IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)))))))))))))	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Jorge L. Alonso

SECOND SUPPLEMENTAL REPORT OF PROFESSOR CHARLES SILVER ON THE REASONABLENESS OF LEAD COUNSEL'S FEE REQUEST

I, Charles Silver, declare as follows:

I. INTRODUCTION

1. In this *Second Supplemental Report*, I express opinions on complaints about Lead Counsel's fee request that are raised in the *Objection to Proposed Settlements and Attorneys' Fee Request* filed on behalf of class member Kevin P. McDonald by attorney John W. Davis ("*The McDonald Objection*" or simply "*The Objection*"). In my judgment, *The McDonald Objection* is worse than wrong; it is misleading and dangerous, and it should be overruled.

2. The chief problem is that although *The Objection* claims to apply the mimic-the-market approach adopted by the Seventh Circuit, it does nothing of the sort. It actually ignores the market for legal services almost entirely. To see this, one need only scour *The Objection* for evidence tending to show what real clients pay real lawyers in relevant contexts. There is almost none of it.

3. Instead of offering evidence of market rates, *The McDonald Objection* cites cases, manuals for judges, and studies of judicial practices. These sources are mostly irrelevant because they shed little light on the fees that real clients usually pay. The market for legal services operates outside the courts, so that is where Seventh Circuit judges, who are bound to mimic the market, must look for guidance. Because *The McDonald Objection* provides little information about the market, the complaints it asserts carry no weight.

4. My credentials are listed in my prior reports.

II. INSTITUTIONAL INVESTORS ARE CONTENT

5. In *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 959 (7th Cir. 2013), where the district court judge awarded a 27.5 percent fee on a recovery of $200 million, silence sent an important message too. Although sophisticated institutional investors with large financial stakes owned about 70 percent of the shares held by the plaintiff class and were charged with protecting the class by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), none of them had complained about class counsel's fee. They had neither filed their own objections nor joined the objections filed by two small investors, even though the amount of money at stake clearly justified "a complaint … if the lawyers' cut seem[ed] too high." *Id.* at 959. Given that the institutional investors were content with the award, Judge Easterbrook concluded that the district court judge had exercised her discretion properly and affirmed.

6. Like the objectors in *Silverman*, Mr. McDonald is a small investor walking among elephants. He holds in his 401-K an unidentified but presumably small number of shares that he received as compensation while working as a Household employee. Although important, his interest is dwarfed by the financial stakes of the institutional investors who are members of the class, all of whom (in theory, at least) stand to gain far more money than he does by complaining. Yet, here as in *Silverman*, no institutional investor has objected. Because the

stakes are much larger than they were in *Silverman*—$388.7 million here versus $55 million there—the large investors' silence speaks especially loudly about the reasonableness of Lead Counsel's fee request. Evidently, the institutional investors understand that, over 14 years of litigation during which a litigation class was certified, the case was tried to a verdict, and the judgment was overturned on appeal, Lead Counsel incurred enormous costs and risks, justifying a large fee.

7. Silence can be important, especially when an action might be expected to generate a noise of some sort. In *Silver Blaze*, Sherlock Holmes solved a mystery involving the death of a man and the disappearance of a valuable horse by noticing that a guard dog did not bark in the night. Had a stranger been responsible for the crimes, the dog would have barked, so the perpetrator must have been someone the dog knew. Likely, under the PSLRA sophisticated investors with large financial stakes protect other class members by speaking up when fee award requests are excessive. Their silence here speaks loudly.

III. THE FEE AGREEMENT WAS REASONABLE WHEN NEGOTIATED

8. In my academic writings, I have emphasized the benefits of setting fees at or near the start of class litigation. I have also urged judges to respect fee agreements that are negotiated at arm's length between lead plaintiffs and their attorneys when awarding fees from common funds.

9. Ideally, fee terms would have been set for this case when the Court appointed the Glickenhaus Institutional Group to the Lead Plaintiff position in December of 2002. In fact, the retainer agreement upon which Lead Counsel's fee request is based was negotiated in April, 2005. That was an early point in this litigation, however. The proposed settlement wasn't finalized until 2016. Neither the Lead Plaintiff nor Lead Counsel could have known how much

money would be recovered 11 years down the road. Nor could they have known that the case would be tried to a verdict, class action trials being few and far between.

10. Therein lies the rub. A negotiated fee agreement is entitled to respect when bargaining occurs "when the risk of loss still existed." *In re Synthroid Mktg. Litig*., 264 F.3d 712, 718 (7th Cir. 2001). This is why the beginning of a case is "[t]he best time" to set a lawyer's fee; at "the end," when the amount recovered is known, "hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low." *Id*. Here, as in ordinary market contexts where lawyers are retained, fee terms were bargained for when the recovery was unknown and most of the work still lay ahead.

11. *The McDonald Objection* does not deny that the fee agreement was negotiated "when the risk of loss still existed." Nor does it assert that the negotiations that produced the fee agreement were deficient in any way.

12. Instead, *The Objection* alleges, at p. 3, that the "agreement was one structured for a much smaller case." In support, it cites the fact that the highest tier of the agreement's rising percentage scale entitles Lead Counsel to "25% of all recovery amounts in excess of $150 million." *Id*., p. 4. *The Objection* then charges that this arrangement "might make sense in a case where the potential recovery tops out at three or four hundred million dollars," but not when the potential recovery exceeds $1 billion.

13. Deciding how to reward class counsel for attempting to recover an enormous sum is, however, both a judgment call and one that an institutional investor serving as a lead plaintiff is well positioned to make. It is a judgment call because it requires a subjective assessment of many considerations, including (without limitation) the strength of the case, the likelihood of certifying a class, the class' damages, the defendant's solvency, the costs class counsel will have

to bear, and class counsel's options for obtaining other employment. It is a call that an institutional investor is well-placed to make because it is a financial decision, and because an institutional investor should have good information about the market for legal services and should want only to maximize its expected recovery, which it can do by retaining excellent lawyers on the best possible terms.

14. The preceding points being clear, it should also be apparent that *The McDonald Objection* is just an exercise in Monday-morning quarterbacking. Mr. McDonald is claiming that, a decade ago, a better deal should have been struck. There is no reason to credit this assertion. The enormous recovery shows that the fee agreement worked extremely well for the Class. It motivated Lead Counsel to persevere in the face of long odds and enormous costs, and ultimately led to a landmark recovery. Mr. McDonald may want to punish success, but a judicial practice of refusing to honor contracts that yield excellent results would harm investors by weakening lawyers' incentives in cases where the damages, and therefore the potential recoveries, are especially large.

15. Fortunately, the law does not punish success. It entitles lawyers who perform exceptionally well to collect the fees promised in their contracts. "A contingent-fee contract … allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34, Comment *c* (2007). Because Lead Counsel's contract was reasonable when made, it should be enforced.

IV. THE DECISION TO REQUIRE A SUPERSEDEAS BOND

16. Another example of Monday-morning quarterbacking appears in *The Objection*'s complaint about Lead Counsel's decision to require the Defendants to secure the Class' judgment by posting a supersedeas bond. Mr. McDonald contends that "[t]his was a wholly unnecessary cost, incurred only because Lead Counsel unreasonably rejected less expensive alternatives" that, in his judgment, would have adequately protected the Class. *Id*., p. 12.

17. This complaint forces one to ask an obvious question: Why would Lead Counsel have put 13 million of their own dollars at risk if they could have protected the Class equally well by another means and not incurred liability for the Defendants' appeal costs? *The Objection* offers no answer. It chides Lead Counsel for requesting to be reimbursed for the $13 million, *id*., p. 12, but it treats the decision to require a bond as a simple mistake. In fact, the decision was thoroughly considered, with help from retained bankruptcy lawyers who advised Lead Counsel on the risks that the Class would face if no bond was posted. Once again, Mr. McDonald simply seeks to second-guess a decision long after it was made and without showing that the Lead Plaintiff or Lead Counsel stood to gain by acting to the detriment of the Class. This is precisely what the PSLRA seeks to prevent, by giving institutional investors with large financial stakes control of securities fraud class actions.

V. *ENRON* AND *WORLDCOM* DIFFERED FROM THIS CASE IN IMPORTANT RESPECTS

18. In hope of casting doubt on the reasonableness of the fee agreement used here, *The McDonald Objection* mentions two other mega-fund cases in which the percentages were lower: *In re Enron Corp. Sec. Litig*., 586 F. Supp. 2d 732 (S.D. Tex. 2008); and *In re WorldCom, Inc. Sec. Litig*., 2005 WL 2319118 (S.D.N.Y.). Standing alone, however, the fact that the *Enron* and *WorldCom* litigations both produced enormous recoveries doesn't mean that the fee

percentages in those cases and this one should be the same. Whether the percentages here should be the same, higher, or possibly lower depends on the risk and reward profiles the cases presented ex ante, not on the results.

19. The failure of Enron was, of course, one of the most spectacular corporate collapses in history—arguably *the* most spectacular up to that time. Its stock price fell from $90-plus per share in mid-2000 to less than $1 per share in late 2001. Enron shares once lost half their value in a single week! Along the way to bankruptcy, which Enron declared in December of 2001, the company announced earnings restatements, suffered SEC investigations, revealed sweetheart deals involving limited partnerships that enabled insiders to earn millions of dollars in hidden compensation, lost both its CEO and its CFO, and saw its market capitalization decline from over $60 billion to essentially nothing. Following Enron's collapse, several of its executives were indicted on criminal charges. Some went to jail and Kenneth Lay, the company's founder, was convicted but died before being sentenced. Enron even took Arthur Andersen, the massive accounting firm, with it to the grave.

20. Despite the obviousness of the *Enron* fraud and its enormity, the case still entailed lots of risk. The chief problem was probably that the parties directly responsible for the fraud were insolvent. Enron was bankrupt and the bad actors who committed the wrongdoing were using whatever money they had left to pay criminal defense lawyers. The litigation necessarily targeted secondary parties, and it was far from clear that the law entitled investors to recover from them.

21. WorldCom sought bankruptcy protection one year after Enron did and its proceeding eclipsed Enron's in size. A team of internal auditors brought WorldCom down. They discovered $3.8 billion in misallocated expenses and phony accounting entries—at the

time, the largest accounting fraud in corporate history. When they reported their findings to the company's audit committee and board of directors, heads rolled. Outside the company, reactions were also swift. Arthur Andersen withdrew is audit opinion for 2001; the SEC and the Justice Department launched investigations; and investors punished the company's stock, which dropped from over $60 per share to less than $1. As the full scale of the fraud became clear—the company's assets were thought to have been inflated by $11 billion—about $100 billion in market capitalization was wiped out. Four company officers pled guilty to fraud charges, while Bernard J. Ebbers, WorldCom's former CEO, was convicted at trial and sentenced to 25 years.

22. The facts surrounding Household International's alleged fraud were very different and, apparently, the misconduct fell far short of being criminal. Although Household announced an earnings restatement in 2002, its official position was that it did so to satisfy its new auditors, KPMG, who replaced Arthur Andersen and had a different opinion as to the proper manner of accounting for payments made in connection with certain relationships with credit card companies. Initially, the restatement didn't hurt the company's stock price much either. Its shares fell by 10 percent in morning trading but recovered some of their value as the day wore on. The restatement had no effect on Household's debt ratings. And unlike Enron and WorldCom, both of which cratered, Household survived. None of its managers pled guilty to criminal offenses or went to jail. Instead of prosecuting anyone, the SEC entered into a no-fault consent decree.

23. Given the facts, one might have expected the litigation against Household to be much riskier than the lawsuits against Enron and WorldCom and to proceed much differently. And, in fact, Household took full advantage of its stronger position. It contested liability and damages throughout the case, and succeeded on many of its defenses. Recognizing the closeness

of the case on the merits, it also gambled on winning at trial and, after losing, succeeded in having the judgment reversed on appeal. It also held out far longer than defendants in the other cases did.

24. Enron and WorldCom were scandalous frauds that captivated the public, led to criminal indictments, and precipitated the collapse of enormous companies. By comparison, the alleged fraud at Household was a minor event. Given the many factual differences that existed when the litigations started, the lead plaintiffs in the three cases might reasonably have agreed to different fee percentages. That is why the PSLRA puts initial control of fees in sophisticated investor's hands. They understand that facts matter, and they have incentives to bargain for the best combination of service quality and price they can get when hiring attorneys. As long as they agree to pay market-like fees, there no reason to complain.

VI. *THE MCDONALD OBJECTION* STANDS *SYNTHROID II* ON ITS HEAD BY FAILING TO SUPPORT ITS COMPLAINTS WITH EVIDENCE OF MARKET PRACTICES

25. *The Objection* adopts many different approaches in hope of convincing the Court that Lead Counsel's fee request is excessive. On p. 6, it contends that fee percentages should fall as the stakes increase, rather than rising as provided for in Lead Counsel's fee agreement. On p. 7, it asserts that "a sensible ceiling" on lodestar-based awards would be a multiplier of two, and that the Seventh Circuit has never approved a multiplier of three. On p. 8, it contends that Lead Counsel's requested multiplier of 5.4 would generate hourly rates that are "plainly excessive" and that would have "negative consequences" by "encourage[ing] class counsel to litigate probable losers."

26. All of these complaints share a common defect: None is supported by any evidence of market-based practices. Start with the allegation that marginal fee percentages should or must fall as recoveries increase. In my prior reports, I showed that, when sophisticated

clients hire lawyers on contingency to handle large commercial cases, they use a variety of approaches. In addition to falling scales, they often pay flat percentages and they frequently use rising scales that compensate lawyers more richly as higher recovery levels are reached or larger risks are incurred. *The McDonald Objection* neither disputes my examples nor shows them to be aberrational.[1] Consequently, the decision to use a particular approach is a judgment call that, under the PSLRA, is properly left to a lead plaintiff's reasonable discretion.

27. In lieu of evidence, *The Objection* supports the declining percentage rule by citing *In re Synthroid Mktg. Litig*., 325 F.3d 974, 975 (7th Cir. 2003) ("*Synthroid II*"), for the proposition that "the market rate, as a percentage of recovery, likely falls as the stakes increase." But the very passage in which this observation appears says that market practices are determinative, not judicial maxims:

> A court must give counsel the market rate for legal services, we held [in *In re Synthroid Marketing Litigation,* 264 F.3d 712 (7th Cir. 2001) ("*Synthroid I*")]. Although the market rate, as a percentage of recovery, likely falls as the stakes increase, whether it exceeds 10% for recoveries above $100 million must be answered by reference to arrangements that satisfy willing buyers and sellers rather than the compensation that a judge thinks appropriate as a matter of first principles.

Synthroid II, 325 F.3d 974, 975 (7th Cir. 2003). Judge Easterbrook could not have been clearer. When assessing the reasonableness of a fee request, a judge must take guidance from the fees

[1] Nor does *The Objection* dispute Professor John C. Coffee's point that flat percentages and rising scales have a desirable property: They discourage cheap settlements by giving lawyers large stakes in high recovery levels that are difficult to obtain. See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 696–97 (1986) ("the most logical answer to [the] problem of premature settlement would be to base fees on a graduated, increasing percentage of the recovery formula—one that operates, much like the Internal Revenue Code, to award the plaintiff's attorney a marginally greater percentage of each defined increment of the recovery").

that real clients actually pay and that real lawyers actually receive, not from nice-sounding legal maxims that the market may not have endorsed. By citing *Synthroid II* as authority for the declining percentage rule, *The McDonald Objection* stood Judge Easterbrook's point on its head.

28. Now turn to the assertion that a multiplier of two sets "a sensible ceiling" on lodestar-based fee awards, and that lodestar multipliers should never exceed three. To make this point persuasively, *The McDonald Objection* would have had to provide evidence that real clients cap fees at these limits. It didn't. *The Objection* contains no data whatsoever about real risk premiums or real fee multipliers. It doesn't even show that real clients use the lodestar method when retaining counsel on contingency or that they treat risk premiums or multipliers as separate terms in fee formulas. To my knowledge, they do neither. When hiring lawyers on straight contingency (as class members do), real clients set fees as percentages of their recoveries. They do not otherwise seek to limit lawyers' risk premiums or hourly rates. Once they obtain fee percentages that seem reasonable, they are content.

29. Knowing how real clients handle fees, it follows under *Synthroid I*, *Synthroid II*, and many other Seventh Circuit cases that judges should do the same. They should ask whether a lead plaintiff made a sensible choice of fee percentages, given the rates that real clients pay in comparable cases. Once satisfied on this score, judges should not be distracted by talk of risk premiums or lodestar multipliers because real clients do not provide separately for these things. Nor do real clients provide separately for other pay components, such as compensation for delay, overhead, or returns on expenses. They use fee percentages to cover all of these things. Judges who are bound to mimic the market should do the same.

30. Finally, turn to the objection that high multipliers have "negative consequences" because they "encourage[] [lawyers] to litigate probable losers." Like the others, this objection

too is unaccompanied by any evidence connecting the alleged problem to the payment of market rates. The objection also has no application to this case, in which the Class survived the Defendants' efforts to have the lawsuit dismissed, won a contested trial, and secured a recovery exceeding $1.5 billion. The only plausible inference in this case is that the fee set by the Lead Plaintiff encouraged Lead Counsel to prosecute a meritorious case to a successful conclusion. Finally, the objection ignores the provisions in the PSLRA that require judges to evaluate the merits of securities class actions and to punish lawyers who pursue frivolous cases. The complaint about "negative consequences" should also be ignored.

VII. CONCLUSION

Nothing in *The McDonald Objection* causes me to change my opinion that Lead Counsel's fee request is reasonable. *The Objection* fails for many reasons, the most basic of which is that it provides no evidence that the fee agreed to by the Lead Plaintiff was out of step with the market when it was set.

VIII. COMPENSATION

I received a flat fee of $10,000 for preparing this Report.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

September 23, 2016

Date

Charles Silver

RESUME OF CHARLES SILVER

CONTACT INFORMATION

Center on Lawyers, Civil Justice and the Media
School of Law
University of Texas
727 East Dean Keeton Street
Austin, Texas 78705
(512) 232-1337 (voice)
csilver@mail.law.utexas.edu (preferred contact method)
Papers on SSRN at: http://ssrn.com/author=164490

Charles Silver holds the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the School of Law at the University of Texas at Austin. He has published widely in law reviews and peer-reviewed journals. His articles use economic theory, philosophical and doctrinal reasoning, and empirical methodologies to shed light on issues arising in the areas of civil procedure, liability insurance, and the professional regulation of attorneys. He has written about group lawsuits (including class actions and other mass proceedings), attorneys' fees (including contractual compensation arrangements, common fund fee awards, and statutory fee awards), and professional responsibility (focusing on lawyers involved in civil litigation on behalf of plaintiffs and defendants). In recent years, as Co-Director of the Center on Lawyers, Civil Justice and the Media at the University of Texas, he has worked with a group of empirical researchers on a series of studies of medical malpractice litigation in Texas. The research group's findings are to appear in a book with the working title "To Sue is Human" on Yale University Press.

Professor Silver served as Associate Reporter on the Principles of the Law of Aggregate Litigation, published by the American Law Institute in 2010. He taught as a Visiting Professor at the Harvard Law School, the University of Michigan Law School, and the Vanderbilt University Law School.

Professor Silver has given many presentations at academic conferences, including programs sponsored by the American Law and Economics Association, the Conference on Empirical Legal Studies, the Law & Society Association, RAND, and the Searle Center on Law, Regulation and Economic Growth. He has also spoken at faculty colloquia at law schools across the U.S.

Professor Silver often consults with attorneys and serves as an expert witness. He has strong ties with all segments of the litigating bar. On the plaintiffs' side, he submitted an expert report on attorneys' fees in the massive Enron settlement and served as professional responsibility advisor to the private attorneys who handled the State of Texas' lawsuit against the tobacco industry. On the defense side, he advises on the responsibilities of lawyers retained by insurance carriers to defend liability suits against policyholders. Professor Silver has also testified to legislative committees and submitted amicus curiae briefs to courts on topics ranging from class certification to lawyers' fiduciary duties to medical malpractice litigation.

In 2009, the Tort Trial & Insurance Practice Section (TIPS) of the ABA awarded Professor Silver the Robert B. McKay Law Professor Award for outstanding scholarship on tort and insurance law.

ACADEMIC EMPLOYMENTS

UNIVERSITY OF TEXAS SCHOOL OF LAW

Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure	2004-present
Co-Director, Center on Lawyers, Civil Justice, and the Media	2001-present
Robert W. Calvert Faculty Fellow	2000-2004
Cecil D. Redford Professor	1994-2004
W. James Kronzer Chair in Trial & Appellate Advocacy	Summer 1994
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow	1991-1992
Assistant Professor	1987-1991

HARVARD LAW SCHOOL

Visiting Professor	Fall 2011

VANDERBILT UNIVERSITY LAW SCHOOL

Visiting Professor	2003

UNIVERSITY OF MICHIGAN LAW SCHOOL

Visiting Professor	1994

UNIVERSITY OF CHICAGO

Managing Editor, Ethics: A Journal of Social, Political and Legal Philosophy	1983-1984

EDUCATION

JD 1987, Yale Law School
MA 1981, University of Chicago (Political Science)
BA 1979, University of Florida (Political Science)

SPECIAL PROJECTS

Associate Reporter, Principles of the Law of Aggregate Litigation, American Law Institute (2010) (with Samuel Issacharoff (Reporter), Robert Klonoff and Richard Nagareda (Associate Reporters)).

Co-Reporter, Practical Guide for Insurance Defense Lawyers, International Association of Defense Counsel (2002) (with Ellen S. Pryor and Kent D. Syverud) (published on the IADC website in 2003 and revised and distributed to all IADC members as a supplement to the Defense Counsel J. in January 2004).

BOOKS UNDER CONTRACT

To Sue is Human: Medical Malpractice Litigation in Texas 1988-2005, Yale University Press (coauthored with Bernard Black, David Hyman, and William Sage).

Health Law and Economics, Edward Elgar (coedited with Ronen Avraham and David Hyman).

BOOKS

Law of Class Actions and Other Aggregate Litigation, 2nd Edition, Foundation Press (2013) (with Richard Nagareda, Robert Bone, Elizabeth Burch and Patrick Woolley).

Professional Responsibilities of Insurance Defense Counsel, LexisNexis Mathew Bender (2012) (with William T. Barker); Updated 2013.

A. PUBLICATIONS AND RECENTLY PRESENTED WORKS IN PROGRESS

1. "Philosophers and Fiduciaries" (in progress) (presented at several law schools and conferences).

2. "Does Tort Reform Affect Physician Supply? Evidence from Texas," International Review of Law & Economics (forthcoming 2014) (with David A. Hyman, Bernard S. Black and Myungho Paik).

3. "Insurer Rights To Limit Costs of Independent Counsel," ABA/TIPS Insurance Coverage Litigation Section Newsletter (forthcoming 2014) (with William T. Barker).

4. "Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," DePaul Law Review (forthcoming 2013) (invited symposium) (with David A. Hyman).

5. "Litigation Funding Versus Liability Insurance: What's the Difference?," DePaul Law Review (forthcoming 2013) (invited symposium).

6. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 Vanderbilt Law Review 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

7. "Five Myths of Medical Malpractice," 143:1 Chest 222-227 (January 2013) (with David A. Hyman) (peer-reviewed).

8. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard Black, David A. Hyman, Myungho Paik, and William Sage), Amer. L. & Econ. Rev. (2012), doi: 10.1093/aler/ahs017 (peer-reviewed).

9. "Ethical Obligations of Independent Defense Counsel," 22:4 Insurance Coverage (July-August 2012) (with William T. Barker), available at

http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

10. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (coauthored with David A. Hyman), 46 New England Law Review 101 (2012) (invited symposium).

11. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?", in Ken Oliphant & Richard W. Wright (eds.) MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (2013), originally published in 87 Chicago-Kent L. Rev. 163 (2012) (coauthored with David A. Hyman).

12. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman) (peer reviewed).

13. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard Black, David A. Hyman, Myungho Paik), 9 J. Empirical Legal Stud. 173-216 (2012) (peer-reviewed).

14. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 Fordham L. Rev. (2011) (invited symposium).

15. "Fiduciaries and Fees," 79 Fordham L. Rev. 1833 (2011) (with Lynn A. Baker) (invited symposium).

16. "The Impact of the Duty to Settle on Settlement: Evidence From Texas," 8 J. Empirical Leg. Stud. 48-84 (2011) (with Bernard Black and David A. Hyman) (peer reviewed).

17. "Ethics and Innovation," 79 George Washington L. Rev. 754 (2011) (invited symposium).

18. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. Empirical Legal Stud. 379 (2010) (with Bernard Black and David A. Hyman) (peer reviewed).

19. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 Fordham Urb. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

20. "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal," 63 Vanderbilt L. Rev. 107 (2010) (with Geoffrey P. Miller).

21. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. Empirical Legal Stud. 723 (2009) (with David A. Hyman and Bernard S. Black) (peer-reviewed).

22. "Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. Legal Analysis 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue) (peer-reviewed).

23. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 The Advocate 25 (2008) (with David A. Hyman and Bernard Black) (invited symposium).

24. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 Amer. Law & Econ. Rev. 185 (2008) (with Bernard Black, David A. Hyman, and William M. Sage) (peer-reviewed).

25. "Incentivizing Institutional Investors to Serve as Lead Plaintiffs in Securities Fraud Class Actions," 57 DePaul L. Rev. 471 (2008) (with Sam Dinkin) (invited symposium), reprinted in L. Padmavathi, ed., SECURITIES FRAUD: REGULATORY DIMENSIONS (2009).

26. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 33 Geneva Papers on Risk and Insurance: Issues and Practice 177-192 (2008) (with David A. Hyman, Bernard S. Black, William M. Sage and Kathryn Zeiler) (peer-reviewed).

27. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," 36 J. Legal Stud. S9 (2007) (with Bernard Black, David A. Hyman, William Sage, and Kathryn Zeiler) (peer-reviewed).

28. "Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003," J. Empirical Legal Stud. 3-68 (2007) (with Bernard Black, David A. Hyman, William M. Sage, and Kathryn Zeiler) (peer-reviewed).

29. Reasonable Attorneys' Fees in Securities Class Actions: A Reply to Mr. Schneider, 20 The NAPPA Report 7 (Aug. 2006).

30. "The Allocation Problem in Multiple-Claimant Representations," 14 S. Ct. Econ. Rev. 95 (2006) (with Paul Edelman and Richard Nagareda) (peer-reviewed).

31. "Dissent from Recommendation to Set Fees Ex Post," 25 Rev. of Litig. 497 (2006) (accompanied Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, "Report on Contingent Fees in Class Action Litigation," 25 Rev. of Litig. 459 (2006)).

32. "In Texas, Life is Cheap," 59 Vanderbilt L. Rev. 1875 (2006) (with Frank Cross) (invited symposium).

33. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 Vanderbilt L. Rev. 1085 (2006) (with David A. Hyman) (invited symposium).

34. "A Rejoinder to Lester Brickman: *On the Theory Class's Theories of Asbestos Litigation,"* 32 Pepperdine L. Rev. 765 (2005).

35. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII Widener L. J. 121 (2005) (with David A. Hyman) (invited symposium).

36. "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," 2 J. Empirical Legal Stud. 207–259 (July 2005) (with Bernard Black, David A. Hyman, and William S. Sage) (peer-reviewed).

37. "Speak Not of Error, Regulation (Spring 2005) (with David A. Hyman).

38. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?," 90 Cornell L. Rev. 893 (2005) (with David A. Hyman).

39. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 Pepp. L. Rev. 301 (2004) (invited symposium).

40. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 Harv. J. L. and Pub. Pol. 107 (2004) (with David A. Hyman) (invited symposium).

41. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. Rev. 1357 (2003).

42. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 Ariz. L. Rev. 787 (2002) (invited symposium).

43. "Introduction: Civil Justice Fact and Fiction," 80 Tex. L. Rev. 1537 (2002) (with Lynn A. Baker).

44. "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002).

45. "Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases," 15 G'town J. Legal Ethics 29 (2001) (with Ellen S. Pryor).

46. "A Critique of *Burrow v. Arce*," 26 Wm. & Mary Envir. L. & Policy Rev. 323 (2001) (invited symposium).

47. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 Wash. & Lee L. Rev. 1427 (2001) (with David A. Hyman).

48. "The Case for Result-Based Compensation in Health Care," 29 J. L. Med. & Ethics 170 (2001) (with David A. Hyman).

49. "Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases," 78 Tex. L. Rev. 599 (2000) (with Ellen S. Pryor).

50. "What's Not To Like About Being A Lawyer?," 109 Yale L. J. 1443 (2000) (with Frank B. Cross) (review essay).

51. "Due Process and the Lodestar Method: You Can't Get There From Here," 74 Tul. L. Rev. 1809 (2000) (invited symposium).

52. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. Tex. L. Rev. 227 (1999) (with Lynn A. Baker) (invited symposium).

53. "Representative Lawsuits & Class Actions," in Int'l Ency. Of L. & Econ., B. Bouckaert & G. De Geest, eds., (1999) (peer-reviewed).

54. "Preliminary Thoughts on the Economics of Witness Preparation," 30 Tex. Tech L. Rev. 1383 (1999) (invited symposium).

55. "The Lost World: Of Politics and Getting the Law Right," 26 Hofstra L. Rev. 773 (1998) (invited symposium).

56. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 Conn. Ins. L. J. 205 (1998) (invited symposium).

57. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 Va. L. Rev. 1465 (1998) (with Lynn A. Baker) (invited symposium).

58. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'town J. Legal Ethics 959 (1998) (with David A. Hyman) (invited symposium).

59. "Mass Lawsuits and the Aggregate Settlement Rule," 32 Wake Forest L. Rev. 733 (1997) (with Lynn A. Baker) (invited symposium).

60. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 Fordham L. Rev. 233 (1996) (invited symposium).

61. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6-3 Coverage 47 (May/June 1996) (with Michael Sean Quinn).

62. "Are Liability Carriers Second-Class Clients? No, But They May Be Soon-A Call to Arms against the Restatement of the Law Governing Lawyers," 6-2 Coverage 21 (Jan./Feb. 1996) (with Michael Sean Quinn).

63. "Bargaining Impediments and Settlement Behavior," in Dispute Resolution: Bridging the Settlement Gap, D.A. Anderson, ed. (1996) (with Samuel Issacharoff and Kent D. Syverud).

64. "The Legal Establishment Meets the Republican Revolution," 37 S. Tex. L. Rev. 1247 (1996) (invited symposium).

65. "Do We Know Enough About Legal Norms?" in Social Rules: Origin; Character; Logic: Change, D. Braybrooke, ed. (1996).

66. "The Professional Responsibilities of Insurance Defense Lawyers," 45 Duke L. J. 255 (1995) (with Kent D. Syverud), reprinted in Ins. L. Anthol. (1996) and 64 Def. L. J. 1 (Spring 1997).

67. "Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers," 5-6 Coverage 1 (Nov./Dec.1995) (with Michael Sean Quinn).

68. "Introduction to the Symposium on Bad Faith in the Law of Contract and Insurance," 72 Tex. L. Rev. 1203 (1994) (with Ellen Smith Pryor).

69. "Does Insurance Defense Counsel Represent the Company or the Insured?" 72 Tex. L. Rev. 1583 (1994), reprinted in Practising Law Institute, Insurance Law: What Every Lawyer and Businessperson Needs To Know, Litigation and Administrative Practice Course Handbook Series, PLI Order No. H0-000S (1998).

70. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A Guide to the Basics of Law Practice (3d) (Texas Center for Legal Ethics and Professionalism 1996).

71. "Getting and Keeping Clients," in F.W. Newton, ed., A Guide to the Basics of Law Practice (3d) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

72. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 Law and Contemporary Problems 213 (1995) (with John S. Dzienkowski, Sanford Levinson, and Amon Burton).

73. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A Guide to the Basics of Law Practice (Texas Center for Legal Ethics and Professionalism 1994).

74. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A Guide to the Basics of Law Practice (Texas Center for Legal Ethics and Professionalism 1994).

75. "Thoughts on Procedural Issues in Insurance Litigation," VII Ins. L. Anthol. (1994).

76. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 Clearinghouse Rev. 114 (June 1994) (with Stephen Yelenosky).

77. "Incoherence and Irrationality in the Law of Attorneys' Fees," 12 Tex. Rev. of Litig. 301 (1993).

78. "A Missed Misalignment of Interests: A Comment on Syverud, The Duty to Settle," 77 Va. L. Rev. 1585 (1991), reprinted in VI Ins. L. Anthol. 857-870 (1992).

79. "Unloading the Lodestar: Toward a New Fee Award Procedure," 70 Tex. L. Rev. 865 (1992).

80. "Comparing Class Actions and Consolidations," 10 Tex. Rev. of Litig. 496 (1991).

81. "A Restitutionary Theory of Attorneys' Fees in Class Actions," 76 Cornell L. Rev. 656 (1991).

82. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L. & Phil. 381 (1987) (peer-reviewed).

83. "Justice In Settlements," 4 Soc. Phil. & Pol. 102 (1986) (with Jules L. Coleman) (peer-reviewed).

84. "Negative Positivism and the Hard Facts of Life," 68 The Monist 347 (1985) (peer-reviewed).

85. "Utilitarian Participation," 23 Soc. Sci. Info. 701 (1984) (peer-reviewed).

86. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 Pop. Res. & Pol. Rev. 255 (1984) (with Robert Y. Shapiro) (peer-reviewed).

B. NOTABLE SERVICE ACTIVITIES

Associate Reporter, American Law Institute Project on the Principles of Aggregate Litigation

Interested Party, Statistical Information Task Force, National Association of Insurance Commissioners, Model Medical Malpractice Closed Claim Reporting Law

Invited Academic Member, American Bar Association/Tort & Insurance Practice Section Task Force on the Contingent Fee

Chair, Dean Search Committee, School of Law, University of Texas at Austin

Chair, Budget Committee, School of Law, University of Texas at Austin

Coordinator, General Faculty Colloquium Series, School of Law, University of Texas at Austin

Sole Drafter, Assessment Report for the Juris Doctor Program at the School of Law, University of Texas at Austin, for the Commission on Colleges of the Southern Association of Colleges and Schools

RECENT AWARDS

Robert B. McKay Law Professor Award, Tort Trial & Insurance Practice Section, American Bar Association (2009)

Faculty Research Grants, University of Texas at Austin (various years)

MEMBERSHIPS

American Bar Foundation

Texas Bar Foundation (Life Fellow)

State Bar of Texas (admitted 1988)

Tort Trial and Insurance Practice Section, American Bar Association

Society for Empirical Legal Studies

American Law and Economics Association

American Association for Justice

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 29, 2016.

s/ Michael J. Dowd
MICHAEL J. DOWD

ROBBINS GELLER RUDMAN
& DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)

E-mail: MikeD@rgrdlaw.com

Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)
Service List

Counsel	E-mail address
Stewart Theodore Kusper Giovanni Antonio Raimondi THE KUSPER LAW GROUP, LTD. 20 North Clark Street, Suite 3000 Chicago, IL 60602 (312) 204-7938 Tim S. Leonard JACKSON WALKER L.L.P. 1401 McKinney Street, Ste. 1900 Houston, TX 77010 (713)752-4439	Stewart.Kusper@Kusperlaw.com Giovanni.Raimondi@Kusperlaw.com tleonard@jw.com
Counsel for Defendant David A. Schoenholz	
Dawn Marie Canty Gil M. Soffer KATTEN MUCHIN ROSENMAN LLP 525 West Monroe Street Chicago, Illinois 60661 (312)902-5253	dawn.canty@kattenlaw.com gil.soffer@kattenlaw.com
Counsel for Defendant William F. Aldinger	
David S. Rosenbloom C. Maeve Kendall McDERMOTT WILL & EMERY, LLP 227 West Monroe Street Chicago, IL 60606 (312) 984-2175	drosenbloom@mwe.com makendall@mwe.com
Counsel for Defendant Gary Gilmer	

<table>
<tr><th>Counsel</th><th>E-mail address</th></tr>
<tr><td>R. Ryan Stoll
Mark E. Rakoczy
Andrew J. Fuchs
Donna L. McDevitt
Patrick Fitzgerald
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606
(312)407-0700

Paul D. Clement
D. Zachary Hudson
BANCROFT PLLC
1919 M Street NW, Ste. 470
Washington, DC 20036
(202)234-0090

Dane H. Butswinkas
Steven M. Farina
Leslie C. Mahaffey
Amanda M. MacDonald
WILLIAMS & CONNOLLY LLP
725 Twelfth Street NW
Washington DC 20005
202-434-5000

Luke DeGrand
Tracey L. Wolfe
DEGRAND & WOLFE, P.C.
20 South Clark Street
Suite 2620
Chicago, Illinois 60603
(312) 236-9200
(312) 236-9201 (fax)</td><td>rstoll@skadden.com
mrakoczy@skadden.com
Andrew.Fuchs@skadden.com
Donna.McDevitt@skadden.com
Patrick.Fitzgerald@skadden.com
pclement@bancroftpllc.com
zhudson@bancroftpllc.com
TKavaler@cahill.com
Jhall@cahill.com
dbutswinkas@wc.com
sfarina@wc.com
lmahaffey@wc.com
amacdonald@wc.com
twolfe@degrandwolfe.com
ldegrand@degrandwolfe.com</td></tr>
<tr><td colspan="2">Counsel for Defendant Household International Inc.</td></tr>
<tr><td>Michael J. Dowd
Spencer A. Burkholz
Daniel S. Drosman
Luke O. Brooks
Hillary B. Stakem
ROBBINS GELLER RUDMAN & DOWD LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
(619)231-1058
619/231-7423 (fax)

Jason C. Davis
ROBBINS GELLER RUDMAN & DOWD LLP
Post Montgomery Center
One Montgomery Street, Suite 1800</td><td>miked@rgrdlaw.com
spenceb@rgrdlaw.com
dand@rgrdlaw.com
lukeb@rgrdlaw.com
hstakem@rgrdlaw.com
jdavis@rgrdlaw.com
mmueller@rgrdlaw.com</td></tr>
</table>

Counsel	E-mail address
San Francisco, CA 94104 (415)288-4545 (415)288-4534 (fax) Maureen E. Mueller ROBBINS GELLER RUDMAN & DOWD LLP 120 East Palmetto Park Road, Suite 500 Boca Raton, FL 33432 (561)750-3000 (561)750-3364 (fax)	
Lead Counsel for Plaintiffs	
Marvin A. Miller Lori A. Fanning MILLER LAW LLC 115 S. LaSalle Street, Suite 2910 Chicago, IL 60603 (312)332-3400 (312)676-2676 (fax)	Mmiller@millerlawllc.com Lfanning@millerlawllc.com
Liaison Counsel for Plaintiffs	