

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE	:	
	:	Master File No. CV-96-5238 (JG)
VISA CHECK/MASTERMONEY ANTITRUST	:	
LITIGATION	:	
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All Actions:	:	
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DECLARATION OF ARTHUR R. MILLER

I, Arthur R. Miller, declare as follows:

Qualifications

1. I am the Bruce Bromley Professor of Law at Harvard Law School in Cambridge, Massachusetts. I graduated from Harvard Law School magna cum laude in 1958 and practiced law in New York City until 1962. Since then, I have taught full time at the University of Minnesota, the University of Michigan, and, since 1971, the Harvard Law School. I have taught the basic first year course in Civil Procedure for over thirty-five years and advanced courses and seminars in complex litigation and copyright most of those years.

2. I am the author or co-author of more than forty books and treatises, including *Federal Practice and Procedure*, the leading multi-volume treatise on practice in the Federal Courts, and *New York Civil Practice*, a leading multi-volume treatise on New York jurisdiction and procedure. I also am the author or co-author of at least thirty law review and other articles and monographs on a range of subjects including United States constitutional law, federal court litigation, class actions, attorneys' fees, transnational procedure, intellectual property issues, legal aspects of computer technology, and the right of privacy.

3. I have served as a member of the Special Advisory Group to the Chief Justice of the United States on Federal Civil Litigation (by appointment of Chief Justice Burger), as the reporter and then as a member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States (by appointment of Chief Justices Burger and Rehnquist), as reporter for the Third Circuit's Task Force on Court Awarded Attorneys' Fees, whose report is published at 108 F.R.D. 237 (1985), as reporter for the Advisory Group on Civil Justice of the United States District Court for the District of Massachusetts, as special consultant to the original Manual for Complex Litigation, as a member of the American Bar Association Special Committee on Complex and Multidistrict Litigation, and as a member of numerous other professional committees and organizations. I also served as reporter for the American Law Institute's Complex Litigation Project, which led to the adoption and publication by the Institute of Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study (1994), and I serve as a member of the Board of Overseers of the RAND Institute for Civil Justice, which has recently completed an in-depth study of class actions. I am also the author of a comprehensive monograph on attorneys fees, which was written for the Federal Judicial Center.

4. I was one of the draftsmen of the Uniform Interstate and International Procedure Act. I have testified before numerous subcommittees of the United States Senate and House of Representatives on constitutional, procedural, privacy, and other issues. I also have been the host of several television programs that have won a variety of awards from media organizations and the American Bar Association for promoting public understanding of the law.

5. Throughout my years in academe, I have maintained my contacts with the Bench and the practicing Bar in order to understand the actual operation and functioning of the civil justice

system. Thus, I have participated in countless judicial conferences in the various federal circuits and in educational programs conducted by the Federal Judicial Center as a lecturer or a discussion leader on a wide variety of subjects, including many on class actions, attorneys' fees, and complex litigation. In addition, I have appeared as a lawyer or as an expert in innumerable class actions and complex cases, on behalf of both plaintiffs and defendants, with regard to issues relating to the propriety of class certification, the fairness, reasonableness, and adequacy of settlements, attorneys' fees, subject-matter and personal jurisdiction, discovery, choice of law, preemption, jury trial, and appealability. Those cases have involved a range of substantive contexts, such as mass disasters, product defects, toxic substances, invasions of personal rights, antitrust, securities fraud and other securities matters, consumer deception, consumer financing, RICO, mail fraud and wire fraud. This experience has included oral argument before the United States Supreme Court, almost all of the United States Courts of Appeals, numerous United States District Courts, and several state trial and appellate courts.

6. My résumé, including lists of all of my significant publications, is attached.

7. This declaration is submitted specifically in the above-captioned litigation with respect to the Petition of Class Counsel for an Award of Attorneys' Fees and Reimbursement of Expenses.

I have been asked to opine on the reasonableness of the fees and expenses sought by Class Counsel.

Materials Relied Upon

8. In assessing the reasonableness of the request for fees and expenses, I have reviewed materials related to this litigation; including, among other things, (1) the operative Complaint; (2) Judge Gleeson's Order certifying the class and the decision of the Court of Appeals for the

Second Circuit affirming that Order; and (3) Judge Gleeson's summary judgment decision. I also have reviewed various submissions provided by Plaintiffs and Defendants during the action, including briefs and declarations submitted during class action proceedings (including the briefs submitted to the Court of Appeals for the Second Circuit and the United States Supreme Court) and during the summary judgment process. Finally, I have reviewed the Settlement Agreements, dated June 4, 2003, which have been executed by Lead Counsel for the certified class and counsel for Defendants Visa U.S.A., Inc. ("Visa") and MasterCard International, Inc. ("MasterCard").

9. In order to familiarize myself fully with the nature of these proceedings, the history of the action and the efforts of Class Counsel, and particularly, Lead Counsel – Constantine & Partners ("C & P") – in prosecuting this action, I have reviewed the Declaration of Lloyd Constantine, dated August 17, 2003.

10. In order to understand the economic and legal complexities of the action fully, I have reviewed the Declaration of Harry First, dated August 13, 2003. Professor First, someone who is known to me through numerous academic contacts, is a noted professor of antitrust law, who is currently on the faculty of the New York University School of Law. I understand that he was previously Chief of the Antitrust Bureau for the Office of New York State Attorney General, Eliot L. Spitzer, a former student of mine.

11. In order to understand fully the ramifications that the Settlement in this action will have on consumers, in addition to the merchant absent class members, I have reviewed the Declaration of Willard I. Ogburn, dated August 6, 2003. Mr. Ogburn is the Executive Director of the National Consumer Law Center.

12. In order to understand the value of the relief offered by the Settlement Agreements to the Class better, I have reviewed the Declaration of Franklin M. Fisher, dated August 14, 2003. Dr. Fisher is a prominent professor of economics at the Massachusetts Institute of Technology.

13. In offering an opinion on the reasonableness of the requested fees and expenses, I have drawn upon my review of these materials, my knowledge of the law governing applications for fees and expenses, my experience both as an advocate and as a witness opining on the reasonableness of fee and expenses applications in various class action proceedings, as well as my experience as reporter for the Third Circuit's Task Force on Court Awarded Attorneys' Fees.

Summary of Conclusion

14. As aforesaid, I was asked by Class Counsel to give my opinion as to the reasonableness of the requested attorneys' fees and expenses. I understand that Class Counsel has sought 18% of the compensatory relief or 2.14% of the total relief (compensatory plus injunctive) as compensation for fees and expenses.

15. My personal experience in class actions, legal research, and the empiric evidence collected by various scholars all make it perfectly clear that the result achieved for the Class in this case far exceeds the recovery secured by way of settlement in all other antitrust class actions. The proposed settlements are nothing short of historic.

16. In my opinion, based on the types of fee awards typically granted in common fund cases comparable to this case, and a review of the (1) procedural and legal complexities of the action, (2) the extraordinary relief achieved on behalf of the Class, (3) the public interest/consumer benefits that the settlement accords, and (4) the tremendous risks taken by Class Counsel, and, in

particular, C & P in prosecuting the action, the request for attorneys' fees and expenses is fair and reasonable to the Class and should be approved by the Court.

Description of the Settlement

17. In order to opine properly upon the reasonableness of the request for fees and expenses, it is necessary to understand the relief made available to the Class by the settlement. The settlement offers two forms of relief: compensatory and injunctive. The compensatory component of the settlement has two parts. First, the settlement provides for a common fund of \$3.05 billion (payable by defendants over ten years). The present value of the fund is \$2.589 billion. Fisher Decl. ¶¶47-50. Second, the settlement also provides for defendants to reduce their debit interchange rates substantially – i.e., the price they charge class members for debit card transactions accepted -- between August 1, 2003 and December 31, 2003. Indeed, the benefit of this portion of the settlement to the Class has been immediate, as the new interchange rates have gone into effect even before the Court has granted final approval to the settlement. The value of this reduced interchange pricing to the Class is estimated to be \$794.4 million. Fisher Decl. ¶¶30-32. Accordingly, the present value of the compensatory portion of the settlement equals \$3.3834 billion.

18. Substantial injunctive relief, e.g. causing Visa and MasterCard to cease forcing merchants to accept their debit card transactions as a condition of accepting their dominant credit card transactions, which is valued most conservatively at \$25.076 billion, also has been achieved for the class. Fisher Decl. ¶¶33-46.¹ Other injunctive relief, such as causing defendants to identify

¹ I understand that Visa's tying policy has been in effect for approximately 28 years and MasterCard's tying policy has been in effect for approximately 24 years and that defendants repeatedly refused

their debit cards conspicuously by visual and electronic means and prohibiting Visa from entering into exclusive arrangements with financial institutions for debit card offerings, is also provided for in the settlements.

The Percentage Of Relief Requested As Fees And Expenses Is Less Than That Typically Requested In Class Actions.

19. There is no national repository of class action results, but there have been several empirical studies and there exists considerable anecdotal evidence on class action recoveries. The empirical evidence shows that most courts award between 20% and 30% in common fund litigation like this case. Indeed, several federal district and circuit courts have referred to 25% as a “benchmark” percentage that is presumptively correct for fees and expenses in class actions but can be adjusted upward or downward in unusual circumstances. A study released in 1996 by the Federal Judicial Center that analyzed class actions in four federal district courts indicated median fee awards in the range of 27% to 30%. See Thomas E. Willgang, Laurel L. Hopper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts*, Final Report to the Advisory Committee on Civil Rules 69 (1996).² Another highly regarded study released in 1996

merchant requests to untie credit from debit throughout this period. Because the United States Supreme Court has held that it is appropriate to value non-monetary relief in determining a fee award, in my opinion, the value of eliminating these practices should be considered in determining the fees and expenses to be granted in this matter. See *Hall v. Cole*, 412 U.S. 1, 5 fn4 (1973) (quoting *Miller v. Electric Auto Lite Co.*, 391 U.S. 375, 396 (1970)).

² I am particularly well acquainted with the report, recommendations, and deliberations of the Third Circuit Task Force (“Task Force”), for which I had the privilege of serving as the official Reporter. See Court-Awarded Attorney Fees, *Report of the Third Circuit Task Force*, October 8, 1985, reprinted in 108 F.R.D. 237, 254-59 (1985). The Task Force was appointed by the Court of Appeals for the Third Circuit, by former Chief Judge Aldisert, and was composed of prominent jurists (including Judges Sarokin and Debevoise), and distinguished, experienced practitioners. The Task Force’s charge was: the development of recommendations to provide fair and reasonable compensation for attorneys in those matters in which fee awards are provided by federal statute or by the fund-in-court doctrine; to discourage abuses and delays in the fee setting process; to encourage early settlement or determination of cases; to provide predictability; to carry out the purposes underlying court-awarded compensation; to simplify the process by reducing the burdens it imposes on the courts and on litigants; and to arrive at fee awards

by National Economic Research Associates and entitled "What Explains Filings and Settlements in Shareholder Class Actions?" noted that the average and median fee awards granted in the sample of securities cases reviewed was over 30%. Finally, in the most recent survey concerning class action fee awards, it was reported that, (1) on average, class counsel has been granted 20.6% of the award in antitrust class actions and (2) in numerous mega-fund antitrust class actions, class counsel was awarded significantly more. Stuart Logan, Jack Moshman & Beverly Moore, Jr., "Attorney Fee Awards in Common Fund Class Actions," 24 *Class Action Reports* 167 (Issue No. 2 March-April 2003).

20. The amount sought in this case represents only 18% of the present value of the compensatory relief and 2.14% of the present value of the total relief achieved for the Class (e.g., present value of compensatory relief plus the value of the injunctive portions (most conservatively estimated) of the settlement), which many courts have found to be the appropriate measuring rod for determining a percentage fee. The instant application for fees and expenses therefore seeks less than that which is usually granted to class counsel in a common fund case, whether measured in terms of the present value of the compensatory relief, or in terms of the total relief achieved, and seeks significantly less than the 25% "benchmark" that certain district and circuit courts have deemed to be presumptively correct for awards of fees and expenses in common fund cases. Under the percentage of recovery method, which I believe to be the

that are fair and equitable to the parties and that take into account the economic realities of the practice of law. *Task Force Report*, 108 F.R.D. at 238. *Based on my work with the Task Force and as the author of a comprehensive monograph on attorneys' fees that I wrote for the Federal Judicial Center, I believe that the percentage of recovery method is entirely appropriate in a common fund situation such as this.* Indeed, in the years since the *Task Force Report*, most federal and state courts have turned away from the so-called "lodestar" method, which had been popular for approximately a decade, and back to the traditional and long-standing percentage method as the preferred method of determining attorneys' fees in class cases.

appropriate gauge for measuring attorneys' fees in common fund cases, the request for fees and expenses by Class Counsel in this action is thus fair and reasonable.³

21. The reasonableness of a 18% fee (using only the present value of the compensatory relief in the denominator) or a 2.14% fee (using the present value of the total relief offered in the denominator) also can be supported, or cross-checked, through the use of a lodestar/multiplier approach. A multiplier of approximately 9.74, although at the high end of the range of multipliers, is supportable in this case given the risks the litigation presented, the burdens and risks it presented to Class Counsel (especially C&P), the tenacity and quality of the defense, the record-breaking result achieved for the class and, quite significantly, the fact that the billing rates of several of the key class attorneys are measurably below those for class counsel in many other cases.⁴ See Declaration of Stacey Anne Mahoney, dated August 18, 2003, for a recitation of how Class Counsel calculated their lodestar, a description of the rates charged by C&P and a chart of rates charged by attorneys of comparable experience specializing in complex litigation.

³ A principal benefit of the percentage method is that it aligns the interest of client and lawyer, giving the lawyer an incentive to press for the best possible recovery. It also assures that counsel fees will not exceed a reasonable percentage of the recovery even when the recovery is small. In addition, it avoids many of the abuses that arose during the era in which the lodestar method was almost universally applied. Indeed, as part of the *Task Force Report*, we consciously noted the existence of "a widespread belief" that numerous deficiencies of the lodestar method either offset or exceeded its supposed benefits, and summarized these criticisms, among which are that it unnecessarily burdens the judicial system, that it encourages lawyers to expend excessive hours engaging in duplicative or unjustified work, that it discourages early settlements by tying counsel's fee to the number of hours expended in the litigation, that it engenders a number of unsavory and unprofessional practices, and that it creates "considerable confusion and lack of predictability in its administration." See generally *Task Force Report*, 108 F.R.D. at 246-49.

⁴ The use of a lodestar/multiplier methodology in mega-fund cases becomes a less reliable cross-check. This is because the multiplier is generally above the norm in these cases even though the percentage of recovery may be lower than the norm. To rely too heavily on the lodestar/multiplier methodology in such cases would thus eviscerate the percentage of recovery method, which I think is the appropriate metric.

The Reasonableness of the Requested Fees and Expenses for this Case

22. Although the requested fees and expenses in this matter may appear large, when one considers (1) that this settlement is by far the largest in antitrust class action history, (2) the enormous procedural hurdles surmounted by Class Counsel, (3) the substantive legal difficulties that confronted Class Counsel, (4) the tremendous efforts and efficiency of Class Counsel, and in particular, C & P, in prosecuting the litigation as well as the high quality of their work and the work of defense counsel,⁵ (5) the benefits that the settlement will achieve for consumers, and (6) the risks taken by Class Counsel, the fees and expenses requested are reasonable and are well within recognized parameters for cases of this character.

23. A consideration of the risks taken by Class Counsel, and particularly, C & P, clearly favors granting the application. A law firm must make an enormous investment when bringing a class action against large companies like the defendants in this case; a case having the characteristics of this one requires a major expenditure in professional time, administrative and support services, and out-of-pocket expenses to maintain the litigation, and to perform at the highest professional level, as Class Counsel did. The risk that the class will not be certified is substantial, particularly when compounded by substantial litigation risks with regard to establishing liability and damages. The Constantine Declaration explicitly details the substantial hurdles encountered by Class Counsel, and, in particular, C & P, in, among other things, having (1) plaintiffs' motion for class certification granted, (2) the class certification Order affirmed on

⁵ Visa was represented by Heller Ehrman White & McAullife and Arnold & Porter – two pre-eminent firms with noted antitrust practices. MasterCard was represented by distinguished, well-resourced, blue-chip firms, Clifford Chance Rogers & Wells and Simpson Thatcher & Bartlett. MasterCard's lead counsel, Kevin Arquit, was formerly Chief of the Bureau of Competition for the Federal Trade Commission.

appeal, (3) plaintiffs' motions for summary judgment substantially granted and (4) defendants' motions for summary judgment denied in their entirety. The First Declaration details the substantive law difficulties that Class Counsel faced in satisfying the Class' burden of proof on its illegal tying and attempt to monopolize claims against defendants.

24. It is particularly relevant that Class Counsel devoted an extremely high ratio of their available time to this case throughout the last seven years with absolutely no certainty as to outcome. (If anything, the converse is true.) Thus, the contingency risk posed a substantial hardship to Class Counsel, and in particular to C & P, in this case. For example, over the six-and-a-half years of this case, C & P dedicated more than 50% of its resources to the prosecution of this action; in the period leading to trial, C & P dedicated approximately 83% of its attorney time to the case. Constantine Decl. ¶¶12-19. I understand that the firm has turned away significant legal matters due to their commitment to work on this case. In all my years of following attorney efforts prosecuting class actions, I have never seen a firm take on the amount of risk -- from the standpoint of resource allocation -- that C & P assumed in prosecuting this case.

25. Class Counsel has had to wait many years to receive any compensation for the more than two hundred thousand hours they dedicated to the prosecution of this case. The long delay in payment for this overwhelming expenditure of Class Counsel's time thus also militates in favor of the requested fee percentage.

Although No Single Case Can Serve As A Benchmark For This Case, The Existing Precedents Favor The Requested Award

26. Because there never has been an antitrust class action as complex, as risky, and as hard-fought that has led to similar beneficial results for the class and the public at large, no reported decision concerning a mega-fund case actually can serve as a “benchmark” for appraising this fee and expense application.

27. For example, two antitrust mega-fund cases that are somewhat similar to the instant case in terms of the large settlements achieved are *In re Vitamins Antitrust Litigation*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25067 (D.D.C. July 16, 2001) (the “Vitamins Case”) and *In re NASDAQ Market-Makers Antitrust Litigation*, No. 94 IV. 3996 (RWS), 1998 WL 782020 (S.D.N.Y. November 9, 1998) (the “NASDAQ Case”). Class counsel in these mega-fund cases faced certain hurdles that were similar to those faced by Class Counsel in this unusual case. However, class counsel in those cases, both of whom were granted a substantial recovery of attorney’s fees, did not face the massive procedural legal and economic complexities that were confronted by Class Counsel, and specifically, C & P, in this case. Nor did class counsel in those cases achieve a result -- in terms of economic value -- that is as substantial as that achieved in this action.

28. In *In re Vitamins Antitrust Litigation*, 2001 U.S. Dist. LEXIS 25067, class counsel was awarded \$123,188,032 plus interest, pursuant to an agreement negotiated at arms-length between class counsel and defendants. That figure comprised one-third of the value of the settlement. *Id.* at 57. That case, unlike the instant case, concerned a settlement class – in which a class is certified on the condition that a settlement is approved, generally before substantial discovery is

completed. Moreover, the Vitamins Case followed a successful government investigation into horizontal price-fixing practices in the vitamin industry, obviating the need for substantial discovery and enhancing the likelihood of success on the merits. Indeed, the court granting the fee application in the Vitamins Case noted that the settlement was not a product of “lengthy litigation.” *Id.* at 63. In the instant case, Class Counsel did not have the opportunity to “piggy-back” on substantial work completed by the United States government in order to litigate the matter successfully. Rather, crafting the legal theories to pursue, eliciting and evaluating probative evidence, preparing experts, drafting submissions for class certification (which, unlike in the Vitamins Case, was vigorously opposed by defense counsel at the district court, appellate court, and United States Supreme Court levels), drafting papers in support of and in opposition to hard fought motions for summary judgment, and preparation for trial was all completed solely due to the ingenuity, effort and tenacity of Class Counsel.

29. Due to the fact that I prepared and submitted a declaration supporting the attorneys' fee application in *In re NASDAQ Market-Makers Antitrust Litigation*, 1998 WL 702020 (S.D.N.Y. November 9, 1998), I am quite familiar with that proceeding. The NASDAQ Case resulted in a class common fund of \$1,027,000,000 – an amount, at the time, which represented the largest settlement among antitrust class actions. The attorneys' fee award in the NASDAQ Case was \$143,700,000 or 14.0% of the common fund. Like the Vitamins Case and unlike the present case, the NASDAQ Case followed a government investigation regarding horizontal price-fixing claims. Indeed, most of the “discovery” completed in that case by plaintiffs' counsel was merely their review of documents requested and depositions taken by the government. Class Counsel, in this action, spent literally tens of thousands of hours reviewing documents of defendants,

responding to discovery requests of defendants and taking and defending fact depositions. Furthermore, unlike class counsel in the NASDAQ Case, C & P (with the assistance of class counsel) spent thousands of hours preparing submissions supporting and opposing motions for summary judgment – submissions that referred to thousands of exhibits.⁶ Finally, Class Counsel in this case recovered compensatory relief (in present value terms) that is more than three times what was achieved in the NASDAQ Case, easily surpassing what was once the largest antitrust class action settlement.⁷ That amount does not even include the \$25.076 billion value (conservatively estimated) afforded to the Class by the injunctive relief achieved.

Conclusion

30. Even after the deduction of attorneys' fees and Expenses, the class' recovery apparently far exceeds any prior antitrust recovery and therapeutic value in a case of extraordinary risk that might readily have been lost entirely by way of pretrial dismissal or at the class certification stage or at summary judgment. Alternatively, it might have been settled for far less than was actually secured.

31. In sum, the class has (1) received first class representation, (2) overcome enormous litigation risks, and (3) obtained the benefits of an extraordinary result that will bring the class monies that it could not possibly have recovered otherwise. In addition, the practices of an industry were reformed in a way that will have long-term public benefits. *See* Declarations of

⁶ Indeed, the quality of work by C & P and Class Counsel is borne out by the fact that Plaintiffs' motions for summary judgment were substantially granted while Defendants' were denied in the entirety.

⁷ I also understand from my review of the First Declaration that the antitrust and economic issues raised in the instant case were more complex than those faced in the NASDAQ Case or the Vitamins Case.

Willard Ogburn. Individualized litigation was economically out of the question for a great majority of the class members, and lawyers of the professional skill and experience of the petitioning attorneys would not have been available to them with no up-front cash payment and no obligation to pay fees in the event of a loss.⁸ For all of this, it should be kept in mind that the class is only being asked to pay 18% of the present value of the compensatory relief or 2.14% of the present value of the total recovery, plus out-of-pocket expenses. These figures are well below the marketplace value for contingent fee services *See In re Continental Illinois Securities Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)(Posner, J.) (in awarding attorneys' fees, "the object is to simulate the market where a direct market determination is infeasible"). That is a highly favorable net result for the class, especially given the absence of any plausible alternative method of securing a recovery for its members.

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

Dated: New York, New York
August 18, 2003



ARTHUR R. MILLER

⁸ As the Court held, "[w]ithout class certification, . . . millions of small merchants [would] lose any practical means of obtaining damages for defendants' allegedly illegal conduct." *In re Visa Check/MasterMoney Antitrust Litigation*, 192 F.R.D. 68, 88 (E.D.N.Y. 2000)



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Professional Employment:

1958-61, associated with Cleary, Gottlieb, Steen & Hamilton, New York, New York

1961-62, Associate Director, Columbia Law School Project on International Procedure

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Publications relating to Civil Procedure, Copyright, and Other Legal Topics

Books

Cases and Materials on Equitable Remedies, 532 pages (mimeographed)

Civil Procedure: Cases and Materials, 1,389 pages, with J.J. Cound, J.H. Friedenthal,
and J. Sexton (eight editions)

Civil Procedure (Hornbook), 880 pages, with J.H. Friedenthal and M.K. Kane (two editions)

Civil Procedure Supplement, 513 pages, with J.J. Cound and J.H. Friedenthal (nineteen
editions)

Federal Practice and Procedure, more than thirty-five volumes, with C.A. Wright,
some with E.H. Cooper, M.K. Kane, and R. Marcus

Intellectual Property: Patents, Trademarks and Copyright in a Nutshell, 437 pages,
with M.H. Davis (two editions)

Manual -- CPLR, 1,050 pages, with J.B. Weinstein and H.L. Korn

Miller's Court, 302 pages, Houghton Mifflin; paperback, New American Library (Plume)

New York Civil Practice, eight volumes, with J.B. Weinstein and H.L. Korn

Pleading, Joinder and Discovery -- Cases and Materials, 643 pages, with J.J. Cound
and J.H. Friedenthal

Sum and Substance of Civil Procedure, 417 pages, with J.H. Friedenthal (four editions)

Articles

The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and
Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?,
78 N.Y.U. L. Rev. 982 (2003)

- "Copyright Term Extension: Boon for American Creators and the American Economy," 45 *Journal of the Copyright Society of the USA* 319 (1998)
- "Artful Pleading: A Doctrine in Search of Definition", 76 *Texas Law Review* 1781 (1998)
- "Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?", 106 *Harvard Law Review* 1977 (1993)
- "Confidentiality, Protective Orders, and Public Access to the Courts," 105 *Harvard Law Review* 428 (1991)
- "Resolving the Asbestos Personal-Injury Litigation Crisis," 10 *Review of Litigation* 419 (1991), with P. Ainsworth
- "The New Certification Standard Under Rule 11," 130 *Federal Rules Decisions* 479 (1990)
- "Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts," 96 *Yale Law Journal* 1 (November 1986), with D. Crump
- "Ancillary and Pendent Jurisdiction," 26 *South Texas Law Journal* 1 (Spring 1985)
- "The Adversary System: Dinosaur or Phoenix," 69 *Minnesota Law Review* 1-37 (October 1984) (Lockhart Lecture)
- "Of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem,'" 92 *Harvard Law Review* 664-94 (1979)
- "Problems of Giving Notice in Class Actions," 58 *Federal Rules Decisions* 313-34 (1973)
- "Problems in Administering Judicial Relief in Class Actions under Federal Rule 23(b)(3), 54 *Federal Rules Decisions* 501-13 (1972)
- "Service of Process Under Rule 4 -- Some Unfinished Business for the Rulemakers," 46 *Federal Rules Decisions* 101-40 (1969)
- "Computers, Copyrights, and Medicine," *Visual Medicine*, June/July 1967, 32-36
- "Computers and Copyright Law," 46 *Michigan State Bar Journal* 11-18 (April 1967)
- "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine," 65 *Michigan Law Review* 613-750 (February 1967)

"International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube," 49 *Minnesota Law Review* 1069-1132 (May 1965)

Monographs and Chapters

"The August 1983 Amendments to the Federal Rules of Civil Procedure -- Promoting Effective Case Management and Lawyer Responsibility," Federal Judicial Center, 41 pages (1984)

"The Class Action -- American Style," Chapter 17, 192-205, *The Cambridge Lectures* (1983)

"Attorneys' Fees in Class Actions," Federal Judicial Center, 430 pages (1980)

"An Overview of Federal Class Actions: Past, Present and Future," Federal Judicial Center, 68 pages (1977)

"International Co-operation in Litigation: Switzerland, in *International Co-operation in Litigation: Europe* 358-81(1965), with M. Guldener

"International Co-operation in Litigation: Belgium," in *International Co-operation in Litigation: Europe* 30-51(1965) with F. Rigaux

"International Co-operation in Civil Litigation -- A Report on Practices and Procedures Prevailing in the United States." 103 pages (1961), with H. Smit

"Problems in the Transfer of Interest in a Copyright," in *Copyright Law Symposium*, Number 10, 131-193 (1959)

Publications relating to Privacy, Information, and Computer Technology

The Assault on Privacy: Computers, Data Banks and Dossiers, 320 pages, University of Michigan Press (1971); paperback edition, New American Library (Signet) (1972)

"Computers, Data Banks and Individual Privacy: An Overview," *Columbia Human Law Review* Volume 4, Number 1, Winter 1972, pp. 1-12

"The Credit Networks: Detour to 1984," *Nation*, June 1, 1970, pp. 648-51, 669

"The Dossier Society," *University of Illinois Law Forum*, Volume 1971, Number 2, pp. 154-67

"The National Data Center and Personal Privacy," *Atlantic*, November 1967, p. 557

"On Proposals and Requirements for Solutions, Symposium: Computers, Data Banks, and Individual Privacy," 53 *Minnesota Law Review* 224-41 (December 1968)

"Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society," *67 Michigan Law Review* 1089-1246 (April 1969)

"The Privacy Implications of Instructional Technology," paper prepared for the Commission on Instructional Technology (March 1969)

"The Privacy Revolution: A Report from the Barricades," *19 Washburn Law Journal* 1-22 (Fall 1979)

"Psychological Testing and Privacy," *Think*, May-June 1969.

"The Right of Privacy -- A Look Through the Kaleidoscope," *SMU Law Review*, Volume 46, Number 1, Summer 1992.

Professional Memberships

Member, American Law Institute

Member, Massachusetts and New York State Bars

Member, United States Supreme Court Bar, the Bars of eleven United States Courts Appeal, and the Bar of the United States Tax Court

Other Professional Activities

Former member, Advisory Committee on Civil Rules of the Judicial Conference of the United States (by appointment of Chief Justices Burger and Rehnquist)

Former reporter, Advisory Committee on Civil Rules of the Judicial Conference of the United States (by appointment of Chief Justices Burger and Rehnquist)

Reporter, Task Force to Study Court Awarded Attorneys' Fees, U. S. Court of Appeals for the Third Circuit

Reporter, Study on Complex Litigation, American Law Institute

Reporter, Complex Litigation Project, American Law Institute

Reporter, Civil Justice Advisory Group, U.S. District Court, District of Massachusetts

Member, Special Advisory Group to the Chief Justice of the United States Supreme Court on Federal Civil Litigation

Member, American Bar Association Special Committee on Complex and Multidistrict Litigation

Special Advisor, Board of Editors, Manual on Complex Litigation

Faculty, Federal Judicial Center

Member, American Bar Association Committee on Scientific and Economic Proof

Draftsman, Uniform Interstate and International Procedure Act

Rapporteur, Study on Taking Evidence Abroad, Secretary of State's Advisory Committee on Private International Law

Member of Council, ABA Section on Science and Technology

Member, Institute of Judicial Administration

Listed in *Who's Who in America*

Public and Professional Activities relating to Privacy, Information, and Computer Technology

Chairman, Massachusetts Security and Privacy Council

Member, National Commission on New Technological Uses of Copyrighted Works (CONTU)(by appointment of President Ford)

Member, Special Committee on Automated Personal Data Systems, U.S. Department of Health, Education and Welfare

Member, Special Legislative Commission on Privacy (Commonwealth of Massachusetts)

Member, Governor's Special Commission on Privacy and Personal Data (Commonwealth of Massachusetts)

Member, Panel on Legal Aspects of Information Systems, Committee on Scientific and Technical Information, Federal Council for Science and Technology

Member, Special Decennial Census Review Committee, U.S. Department of Commerce

Member, National Advisory Panel of the Project on Computer Data Banks, National Academy of Sciences

Chairman, Panel on External Affairs, Interuniversity Communications Council (EDUCOM)

Advisor, Special Committee on Computer Research, State Bar of Michigan

Director, American Association of Law Schools Projects on Computer-Assisted Instruction

Member, American Bar Association Committee on Scientific and Economic Proof

Numerous speaking and radio and television appearances on subjects including individual privacy, the census, computer technology, the National Data Center, and computers and the law

Senate Testimony relating to Privacy, Information, and Computer Technology (in each case at the request of the Subcommittee involved)

United States Senate Subcommittee on Technology and the Law, August 1, 1990 (caller ID)

United States Senate Subcommittee on Banking, Housing, and Urban Affairs, October 4, 1973 (consumer credit)

United States Senate Subcommittee on Financial Institutions, August 14, 1972 (amendments to Bank Secrecy Act)

United States Senate Subcommittee on Constitutional Rights, February, 1971 (governmental data banks)

United States Senate Subcommittee on Antitrust and Monopoly, December 11, 1968 (credit bureaus)

United States Senate Subcommittee on Administrative Practice and Procedure (the computer and individual privacy)

Media Activities

Legal Editor, WCVB-TV Channel 5, Boston

Former Legal Editor, "Good Morning America," ABC-TV

Former Host, "Miller's Law" (and earlier "In Context"), Courtroom Television Network (Court TV)

Former Host, "Miller's Court," WCVB-TV Channel 5, Boston

Former Host, "Headlines on Trial," WRC-TV Channel 4, Washington, DC, New York, NY
Moderator, numerous public television programs
Commentator, "The Justice Files," Discovery Network
Occasional Columnist, Boston *Globe*, *USA Today*, *ABA Journal*, Los Angeles *Times*

Honors and Awards

Honorary Degree, Doctor of Education, Merrimack College
Honorary Degree, Doctor of Laws, Fitchburg State College
Honorary Degree, Doctor of Laws, Framingham State College
Honorary Degree, Doctor of Laws, University of the Pacific
Honorary Degree, Doctor of Laws, Thomas M. Cooley Law School
Hutchinson Medal for Distinguished Public Service, University of Rochester
National Academy of Television Arts and Sciences Award (Emmy) for hosting
"The Constitution: That Delicate Balance"
Six New England Regional Academy of Television Arts and Sciences Awards
for "Miller's Court," hosting, and "The Law Works"
Three American Bar Association Gavel Awards for promoting public understanding
of the law
Special Recognition Gavel from the American Bar Association for twenty years service
in promoting public understanding of the law
Award for Patient Advocacy, American Psychiatric Association
Iris Award for outstanding television
Charles Dickens Society Award for the Preservation of Literacy from the National
Court Reporters Association

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