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Third Circuit Task Force Report on Selection of Class Counsel

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FOREWORD

THIRD CIRCUIT TASK FORCE REPORT ON SELECTION OF CLASS COUNSEL

Chief Judge Edward R. Becker

By November 2000, I had become aware that a number of respected U.S. District Judges were selecting class counsel through a bidding process, with apparent success in lowering counsel fees and thus achieving greater benefits for the class. However, I also noted that many respected judges and lawyers had opined that the bidding process was flawed in concept and practice; that it presented professional responsibility problems; and that the conventional method of selection of class counsel—at the discretion of the assigned judge—was preferable. I began to ruminate about the plight of a newly minted district judge assigned a big class action case. It seemed to me that he or she would face a quandary in deciding whether to select class counsel by auction or by the conventional method. I surveyed the literature but found neither an empirical study of the bidding process nor any normative evaluation of the competing methodologies. I therefore resolved to form a Task Force to analyze the various methods of selection of class counsel and to prepare a report that would evaluate them for the benefit of the bench and bar. This report would identify salient considerations and relevant factors for judges to weigh in assessing whether, or when (if at all), the bidding method is most apt.

Fortunately, I was able to persuade two of the finest lawyers in the nation, Professor Stephen A. Saltzburg of George Washington University Law School and Gregory P. Joseph of the New York City bar, to co-chair the Task Force. I was also able to enlist thirteen other lawyers, judges and academics of enormous ability, experience and judgment to serve as Task Force members. The members were selected with a view to balance, and included both plaintiffs' and

* Chief Judge, United States Court of Appeals for the Third Circuit.

defendants' lawyers, non-litigators who were expert on the economics of law practice, in-house counsel, and state and federal judges. The plaintiffs' lawyers on the Task Force included some who had bid successfully, some who had bid unsuccessfully, and some who have not been involved in bidding. I was also fortunate in persuading Professor Daniel Capra of Fordham Law School, one of the best and brightest members of the legal academy, to serve as the Reporter for the Task Force, and the extremely able Professor Eleanor W. Myers of Temple Law School to serve as the Associate Reporter.

My plan was for the Task Force to elicit comment from a wide array of lawyers, judges, and scholars throughout the nation, to hold hearings, and to write a draft report that would be subject to comment and criticism at the Third Circuit Judicial Conference in Philadelphia in November of 2001. The plan was fully implemented. The commentators and critics included the members of the bar, academy, and judiciary with the most experience in the area. The array was truly impressive, and the comments at the Judicial Conference extremely incisive. All of these submissions were weighed and balanced by the Task Force in preparing the final report.

The end product speaks for itself. While it is not the function of a "foreword" to evaluate it—others have done so—I will at least opine that I find the Report to be extremely impressive. More importantly, it has fulfilled its purpose—it has exposed every facet of the problem, and amply informed the judgment of all who will confront it. It has accomplished within a year what would have taken ten years or more for jurisprudence and scholarship to develop. I extend my thanks to the Task Force, its Chairs and Reporters, and to all who made submissions that informed its judgment. I also extend my thanks to the Editors of the Temple Law Review for making the report available to the legal community at large and for the symposium in this issue, which airs conflicting views as to the Task Force's conclusions.

Out of excess of caution, I conclude with a disclaimer. The Task Force Report, while done under the aegis of the Third Circuit, does not constitute Third Circuit law. Indeed, no panel of the Court is bound by any of its conclusions. Concomitantly, it is intended to inform but not to cabin or stifle the judgment of any Court dealing with the issue. I acknowledge that some may not be persuaded by the Task Force Report. Rather it is offered as a contribution to the administration of justice in the Third Circuit and throughout the nation. I hope that history will record that it has served that end.

EDITOR'S INTRODUCTION

The Third Circuit Task Force Report on the Selection of Class Counsel ("the Report") is published by the Temple Law Review as a public service to the legal community and all other interested parties.

The Report is herein published in full without addition or deletion. The form and format of the Report are reprinted exactly as written by the Task Force. At the Task Force's request, no modification to the text or footnotes of the Report have been made, with the exception of correcting minor typographical or spelling errors.

The Editors would like to thank Chief Judge Edward R. Becker for generously offering Temple Law Review the opportunity to reprint the Report. We also thank the Honorable Vaughn Walker, the Honorable Milton Shadur, Professor John Coffee, Professor Joseph Grundfest, and Professor Jill Fisch, who generously responded to our request for comments to the Report. Finally, we express appreciation to Professor Daniel Capra and Professor Eleanor Myers for their support and assistance in preparing the Report for publication.

The comments are presented directly following the Report. We hope that the Report and corresponding comments make a positive contribution to the ongoing discussion and debate regarding this important topic.