my expert opinions that:

> Plaintiffs allege that a fraud was perpetuated upon a principal (the *MedPartners* class) by virtue of misrepresentations or omissions having been made to an agent (*MedPartners* class counsel) and/or fiduciary (the *MedPartners* court). Agency law enables a principal to pursue a fraud claim when its agent or fiduciary has been defrauded and permits the principal to demonstrate reliance by showing that its agents or fiduciary relied. There is no requirement that the principal show that it relied.
>
> Requiring a demonstration that the principal relied on a fraud perpetuated on her agent is especially inappropriate in a class action lawsuit because in a class action lawsuit the class's agents have authority to bind the class member principals without those principals' explicit approval. Given that individual class member consent to a settlement is unnecessary, individual class member reliance is simply irrelevant.
>
> Requiring each class member to demonstrate individual reliance in a class action lawsuit is not only unnecessary under principal-agent rules, it would also run afoul of the Due Process Clause. To require each member of the MedPartners class to show that she relied on the alleged misrepresentations or omissions in that matter would essentially turn the case into an opt-in case, in violation of the Supreme Court's holding in *Shutts*.
>
> As applied to the facts of this case: [1] the evidence of the defendants' misrepresentations or omissions is common evidence flowing from whether they met their duties to provide accurate information to the class's agents and to the class's fiduciary, the *MedPartners* Court; [2] those agents' and fiduciary's

> reliance is also a common issue; and [3] defenses do not appear to raise individual questions. Given the nature of the underlying transaction - a class action lawsuit - this class action about a class action lawsuit will not entail individualized inquiries.

Here is quoted a substantial passage from Prof. Rubenstein's declaration, explaining his arguments as to why this unique fraud claim is appropriate for class treatment. This long quotation is not indented, but is single-spaced to indicate it is a quotation. Some footnotes have been moved into the text and some footnotes have been omitted. The remaining footnotes have been renumbered to fit within the numbering system of the overall brief. Beginning at p. 1 of his Declaration (Report):

But the normal problems that plague certification of fraud cases do not, in fact, apply here for one simple reason related to the unique nature of this case: this is a class action lawsuit about a class action lawsuit, not about a set of individual market transactions. The nature of the underlying transaction - the class action lawsuit - renders individual class member reliance irrelevant:

Class members do not conduct class action lawsuits - the class's agents (class representatives and counsel) conduct such cases and the class's fiduciary (the class action court) safeguards the class's interests. Class actions serve important public goals but they would be infeasible if each class member had to be individually involved. Indeed, the primary point of the class action is that its solves the problem that individuals lack sufficient incentive to pursue small claims individually. It does so by enabling agents - class representatives and class counsel - to aggregate the class members's claims into a single suit. Upon settlement, class members receive notice and an opportunity to opt out, but there is no requirement that they explicitly consent. Requiring individualized consent would be illogical since the factor motivating class treatment is that class members do not have enough at stake to bother with the case. The class action replaces individual consent with court approval: the judge serves as the class members' guardian, reviewing the settlement's reasonableness on behalf of the absent class members.

Three conclusions follow from this case being a class action about a class action:

First, because class actions are agent-driven, the key legal principles that apply to this fraud case are those of agency law - namely, the only reliance that matters is that of the agent and fiduciary. In settling the *MedPartners* case, the defendants did not negotiate with individual class members. They negotiated solely with the class's agents and then sought approval of that settlement from the class's fiduciary. Under the basic rules of agency and trust law, if an agent or

fiduciary is defrauded, the principal is defrauded and the principal may pursue a cause of action in fraud. In doing so, the principal need not show it relied if the agent or fiduciary did, and the principal, if an entity like a corporation or class, surely need not show that every member of the entity relied.

Second, because class actions embody an extreme form of agency relationship whereby the agent has authority to bind the principal without the principal's explicit consent, individual class member reliance is especially irrelevant. After the defendants settled the *MedPartners* suit with the class's agent and secured preliminary approval from the class's fiduciary, class members received notice and could object or opt out. As is typical, the vast majority of class members did absolutely nothing and the court approved the settlement for them, without their explicit individual consent. Given that the class action embodies this form of agency, inquiring into individual class member reliance is not only unnecessary, it is illogical.

Third, requiring individual class member reliance would run afoul of the Due Process Clause, which protects a class member's right to rely on her agent and fiduciary. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809-810 (1985), the United States Supreme Court stated that, "[A] class-action plaintiff is not required to fend for himself. . . . The court and named plaintiffs protect his interests," and that, "[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." To now require each member of the *MedPartners* class to come forward and demonstrate individual reliance on the alleged misrepresentations or omissions would not only violate principles of agency law and be illogical, it would also run afoul of *Shutts* and the Due Process Clause.

As applied to this case, these principles show that:

The evidence here is common: plaintiffs allege that the defendants failed to disclose accurate information about their insurance coverage to the class's agents and to the class's fiduciary and that those agents and fiduciary relied on the misrepresentations or omissions on behalf of the whole class. The class's agents (*MedPartners* class counsel) made a formal discovery request for the defendants' insurance information; plaintiffs allege that by virtue of Alabama's discovery rules, the defendants had an obligation to provide an accurate response and seasonably to update that information. The class's fiduciary (the *MedPartners* Court) requested that the proponents of that settlement provide information about the defendants' financial situation; plaintiffs allege that by virtue of those requests, the defendants had an affirmative obligation to ensure that the Court had accurate information about its insurance. Plaintiffs further allege that the defendants did not provide accurate insurance information to the class's agents then stood mute while those agents passed on the misinformation to the class's fiduciary; they contend that the agents and fiduciary relied on the misrepresentations in, respectively, settling and approving the *MedPartners* case for $56 million. If the plaintiffs can prove these allegations, they will have met their burden - given the class action nature of the *MedPartners* case, the plaintiffs need not also show individual reliance by each *MedPartners* class member.

Moreover, it is little defense - and surely not an individualized defense - that the defendants provided accurate information about their insurance to the public in a press release or to the SEC in a 10-K filing; if the defendants were legally obligated to provide that information to the class's agents and fiduciary, provision of it to other parties in other ways is irrelevant.

In sum, if the plaintiffs can prove that the defendants duped the *MedPartners* class's agents and/or fiduciary to rely on misrepresentations or omissions, that will satisfy the reliance requirement in a class action about a class action settlement. Because reliance here is a simple inquiry directed at the reliance of the *MedPartners* class's agents and the *MedPartners* Court and not at each individual class member, common issues predominate and reliance does not preclude certification. . . .

III. THE RELIANCE INQUIRY FOCUSES ON THE RELIANCE OF THE MEDPARTNERS CLASS'S AGENTS AND COURT AND IS THEREFORE A COMMON, NOT INDIVIDUALIZED, INQUIRY

A. Agency Principles Apply To The Reliance Inquiry

Like its federal counterpart, Alabama Rule 23 requires that a party proposing to certify a class demonstrate that the class meets all of the requirements of Rule 23(a) and fit into one of the categories of Rule 23(b). Compare Fed. R. Civ. P. 23(a)-(b) with Ala. R. Civ. P. 23(a)-(b). See also *National Sec. Fire & Cas. Co. v. DeWitt*, 2011 WL 5607802 at *12 (Ala. Sup. Ct. Nov. 18,2011) ("Alabama's Rule 23 and the corresponding federal rule ... are virtually identical ... and federal authorities are persuasive when a court is interpreting the Alabama Rules of Civil Procedure.") (internal citations omitted). A separate Alabama statute underscores the plaintiffs' burden at class certification. See Ala. Code §6-5-641.

Plaintiffs here propose a class action under Rule 23(b)(3). They must therefore demonstrate that common issues predominate and that a class action is superior to other forms of adjudication, and, in particular that it is manageable. The critical question is whether class litigation of these particular fraud and/or suppression claims is likely to devolve into myriad individualized assessments that will predominate over the adjudication of common issues and therefore render aggregate litigation not a superior method of adjudication. See *Alfa Life Ins. Corp. v. Hughes*, 861 So.2d 1088, 1103-1104 (Ala. 2003) (noting that when "individual issues predominate over the common claims, manageability difficulties [may render the] case unfit for class certification").

The Court must "initially identify the substantive law applicable to the case and identify the proof that will be necessary to establish the claim." *DeWitt,* 2011 WL 5607802 at *13 (internal citations omitted). Plaintiffs pursue two claims for relief: misrepresentation and suppression. To make out a claim for fraudulent misrepresentation, a plaintiff must demonstrate: (1) that [the defendants] made a false representation, (2) that the misrepresentation involved a material fact, (3) that [the plaintiffs] relied on the misrepresentation, and (4) that the misrepresentation damaged [the plaintiffs]. *GE Capital Aviation Services, Inc. v.*

Pemco World Air Services, Inc., 2011 WL 6004610 at *9 (Ala. Sup. Ct., Dec. 2, 2011) (quoting *AmerUs Life Ins. Co. v. Smith*, 5 So.3d 1200, 1207 (Ala. 2008)).

Similarly, the fraudulent suppression claim requires a plaintiff to demonstrate: (1) that the defendant had a duty to disclose an existing material fact; (2) that the defendant suppressed that existing material fact; (3) that the defendant had actual knowledge of the fact; (4) that the defendant's suppression of the fact induced the plaintiff to act or to refrain from acting; and (5) that the plaintiff suffered actual damage as a proximate result. *Johnson v. Sorensen*, 914 So.2d 830, 837 (Ala. 2005) (quoting *Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So.2d 1143, 1161 (Ala. 2003) and *State Farm Fire & Cas. Co. v. Slade*, 747 So.2d 293,323-24 (Ala. 1999)).

Both torts contain two essential ingredients - a misrepresentation or omission and some form of reliance or inducement. The plaintiffs' burden here is to demonstrate that both the misrepresentation/omission and the relianceinducement aspects are common questions across the class.

In a normal class action lawsuit, plaintiffs may have trouble demonstrating that the misrepresentation and reliance evidence is common to all members of the class. While misrepresentations may be common if they are written and distributed in a mass fashion to all class members,[41] oral misrepresentations are less prone to common evidence unless, for example, made by a single speaker in a single place to the whole class.[42] Regardless of whether the misrepresentations or omissions are common, reliance may nonetheless be individualized if each class member has to demonstrate his or her reaction to the misrepresentation or omission.[43] This

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[41] See, e.g., *Ex parte Household Retail Services Inc*., 744 So. 2d 871, 877 (Ala. 1999) ("Whether a fraud claim is suitable for class-action treatment depends on the degree of similarity between the representations made to the class members ... Courts have often found that cases involving written misrepresentations distributed to all members of the class are suitable for class treatment.").

[42] *Alfa Life*, 861 So. 2d at 1097 (noting the "general rule that the individualized nature of oral communications in fraud claims between class members and defendants typically precludes class certification," but that "a plaintiff can have a class action certified on fraud claims based on oral misrepresentations by showing that the oral misrepresentations were uniform or that they were part of a standardized sales pitch"); Household Retail Services, 744 So.2d at 878 (noting that "courts have generally denied certification of [classes involving claims based on] oral communications because ofthe highly individualized nature ofthe statements between class members and defendants ... [unless plaintiffs can show] that the oral misrepresentations were uniform, e.g., were part of a standardized or 'canned' sales pitch").

[43] *Univ. Fed. Credit Union v. Grayson*, 878 So. 2d 280, 287 (Ala. 2003) ("Even ifthe alleged misrepresentations in a fraud case are uniform or have a 'common core,' the action may

is the problem that makes certification of fraud class actions difficult. See generally, Rubenstein et al., 2 NEWBERG ON CLASS ACTIONS § 4:26 (4th ed. 2004). It is not an unconquerable problem. The Alabama Supreme Court has noted that fraud classes can be certified[44] - and they regularly are.[45] Similarly, the United States Supreme Court has enabled certification of fraud classes by, for example, holding that the reliance requirement may be presumed in certain circumstances[46] and federal circuits courts have regularly noted that fraud class actions may be certified.[47]

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still be unsuited for class-action treatment if the degree of reliance varies among the persons to whom the representations were made. If); Alfa Life, 861 So. 2d at 1097 ("Even ifnumerous representations have a 'common core,' an action may still be unsuited for class-action treatment if material variations exist in the representations or if the degree of reliance varies among the persons to whom the representations were made.") (citing *Ex parte Green Tree Fin. Corp*., 723 So.2d 6, 10 n. 2 (Ala. 1998)).

[44] *Household Retail Services,* 744 So.2d at 881 (stating that "[T]his Court has not thus far adopted a blanket prohibition against the certification of a fraud class action. Therefore, as with other courts that have addressed the issue, we must consider whether proof of reliance in this case involves predominating individual issues of fact.").

[45] *Id*. (citing *Warehouse Home Furnishing Distributors, Inc. v. Whitson*, 709 So.2d 1144 (Ala. 1997); *Ex parte Gold Kist*, 646 So.2d 1339 (Ala. 1994); *Harbor Ins. Co. v. Blackwelder,* 554So.2d 329 (Ala. 1989)).

[46] See Stoneridge, 552 U.S. at 159 ("We have found a rebuttable presumption of reliance in two different circumstances. First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance. Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. The public information is reflected in the market price of the security. Then it can be assumed that an investor who buys or sells stock at the market price relies upon the statement.") (citing *Affiliated Ute Citizens of Utah v. US.*, 406 U.S. 128, 153 (1972) and *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988)).

[47] See, e.g., *In re First Alliance Mortg. Co.*, 471 F.3d 977, 991 (9th Cir. 2006) ("Class treatment has been permitted in fraud cases where, as in this case, a standardized sales pitch is employed."); *Klay v. Humana Inc*., 382 F.3d 1241,1258 (11th Cir. 2004) ("Under well-established Eleventh Circuit precedent, the simple fact that reliance is an element in a cause of action is not an absolute bar to class certification."); *Moore v. Paine Webber, Inc*., 306 F.3d 1247, 1254 (2d Cir. 2002) ("Fraud actions must therefore be separated into two categories: fraud claims based on uniform misrepresentations made to all members of the class and fraud claims based on individualized misrepresentations. The former are appropriate subjects for class certification because the standardized misrepresentations may be established by generalized proof.").

Having recited the legal principles establishing that fraud cases may be certified as class actions, it would behoove me to apply those principles to the facts of this case. But in fact, these cases are not the most pertinent precedent for what happened here because the facts of this case are so unique. In a normal class action, the defendant may have sold a product or security to disparate individual consumers or investors. Each consumer or investor made an individual decision at the point of purchase about whether or not to buy the product. The class action, alleging fraud, attempts to aggregate all of these individual purchasers into one action. In this case, by contrast, the defendants are alleged to have made misrepresentation to the class's agents (its counsel and class representatives)[48] and to the class's fiduciary (the class action court),[49] not directly to each class member individually. This is not the aggregation of many discrete transactions but rather a group's singular pursuit of the defrauding of its agent and fiduciary.

A factual analogy helps bring home the point. Assume that in a class action, the class's agents - class counsel- undertake an act pursuant to their authority to represent the class, such as retaining a private company to provide notice to, or claims administration services for, the class. For example, assume class counsel contracts with a claims administrator to provide notice to the class, set up a website for the case, staff an 800-number, and distribute the common fund. Class counsel and the claims administration company agree that the services will be provided for a $200,000 contract price. Class counsel pays the claims administrator, from the class's common fund, a $100,000 advance. Weeks pass and nothing happens - no notice program, no website, no 800-number, no claim forms, no claiming. Class counsel contacts the claims company and learns that its phone lines have been disconnected and that its president has sailed for Bermuda in a new yacht purchased with the class's money. Class counsel then brings a fraud case against the "Madoffian" claims administrator. The case is brought on behalf of the class, as the funds

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[48] There is an extensive literature demonstrating that the class action is at its core a principal agent relationship. *See, e.g.,* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 COLUM. L. REV. 370,375 (2000) ("[T]he class action is essentially an organizational fonn that at bottom involves a principal/agent relationship.").

[49] A court overseeing a class action has a fiduciary duty to the class, essentially acting as the class's trustee. *See, e.g., In re BankAmerica Corp. Sec. Litig.,* 350 F.3d 747, 751 (8th Cir. 2003) ("[T]he district court acts as a fiduciary who must serve as guardian of the rights of absent class members.") (internal quotation omitted); *Reynolds v. Beneficial Nat 'l Bank,* 288 F.3d 277,279-80 (7th Cir. 2002) ("We and other courts have gone so far as to tenn the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."); *Grant v. Bethlehem Steel Corp.,* 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately.") (internal quotation marks omitted).

belonged to the class and any recovery will be returned to the common fund. To succeed in that fraud case, class counsel may need to demonstrate that class counsel relied on the assurances of the defendant that it was a legitimate claims facility. But there would be absolutely no requirement that any class member - much less each and every one - demonstrate reliance on the claims administrator's representations. This is so for a simple reason: because the class is a principal that, in these circumstances, acted through its agent, it is permitted to rely on its agent's activities; if the agent is defrauded, then the principal (the class) is defrauded and the principal may pursue the fraud claim with reliance demonstrated through the agent's reliance.

While the principal-agent construct for fraud applies when the principal is a single individual, it applies even more critically when the principal is an entity like a corporation, a union, a government, or a class. In these circumstances, the principal acts through agents precisely because of the difficulty of coordinating the interests of each individual within the entity. Thus, shareholders in corporations elect directors who hire officers who then run the corporation. If the corporation is defrauded in dealing with third parties, it is likely because its agents - who run the day to day operations - have been defrauded. As described in the following paragraphs in the text, the corporation *qua* corporation then sues for fraud as an entity, with reliance demonstrated by the reliance of the corporation's agents; there is no requirement that the principal - the corporation - demonstrate reliance, much less any requirement that every individual shareholder show reliance.

In a class action lawsuit, the class is an entity, much like a corporation, a trust, or government. See generally, David L. Shapiro, Class Actions: The Class as Party and Client, 73 NOTRE DAME L. REV. 913 (1998). Thus, the principle articulated in this note - that fraud on the agent is fraud on the entity - pertains to fraud cases brought on behalf of a class. Moreover, for the reasons set forth, *infra,* these principles are especially important given the nature of the particular principal-agent relationship at the heart of the class action mechanism.

Given the principal-agent relationship that exists between the class and class counsel, the legal principles that govern the fraud claims in this case are those of agency law. When an agent justifiably relies on the misrepresentation of a third party, the principal has a cause of action in fraud against that third party. In other words, when a third party defrauds an agent, it defrauds the principal as well. The Restatement (Second) of Agency states the principle in this way: "A person who fraudulently obtains a contract through, or enters into a transaction with, an agent acting within the scope of his power to bind the principal, or who by fraud causes the agent to do what would be a violation of his duty to the principal if the agent knew the facts, is subject to liability to the principal whether the fraud is practiced upon the agent or upon the principal." RESTATEMENT (SECOND) OF AGENCY § 315 (1958 and 2011 Supp.) (citing 12 cases). See also *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 463 S.E.2d 618,632 (S.C. App. 1995) ("Where a fraud is worked upon an agent by a third person, either by misrepresentation or by silence, the fraud is considered as worked upon the principal, and the latter has a right of action against the third person.") (quoting 3 AM. JUR.2D AGENCY § 298 (1986)), aff'd, 489 S.E.2d 470 (S.C. 1997).

To pursue the wrong-doer, the principal need only demonstrate that there was a misrepresentation made to its agent[50] and that its agent relied on that misrepresentation to the detriment of the principal. See, e.g., *In re Fine Host Corp. Sees. Litig*., 25 F.Supp.2d 61, 71-72 (D. Conn. 1998) ("Under well-settled principles of agency law, one who defrauds an agent is liable to the principal. . . . In other words, a principal may sue when it is his agent who has been defrauded. Applying that general principle of agency law to this action, plaintiffs need only allege that an agent acting on their behalf reasonably relied on the alleged misrepresentations of the defendants."); *Schneider v. Freres & Co.*, 159 A.D.2d 291,552 N.Y.S.2d 571,575 (1990) ("[A] negligent statement made by a third person to an agent and relied on by the agent to the principal's detriment is actionable by the principa1.").

There is no legal requirement that the principal also demonstrate that the principal relied,[51] much less a rule that if the principal is an entity, every component demonstrate reliance individually.[52] These principles apply as well to the fiduciary relationship between the court and

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[50] See, e.g., *In re Beacon Associates Litigation*, 745 F.Supp.2d 386, 408 (S.D. N.Y. 2010) (noting plaintiffs' argument that "misrepresentations made to an agent are deemed to [be] made to the principal" and finding that "[i]ndeed, courts have endorsed such a 'fraud on the agent theory'" in securities cases).

[51] See, e.g., *Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App. 4th 1559,1568 (4th Dist. 1996) ("[T]he notion that reliance by an agent may be imputed to the principal, even though the misrepresentation was never communicated to the principal, is ensconced in California law."); *ML-Lee Acquisition Fund*, 463 S.E.2d at 632 (holding "the reliance on a representation by an agent amounts to the reliance by the principal" and thus a principal need only demonstrate that its agent relied to have an actionable claim for fraud), aff'd in relevant part, 489 S.E.2d 470 (S.C. 1997) ("[T]he reliance of an agent acting within the scope of his agency is the reliance of the principa1."); *Alten v. Atl. Fin. Fed*., 805 F. Supp. 5, 7 (E.D. Pa. 1992) (holding reliance requirement satisfied where the plaintiff's accountants "acting as plaintiff's representatives . . . relied on the financial reports and thus advise[d] their clients based on this information"); *Jernryd v. Nilsson,* 84 C 7551, 1985 WL 3590 at *11 n.13 (N.D. Il1. Nov. 8, 1985) (stating the rule that "the foreseeable reliance by the agent is imputed to the principal").

[52] A South Carolina appellate court explained the point this way: "The trial court's requirement that the 'decision makers' actually review and rely on a statement in order to prevail in a negligent misrepresentation claim simply ignores the fact that corporations and other business entities must function through their agents and employees in order to operate efficiently. To require company presidents or members of the board of directors to review individually every document important in every transaction would bring the operations of the business to a standstill. Accordingly, we conclude that reliance by an agent amounts to reliance by the principal in cases of both fraudulent and negligent misrepresentation." *ML-Lee Acquisition Fund,* 463 S.E.2d at 632. That case therefore considered and rejected the notion that a company's officers need show individual reliance; no one even made the more extreme argument

the class, as existence of a fiduciary duty enables the beneficiary to rely on the fiduciary,[53] such that fraud on the trustee constitutes fraud on the trust, or its beneficiaries. See, e.g., *In re Del Grosso*, 89 B 06606, 1992 WL280788 (Bankr. N.D. Ill. Sept. 21,1992) ("Under Illinois law, the Trustee must establish the following elements to prevail on a fraud based cause of action: (1) false statements of material fact rather than opinion; (2) known or believed to be false ... (3) intent to induce the Trustee to act; (4) action by the Trustee in reliance on the truth of statement; (5) his justifiable reliance or right to rely; and (6) damage resulting from such reliance."). See also *Indep. Trust Corp. v. Fid. Nat. Title Ins. Co. of New York*, 577 F. Supp. 2d 1023, 1037 (N.D. Ill. 2008) (discussing requirements for fraud in context of action brought by trustee and noting that reliance is that of the trustee).

Because the allegations in this case are that the class's agents and its fiduciary were defrauded in the *MedPartners* action, the fraud claim herein may be proven by demonstrating that misrepresentations or omissions were made to the agent or fiduciary and that the agent or fiduciary relied, or can be presumed to have relied, upon them. There is no requirement in the context of this case - a class action about a class action - that either the principal itself (the class) or each and every one of its members demonstrate reliance.

B. Individual Reliance Is Especially Irrelevant In Class Action Lawsuits

If class members do not have to show individual reliance when their agents are defrauded, it may seem that they are maintaining a cause of action without demonstrating that they suffered any harm. But this is a misunderstanding of the nature of a class suit. In a class action lawsuit, notice is sent to the class members that their agents propose a settlement of their claims. The implication of this is that the agents, having negotiated a deal for their principal, transmit the terms of the deal to the principal and the principal then makes a decision about whether to accept or reject the deal. In a normal situation, like an individual lawsuit, if the principal does nothing, the deal is likely not consummated because the agent cannot bind the principal. See, e.g., Ala. R. Prof. C. 1.2 ("A lawyer shall abide by a client's decision whether to accept an offer of settlement

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that the shareholders had to show reliance for the corporation to have a cause of action. See also *LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, L.L.C.*, 659 F.3d 450 (5th Cir. 2011) (affirming jury finding of justifiable reliance in action brought by partnership where partner, acting as agent for partnership, relied on defendant's misrepresentations); *Boone County Cmty. Credit Union v. Masel,* 665 N.W.2d 440 (Iowa Ct. App. 2003) (affirming judgment for credit union when individual manager relied on defendant's misrepresentations over the course of telephone conversations).

[53] See, e.g., *Alfa Mut. Ins. Co. v. Northington*, 561 So. 2d 1041, 1049 (Ala. 1990) (Houston, J., concurring specially on Application for Rehearing) (noting that "[w]here a fiduciary prepares a writing for his beneficiary's signature, then the beneficiary is entitled, by reason of this special relationship, to rely upon the fiduciary's statements of what the writing contains") (internal quotation omitted).

of a matter."). One might conclude either that the principal did not rely on the fraud wrought upon its agents or that it suffered no harm from that fraud because the deal was never finalized. This is the instinct that would encourage a court to insist that each class member show how she individually relied on the misrepresentations or omissions allegedly made to the class's agents in the *MedPartners* case.

But the class action does not fit this normal principal-agent relationship. If a class member in a class action does nothing, her claims are actually compromised and lost to her once the court enters final judgment.[54] The class member's claim becomes part of the final judgment regardless of what actions she takes so long as she does not opt out - her cause of action is compromised upon final approval if she files a claim, it is compromised if she reads the notice and decides not to file a claim, it is compromised if she never reads the notice, and the claim is compromised if the class member never even receives the notice (so long as it was reasonably calculated to reach her). This is so because in a class suit, the class's agents have authority to bind the class without the class member's explicit acquiescence.[55] Hence, class members in a class action lose something - their chose in action - when their agents rely on a fraud whether or not they took any action whatsoever. In such circumstances, individual class member reliance is truly irrelevant.

The exceptional rule that a class's agents may bind the class members without their explicit approval in a class action is in place not by happenstance but because class actions serve important public goals and would be infeasible if each class member had to be individually involved. Indeed, the primary purpose of the class action lawsuit is that it solves the problem that individuals lack the incentive to pursue small harms individually. Nearly 40 years ago, the Supreme Court stated that where individual claims are for small amounts of money, the class action device is often the sole means by which individuals may receive compensation: "A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).

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[54] See *Shutts*, 472 U.S. at 807 (holding that each class member has a "constitutionally recognized property interest" in her cause of action and that a class action judgment "may extinguish the chose in action forever through res judicata").

[55] See, e.g., *Shutts*, 472 U.S. at 810 (noting that "an absent class-action p1aintiffis not required to do anything" but that "a valid adverse judgment may extinguish any of the plaintiffs claims which were litigated"); *Battle v. Liberty Nat. Life Ins. Co.*, 770 F. Supp. 1499, 1516 (N.D. Ala. 1991), *aff'd*, 974 F.2d 1279 (11th Cir. 1992) (noting that "plaintiffs who are in fact provided with appropriate notice need not actually receive it in order to be bound") (citing 7 A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1787, at 214 (2d ed. 1986) (internal citations omitted)).

As the Supreme Court recognized, individuals have no practical means of bringing suit to be compensated for small harms because the cost of the lawsuit outweighs their individual recovery. Thus, absent the class action device, a dispersed group of individual claimants typically will not be compensated for small harms: "Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326,339 (1980).

The class action device solves this problem by aggregating many individual claims into a single suit and distributing the costs of representation across the entire claimant group.[56] But for the aggregation mechanism to work, it obviously cannot then turn around and require each individual class member to express explicit consent to the actions of the class representatives and class counsel. Therefore, in class suits, for critical policy reasons, the class members' agents - their class representatives and counsel - possess the authority to bind them without their explicit approval. In such circumstances, it is simply illogical to require a demonstration that each class member relied on a misrepresentation or omission made to her agent.

C. Requiring Individual Reliance Would Run Afoul of the Due Process Clause

The conclusion that class members are entitled to rely on the actions of their agents is not only logical, it is essentially required by the Fourteenth Amendment's Due Process Clause as interpreted by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and its progeny. *Shutts* was a nationwide class action challenging Phillips Petroleum's failure to pay interest on delayed royalty payments. The case was litigated in the state courts of the state of Kansas. Few class members had any connection to Kansas. Phillips Petroleum argued that the class action could not bind these class members because their lack of connection with Kansas meant that the Kansas court had no personal jurisdiction over them. Given the absence of a territorial connection, Phillips Petroleum argued, the class members should have to affirmatively opt in to be part of the class suit. The Supreme Court rejected both premises. First, the Court held that the Due Process Clause did not require a territorial connection between absent class members and a class action court because absent plaintiffs were differently situated than defendants:

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[56] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591,617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338,344 (7th Cir. 1997)); *Shutts*, 472 U.S. at 809 ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.").

> Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests .... [A]bsent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counselor appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs. Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiffs claims which were litigated. Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection..

Shutts, 472 U.S. at 810 (citations and footnotes omitted) (emphasis added).

Second, the Court held that one of the things that absent class members were not required to do was to opt-in to the class suit:

> We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively "opt in" to the class, rather than be deemed members of the class if they do not "opt out." ... Any plaintiff may consent to jurisdiction. The essential question, then, is how stringent the requirement for a showing of consent will be. We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process. Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff s claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.

Shutts, 472 U.S. at 812-13.

Because requiring plaintiffs to opt-in to class actions undermines the conceptual bases of such actions, the Second Circuit has stated that "substantial legal authority supports the view that by adding the 'opt out' requirement to Rule 23 in the 1966 Amendments, Congress *prohibited* 'opt in' provisions by implication. *Kern v. Siemens Corp*., 393 F.3d 120, 124 (2d Cir. 2004) (emphasis in original) (citing *Clark v. Universal Builders, Inc*., 501 F.2d 324, 340 (7th Cir. 1974) ("[T]he requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B) .... "); *Enter. Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y.1980) ("Rule 23(c)(2)(B) calls for a notice that enables prospective members to opt-out, in language strongly suggesting the impropriety of opt-in requirements (i.e. 'the

judgment, whether favorable or not, will include all members who do not request exclusion') ... ").

The Second Circuit noted that "eminent authorities on the Rules agree," listing the following:

> "There is no authority for establishing 'opt-in' classes in which the class members must take action to be included in the class. Indeed, courts that have considered 'opt-in' procedures have rejected them as contrary to Rule 23." 5 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 23.104[2][a][ii] (3d ed. 2012).
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> "Federal class action procedures do not provide for 'opt-in' classes in which the class members need to take action to be included in the class. Therefore, *a class member may do nothing and rely on the class counsel and class representative to conduct the action, in which case the class member is bound by the judgment*." 2-14A JAMES WM. MOORE, ET AL., MOORE'S MANUAL-FEDERAL PRACTICE AND PROCEDURE § 14A.23[5][f] (2012) (internal citations omitted) (emphasis added).
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> "The ability of a member to secure the benefits of a successful termination of the action without affirmatively pressing his own claim is particularly important because it assures that small claimants who would be unable to protect their rights through separate suits can take advantage of the judgment in the class action without the burden of actually participating. It was for this reason that the Advisory Committee specifically rejected the notion of requiring absent class members to opt-into the action to secure its benefits." 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1787, at 214 (2d ed. 1986 & 2011 Update) (internal citations omitted).
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> "Bar[ring] the claims of the passive members unless within a reasonable period they file a brief statement of their intent to prove damages" would have "the effect of obliging absent class members to opt-in, [which] is directly contrary to the philosophy of Rule 23(c)(2)." 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1787, at 216 (2d ed. 1986 & 2011 Update) (internal citations omitted).

To require each member of the *MedPartners* class to demonstrate his or her reliance on the misrepresentations or omissions that were made to the class's agents in that case would run afoul of the Supreme Court's holding in Shutts. Requiring individual reliance here would effectively turn *MedPartners* into an opt-in class action as it would suggest that no class member from that case was permitted to rely on his or her agent; rather, each had to act individually.

Because the Due Process Clause ensures that class members may rely on their agents and need do nothing themselves, the *MedPartners* class members cannot now be made to come forward and demonstrate that they did something in *MedPartners*. Such a requirement would violate the Due Process Clause.

D. As Applied, Plaintiffs Need Only Demonstrate That The *MedPartners* Class Counsel and/or the *MedPartners* Court Relied on the Alleged Misrepresentations or Omissions Concerning the Insurance Coverage in That Matter; They Need Not Demonstrate That Each Individual Class Member Relied

The two critical questions in this lawsuit are (1) whether the defendants misrepresented their insurance coverage information in the *MedPartners* case; and, if so, (2) whether there was reliance on those misrepresentations or omissions. Both inquiries focus on evidence common to the whole class, not on individualized inquiries, and therefore the reliance inquiry does not impede class certification.

The Alleged Misrepresentations or Omissions Are Common. Plaintiffs allege that the defendants failed to provide truthful information about their insurance coverage in at least two distinct contexts: (1) pursuant to formal and informal discovery requests made by *MedPartners* class counsel; and (2) pursuant to explicit questions posed by the *MedPartners* court. Both sets of evidence are common to the whole class:

Class Counsel's Discovery Requests. In at least one of the initial *MedPartners* cases, plaintiffs served a formal discovery request on the defendants seeking documents related to the scope of their insurance coverage.[57] Defendants objected to the request on various grounds,[58] but they appear to have provided some evidence thereof, as the topic was not made part of plaintiffs' subsequent motion to compe1.[59] Under Alabama procedural rules, as under the federal rules,

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[57] See First Request for Production of Documents to Defendants at 11, Request #13, *Schachter v. MedPartners, Inc.*, Case No. 98-00297 (Ala. Cir. Ct., Jefferson County) (filed Feb. 2, 1998) (seeking "All documents constituting or concerning any insurance policy under which any defendant may claim coverage to satisfy part or all of any possible liabilities as a result of any of the claims asserted in this litigation.").

[58] See Defendants' Response To Plaintiffs' First Request for Production of Documents at 11, Response #13, *Schacter [sic} v. MedPartners, Inc.*, Civil Action No. CV-98-297 (Ala. Cir. Ct., Jefferson County) (filed March 12, 1998) (noting objection and stating that "Notwithstanding and not waiving this objection, defendants will produce ... nonprivileged documents constituting contracts of insurance applicable to the period determined to be pertinent for coverage purposes . . . ").

[59] See Plaintiff's Motion to Compel Discovery Pursuant to the First Request for Production of Documents, and the Notice of Taking Deposition Pursuant to Rule 30(B), *Griffin*

parties have a duty to supplement discovery requests as circumstances change.[60] Plaintiffs contend that defendants therefore had a duty to provide *MedPartners* class counsel with its expanded insurance coverage information.

The Court's Information. In performing its function of safeguarding the class members' interests by overseeing the settlement, the *MedPartners* Court specifically asked the parties proposing the settlement to provide information regarding the defendant's resources.[61] At the preliminary approval hearing, the Court asked about the defendant's financial situation and insurance coverage[62] and at both the preliminary and final approval hearings, class counsel repeatedly represented to the Court that the settlement secured all of the available insurance

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v. MedPartners, Inc., No. 98-297 (Ala. Cir. Ct., Jefferson County) (filed Aug. 20, 1998) (seeking to compel with regard to requests 1-12, but not 13, the insurance request). See also Joint Affidavit of Neil L. Selinger and Steven E. Cauley in Support of the Proposed Settlement and Joint Petition for an Award of Attorneys' Fees and Reimbursement of Expenses at 22, *Griffin v. MedPartners, Inc.*, Civ. Action No. CV-98-00297 (Ala. Cir. Ct., Jefferson County) (filed Aug. 20, 1998) (stating that "Plaintiffs' counsel also learned that the insurance coverage available provided for maximum benefits of $50 million ... ").

[60] Compare Fed. R. Civ. P. 26(e) ("A party who has ... responded to [a] request for production ... must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court.") with Ala. R. Civ. P. 26(e)(2) ("A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis 0 f which the party (A) knows that the response was incorrect when made, or (B) knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.").

[61] See Order at 3, *Griffin v. MedPartners, Inc.*, Civil Action No. CV 98-0297 (WJW) (Ala. Cir. Ct., Jefferson County) (filed May 10, 1999) (asking proponents of the settlement to address in writing, *inter alia*, "the financial ability of defendant to withstand a greater judgment in an amount likely to trigger Due Process considerations ... ").

[62] See Transcript [Preliminary Approval Hearing] at 67-68, *Griffin v. MedPartners, Inc.*, Civil Action No. CV 98-0297 (WJW) (Ala. Cir. Ct., Jefferson County) (May 3, 1999) (["Tr. Prelim. Hearing"]) (quoting Court as stating, "So you're saying you've got the limit, that is ... as plaintiffs you've got the limits and there's simply no way that you can avoid saying that this must be in the best interest of your plaintiffs ... "). See also Transcript [Final Approval Hearing] at 61, *Griffin v. MedPartners, Inc.*, Civil Action No. CV 98-0297 (WJW) (Ala. Cir. Ct., Jefferson County) (July 9, 1999) (["Tr. Fairness Hearing"]) (quoting Court as stating, "[I]t's a settlement that is almost too good to be true in light of the condition of the Defendant.").

coverage.[63] Plaintiffs allege that the defendants therefore had an explicit duty to ensure that the information provided to the Court was accurate.

The Reliance Was Common. Because the alleged misrepresentations or omissions were made to the class's agents and/or fiduciary, the question of reliance focuses solely on those actors and evidence of it will be common to the whole class.

Class Counsel's Reliance. Class counsel reported to the *MedPartners* court that the information about the insurance coverage was critical to its decision to settle a case they thought could be worth billions of dollars for only $56 million. This testimony suggests that class counsel relied on the misrepresentations or omissions.

Court's Reliance. The Court asked in writing for the parties to provide information about the defendant's financial information and commented upon that issue at the settlement hearing. These facts suggest that the Court's approval of the $56 million settlement relied on supposed scope of coverage. Because the alleged misrepresentations or omissions were made to the class's agents and fiduciary, those parties' reliance must be demonstrated, but there is no further requirement that each class member show that she relied on these representations or omissions. . . .

The applicable agency law principles, as applied to the facts of this case, show that the evidence of both misrepresentation and reliance is common. In the context of the facts of this unique case, there is no requirement that the plaintiffs demonstrate that each individual member of the *MedPartners* class relied on the alleged misrepresentation or omissions. Because the misrepresentation and reliance evidence is common, common issues will predominate and the reliance requirement should not impede class certification.

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[63] See, e.g., Tr. Prelim. Hearing at 26 (quoting class counsel as stating that, "$56,000,000 which constitutes the entire amount of insurance proceeds available in this action and in the context of a company which just disclosed in its most recent annual report that it has a negative net worth of more than $1.1 billion dollars is an extraordinary recovery ... "); Tr. Fairness Hearing at 37 (quoting class counsel as stating, "[W]e have a situation where we have not only obtained the best possible recovery we could get under those policies, we've maximized them beyond the original scope of the policies.").

C. THIS FRAUD CLASS ACTION SHOULD BE CERTIFIED AS A "MANDATORY" CLASS, PURSUANT TO RULE 23(b)(1)(A)

A single legal entity, the 1999 class, was defrauded (allegedly) by CVS and AIG when the Court and the class was falsely told that the limits of insurance was $50 million.[64] The class has a legal status as an 'entity' separate and apart from the class representatives and the absent class members. See *Sosna v. Iowa*, 419 U.S. 393, 399 (1975) ("When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant."); *Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331, 1339 (11th Cir. 2003) ("a class has a legal status separate from the named plaintiff"); and *Corbitt v. Mangum*, 523 So.2d 348, 351 (Ala. 1988) (internal citations and quotations omitted): "Additionally, it is well settled that when the court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the named representative. Consequently, the plaintiffs' class in the instant case had a legal status and interest separate from the interest asserted by Audrey Pinkston, and the claims of the class were not extinguished because her claim subsequently failed."

The class complaint filed by Lauriello in October 2003 is (as determined by the Supreme Court) a "new" claim, but NOT on behalf of a "new" class (also as held by the Supreme Court). Assume that Lauriello's allegations are true: that AIG and CVS intentionally lied to the Court and to 1999 settling class counsel in regard to the amount of available insurance in order to trick the Court and the 1999 class into accepting and approving a $56 million settlement. What

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[64] Or, $56M.

AIG/CVS did was not a series of independent misrepresentations to separate individuals. Instead, AIG/CVS defrauded a certified class - a single, separate, legal entity. That single legal entity now can sue for fraud in inducing the settlement, without necessitating a new certification of the "class." If this Court determines that the fraud "claim" is properly certifiable as a class-wide "claim," then that claim ought to be litigate just one time, via a (b)(1) mandatory class. There is no logical basis for permitting individual class members to opt out when it was not the individual who was defrauded - - - it was class itself.

As discussed above, e.g., by Prof. Rubenstein, this case does not present the ordinary, garden-variety fraud scenario wherein a group of individuals, who were independently and individually defrauded, are attempting to band together for class action treatment. Instead, this unique case presents a situation where an already- certified class, in its capacity as a class, was defrauded. (For example, once the class was certified and a person did not opt out, that person was bound to whatever settlement the Court approved, and that person could no longer make individual decisions.) Thus, the proper party plaintiff is the already-certified 1999 class, and the three plaintiff (other than Lauriello) simply seek appointment to act as the representatives for that legal entity. So, the claim at issue (fraud-in-the-settlement) is not one on behalf of a "new," putative class. The class was certified and the class was defrauded. There was one victim: the class.

For example, what if AIG/CVS had simply refused to transfer the $56 million after agreeing in writing and in open court to settle? Who would have been the proper party to have moved or sued to enforce the settlement agreement? Obviously, the already-certified 1999 class. No new class would have had to have been certified to enforce the settlement. The only question

would be whether the new "claim," to enforce the settlement, is the type of "claim" that can be efficiently handled on a class basis. Or, what if the depositor bank had negligently failed to place the settlement escrow into an interest-bearing account, and the class lost $1M of interest. Obviously, the class would be the plaintiff against the bank, and it would be a mandatory class because the bank acted uniformly toward the class and everyone in it, and there would be no logical or lawful basis for ordering the bank to pay interest to some class members but not to others. Just as in our real case, there is no issue of individual reliance or proof needed in these hypotheticals.

Plaintiffs contend that Rule 23(b)(1) "fits" this case better than (b)(3) because a hypothetical plaintiff litigating this claim alone would logically and necessarily have to prove that ***the class*** was defrauded. That hypothetical plaintiff class member would have had no individual involvement with or input into the settlement process. By definition, that absent class member "relied" on class counsel and the court. That hypothetical plaintiff suffered financial loss from defendants' fraud only by virtue of his membership in the 1999 settlement class. He was injured only indirectly, and derivatively. In such a hypothetical individual lawsuit, that plaintiff could win ***only*** by proving that the class (the class as a whole and every class member, derivatively) was defrauded. Whichever way the hypothetical case is decided, the loser faces a very real specter of preclusion (collateral estoppel), or, at very minimum, being left practically unable to vindicate their rights because of the force of stare decisis. This is why (b)(1) "fits" our unique situation better than started from scratch with a new notice and opt out period. Individual litigation does not "fit" the fraud-in-the-settlement-of-a-class-action claim alleged herein.

"The most likely candidates for being successfully certified as a Rule 23(b)(1)(A) class

would have one or more of the following characteristics: 1. The suit challenges the conduct or practices of defendants who are required by law or by practical circumstances to deal with all class members in the same way." 2 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 4:8 (4th ed.) (database updated Nov. 2011). Once a class is certified, the court, class counsel, and the defendants have to treat class members equally.[65] Because, in 1999, CVS/AIG could not have elected to pay some class members but not pay others (who are identically situated), individual litigation in 2012 of the fraud claim does not make sense. The class itself, as a single entity (and thus, derivatively, every class member) was either defrauded, or not. The class as a whole will either win or lose on the merits.

"A class suit seeking primarily damages relief . . . may qualify under both Rule 23(b)(1) and (3) categories. Subdivisions (b)(1)(A) and (B) therefore have unique applicability in damage cases where the court is desirous of avoiding opt-out rights for class members. Certain aspects of mass tort cases particularly lend themselves to Rule 23(b)(1) class category treatment which would bind everyone similarly situated. . . . Rule 23(b)(1)(A) class actions are not limited to those suits seeking primarily declaratory or injunctive relief. Monetary damages may be a major if not predominant form of relief sought." *Id.*

"The Supreme Court recently clarified the limited availability of this provision, stating that 'Rule 23(b)(1)(A) takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as

[65] Today, in this 2003-filed fraud class, each class member has an identical and equal claim and must, therefore, be treated equally. We mean "equal" as in an identical legal claim. Money damages will vary with numbers of shares owned.

against downriver owners).' *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Thus, 'the phrase "incompatible standards of conduct" refers to the situation where different results in separate actions would impair the opposing party's ability to pursue a uniform continuing course of conduct.' Potential stare decisis impact of separate actions also does create a risk of inconsistent or varying adjudications which would establish incompatible standards. Rule 23(b)(1)(A) certification is appropriate only in cases presenting minimal individual issues. If the factual circumstances of the putative class members vary in any material respect, the justification for (b)(1)(A) certification — avoidance of subjecting the defendant to incompatible judgments — is absent." 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 5:2 (8th ed.) (database updated Nov. 2011).

Individual litigation would violate the principle established in *Sosna* that a class, once certified, becomes an independent legal entity. Logically, ours can only be a mandatory class action because the defendants acted against the 1999 class as a whole. Individual actions would raise the specter of inconsistent results. A class defendant cannot just pay some class members and not pay others identically situated. Today, in this 2003-filed fraud class, each class member has an identical and equal claim[66] and must, therefore, be treated equally.[67] There is no basis for

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[66] We mean legally "equal," as to liability. Obviously, each individual's pro rata portion of money damages will vary, depending on how many shares of stock they owned and when they bought and sold.

[67] See *Dechert v. Cadle Co.*, 333 F.3d 801, 803 (7th Cir. 2003) (class fiduciaries must treat "all members of the class equally"); *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) ("If they . . . are treated equally in that agreement with other class members making similarly strong claims"); and *Lowery v. City of Albuquerque*, No. CIV 09-0457, 2012 WL 394392 (D. N.M. Jan. 24, 2012) ("Indeed, the treatment of named Plaintiffs can only be justified if all similarly situated plaintiffs are treated equally").

the Court or these defendants to treat members of this fraud class differently. That is one major reason that individual litigation would be inappropriate.

Defendants did not harm thousands of separate, individual stockholders; they harmed one, single class. A single legal entity was harmed. So, any attempt at individual litigation would necessarily end up deciding the ultimate question - i.e., whether or not the class had been defrauded. That decision would legally bind the loser, through collateral estoppel, or at least create the practical problem of stare decisis.

A single class member cannot litigate this claim in an individual action. It is analogous to a Rule 23.1 shareholder derivative action, where the claim has to be brought in the name of the corporation because the shareholder was not directly and individually injured (even though his shares dropped in value from $30.00 each to $1.25), the individual feels an economic loss only because the corporation in which he held shares was harmed by the defendant. In this case, the 1999 class is like a corporation, so that, when it was injured by the defendants' fraud, the class was injured and the class members suffered an economic loss only derivatively through their class being injured.

The stockholders' due process right to opt out have already been protected because they had their chance to opt out in 1999. And, those subclass B members who do not wish to participate in this 2003-filed fraud action can simply ignore their notices of settlement or judgment and decline to file a claim at the end of this case (or subclass A members can decline to cash their checks).

IV. ARGUMENT FOR ESTOPPING THE AIG DEFENDANTS FROM DENYING THE EXISTENCE OF AN ALREADY-CERTIFIED CLASS

The Supreme Court has already held that estoppel applies to CVS. That is, CVS is estopped to deny the existence of an already-certified class, and the only remaining question is whether the fraud claims pleaded in 2003 are appropriate for class treatment. Plaintiff contend that AIG is also bound to estoppel. The factual case for estoppel is actually much stronger against AIG than it is for CVS, because (after the October 1998 LMU) AIG and Richard George, its lawyer, were much more active in and much more in control of the settlement process than was CVS.

Plaintiffs contend that each of the three elements of judicial estoppel are shown to exist in relation to AIG, which was a signatory to the Stipulation of Settlement and a proponent of the settlement.

(1) AIG's positions are inconsistent. In 1999, it directed and participated in the settlement process that culminated with telling the Jefferson Circuit Court that the Rule 23 factors do exist and such that a class could be properly certified.[68] Now, in 2012, AIG cannot be heard to argue that the Rule 23 factors do not exist for a class[69] to attempt to raise the fraud-in-the-settlement claim.

(2) AIG's positions were "successful" in the earlier action. AIG desired certification and approval of settlement, and that is what it got from Judge Wynn in 1999. AIG was a proponent

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[68] AIG was a named, defined, and signatory party to the Stipulation of Settlement.

[69] We understand the Supreme Court held that the defendants can argue about whether the fraud "claim" ought to be certified - - - but AIG should not be able to re-argue the question of whether a "class" exists.

of the settlement. AIG benefitted from Judge Wynn's orders because it got the global peace and res judicata effect for its insured that a class judgment provides, thus avoiding defending individual litigation of security fraud claims that CVS's people admit amount to over three billion dollars.

(3) Permitting AIG to use an inconsistent position (agreeing that class existed in 1999, but denying the existence of the same class in 2012) would create an unfair advantage and impose an unfair detriment on the class. The expense and delay in prosecuting a new certification process from scratch is a severe detriment.

Wilfong v. Rent-A-Center, Inc., No. 00-CV-680-DRH, 2001 WL 1795093 (S.D. Ill. Dec. 27, 2001), is a class action case directly on point on the issue of judicial estoppel. In federal court in Illinois, plaintiffs sought certification of a class against Rent-A-Center for gender discrimination in employment. Defendant Rent-A-Center opposed certification by, for example, denying commonality on the argument that hiring decisions are decentralized and made locally. At footnote 1, the Illinois court noted that an almost identical class action was filed in federal court in Missouri and "Rent-A-Center and counsel for the putative class of Plaintiffs in Western District of Missouri cases entered into a stipulation and settlement agreement in which Rent-A-Center stipulated and agreed that all of the requirements of FEDERAL RULE OF CIVIL PROCEDURE 23 were met."

The Illinois court found that commonality existed. And, as an alternative ground for the finding of commonality, the court relied upon a finding of judicial estoppel, based on Rent-A-Center's conduct in consenting to a settlement class certification in Missouri. At *6, the Wilfong Court said (emphasis added):

> Moreover, the Court finds Rent-A-Center is judicially estopped from arguing that there is not commonality.
>
> In order to protect the integrity of the judicial process, Defendants are judicially estopped from asserting that the commonality requirement of RULE 23(a) cannot be met here. *State of New Hampshire v. Maine*, 532 U.S. 742, 977-78 (2001). Under the doctrine of judicial estoppel, a party is prohibited "from deliberately changing positions according to the exigencies of the moment...." *Id.* at 977. Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. *Id.*
>
> When the Defendant stipulated to commonality "for settlement purposes" in the Western District, it stipulated to actual commonality, not some legal fiction for a limited purpose. This is true because even in--and especially in--the settlement only context there must be genuine compliance with the certification requirements of RULE 23 in order for a class to be certified. *Amchem Products, Inc. v. Winston*, 521 U.S. 591, 620 (1997). Thus, Defendant's stipulation to commonality in the Western District case provides an alternative ground, for this Court's finding that there are issues of law and fact common to the claims of the class members in this case.

For a discussion of ***Wilfong***, see Kira A. Davis, <u>Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law</u>, 89 Cornell L. Rev. 191, 216-17 (2003), says (emphasis added):

> It is generally considered the purpose of judicial estoppel to protect the integrity of the courts. . . . . The harm to judicial integrity occurs when a litigant engages in "cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." If a litigant is allowed to prevail on contradictory positions in different courts, it inescapably follows that one court was wrong, misled, or perhaps even defrauded. . . . .
>
> [J]udicial estoppel serves a greater purpose than preserving judicial integrity merely by preventing inconsistent results. Judicial estoppel is also concerned with the threat to judicial integrity that arises when litigants are allowed to knowingly manipulate the courts. Again, however, this "evil"of culpable litigants appears as frequently when litigants seek to contradict positions of law applied to fact as when litigants seek to contradict positions of fact.
>
> Consider the case of *Wilfong v. Rent-A-Center, Inc.*, which dealt with the requirements for class certification in a gender discrimination suit. Defendant Rent-A-Center had been sued by current and former female employees in two separate federal courts, the Western District of Missouri and the Southern District of Illinois. <u>Rent-A-Center settled the claims in Missouri, but in doing so it stipulated that all the requirements of Federal Rule of Civil Procedure 23 had been met, because genuine compliance with this Rule is required even for settlement</u>

> purposes. Yet in the action in Illinois, Rent-A-Center not only disputed the commonality of the women's claims, it may also have tried to hide the fact of the stipulation by leaving out any mention of the Missouri actions in its response to the class certification motion. Because the commonality of claims is determined by a legal test, Rent-A-Center's position is best described as one of law applied to fact. For whatever reason, Rent-A-Center decided that its interests were best served in the Illinois action by fighting class certification, and so it chose to hide its earlier position. This attempt to increase the chances that the Illinois district court would render a decision inconsistent with the settlement brokered in the Missouri district court is precisely the type of culpable behavior that judicial estoppel seeks to discourage.

Alabama has adopted these three elements or factors from *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001): (1) a party's later position must be clearly inconsistent with its earlier position; (2) the party must have been successful in the prior proceeding so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) the party seeking to assert an inconsistent position must derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See *Ex parte First Alabama Bank*, 883 So.2d 1236, 1244-45 (Ala. 2003); and *Unum Life Ins. Co. of America v. Wright*, 897 So.2d 1059, 1076-77 (Ala. 2004). Therefore, AIG, the same as CVS, is estopped to deny the existence of an already-certified class.

Recall that MedPartners and AIG ("the Insurance Carrier") are signatories and defined "Parties" to the Stipulation of Settlement (see § 1.14, at p. 15 of the Stipulation, defining "Parties"). Section 3.1, at pp. 30-31, requires that "the Parties (meaning AIG, too) shall submit this Stipulation together with its Exhibits to the State Court and shall jointly apply for entry of an order . . . substantially in the form of Exhibit A hereto, requesting preliminary approval of the Settlement set forth in this Stipulation, the certification of the Consolidated Class Cases, for settlement purposes only, as a class action pursuant to Rules 23(a) and 23(b)(3) of the Alabama

Rules of Civil Procedure . . ., the appointment . . . of their counsel as counsel for the Settlement Class, the holding of the Settlement **hearing**. . . ." (emphases added). AIG should be estopped to deny that AIG was just as much involved and responsible as were the named parties for the 1999 class settlement and all of its components, including the evidence to be presented to the Court at fairness hearings.

V. ALTERNATIVE ARGUMENT FOR CERTIFYING A NEW, NEVER BEFORE CERTIFIED, CLASS AGAINST THE AIG DEFENDANTS

Even if AIG is not estopped to deny the existence of a class, sufficient facts presently exist for this Court to certify, from scratch, a plaintiff class against AIG. The four pre-requisites that must be met in order to have proper certification of a class action are commonly referred to as numerosity, commonality, typicality, and representation. These four pre-requisites are set forth by Rule 23(a) as follows:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. **Numerosity**. Plaintiffs have satisfied the numerosity requirement under Rule 23(a) in this case. Joaquin's affidavit and deposition demonstrates that the class consists of many thousands of MedPartners stockholders. There is no magic quantity of class members that will warrant class certification, and the Alabama Supreme Court has held that "where the numerosity question is a close one, a balance should be struck in favor of a finding of numerosity." *Faulk v. Home Oil Co., Inc*., 184 F.R.D. 645, 654 (M.D. Ala. 1999). A class must be so numerous that joinder of all members is impracticable. An exact count of the class members is not required. *Ex*

parte Government Employees Ins. Co., 729 So. 2d 299, 303 (Ala. 1999). All that is required for satisfaction of the numerosity requirement is sufficient evidence that will demonstrate that joinder of the claims is impracticable, and "impracticable does not mean impossible" *D.W. v. Poundstone*, 165 F.R.D. 661, 670 (M.D. Ala. 1996). "'Approximation of the number of potential class members in consumer actions is generally the rule.' *Ex parte Government Employees Ins. Co., supra*, at 303, citing 2 H. Newberg and A. Conte, Newberg on Class Actions § 7.22 (3d ed. 1992)."[70] *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1179 (Ala. 2000).

2. **Commonality**. The requirement of commonality is often merged with the pre-requisite of typicality, which is analyzed in detail below. *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645, 655 (M.D. Ala. 1999). However, the essential burden that Plaintiffs must bear in proving commonality is to demonstrate to this court that the common issues to be resolved through class litigation "predominate over those issues that are subject only to individualized proof." *Id.* at 655 [citing *Nichols v. Mobile Board of Realtors, Inc.*, 675 F.2d 671, 676 (11th Cir. 1982)]. "The test for ... commonality is not demanding." *Forbush v. J. C. Penney Co.*, 994 F .2d 1101, 1106 (5th Cir. 1990); see also *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) ("The threshold of 'commonality' is not high."); *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997).

If Sam Johnson was defrauded in 1999, so were all the other members of the 1999 settlement class. The element of commonality is clearly met in this case. In regard to the fraud claim, the three putative class representatives occupy a position in relation to CVS/AIG identical

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[70] In the current edition, see 1 William B. Rubenstein, Newberg on Class Actions § 3:11 (4th ed.) (database updated Nov. 2011).

to the other members of the 1999 class. Indeed, by definition and by actual fact, every 1999 class member is identical to each other vis-a-vis CVS/AIG. There are no issues of individualized proof that would arise out of each individual class member's individual dealings with the defendants. In fact, there were no individual meetings or relationships.

It is not necessary that all questions in a case be common to all members of the class, but only that some questions be common. *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986); *Ex parte AmSouth Bancorporation*, 717 So.2d 357 (Ala. 1998). "For example, factual variations among the class's grievances will not defeat a class action. A common nucleus of operative facts is usually enough to satisfy the commonality requirement of Rule 23(a)(2). " *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1180 (Ala. 2000) (quoting the trial court with approval). See *Warehouse Home Furnishing Distributors, Inc. v. Whitson*, 709 So.2d 1144 (Ala. 1997) (single scheme of defendant regarding charges to all class members for credit insurance on financed retail purchases satisfies commonality requirement).

CIT Communication Finance Corp. v. McFadden, Lyon & Rouse, L.L.C., 37 So.3d 114 (Ala. 2009), affirmed the certification of a nationwide class of persons and entities who entered into agreements with CIT for the lease of office equipment and who incurred, pursuant to such leases, insurance charges within six years prior. At 124, the Court wrote: "CIT used the same standard lease agreement with each class member and charged each class member a monthly amount for insurance placed by CIT. Thus, there will be no need for individualized evidence to address McFadden's claims that CIT's methods violated the lease agreement and the duty of good faith. Consequently, we hold that McFadden presented 'common issues of law and fact,' Rule 23(a), and, therefore, satisfied the commonality prerequisite for class certification." The

Alabama Supreme Court, quoting the Fifth Circuit, observed that the threshold of commonality is "not high," and that commonality only required that resolution of the common issues affect all or a substantial portion of the class. *CIT*, 37 So. 3d at 123-24. Based on the foregoing, it is clear that the plaintiffs have met their burden in proving the commonality requirement of Rule 23(a), Ala. R. Civ. P. See *Dujanovic v. MortgageAmerica, Inc.*, 185 F.R.D. 660, 667 (N.D. Ala. 1999):

> Commonality may exist where the party opposing the class has engaged in a course of conduct that affects all class members and gives rise to the plaintiffs claims. See *Rodriguez v. Berrybrook Farms, Inc.*, 672 F.Supp. 1009 (W.D. Mich. 1987). It also is well established that the commonality requirement of Rule 23(a) is not high; it is generally met when there is either a common question of fact, or of law. See *Cottrell v. Virginia Elec. & Power Co.*, 62 F.R.D. 516 (D. Va. 1974). Commonality also may be established by a showing that the action of all members arises from a common nucleus of operative facts. *Thompson v. Midwest Found. Ind. Physicians Assoc.*, 117 F.RD. 108, 112 (S.D. Ohio 1987).

"[T]he commonality requirement is not usually a contentious one: the requirement is generally satisfied by the existence of a single issue of law or fact that is common across all class members and is thus easily met in most cases." 1 William B. Rubenstein, Newberg on Class Actions § 3:18 (5th ed.) (database updated Nov. 2011). "Put simply, commonality has required (1) that the proposed class representative has the burden of proving, that (2) that there is at least one common question of law or fact shared by the class, and (3) that the common question not be peripheral but important to most of the individual class member's claims." *Id*. "Rule 23(a)(2) does not require that all questions of law or fact raised in the litigation be common. The commonality test is more qualitative than quantitative, and thus, there need be only a single issue common to all members of the class." *Id*. at § 3:20.

"The requirement of Rule 23(a)(2) that the class have 'common' questions of law or fact is related to Rule 23(a)(3)'s requirement that the class representative's claims be 'typical' of

those of the class. The commonality requirement is also related to each of the Rule 23(b) categories, all of which turn, in different ways, on the existence of common questions among the proposed class members; Rule 23(b)(3), in particular, is defined specifically by reference to common questions, permitting class certification on that basis alone so long as the common question 'predominate' over the noncommon ones and the class form prove superior to other modes of adjudication." *Id*. at § 3:25.

3. **<u>Typicality</u>**. The touchstone of typicality is "whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Cutler v. Orkin Exterminating Co., Inc*., 770 So.2d 67, 70 (Ala. 2000). "The test for typicality ... is not demanding." *Lightbourn*, 118 F.3d at 426 (citing *Forbush*, 994 F.2d at 1106). "Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Id*.

"In sum, typicality insists that the class representative be a member of the class and have claims similar to those of other class members, and the requirement rests upon the belief that such a representative, pursuing her own interests, will pursue the class's as well." 1 William B. Rubenstein, Newberg on Class Actions § 3:28 (5th ed.) (database updated Nov. 2011). "A plaintiff's claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of other class members and if his or her claims are based on the same legal theory." *Id*. at § 3:29.

Typicality in this case is clear because the three plaintiffs' contacts with and claims against CVS/AIG arise from the same event or practice or course of conduct that gives rise to the

claims of other class members, and their claims are all based on the same legal theory. The same two variations of the fraud claims apply to all class members, and CVS/AIG's course of conduct giving rise to these claims is factually identical for all putative class members. In this case, the putative class representatives' claims and the claims of all other class members are *identical*.

The typicality element is met when the class representatives' claims arise from or are directly related to the defendants' conduct that gives rise to the claims of the class, and when the wrong to the class includes the wrong to the class representative. *Whitson, supra,* 709 So.2d at 1149, citing *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996). That is, the claims of the class representatives must possess the same essential characteristics as the class at large, *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 527 (M.D. Ala. 1992), and must arise from the same event or pattern or practice and be based on the same legal theory. *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1337 (11th Cir. 1994).

"Where, as here, 'the party seeking certification alleges that the same unlawful conduct was directed at the class representatives and the class itself, the typicality requirement is usually met irrespective of the varying fact patterns which underlie individual claims.' See *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985)." *Cheminova America Corp. v. Corker*, 779 So.2d 1175, 1181 (Ala. 2000) (quoting the trial court with approval). See *CIT Communication Finance Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So.3d 124-26 (Ala. 2009):

> To establish typicality, the party seeking class certification must demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a), Ala. R. Civ. P. "The 'typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' cases than on the similarity of the legal and remedial theories behind

> their claims." *Jenkins*, 782 F.2d at 472. CIT argues that McFadden's claims are not typical of those of the class, because, it argues, there could be myriad reasons why class members chose to allow CIT to obtain insurance coverage for them and because there is no proof that the other class members feel, as McFadden does, that the fees were outside the bounds of the lease agreement.
>
> Again, however, the issues to be addressed in this case involve CIT's methods of administering the insurance programs and assessing fees. CIT used the same standard lease agreement with each class member, charged each class member a monthly fee, and otherwise administered its insurance programs without regard to the individual circumstances of a class member. Under these circumstances, the "legal and remedial theories" underlying McFadden's claims and those of the class members would be the same. See *Jenkins, supra*. Therefore, we hold that McFadden satisfied the typicality requirement of Rule 23(a). . . .
>
> Both parties have argued that the terms of the lease agreement are unambiguous. Therefore, the trial court in this case will not be required to determine whether a contract existed between CIT and any class member or what the terms of that contract might be. Moreover, as discussed previously, no individualized evidence will be required to establish McFadden's claims regarding CIT's conduct in administering the insurance programs and in assessing fees for the insurance it placed. Therefore, unlike *Reynolds Metals*, individual issues of proof do not predominate in this case.

"The typicality requirement of Rule 23 often is considered to require no more than that there exist no antagonism between the claims of the class representative and the other members of the class." *Dujanovic v. MortgageAmerica, Inc.*, 185 F.R.D. 660, 667 (N.D. Ala. 1999). See *Andrews v. American Tel & Tel Co.*, 95 F. 3d 1014, 1022-23 (11th Cir. 1996):

> See *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) ("Typicality" exists when "a plaintiffs injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. II) (internal quotations and citation omitted); Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1557(11th Cir.) ("The claims actually litigated in the suit must simply be hose fairly represented by the named plaintiffs."), *cert. denied*, 479 U.S. 883 (1986). The named plaintiffs can also consistently pursue and protect the classes' claims while litigating individual issues that may arise in connection with their own claims. See . . . also *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (Commonality and typicality under Rule 23(a) serve to ensure that named plaintiffs' claims and class claims are "so interrelated that the interests of the class members will be fairly and adequately protected .... Those

requirements ... tend to merge with the adequacy-of-representation requirement, although the latter ... also raises concerns about the competency of class counsel and conflicts of interest.").

"That the named plaintiffs and members of the Class may have suffered varying degrees of injury and damage does not defeat typicality." *Ex Parte Masonite Corp*., 681 So. 2d 1068, 1089 (Ala. 1996). "Similarly, the existence of alleged affirmative defenses does not defeat typicality." *Id*. (citing *Ex parte Gold Kist,* 646 So. 2d at 1342; *Rischoff v. Commodity Fluctuations Sys. Inc*., III F.R.D. 381,382 (E.D. Pa. 1986)); see also, *Ex parte Gold Kist*, 646 So. 2d at 1342 (holding that "the possible existence of a defense unique to the claims of one or more of the named plaintiffs ... d[oes] not require the Trial Court to deny certification"); *Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 522 (M.D. Ala. 1992) ("[t]ypicality is not destroyed by mere dissimilarity in factual patterns between the class and its representative").

As long as each class member suffers injury as a result of the defendants' common malfeasance (as has occurred in this case), the fact that the class members may be entitled to different amounts of monetary relief is a distinction without a difference and does not defeat typicality, inasmuch as calculation thereof is a merely a mechanical function. See *Whitson, supra*, 709 So.2d 1144 (class certified even though class members entitled to different amounts of money recovery depending on which credit insurance products were purchased and in what amounts); *In re School Asbestos Litigation*, 104 F.R.D. 422 (E.D. Pa. 1984) (typicality requirement satisfied if harm suffered by named plaintiff is of the same type suffered by the class, even though the degree of harm (e.g., amount of monetary award) may differ).

Lastly, as to typicality, see *Culpepper v. Inland Mortgage Corp*., 189 F.R.D. 668, 674 n.2 (N.D. Ala. 1999):

In *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984), the Eleventh Circuit Court of Appeals explained, in general, what factors bear on the determination of whether the claims or defenses of the class representative are typical of those belonging to the class. A class representative's claims or defenses must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). In other words, there must be a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class. A sufficient nexus is established if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. Typicality, however, does not require identical claims or defenses. A factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class. *Edmondson* v. *Simon, 86* F.RD. 375,380-81 (N.D. Ill. 1980); *Senter* v. *General Motors Corp.,* 532 F.2d 511,525 n. 31 (6th Cir.1976), *cert. denied*, 429 U.S. 870 (1976); 3B J. Moore & J. KENNEDY, MOORE'S FEDERAL PRACTICE P 23.06-2 at 191-92 (2d ed.1982); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE s 1764 (1972). See also *Washington* v. *Brown & Williamson Tobacco Corp.,* 959 F.2d 1566, 1569 n. 8 (11th Cir.1992) (stating that the commonality, typicality and fair representation requirements of class certification tend to merge and that "[c]ommonality and typicality represent the 'nexus' necessary between class representatives and class members"), and *Taylor* v. *Flagstar Bank, FSB,* 181 F.RD. 509,516 (N.D. Ala. 1998)(noting that the typicality requirement presents "somewhat of a low hurdle" to the purported class representative seeking certification).

4. **Adequate Representation.** Whether or not the representation pre-requisite of Rule 23(a), Ala. R. Civ. P., has been satisfied is determined through a two-prong analysis. First, the Court must be satisfied that the class representatives have interests that are not in conflict with the putative class members. See *Cutler v. Orkin Exterminating Co., Inc.*, 770 So.2d 67, 71 (Ala. 2000). Second, it must be demonstrated to the Court that plaintiffs' counsel is "qualified, experienced, and generally able to conduct the proposed litigation." *Id*. at 71 (quoting *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). "Thus, the standard for adequacy splits into two prongs: adequacy of the proposed class representative and adequacy of the attorneys seeking appointment as class counsel." 1 William B. Rubenstein, Newberg on Class Actions § 3:54 (5th

ed.) (database updated Nov. 2011).

(i) **The Plaintiffs Are Adequate Class Representatives.** "[S]o long as all Class Members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *Faulk v. Home Oil Co., Inc.*, 184 F.R.D. 645, 660 (M.D. Ala. 1999) (quoting *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981). "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they playa personal role in the direction and management of the action." *Id.*; see also *Longden v. Sunderman*, 123 F.R.D. 547, 558 (N.D. Tex. 1988) (recognizing that, in a complex class action, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"). "A proposed representative's knowledge of the case need not be robust." 1 William B. Rubenstein, Newberg on Class Actions § 3:67 (5th ed.) (database updated Nov. 2011). The three putative class representatives in this case under the case well and are sophisticated businessmen, professionals, or entities with a demonstrated interest in performing the duties of class representatives.

Rule 23(a)(4) imposes the requirement that the class representative, "fairly and adequately protect the interest of the class." "Satisfaction of this rule requires that the representative plaintiffs' interests not be antagonistic to those of the class, and that the representative parties' attorneys be qualified, experienced, and generally able to conduct the litigation." *Ex parte Masonite*, 681 So. 2d 1068, 1089 (Ala. 1996) (citing trial court order which it affirmed); see also, *Dujanovic*, 185 F.R.D. at 667-68 ("[The adequacy] requirement usually takes the form of an inquiry into whether the class counsel is capable of handling the litigation,

and whether the class representative will prosecute his claims for the benefit of both himself and the class members.") (citing *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). "The central component of class representative adequacy is the absence of conflicts of interest between the proposed representatives and the class." 1 William B. Rubenstein, Newberg on Class Actions § 3:54 (5th ed.) (database updated Nov. 2011).

(ii) **Undersigned Counsel Are Adequate to Represent the Class**. The principal factor in determining the adequacy of class representatives is whether the plaintiffs have the ability and commitment to prosecute the action vigorously. *Kirkpatrick v. J. C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987). This adequacy inquiry involves two issues: (i) whether plaintiffs have any interest antagonistic to the rest of the class; and (ii) whether plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation. *Id*. at 726. The adequacy of plaintiffs' counsel is presumed in the absence of specific proof to the contrary, and courts generally hold that the employment of competent counsel assures vigorous prosecution. *Id.*[71] "The defendant bears the burden of demonstrating the inadequacy of the counselor or the representative." *Dujanovic v. MortgageAmerica, Inc*., 185 F.R.D. 660, 668 (N.D. Ala. 1999). "The burden is on the Defendant to show inadequacy of representation." *Cheminova America*

[71] See *Chakejian v. Equifax Information Services LLC*, 256 F.R.D. 492, 498 (E.D. Pa. 2009) (citing exhibits attached to the plaintiff's motion for class certification that demonstrated that "[t]he attorneys who represent plaintiffs are experienced in class action litigation, including class actions under the FCRA and other consumer protection laws and are well-qualified to conduct the proposed litigation"); *Katz v. MRT Holdings, LLC,* 2008 WL 4725284 (S.D. Fla. 2008) (citing plaintiffs' motion for class certification and finding class counsel adequate because "Plaintiffs' counsel has set forth substantial qualifications and experience in the handling of similar matters"); and *Zeno v. Ford Motor Co., Inc*., 238 F.R.D. 173, 188 (W.D. Pa. 2006) ("Plaintiff has attached as exhibits to the motion for class certification the biographies of proposed class counsel in this action …. The court, therefore, finds plaintiff's counsel … to be adequate class counsel.").

Corp. v. Corker, 779 So.2d 1175, 1181 (Ala. 2000) (quoting trial court with approval).[72]

"Although the plaintiff has the affirmative burden of establishing each of the Rule 23(a) requirements, the elements needed to establish adequacy of representation - namely, the absence of class representative conflicts and the competence of class counsel - may be established in the first instance by a simple demonstration of facts in the motion for class certification. Courts will generally presume the truth of such demonstrations unless the party opposing the class presents contrary evidence." 1 William B. Rubenstein, Newberg on Class Actions § 3:55 (5th ed.) (database updated Nov. 2011) (emphasis added).[73]

The there plaintiffs meet the adequate-representation requirement. And, plaintiffs have retained attorneys competent and experienced in class actions. Furthermore, plaintiffs' counsel

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[72] "The adequacy of class counsel is rarely contested, owing to (a) the usual involvement of experienced and specialized class counsel, and (b) courts' unwillingness to interfere with a plaintiff's choice of counsel or to deprive putative class members of their day in court unless it appears that counsel's shortcomings are likely to achieve that result anyway. Indeed, many courts adopt a rebuttable presumption that counsel is adequate." 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:38 (8th ed.) (database updated Nov. 2011).

[73] Other than the specific references to the prior representations of John Lauriello and J. Johnston, defendants have not attacked the quality of undersigned plaintiffs' counsel, in general. John Somerville, Jim North, Tim Francis, John Haley, and the rest of the Hare, Wynn firm, are among the best and most experienced lawyers in Birmingham for handling class actions and complex litigation. The burden is on the defendants to disprove this presumption, and we do not expect them to try. The Court can judicially notice the fact that these three firms have a high reputation in Birmingham and have met with great success over many years. Just in an abundance of caution, some additional information about these lawyers is attached in an Appendix to this brief. "The adequacy of counsel prong of Rule 23(a)(4) asks whether counsel are 'qualified, experienced and generally able to conduct the litigation' and whether counsel will 'vigorously prosecute the interests of the class.' These standards are easily met, with members of the bar in good standing typically deemed qualified and competent to represent a class absent evidence to the contrary. The fact that proposed counsel has been found adequate in other class actions is persuasive evidence that the attorney will be adequate in the present action." 1 William B. Rubenstein, Newberg on Class Actions § 3:72 (5th ed.) (database updated Nov. 2011) (emphasis added).

has the necessary financial resources to litigate this class action vigorously. The plaintiffs have no interests antagonistic to the interests of the class because, as noted above: the plaintiffs' claims are the same as those of the members of the class; the defendants' liability involves issues common to the class, and, by prevailing on their own claims, the plaintiffs necessarily will establish the defendants' liability to each member of the class, as well; and the plaintiffs are aware of their fiduciary responsibilities to the absent class members and are determined to discharge them diligently.

Throughout the already long course of this litigation, plaintiffs and undersigned counsel have demonstrated that their interests are not in conflict with those of the putative class members. Plaintiffs interests are identical to the other 1999 class members. Furthermore, the record of this 2003-filed case alone demonstrates the competency and skill of plaintiffs' counsel. "When counsel has already devoted significant effort or resources to the prosecution of the action prior to submitting a class certification motion, courts will usually presume that counsel will continue to devote the same level of resources going forward and this presumption weighs in favor of a finding of adequate representation." 1 William B. Rubenstein, Newberg on Class Actions § 3:74 (5th ed.) (database updated Nov. 2011).

(a) **The 1998 *Lauriello* case**. Defendants are apparently taking the position that the North and Hare, Wynn firms are incompetent and inadequate to handle class actions because of certain acts or omissions allegedly committed in 1998-99. This summary time line may aid the Court's recollection of the basic events:

1. *Lauriello v. MedPartners* filed on January 9, 1998, by Hare Wynn after consulting with North and Lauriello.
2. Joint prosecution agreement between North / Hare, Wynn and Milberg

Weiss dated January 20, 1998, specifying division of all fees in all Medpartners Securities Litigation. Milberg to receive 60% of all fees and North / Hare, Wynn 40%. Milberg appears in *Lauriello.*

3. Milberg had already filed *Padilla v. Medpartners* in California in December 1997.

4. Milberg filed *Blankenship v. Medpartners* - an individual case - in 1998.

5. North and Hare, Wynn unaware until July 21, 1999, of Milberg's involvement in both *Padilla* and *Blankenship*.

6. Numerous copycat cases were filed in early 1998 by other lawyers.

7. *Lauriello* dismissed on April 17, 1998.

8. Notice of Appeal filed on April 23, 1998, and briefing ensued.

9. Unknown to North and Hare, Wynn, negotiations to settle all Medpartners Securities Litigation began in June 1998. Milberg, through Bill Lerach, led negotiations for all plaintiffs.

10. Unknown to North and Hare, Wynn, settlement of Medpartners Securities Litigation reached in November 1998, with Memorandum of Understanding to be executed on January 15, 1999.

11. In or about February 1999, Lerach telephones and speaks to North and Francis and informs them that he has an "opportunity" to settle Medpartners Securities Litigation. Lerach seeks modification of the division of attorneys' fees set forth in the Agreement from 60/40 to 65/35. North and Hare, Wynn agree.[74]

12. In or about March 1999, North and Hare, Wynn furnished Stipulation of Settlement for the first time. Milberg named one of four "settlement counsel" (North and Hare, Wynn not so named) and several individuals named as class representatives, but John Lauriello was not so named.

13. Lauriello required to dismiss appeal for Medpartners Securities Litigation to be settled. Lauriello told that firms could not economically pursue his case on individual basis. He agrees to dismiss appeal.

14. Preliminary Settlement Hearing held on May 3, 1999, and Final Settlement Hearing held on July 9, 1999.

15. North and Hare, Wynn unaware of amount of Milberg's fees derived from Medpartners Securities Litigation until July 19, 1999, order and Milberg

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[74] Pages 24-25 of Francis's deposition of Jan. 6, 2011, says: "Q. Tell me everything you remember about the conversation. A. That Mr. Lerach -- that our case, as we knew, had been dismissed, talking about Lauriello, that because of his relationship with the insurance carriers and his experience in securities litigation and other cases he had pending with these securities -- these -- securities cases pending that he was dealing with these insurance carriers on he was in a position that he might could reach a global settlement of the MedPartners . . . securities litigation, and that because our case had been dismissed he thought it would be fair for us to revisit our previous fee agreement. And we -- he suggested that we take five percent less, which the original agreement was sixty/forty, and we agreed to do that subject to approval of Mr. Haley. . . ."

letter of July 21, 1999.

16. In or about late July 1999, North and Hare, Wynn received a total of $2,543,458, which is 35% of Milberg's fees in Medpartners Securities Litigation and in *Padilla* and *Blankenship*.

17. Upon receipt of funds, North and Hare, Wynn decide to reduce their fee to make Lauriello whole. Lauriello's loss in MedPartners's securities is calculated and he is paid $76,870.38.

18. On July 29,1999, Lauriello submits claim form as a member of the class.

19. Lauriello signs note which requires him to pay North and Hare, Wynn any amount he receives from the Settlement Administrator.

20. Lauriello eventually receives $2,200 from settlement administrator. North and Hare, Wynn do not seek to recover such amount.

As to the North/Hare fee, Restatement (Third) of Law Governing Lawyers § 47 ("Fee-Splitting Between Lawyers Not In The Same Firm") (2000) (current through June 2011) states the general American rule, as follows: "A division of fees between lawyers who are not in the same firm may be made . . . if: . . . by agreement with the client, the lawyers assume joint responsibility for the representation." Note that there is a critical difference between local Alabama law and the general rule, or the ABA Model rules. Alabama RPC 1.5(e) provides that: "A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if: (1) either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, **or** (c) in a **contingency fee case**, the division is between the referring or forwarding lawyer and the receiving lawyer; (2) the client is advised of and does not object to the participation of all the lawyers involved; (3) the client is advised that a division of fee will occur; and (4) the total fee is not clearly excessive." (emphasis added). In Alabama, in a contingency fee case, a fee can be split without all the lawyers becoming professionally responsible for the representation (i.e., having potential tort liability to the client).

The Hare/North arrangement with Milberg Weiss can be viewed as a "reverse" referral fee: that is, whichever lawyer's case proceeded to victory (that was Milberg in the MedPartners Securities Litigation), the other non-active lawyer would be a mere referring lawyer. In the MedPartners Securities Litigation, Hare/North were in the case first and referred or forwarded it to Milberg. The unique Alabama version of Rule 1.5 is just further evidence of how the Hare and North firms were on the outside looking in and they had limited "duties" to and no power over the litigation - - - they merely received a referral fee, without being professionally "responsible" for the conduct of the litigation, which is perfectly lawful in Alabama. The official Alabama Comment to RPC 1.5 says: "Paragraph (e)(1)(c) permits the lawyers in a contingency fee matter to divide the fee without restriction other than disclosure to the client." Therefore, whatever limited "duties" Haley and North had in 1998-99 (via having filed the putative *Lauriello* class action case) come from Rule 23 and the law of class actions, and not from RPC 1.5(e) and the rules of ethics.

Should have, and could have John Haley and Jim North done something more, different, or better in 1998-99 in relation to the amount of MedPartners's insurance coverage? [75] Three undisputed facts are dispositive of the disqualification issue in favor of Lauriello and his counsel. First, *Lauriello* was never certified as a class action. There never was any "*Lauriello* class" in 1998-99. The North and Hare firms were never appointed class counsel for any class during the 1998 MedPartners Securities Litigation. Second, *Lauriello* was dismissed prior to any

[75] Defendants' "should have done more" argument is really a "red herring" because all the known evidence leads to the inescapable conclusion that, in late 1998, and up to July 1999 (and beyond), AIG and MedPartners would NOT have disclosed the unlimited LMU, no matter who had asked or how demanding the requests had been.

opportunity to conduct discovery. Judge Rogers dismissed the case on April 17, 1998, and it was pending on appeal until the time of the global settlement. The North and Hare firms never had any chance to receive an answer to the insurance-seeking discovery they actually served. Third, counsel for plaintiff/intervenor Lauriello were not class counsel with respect to the settlement class. Lerach and Selinger purported to represent the plaintiff settlement class during settlement negotiations with AIG. Judge Wynn appointed as class counsel (for the 1999 settlement class) the following: Gusty Yearout; Steven Cauley; Bill Lerach; Roger Kirby; and Neil Selinger. The North and Hare firms were not "in the loop" at that point. The settlement class was a totally separate case from *Lauriello*, and Lauriello's counsel were not acting as attorneys for anyone in that class action.

The North and Hare firms committed no act of professional negligence or breach of professional ethics, thus, they are not subject to disqualification or a finding of inadequacy. There had been no opportunity to conduct discovery to determine the amount of insurance in the 1998 *Lauriello* case, and Haley and North were not made privy to any discussions between class counsel and defendants (and they had no right to be involved). Importantly, the policy of unlimited insurance made the basis of this case was not secured until October 1998, some four months after *Lauriello* was dismissed. Thus, even if the discovery process had been available to Lauriello's counsel (Haley and North) prior to the 1998 *Lauriello* case being dismissed, it could not have led to the production of the unlimited insurance policy.

The present complaints about insufficient insurance-related discovery is directed at persons and activities with which Haley and North had nothing whatsoever to do. The North and Hare firms were NOT counsel for the plaintiffs' class.

(b) **Lawyers as Witnesses**. Defendants also apparently intend to assert that Haley and North are disqualified because they will be necessary and material witnesses in the current action against AIG/CVS on the issue of statute of limitations. Nothing could be further from the truth. Haley and North were not class counsel in 1999, and they played no part whatsoever in the settlement or the settlement negotiations. They were witnesses to nothing. What Haley or North (or Somerville) knew or thought or discovered or did not discover prior to Judge Wynn's final order of July 1999 is completely and totally irrelevant. What they learned later, and when, is also irrelevant. After 1999, Haley and North and Somerville where not counsel for any class of any category of MedPartners stockholders. They were not, and never had been, counsel for the 1999 settlement class. What they knew, or did not know, in 2000, 2001, and 2002 has absolutely nothing to do with the 1999 class or its members. For example, John Haley, in July 2000, could not bind the 1999 class to any action - because he was not the class's lawyer or agent. Conversely, any knowledge to him could not have adversely bound or affected the class or its members.

[Please note that, even if a lawyer has to be a material witness to a disputed event, the particular lawyer's individual disqualification is not imputed to the law firm as a whole. That is, Scott Powell, on behalf of Hare, Wynn, Newell & Newton, LPP, could try this lawsuit for the class, even if John Haley were deemed a necessary and material witness to a disputed issue.]

Alabama RPC (" Lawyer as Witness"), says: "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the

client. (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9." The Comment to the Rule says: "To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a) (1) through (a) (3). Paragraph (a) (1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. . . . The principle of imputed disqualification stated in Rule 1.10 has no application to this aspect of the problem."

See Restatement (Third) of Law Governing Lawyers § 108 ("An Advocate As A Witness") (2000) (current through June 2011):

> (1) Except as provided in Subsection (2), a lawyer may not represent a client in a contested hearing or trial of a matter in which:
> (a) the lawyer is expected to testify for the lawyer's client; or
> (b) the lawyer does not intend to testify but (I) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented as stated in § 122 to the lawyer's intention not to testify.
> (2) A lawyer may represent a client when the lawyer will testify as stated in Subsection (1)(a) if:
> (a) the lawyer's testimony relates to an issue that the lawyer reasonably believes will not be contested or to the nature and value of legal services rendered in the proceeding;
> (b) deprivation of the lawyer's services as advocate would work a substantial hardship on the client; or
> (c) consent has been given by (I) opposing parties who would be adversely affected by the lawyer's testimony and, (ii) if relevant, the lawyer's client, as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the lawyer's testimony would create.
> (3) A lawyer may not represent a client in a litigated matter pending before a tribunal when the lawyer or a lawyer in the lawyer's firm will give testimony materially adverse to the position of the lawyer's client or materially adverse to a former client of any such lawyer with respect to a matter substantially related to the earlier representation, unless the affected client has consented as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the testimony would create.
> (4) A tribunal should not permit a lawyer to call opposing trial counsel as a

witness unless there is a compelling need for the lawyer's testimony.

Here are some excerpts from the Comments to § 108 (emphases added):

> . . . The rule imputing conflicts of interest to other members of a lawyer's firm (see §§ 123-124) does not apply generally to an advocate-witness prohibition. . . .
>
> A lawyer's testimony is material within the meaning of the Subsection when a reasonable lawyer, viewing the circumstances objectively, would conclude that failure of the lawyer to testify would have a substantially adverse effect on the client's cause. The forensic value of evidence must be assessed in practical terms. . . .
>
> The decision whether a lawyer whose testimony is material should continue in the matter as advocate is one for the client (see § 22). Since the lawyer might be disinclined to testify in order to remain as advocate, a conflict of interest is presented (see § 125). The conflict is consentable when the lawyer can adequately represent the client in the litigation without providing the testimony (see § 122(2)(c)), and when the client gives informed consent to the conflict (see § 122(1)). The client must understand the implications of consent. . . .
>
> When the lawyer's testimony would be adverse to an important interest of a present or former client, the broader rule of Subsection (3) applies. In such a representation, a conflict exists between the lawyer's duty to testify truthfully and the client's interest in avoiding adverse testimony (see, e.g., §§ 125 & 132). <u>In the absence of client consent</u>, such adverse testimony requires disqualification not only of the lawyer but of the lawyer's firm as well (compare Comment I). Although effective <u>client consent removes the conflict</u> between client and lawyer, an opposing party has standing to object to the lawyer's continued advocacy when the advocate personally will testify. . . .
>
> An advocate may testify for the lawyer's client to establish a necessary fact that is not significantly contested. . . .
>
> Disqualification of an advocate ordinarily works hardship on the client. Substantial hardship warrants the lawyer in continuing as advocate while also testifying. Relevant factors include the length of time the lawyer has represented the client, the complexity of the issues, the client's economic resources, the lawyer's care in attempting to anticipate or avoid the necessity of testifying, the extent of harm to the lawyer's client and opposing parties from the blending of the roles of advocate and witness, additional expense that disqualification would entail, and the effect of delay upon the interests of the parties and the tribunal. . . .
>
> Any other lawyer in a testifying lawyer's firm may serve as advocate for a party in the proceeding, despite disqualification of one or more firm lawyers as advocates under Subsection (1)(a), so long as the representation would not involve a conflict of interest. . . .
>
> Such a motion should be made promptly after discovery of information

indicating the grounds therefor.

When a lawyer's material testimony as a necessary witness (see Comment e) would be favorable to the lawyer's client, the lawyer's announced intention not to testify and to continue as advocate should be accepted by the tribunal when it appears that the lawyer's client has adequately consented after appropriate consultation (see generally § 122 & Comment e hereto). If the client gives informed consent to the lawyer's not testifying for the client, other parties have no standing to object to the lawyer's failure to testify. If the lawyer proposes to testify, opposing parties have standing to invoke the rules of Subsections (1), (2), and (3). If an opposing party proposes to call the lawyer as a witness, the client or lawyer has standing to invoke the rule of Subsection (4). . . .

As provided in Subsection (4), a lawyer may call opposing counsel to the witness stand only when doing so is justified by compelling need (see also § 106, Comment e). A lawyer called as a witness may be seriously disrupted in functioning as an advocate (see Comment b). Calling opposing counsel may also create the false impression in the eyes of a jury that the lawyer was improperly involved in the underlying transaction. An adversary who wishes to make an issue of an opposing advocate's role as a prospective witness normally should promptly move for disqualification. . . .

Defendants are trying to create an issue where none exists. To the extent that Haley's and North's activities might ever be relevant to a statute of limitations issue, there remains nothing to give live testimony about at trial. These lawyers have already given sworn paper discovery responses to the fact that they did not read the December 1998 press release, the April 1999 10-K, etc. Those undisputed facts can be stipulated to at trial. Haley and Somerville and Francis have been deposed and those sworn depositions "speak for themselves." After 1999, nothing is relevant to statute of limitations because these lawyers' (Haley, North, Somerville, etc.) knowledge, if any, cannot possibly be charged or imputed to the class.

It is perhaps relevant to note that Haley and North (and John Lauriello) were not, practically speaking, "active" proponents of the July 1999 class settlement. Lauriello and his counsel "agreed" or acquiesced to the 1999 global settlement only in the sense that they had no choice. Their case had been dismissed and was pending on appeal. Their claims were going to

be settled and dismissed in the settlement class, whether they "agreed" or not. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996), held that a state court could settle and dismiss all securities claims, even federal causes of action over which the state court had no subject matter jurisdiction. "Matsushita then gave state courts the power to release claims that were otherwise not within their subject-matter jurisdiction. As a result, practically any state court can approve a settlement which would eliminate claims on a nationwide basis." 4 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 13:27 (4th ed.) (database updated Nov. 2011). If a state court can settle a nationwide class and effectively dismiss even federal claims, Judge Wynn's settlement class could have validly settled all of Lauriello's state law claims.

(c) **Somerville's Representation of Johnston**. John Somerville never represented Lauriello in 1998-99, nor did he represent anyone in the 1998 MedPartners Securities Litigation. Thus, defendants' attacks on Somerville are based on his representation of J. Johnston. "The party moving for an attorney's disqualification under Rule 1.7 or Rule 1.9 bears the burden of proving the existence of a conflict of interest." *Ex parte Tiffin*, 879 So.2d 1160, 1164 (Ala. 2003). Here is an outline of those main events:

> 1. J. Brooke Johnston went to work for the law firm of North, Haskell, Slaughter on January 1, 1979. During his employment with the firm, he represented MedPartners as outside counsel for several years until he went to work as general counsel of MedPartners on May 1, 1996. He resigned from MedPartners on July 7, 1998.
>
> 2. The MedPartners Securities Litigation settlement was approved in July 1999.
>
> 3. On August 20, 1998, MedPartners filed a complaint against J. Johnston for declaratory judgment relating to his employment agreement and demand for arbitration. The complaint was amended on October 5, 1999, to add claims against him for suppression, reckless misrepresentation and omissions, breach of

> fiduciary duty, conspiracy to defraud, waste, and misuse of corporate assets. In that amended complaint, MedPartners alleged that Johnston committed securities fraud in connection with virtually every merger or transaction undertaken by MedPartners. He was sued based upon virtually every action he took representing MedPartners as outside counsel and as general counsel.
>
> 4. J. Johnston hired John Somerville in February 2001 to represent him against the claims by MedPartners. He associated John Haley and Ralph Cook in October 2001 to assist Somerville in representing him against the claims by MedPartners. Prior to February 2001, Johnston was represented by the Atlanta firm of Powell, Goldstein.
>
> 5. A jury returned a verdict in favor of J. Johnston with respect to all claims asserted against him by MedPartners and, further, awarded $3.8 million in his favor on claims he asserted for breach of an employment agreement and for fraud. His verdict was affirmed on appeal.

Defendants herein have made completely unfounded allegations that Johnston must have [no proof] given Somerville (then Haley) confidential (i.e., attorney-client privileged information vis-a-vis Johnston and MedPartners) information that is somehow material and helpful to the plaintiffs herein in this putative class action. Johnston and Somerville deny any such activity. It does not matter, anyway, because MedPartners was never Somerville's or Haley's client, and MedPartners waived all its attorney-attorney privileges relating to Johnston when it sued him for three billion dollars.

1 Paul R. Rice, Attorney-Client Privilege: State Law Alabama § 9:55 (database updated April 2010), says: "Ala R. Evid. 501(d)(3) provides: '(d) Exceptions. There is no privilege under this rule: . . . (3) Breach of Duty by an Attorney or Client. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the client's attorney.' As under federal law, where the client alleges malfeasance on the part of his attorney, the attorney may disclose otherwise privileged communications in his own defense."

Restatement (Third) of The Law Governing Lawyers § 80 ("Putting Assistance Or A

Communication In Issue") (2000) (current through June 2011) says: "(1) The attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that: . . . (b) a lawyer's assistance was ineffective, negligent, or otherwise wrongful." See also Restatement (Third) of The Law Governing Lawyers § 83 ("Lawyer Self-Protection") (2000) (current through June 2011): "The attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding: . . . (2) to defend the lawyer or the lawyer's associate or agent against a charge by any person that the lawyer, associate, or agent acted wrongfully during the course of representing a client."

Restatement (Third) of Law Governing Lawyers § 132 ("A Representation Adverse To The Interests Of A Former Client") (2000) (current through June 2011), states the general rule, thusly: "[A] lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the interests of <u>the former client</u> are materially adverse." (emphasis added). This is completely inapplicable because Somerville and Haley never represented MedPartners. See Alabama RPC 1.9 ("Conflict of Interest: Former Client"): "A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of <u>the former client</u>, unless the former client consents after consultation; or (b) use information relating to the representation to the disadvantage of <u>the former client</u> except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known." (emphasis added). MedPartners is not Somerville's or Haley's "former client." None of Haley's or Somerville's present or former clients are adverse to the 1999 settlement class or the plaintiffs herein. Thus,

there can be no valid complaint against John Somerville. See 1 William B. Rubenstein, Newberg on Class Actions § 3:75 (5th ed.) (database updated Nov. 2011): "In general, class counsel may represent multiple sets of litigants - whether in the same action or in a related proceeding - so long as the litigants' interests are not inherently opposed."

Again, no present or former client of Haley's or Somerville's are "inherently opposed" to this present action. The party who is opposed, CVS (f/n/a MedPartners), has always been adverse to Haley and Somerville and their clients. Haley and Somerville have no duties, ethical or otherwise, to CVS (f/n/a MedPartners), a party they have never represented. See *Ex parte Tiffin*, 879 So.2d 1160, 1165 (Ala. 2003) (emphasis added):

> A <u>former client</u> seeking disqualification for the conflict addressed in Rule 1.9 must demonstrate (1) <u>that it "had an attorney-client relationship with the attorney</u> the former client seeks to disqualify and [(2)] <u>that the attorney represented the former client</u> in a [(3)] substantially related matter." *Ex parte Intergraph Corp*., 670 So.2d at 860.
>
> Ordinarily, therefore, "<u>a stranger to the attorney-client relationship lacks standing</u> to assert a conflict of interest in that relationship." *Jones v. American Employers Ins. Co.*, 106 Ohio App.3d 636, 641, 666 N.E.2d 1152, 1155 (1995) (citing *Morgan v. North Coast Cable Co.*, 63 Ohio St.3d 156, 586 N.E.2d 88 (1992)); see also *Lowe v. Graves*, 404 So.2d 652 (Ala. 1981); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998); *Johnson v. Prime Bank*, 219 Ga. App. 29, 464 S.E.2d 24 (1995). In other words, "'as a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the [current or] former client moves for disqualification.'" *Lowe,* 404 So.2d at 653 (quoting *In re Yarn Processing Patent Validity Litig*., 530 F.2d 83 (5th Cir. 1976)).

CVS is nothing more than a "stranger" in relation to Haley and Somerville.

(d) **<u>Defendants' Lawyer Attacks Prove Nothing</u>**. Even if this Court gives credence to most of the defendants' attacks on undersigned counsel, such would still not determine the

question of Rule 23(b)(4) adequacy.[76] "Ethical concerns are not *per se* disqualifying, and courts often choose to sanction the individual attorney rather than find the counsel inadequate, on the theory that denying a motion for class certification punishes the absent class members for counsel's alleged misconduct. Whether unethical or questionable conduct will bar a finding of adequacy will depend on the seriousness of the violation and the facts and circumstance of the particular case. Isolated ethical violations ordinarily will not preclude counsel from representing a class. . . [citing, *inter alia*, *Bogner v. Masari Investments, LLC*, 257 F.R.D. 529, 533 (D. Ariz. 2009) (finding that proposed counsel was adequate despite prior unethical conduct when defendants cited only two prior incidents of unethical conduct, both had occurred more than 15 years ago, and the incidents had not been serious enough to warrant referral to disciplinary authorities)]." 1 William B. Rubenstein, Newberg on Class Actions § 3:78 (5th ed.) (database updated Nov. 2011) (emphasis added).

See also *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323-24 (11th Cir. 2008) ("[E]ven had it found that Busby's counsel's conduct violated [an Alabama state ethics rule], the district court was not then required to find [class counsel] inadequate to represent the class. In the event that class counsel does act improperly, '[t]he ordinary remedy is disciplinary action against the lawyer and remedial notice to class members," not denial of class certification.'" (quoting

[76] That is, this Court does not have to ultimately determine the "merits" of the defendants' ethical attacks, because: even if viewed, *arguendo*, in the worst light toward undersigned counsel, these attacks, if true, do not determine the answer to the question before the Court. The issue is whether undersigned counsel are, today, "adequate" to represent this 2003-filed fraud claim via a class action procedure. Are the defendants really contending that the Hare/North/Somerville firms are not competent to handle class action litigation or do not have the goal of maximizing recovery for the class - and in an ethical manner of litigation? The fact that a lawyer maybe could have done something different, more, or better in a case 15 years ago does not answer the Rule 23(b)(4) issue today.

Halverson v. Convenient Food Mart)). *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972), says: "Only the most egregious misconduct on the part of plaintiffs' lawyer could ever arguably justify denial of class status. The ordinary remedy is disciplinary action against the lawyer and remedial notice to class members." And, *Endo v. Albertine*, 147 F.R.D. 164, 170-71 (N.D. Ill. 1993), held: "In any case, while we do not in any way condone [the class attorney's] conduct, there are other procedures in place to thwart such conduct other than denying class status to claimants who have alleged actionable claims." Citing and applying *Busby v. JRHBW Realty* are cases such as *Andrews Farms v. Calcot, LTD*, No. CV-F-07-0464, 2010 WL 3341963, *9 (E.D. Cal. Aug. 23, 2010), and *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 108 (E.D. N.Y. 2012).

(e) **Defendants are Estopped to Deny Adequacy of Counsel**. Both AIG and CVS are estopped to deny the adequacy of the North, Hare, and Somerville firms. In 1999, MedPartners and AIG were joint propounders of the class certification and final approval of the settlement. This included jointly propounding the appointment of class counsel (i.e., representing to the Court that those lawyers were adequate, within the meaning of Rule 23(b)(4)). MedPartners and AIG are parties to the Stipulation of Settlement, which requires that "the Parties (meaning AIG, too) shall submit this Stipulation together with its Exhibits to the State Court and shall jointly apply for entry of an order . . . substantially in the form of Exhibit A hereto, requesting preliminary approval of the Settlement set forth in this Stipulation, the certification of the Consolidated Class Cases, for settlement purposes only, as a class action pursuant to Rules 23(a) and 23(b)(3) of the Alabama Rules of Civil Procedure . . ., the **appointment . . . of their counsel as counsel for the Settlement Class**, the holding of the Settlement hearing. . . ." (emphases

added). Defendants should be estopped to deny the adequacy of the North, Hare, and Somerville firms because they have judicial agreed and propounded that other lawyers, much more involved in the settlement class in 1999, were legally adequate. That is, 1999 class counsel had a much higher duty to the class than "outsiders" like Haley and North, and they had the power and ability to conduct discovery or question persons in authority about insurance coverage. If these lawyers, the court-appointed class counsel, are "adequate," defendants should not be heard to argue that Haley and North are legally inadequate and incompetent lawyers because they did not catch the defendants' lies at some earlier time.[77]

Yet another aspect of waiver is the fact that, after Johnston, Haley and Somerville represented another MedPartners officer, Tracy Thrasher, against MedPartners. In that representation, MedPartners/Caremark never made any motion to disqualify Thrasher's lawyers. The same purported "conflict" that defendants' experts cite to today existed then, but MedPartners never objected. Defendants have further waived the objection they attempt to raise today because they failed to object under the same circumstances in previous litigation. Such a waiver was found in *Ex parte Intergraph Corp*., 670 So. 2d 858, 860 (Ala. 1995), where the Court said: "One should file a motion to disqualify within a reasonable time after discovering the facts constituting the basis for the motion."

(f) **<u>The Lead Counsel Agreement</u>**. The Lead Counsel Agreement with Lanny Vines is not problematic. The intervenor, whose last name is now Hoffman, is not restricted in any way from doing whatever she wishes to do in this litigation or voicing whatever objections she might

[77] There is a delicious irony here: the defendants are arguing that undersigned counsel are inadequate because they were not astute enough, in 1999, to catch the defendants' lies and prevent them from defrauding the class and this Court.

have. This is not a "fee-splitting" arrangement. Whatever fee Mr. Vines ultimately receives, if any, will because he applies to the Court and proves his work to the Court and the Court determines to award him a share of the overall fee.

5. **RULE 23(B)(3) FACTORS**. Plaintiffs have shown the existence of the four factors of Rule 23(a) (numerosity, commonality, typicality, and adequacy). As against AIG, as well as CVS, plaintiff first urge for certification of the fraud claim as a Rule 23(b)(1) mandatory class. In the alternative, plaintiffs seek certification of the fraud claim under Rule 23(b)(3). Rule 23(b)(3), Ala. R. Civ. P., provides, in pertinent part:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> ....
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Having met the four requirements under Rule 23(a), Ala. R. Civ. P., Plaintiffs must now prove that a class action can be maintained under at least one of the categories found in subsection (b) of Rule 23. In the alternative to (b)(1), plaintiffs seek certification under Rule 23(b)(3), Ala. R. Civ. P. In order to satisfy a 23(b)(3) class, this Court must find two things: (1) common questions of law or fact predominate over those affecting only individual members; (2) a class action is a superior method for efficiently and fairly proceeding on the class members' claims.

(i) **Common Questions of Law or Fact Predominate**. This question has been exhaustively analyzed and answered by plaintiffs in their foregoing arguments satisfying the prerequisites under subsection (a) of Rule 23. The common fact that predominates over the

putative class members is that the defendants never disclosed the existence of unlimited insurance coverage. The common questions of law include whether the defendants had a duty to speak and whether they expressed affirmative misrepresentations (or are liable for third-party fraud).

(ii) **Superiority of the Class Action Device**. Plaintiffs must demonstrate that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23(b)(3), Ala. R. Civ. P. Facts relevant to the superiority determination include: the evidence involves only a very few persons who were involved in settlement negotiations; much of the evidence is admitted or already testified to by agents of the defendants'; and there are no individual issues pertaining to any absent class members contacts with the defendants. There is little or no interest of individual class members for individually controlling the prosecution of separate actions; it is desirable to concentrate this litigation in this particular forum, which approved the 1999 class settlement in the first place; and defendants can point to absolutely no "management" difficulties in handling and trying this case as a class action (class membership and damages have already been determined for thousands of subclass A members, and the processes and formulas for determining subclass B claims are already in place).

Given the procedural history in this case, class certification is far superior to leaving the putative class members to prosecuting their claims individually. It is a general rule that class certification is determined by the use of "common sense" with appropriate attention paid to "concerns of judicial economy and access to the legal system." *D.W. v. Poundstone*, 165 F.R.D. 661, 670 (M.D. Ala. 1996). The putative class members in this case will be placed at a

disadvantage if certification is denied. They would be forced to bring their own claims for fraud and re-litigate the key issues of liability, which ought to be determined just one time, by this Court in this case. Such a result would be injurious to the twin aims of Rule 23 (b)(3) class certification: judicial economy and convenience of the parties. See, *Ex parte AmSouth Bancorporation*, 717 So.2d 357, 362 (Ala.1998).

As shown above, this case meets all four prerequisites of Ala. R. Civ. P. 23(a). Therefore, a class may be certified under Rule 23(b)(3) if The Court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(iii) **Variations in Damages Amounts**. It is true that subclass B members will have to submit claim forms to prove their membership in the class and how many shares they had (just as subclass A members already did, in 1999). Each class member's damages vary, depending upon how many shares he own, and when. As to varying damages, *CIT Communication Finance Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So.3d 114, 126-27 (Ala. 2009), says:

> However, as the United States Court of Appeals for the First Circuit noted in *Smilow v. Southwestern Bell Mobile Systems*, 323 F.3d 32, 40 (1st Cir. 2003), "[t]he individuation of damages in consumer class actions is rarely determinative

> under Rule 23(b)(3). Where ... common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." In this case, as in *Smilow*, common questions of law and fact predominate regarding CIT's liability, thereby satisfying the predominance requirement, despite the fact that each customer's damages would have to be calculated. CIT has not convinced this Court that there is a likely "potential for highly individualized damages computations." *Compass Bank v. Snow*, 823 So.2d at 676.
>
> Any potential affirmative defenses in this case would not be relevant to commonality or typicality because, whether meritorious or not, they would be class-wide defenses. That is, the defense, if good, would be good against the entire class and each class member. If the press release of December 1998, for example, put the whole world on notice about the LMU, then that notice is good as against the class as a whole. AIG did not engage in any individualized negotiations with or representations to individual class members.

"The overwhelming majority of cases addressing the effect of variations in the amount of damages recoverable by class members on the certification analysis have concluded that if there is a sufficient nucleus of common questions concerning liability, the fact that damages will need to be calculated on an individual basis does not defeat typicality or otherwise bar class certification." 1 Joseph M. McLaughlin, McLaughlin on Class Actions § 4:19 (8th ed.) (database updated Nov. 2011).

(iv) **<u>Affirmative Defenses</u>**. As to affirmative defenses and typicality, see *CIT Communication Finance Corp. v. McFadden, Lyon & Rouse, L.L.C.*, 37 So.3d 114, 127-28 (Ala. 2009) (emphases added):

> Finally, CIT argues that McFadden cannot meet the Rule 23(b)(3) predominance requirement because, CIT argues, its affirmative defenses of waiver, mitigation of damages, and voluntary payment will require individualized proof. <u>Any issues of law or fact underlying CIT's waiver and mitigation - of - damages defenses would appear to be common to all class members</u>. . . . [T]he class certified by the trial court includes only those customers who entered into a standard lease agreement with CIT and who, after they failed to provide proof of insurance, paid insurance charges incurred under the lease agreement. It would

> appear, therefore, that CIT's waiver and mitigation-of-damages arguments would apply in substantially the same way to all class members. Therefore, CIT has not demonstrated that any individualized proof would be required regarding either of these defenses. . . .
>
> However, as the trial court noted in the class-certification order, "[i]f paying the charge after being billed for it is enough to give rise to the defense of . . . voluntary payment, then the court may apply that defense across the board to each class member." Furthermore, CIT points to no evidence indicating that McFadden or any other member of the class received any information, much less full information, regarding the reasonableness of the insurance charges or the manner in which CIT set its insurance charges, allocated those charges between it and other companies, or otherwise administered its insurance programs. Thus, we are not convinced by CIT's argument that its voluntary-payment defense raises individualized issues. . . .

Plaintiffs contend that any affirmative defenses the defendants might have (e.g., statute of limitations, no duty to speak, etc.) are, by their nature, class-wide defenses. But, in general, affirmative defenses (even individual ones) do not prevent certification. See, for example, *Smilow v. S.W. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003): "Courts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *In re Tyco Intern., Ltd.*, 236 F.R.D. 62, 71 (D. N.H. 2006), says: "I also am unpersuaded by Tyco's assertion that the proposed class is unmanageable because some class members will have stronger loss causation arguments than others based upon when they sold their Tyco stock. As the First Circuit has recognized, classes are routinely certified where common issues predominate even though individual issues exist with respect to other matters such as affirmative defenses or damages. *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003). There is no reason why this principle should not also apply to the subject of loss causation." See also *Shores v. First City Bank Corp.*, 689 P.2d 299, 304 (Okla. 1984) ("The claim that there exists sufficient individual statute of

limitations defenses to prevent class action certification has not found much favor with the courts . . . .").

"The existence of counterclaims, the presence of affirmative defenses against various class members, the complexity of the defendant's defense, or the complexity of the defendant's industry will not usually bar a finding of predominance of common issues. . . ." 2 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 4:26 (4th ed.) (database updated Nov. 2011). *Lorber v. Beebe*, 407 F.Supp. 279, 294 (S.D. N.Y. 1976), says: "In the first place, any defense based on the statute of limitations is an affirmative defense, and courts have traditionally been reluctant to deny class action status simply because affirmative defenses may be available against individual members. *Lamb v. United Security Life* (S.D. Iowa 1972), 59 F.R.D. 25, 34; *Zeigler v. Gibralter Life Insurance Company of America* (D.S. D. 1967) 43 F.R.D. 169, 173."

6A Federal Procedure, Lawyers Edition § 12:253 (database updated June 2006), says: "The courts have traditionally been reluctant to deny class action status simply because affirmative defenses, including a defense based on a statute of limitations, may be available against individual members. The existence of individual issues concerning compliance by class members with the applicable statute of limitations will not bar class certification under Fed. R. Civ. P. 23(b)(3) where questions of law or fact common to the members of the class predominate. Thus, a class action determination is not undermined on predominance grounds by problems that some class members may have with the applicable statute of limitations, since those problems can be determined in due course. . . ." 7AA Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure: Civil § 1778 (2006), says: "The

common questions need not be dispositive of the entire action. In other words, 'predominate' should not be automatically equated with 'determinative.' Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." See *In re WorldCom, Inc. Securities Litigation*, 219 F.R.D. 267, 303 (S.D. N.Y. 2003):

> The SSB Defendants contend that the affirmative defense based on the statute of limitations, specifically, the one year period that governs when an investor has actual notice of the fraud alleged in a complaint, will require an individual inquiry into the knowledge of each putative class member. See 15 U.S.C. § 78i(e). There is, of course, no reason to believe that any investor learned of WorldCom's accounting fraud before it was publicly disclosed. The SSB Defendants themselves take the position that they, despite their close relationship to WorldCom, remained in ignorance of the fraud. Similarly, they have not suggested how the public would have learned during the Class Period of the nature and extent of the specific conflicts of interest itemized in the Amended Complaint.
>
> The existence of this affirmative defense does not suggest that a class should not be certified in this case. Although affirmative defenses such as the statute of limitations defense may be considered as one factor in the class certification calculus, the existence of even a meritorious statute of limitations defense does not necessarily defeat certification. As the First Circuit explained in one of the cases upon which the SSB Defendants rely, *Waste Management Holdings, Inc. v. Mowbray,* 208 F.3d 288 (1st Cir. 2000), although the existence of an affirmative statute of limitations defense should be considered in assessing class certification, the mere fact that such concerns may arise and may affect different class members differently does not compel a finding that individual issues predominate over common ones. As long as a sufficient constellation of common issues binds class members together, variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3).

"The 'predominance' requirement of Rule 23(b)(3) does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues

which 'predominate' over the individual issues. 3B Moore and Kennedy, Moore's Federal Practice and Procedure ¶ 23.06-1 at 23-159, 160." *South Carolina Nat. Bank v. Stone*, 139 F.R.D. 325, 331 (D. S.C. 1991). "When 'common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis.' Wright and Miller, *Federal Practice and Procedure:* Civil § 1778." *Haywood v. Barnes,* 109 F.R.D. 568, 581 (E.D. N.C. 1986). "[C]ourts uniformly hold that class actions may be appropriate even though there are differences in the amount of damages suffered by the individual class members." *Stone*, 139 F.RD. at 331.

"[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Sterling v. Velsicol Chem. Corp*., 855 F.2d 1188, 1196-97 (6th Cir. 1987). The Eleventh Circuit explained predominance, in *Rutstein v. Avis Rent-A-Car Systems, Inc*., 211 F. 3d 1228, 1233-34 (11th Cir. 2000), thusly: "That common questions of law or fact predominate over individualized questions means that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.' *Kerr v. City of West Palm Beach,* 875 F.2d 1546, 1558 (11th Cir. 1989)." The case at bar is a classic case for certifying the fraud claim to proceed as a class. "[A] classic case for finding superiority (and for certifying a class) exists when "[t]he claims of a large number of individuals can be adjudicated at one time, with less expense than would be incurred in any other form of litigation." *Roper v. Consurve, Inc*., 578 F.2d 1106, 1112 (5th Cir. 1978), *aff'd*, *Deposit Guaranty Nat'l Bank v.*

Roper, 445 U.S. 326 (1980).

(v) **Manageability is not in Question**. Under the manageability requirement, courts are to determine which issues are to be addressed in a class-wide trial phase and which issues, if any, are to be left over for individual adjudication. This requirement addresses the relational nature of predominance and superiority: the more issues that can be tried class-wide the more likely it is that the case satisfies predominance and superiority. The manageability element of Rule 23(b)(3) is the most important to the superiority determination. See *McClenathan v. Rhone-Poulenc, Inc*., 173 F.R.D. 156, 165 (S.D. W. Va. 1996).

As demonstrated by the predominance analysis and the information from Gilardi & Co., this case is manageable. All issues of liability and most damages issues are subject to class wide adjudication. Thus, a class action will result in efficiency and avoid needless, repetitive litigation.

"Many courts have recognized that complexity is often a characteristic of class action litigation and that potential management difficulties are not grounds for class denial when justice can be done only through the class action device. . . . It must also be remembered that manageability is only one of the elements that goes into the balance to determine the superiority of a class action in a particular case. Other factors must also be considered, as must the purposes of Rule 23, including: conserving time, effort, and expense; providing a forum for small claimants; and deterring illegal activities. . . . Most courts have [held] that manageability difficulties cannot support a class denial ruling when no other practical litigation alternative exists." 2 William B. Rubenstein, Alba Conte, and Herbert B. Newberg, Newberg on Class Actions § 4:32 (4th ed.) (database updated Nov. 2011). Liability will be determined at trial as

well as the amount of common fund damages (and punitive damages, if any). Then, just as in 1999, class members can file claims with a claims administrator. There is nothing difficult with the manageability factor in this case: after all, it has already been done once before! The calculation of individual damages is a mechanical process.

VI. CONCLUSION

Plaintiffs move the Court for an order that certifies "the fraud claim" (meaning Counts I and II: misrepresentation and suppression) to proceed as a class action against all named defendants, CVS Caremark Corporation and the "AIG defendants." Plaintiffs assert that AIG, just as CVS, is also estopped to deny the existence of a class; but, in the alternative to estoppel, a class, identical to the 1999 settlement class, ought to be recognized and certified against AIG.

Plaintiff John Lauriello does not seek appointment as class representative, but the other three plaintiffs seek appointment as co-class representatives. And, undersigned counsel seek appointment as co-class counsel.

Plaintiffs seek an order that certifies the fraud claim to proceed as a "mandatory" class action, pursuant to Rule 23(b)(1), Alabama Rules of Civil Procedure. Although plaintiffs see no valid grounds for rejecting a "mandatory," class, plaintiffs urge, in the alternative, certification of at least an "opt-out" class, pursuant to Rule 23(b)(3).

The three putative representative plaintiffs seek to represent the same class that was certified in the 1998 MedPartners Securities Litigation pursuant to the Stipulation of Settlement dated as of January 15, 1999, and the Order Regarding Preliminary Approval and Notice, entered by the Circuit Court for Jefferson County, Alabama, on May 3, 1999, which is further divided

into the following subclasses:

(A) Class Members that submitted claims to the Claims Administrator in the 1998 MedPartners Securities Litigation and were found to be Authorized Claimants and to have an Allowed Loss, as those terms have been defined by the Claims Administrator; and

(B) Class Members who did not submit claims to the Claims Administrator in the 1998 MedPartners Securities Litigation.

For clarification, plaintiffs seek to define the May 3, 1999, court-ordered Class as it was articulated in the Class Notice that was mailed to class members and potential class members by the Claims Administrator. Such definition appears as follows:

> All Persons who (I) purchased MedPartners, Inc. ("MedPartners") common stock [including, but not limited to, through open market transactions, mergers or acquisitions in which MedPartners issued common stock, acquisition through the Company's Employee Stock Purchase Plan ("ESPP"), and any other type of transaction in which a person acquired one or more shares of MedPartners stock in return for consideration] during the period from October 30, 1996, through January 7, 1998, inclusive (MedPartners employees who purchased shares through the ESPP in January 1998 being deemed to have purchased their shares on December 31, 1997); (ii) purchased call option contracts on MedPartners common stock during the period October 30, 1996, through January 7, 1998, inclusive; (iii) sold put option contracts on MedPartners common stock during the period October 30, 1996, through January 7, 1998, inclusive; (iv) purchased MedPartners Threshold Appreciation Price Securities ("TAPS") in the September 15, 1997, offering or thereafter through January 7, 1998; or (v) tendered shares of Talbert Medical Management Holdings Corporation to MedPartners between August 20, 1997, and September 19, 1997 ("The Settlement Class").

To speed this case to a conclusion, plaintiffs suggest that the Court write into its certification order certain "conditional" rulings. Such a "conditional" ruling would order "A," but state, if the appellate court rules that "A" is incorrect, then, alternatively, the court would order "B." This would avoid the specter of further delaying, piecemeal appeals in this case. As

an analogy, note that Ala. R. Civ. P. 50(c)(1) *requires* a circuit court to rule conditionally on an alternative motion for new trial, in case the appellate reverses the granting of JML:

> If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

If the Court accepts the plaintiffs' primary positions, application of this "conditional" concept in this case would work like this:

> 1. (A) The Court certifies the fraud claim to proceed as a class action against all defendants by finding that AIG, as is CVS, is estopped to deny the existence of a class. (B) If application of estoppel against AIG is reversed on appeal, then the Court finds that sufficient grounds exist to certify a class "from scratch" against AIG, that class being defined as the same class proceeding against CVS. (C) If both A and B rulings are reversed on appeal, then, further in the alternative, the Court would certify the fraud claim to proceed as a class action against CVS alone.
>
> 2. (A) The Court certifies the fraud claim to proceed as a "mandatory" class action under Rule 23(b)(1). (B) In case the appellate court reverses the use of a "mandatory" class, the Court declares that it would, in the alternative, certify the fraud claim to proceed as a Rule 23(b)(3) "opt-out" class.

Plaintiffs urge that this kind of order, containing alternative "conditional" rulings, would do no harm and could operate to save considerable time, depending on how the Alabama Supreme Court rules (assuming a certification order is appealed by the defendants, pursuant Ala. Code § 6-5-642).

Respectfully submitted this the 4th day of May, 2012.

s/ John W. Haley
One of Plaintiffs' Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Clerk of Court and counsel of record using the AlaFile system which will send notification of such filing to the parties listed with the Clerk, on this the 4th day of May, 2012.

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APPENDIX

RE: PLAINTIFFS' LAWYERS QUALIFICATIONS

(A) HARE, WYNN, NEWELL & NEWTON, LLP

"About The Firm," from website hwnn.com/about-the-firm#SuccessfulTrialLawyers:

In its second century of practice, Hare Wynn is one of the most respected plaintiffs' litigation firms in the country. Hare Wynn's success has come as a result of the unique opportunity its attorneys have had to become both experienced and successful trial lawyers, as well as legal tacticians. Whether arguing to a jury in a rural county in Arkansas or to the United States Supreme Court, Hare Wynn's lawyers have a proven track record of success for their clients.

Hare Wynn began in the late 1800's, and through the firm's founder, Francis Hare, was instrumental in making plaintiffs' litigation affordable to those needing high quality representation in significant litigation. Built on a legacy of representing individuals, Hare Wynn continues to build on more than 100 years of successful trial experience in its representation of individuals, Fortune 500 companies, small business, and government entities.

Most recently, the magnitude of the firm's litigation success was recognized when Hare Wynn was identified as one of the top plaintiff's firms in the United States in being named to the National Law Journal's 2011 Plaintiffs' Hot List. The Journal honored Hare Wynn as one of 20 firms nationally "that are at the cutting edge of plaintiffs' work – and giving the defense a run for their money."

Successful Trial Lawyers. Hare Wynn's attorneys have mastered their courtroom skills during more than a century of trials involving business litigation, products liability, wrongful death, catastrophic injuries, aviation accidents and medical negligence cases. In an age when fewer and fewer cases go to trial, Hare Wynn's lawyers are still arguing to juries on a regular basis. In fact, in 2010 ninety percent of Hare Wynn's lawyers were involved in jury trials. The verdicts from those trials exceeded $100 million. Examples include:

- Schafer v. Bayer CropScience - $47.9 million – genetically modified rice
- Polston v. Ford Motor Company - $19.1 million – product liability
- Golden v. Jalisco Restaurant - $37.5 million – dram shop wrongful death
- Davis v. BMCE - $3.2 million – Medical negligence wrongful death

Hare Wynn's lawyers have consistently been recognized by numerous national organizations, publications and their peers as among the most successful and experienced courtroom lawyers in the country.

- U.S. News Best Law Firms in America
- The Best Lawyers in America
- Law Dragon's 500 Leading Lawyers in America
- American College of Trial Lawyers
- International Society of Barristers
- American Board of Trial Advocates
- Birmingham Magazine's Best Lawyers in Birmingham
- Superlawyers
- Martindale-Hubbell's AV Preeminent Peer Review Rated
- Chambers USA – Ranking of Leading Firms and Lawyers in America
- Benchmark Litigation – America's Leading Litigation Firms & Attorneys

Comfortable and Successful with Complex Litigation. Although Hare Wynn got its start representing individuals in personal injury litigation, the Firm and its attorneys have evolved as the complexity and magnitude of litigation has grown. Hare Wynn lawyers have deftly adapted to handling complex and commercial litigation. Members of the firm have been rated by their peers as top lawyers in: "Bet the Company" litigation; commercial litigation; securities litigation; business litigation; aviation litigation; employment litigation; whistleblower litigation; products liability; medical negligence; and, personal injury litigation.

The firm has been hired by State Attorneys General to represent States against some of the world's most powerful pharmaceutical companies. Hare Wynn is also proud to have recovered more than $1 billion for the United States of America by representing whistleblowers who shine the light of truth on those who would steal from the American taxpayers. As part of the firm's commitment to help clients expose and combat fraud, Hare Wynn obtained a $2.8 billion trial judgment, and affirmance on appeal, against former HealthSouth CEO Richard Scrushy in a shareholder derivate suit that returned ill-gotten gains to the company.

And while we are honored to represent each and every one of our clients, we take particular pride in representing the American farmer to help many of them save the family farms built over generations. In the last decade, Hare Wynn had the privilege of successfully settling cases which threatened the livelihood of thousands of farmers. Recently, the Firm represented over 2,500 rice farmers whose crops were contaminated and foreign markets closed, when Bayer CropScience allowed the escape of experimental genetically modified rice. The firm also represented a large group of Arkansas hog farmers in a business dispute with a large pork processing company.

Cutting Edge Technology. Through its reliance on cutting edge technology, Hare Wynn, with its twenty lawyers, can effectively litigate against defendants who have hired firms with hundreds, if not thousands, of lawyers. Hare Wynn has developed and staffs an information technology department capable of processing and assimilating tens of millions of documents. This capability allows the lawyers at Hare Wynn to compete with, and stay ahead of, the largest litigation opponents in the world. In addition, this department's experienced staff has mastered

the latest presentation equipment to effectively present our client's cases at trial. Hare Wynn's reliance on technology is particularly appreciated by its business clients. Through technology and skilled staff, Hare Wynn is able to effectively manage the cost of litigation for businesses.

Leaders of the Bar and Community. Our lawyers at Hare Wynn derive great satisfaction from representing their clients, but also recognize the obligation and benefits of giving back to their profession and the community. This commitment has existed since the firm's founding. Mr. Hare helped create the organizations that are now known as the American Association for Justice and the Alabama Association for Justice in response to the need for lawyers representing plaintiffs to collaborate, share information, trial techniques and compete with the organized defense bar on a level never imagined.

Hare Wynn has continued this tradition of leadership having had eight members serve as President of the Alabama Association for Justice, two members serve as President of the Alabama State Bar -- including the current State Bar President, and four members served as President of the Birmingham Bar Association. The firm also counts among its members Fellows of the American College of Trial Lawyers, the International Academy of Trial Lawyers and the International Society of Barristers, including a Past-President of that organization. . . .

From www.hwnn.com/news/203-alabama-litigator-of-the-year:

Scott Powell was recognized as 2011 Alabama Litigator of the Year by Benchmark Litigation at the inaugural Benchmark Annual Awards – South in Atlanta on March 8, 2012. The award selection was based upon peer review and research conducted by Benchmark's research team from November 2011 to January 2012. . . .

Scott Powell is lead counsel in a historic $750 million settlement in a lawsuit against Bayer Cropscience. Hare Wynn represents more than 2,500 rice-farmer clients in that case. The lawsuits that prompted the eventual settlement were filed as a result of the corruption of farmers' crops by a genetically engineered strain of rice produced by the Bayer Cropscience. . . .

From a recent interrogatory answer:

Hare, Wynn, Newell & Newton, LLP, has served as national class counsel in numerous cases including, but not limited to, the oil anti-trust case of Lovelace v. Amerada Hess as part of MDL 1206 in Corpus Christi, Texas. The case alleged that the largest oil companies in the county underpaid oil royalties to landowners. Class counsel has represented large numbers of plaintiffs in consumer actions against Norwest Financial and TranSouth. Class counsel was part of the litigation team in U.S. ex rel Johnson v. Shell in the Eastern District of Texas. This litigation was against 18 major oil companies who employed hundreds of lawyers to defend the case. The case resulted in a recovery of over $400 million to the United States. Hare Wynn also acted as class counsel in the case of Birmingham Steel v. Tennessee Valley Authority, where the plaintiff class consisted of approximately 400 industrial customers of the Tennessee Valley

Authority, several of whom were located in Kentucky. Plaintiffs alleged that TVA breached contracts by charging a "forward purchase adder" that was not allowed by then "Economy Surplus Power" contracts. The class action complaint was filed in the U.S. District Court for the Northern District of Alabama. The $18 million settlement represented a near 100 percent recovery of the overpayments by the class of industrial customers to the TVA. Hare, Wynn, is presently class counsel for a class of 30,000 consumers in the Northern District of Alabama against RealtySouth for charging an unearned fee in violation of the Federal Real Estate Settlement Procedures Act. Counsel has been successful in obtaining class certification, after an appeal to the Eleventh Circuit Court of Appeals. . . . Hare, Wynn is also class counsel for classes of landowners in Mississippi and Alabama against several fiber optic companies for claims of trespass. Those cases are presently part of a proposed national settlement. . . . Class counsel also is engaged in complex commercial litigation in Alabama, Arkansas, Ohio, Texas, Mississippi, Tennessee, Florida, Louisiana and Georgia. Class counsel has litigated class actions in multiple states and is familiar with the all of the obligations and requirements of class counsel.

(B) JOHN Q. SOMERVILLE AND SOMERVILLE, LLC

Founded in 2001, the firm, Somerville, LLC (formerly known as Galloway & Somerville, LLC), represents both plaintiffs and defendants. The firm has been involved in cases and matters throughout the State of Alabama and the Southeast region, but the firm has also been involved in cases pending in other jurisdictions such as Delaware, Colorado, and Pennsylvania. Matters that the firm has been involved in include class actions, complex business litigation, and derivative and shareholder litigation, including cases alleging violations of federal and state securities and consumer laws. The firm has also been hired in the past to oversee and coordinate board of director investigations of alleged corporate wrongdoing.

John Somerville and the firm was appointed co-lead derivative counsel in In re HealthSouth Corporation Derivative Litigation, Circuit Court of Jefferson County, Alabama, No. CV-02-5212, where the Court entered a judgment against Richard M. Scrushy for $2.89 billion. In addition to this judgment, over $300 million has been recovered on behalf of HealthSouth Corporation in this derivative litigation. Somerville also served as counsel for plaintiffs in the shareholder litigation: In re ALFA Corporation Shareholders Litigation, originally filed in Chancery Court of the State of Delaware in and for the New Castle County, No. C.A. No. 3104-VCP. That case was ultimately resolved in a global settlement in the Circuit Court of Montgomery County, Alabama.

John Q. Somerville graduated with a B.A. from the University of the South (Sewanee) and earned his J.D. at the University of Alabama School of Law. In law school, he was a Hugo Black Scholar, a recipient of the Dean Thomas W. Christopher Award, and he served as Editor in Chief of the Alabama Law Review. After law school, he served as law clerk to Senior U.S. District Court Judge Seybourn H. Lynne from 1991 to 1993 and he taught Trial Advocacy for

several years. Before law school, Mr. Somerville served as speech writer to U.S. Senator Howell T. Heflin, from 1986 to 1988.

Mr. Somerville has extensive trial and arbitration experience representing both plaintiffs and defendants. He has both prosecuted and defended class actions and other complex commercial and business cases since he started practicing law almost twenty years ago. He is licensed to practice in the state of Alabama, the United States District Court for Alabama (Northern, Middle and Southern Districts), and the Supreme Court of the United States of America.

(C) JAMES L. NORTH & ASSOCIATES: JAMES L. NORTH AND J. TIMOTHY FRANCIS

James L. North & Associates, of Birmingham, Alabama, was founded in February 1985 by James L. North. Mr. North is a graduate of the University of Alabama and the University of Virginia School of Law, where he served on the Editorial Board of the Virginia Law Review. Mr. North served as a Law Clerk to the late Associate Justice of the United States Supreme Court Hugo L. Black in 1964-1965.

Mr. North was an associate and partner at Bradley, Arant, Rose & White from 1965 to 1973 and a founding partner of North, Haskell, Slaughter, Young & Lewis from 1973 to 1985. Mr. North is General Counsel and a member of the Board of Directors of ADTRAN, Inc., a publicly-traded telecommunications company.

Mr. North has extensive experience in all types of complex civil litigation over his forty-five years in practice. He is admitted to practice in the United States District Courts for the Northern and Middle Districts of Alabama, the Courts of Appeals for the Eleventh and Fifth Circuits, and the United States Supreme Court. He is also a former President of the Alabama State Bar. Mr. North is also a former Judge on the Alabama Court of the Judiciary, a court established in the Alabama Constitution to try Alabama Supreme Court Justices and other Alabama Judges for charges relating to criminal conduct or ethical violations and, if found guilty, to establish punishment, which can range from removal from office to censure.

J. Timothy Francis, a 1984 graduate of the University of Alabama School of Law, joined the firm in 1987. Mr. Francis's practice consists of the conduct of complex civil litigation including class actions. Mr. Francis is admitted to practice in the United States District Courts for the Northern and Middle Districts of Alabama, the Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

Mr. North and Mr. Francis have extensive experience in securities litigation, primarily representing plaintiffs in both individual cases and class action cases. With respect to class

actions, Mr. North and Mr. Francis were named class counsel for the class of purchasers for certain bonds issued by Just For Feet, Inc. in AAL High Yield Fund v. Ruttenberg, CV-00-C-1404-S, United States District Court for the Northern District of Alabama, where they obtained over $25 million on behalf of the class. Counsel for the defendants in that case included Lightfoot, Franklin & White, which represents the AIG defendants in this case.

Mr. North and Mr. Francis were named class counsel by Judge Tom King for the class of bondholders of the Altamont Retirement Center in Martin v. SouthTrust Bank, CV-01-7367, Circuit Court of Jefferson County, Alabama, where they obtained over $8 million on behalf of the class. Counsel for the defendants in that case included Bradley, Arant, Rose & White, which represents CVS in this case.

In addition, Mr. Francis was named class counsel for the class of retirees of the Lloyd Noland Foundation in Sellers v. Tenet Healthcare, Inc., CV-03-PWG-0457-S, where cash and substantial equitable relief were obtained for the class.

With respect to securities litigation on behalf of individuals, Mr. North and Mr. Francis have successfully tried cases against Arthur Young & Company, Bear Stearns, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Raymond James Financial Services, Inc., Morgan Keegan & Company, among others. Mr. North and Mr. Francis have prosecuted and settled securities cases against Merrill Lynch, Prudential Securities, Salomon Brothers, Citigroup, Arthur Andersen, Morgan Keegan, Deloitte & Touche, Compass Bank, SouthTrust Bank, and Regions Bank, among others. Mr. North and Mr. Francis have also settled or tried other complex business and personal injury cases, including the trial of Parker v. Blackmon, CV-06-4264, Circuit Court of Jefferson County, Alabama, which resulted in an $8 million judgment in favor of their client.