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COURT OF APPEALS

STATE OF NEW YORK

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Borden,

Respondent,

-against-

No. 182

400 E. 55th Street Associates, L.P.,

Appellant.

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Gudz,

Respondent,

-against-

No. 183

Jemrock Realty Corp.,

Appellant.

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Downing,

Respondent,

-against-

No. 184

First Lenox Terrace Associates,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 14, 2014

1 Before:

2 CHIEF JUDGE JONATHAN LIPPMAN  
3 ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
4 ASSOCIATE JUDGE SUSAN PHILLIPS READ  
5 ASSOCIATE JUDGE ROBERT S. SMITH  
6 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
7 ASSOCIATE JUDGE JENNY RIVERA  
8 ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Number 182, 183 and  
2 184?

3 Counsel, would you like any rebuttal time?

4 MR. SOLOWAY: Yes, two minutes of rebuttal.

5 CHIEF JUDGE LIPPMAN: Two minutes. Go  
6 ahead, counsel. You're - - - you're on Lenox, right?

7 MR. SOLOWAY: That's correct, Your Honor.  
8 Todd Soloway from Pryor Cashman.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. SOLOWAY: Your Honors, in the brief  
11 time I have up here, I want to focus on a few precise  
12 points that I believe that not only will decide all  
13 three of these cases - - -

14 CHIEF JUDGE LIPPMAN: Go ahead.

15 MR. SOLOWAY: - - - but also provide the  
16 necessary guidance going forward.

17 901(b) on its face bars an action to  
18 recover a penalty from being brought as a class  
19 action. It's a gate-keeping statute. It's a  
20 question - - - the question presented is what are you  
21 necessarily seeking when you walk into the courtroom,  
22 not what you're seeking when you - - - not what  
23 you're going to get when you leave.

24 JUDGE PIGOTT: Isn't it rare for a  
25 defendant to come in and say, you're not suing me for

1           enough, and in fact, you - - - what you should be  
2           doing is suing me because I'm doing this  
3           intentionally, when you know that you're going to  
4           deny that you did it intentionally, I don't think you  
5           did it intentionally, and there is no grounds for - -  
6           - for a - - - for a punitive damages?

7                       MR. SOLOWAY: Well, Your Honor, I would say  
8           it's no secret that nobody wants to be on the  
9           receiving end of a class-action lawsuit. You know,  
10          these - - - these cases - - -

11                      JUDGE PIGOTT: But there are situations  
12          that would seem to me when all - - - when everything  
13          lines up, and it's just a question of whether or not  
14          there were overcharges or not, based upon our  
15          previous decision, and based on our previous  
16          decision, a good argument could be made that none of  
17          you were acting in a punitive fashion, that these  
18          things could be wrapped up in a - - - almost  
19          mathematically.

20                      MR. SOLOWAY: Your Honor, there are - - -  
21          there's a lot of back and forth in the record in my  
22          case, and in each of these cases, where there's  
23          argument back and forth as to what the nature of it  
24          is, and whether or not there will be treble damages.

25                      CHIEF JUDGE LIPPMAN: It's very - - - it -

1           - - it would be unusual that the - - - that there's a  
2 willfulness that would require treble damages.

3           MR. SOLOWAY: Your Honor, in the 72A case  
4 that came up from the civil court, which is where we  
5 would submit these cases should originate, the - - -  
6 the appellate court actually said the fact that you  
7 may - - - may or may not have relied upon the  
8 regulations or the previous state of affairs is  
9 evidence for us to consider, but it's not  
10 determinative.

11           JUDGE READ: So it's not a slam dunk.

12           MR. SOLOWAY: It's no - - - by any stretch,  
13 no.

14           JUDGE SMITH: Suppose it were. Suppose you  
15 - - - suppose you could - - - had an absolute  
16 assurance that you were going to get no more than the  
17 - - - that you were not going to get the treble; you  
18 were going to get only the single overcharge. Is  
19 that overcharge in itself a penalty?

20           MR. SOLOWAY: Well, the - - - the language  
21 of the statute - - - Your Honor, they use the word  
22 "penalty" to describe that in - - - in the language  
23 of the statute. There is case law that talks about  
24 whether or not - - -

25           JUDGE SMITH: Is there a sense - - - is



1 well, she signed - - - yeah, she signed a lease for  
2 the higher rent.

3 MR. SOLOWAY: Correct.

4 JUDGE SMITH: And presumably thought she  
5 could pay it. If you had never deregulated the  
6 apartment, she never would - - - you never would have  
7 heard of her.

8 MR. SOLOWAY: Yes, there's a possibility  
9 that she may have been an existential - - - never  
10 would have come to be in this position.

11 JUDGE SMITH: I guess what I'm saying is,  
12 isn't this - - - isn't what she's getting something  
13 of a windfall to her, rather than - - - rather than  
14 real damages.

15 MR. SOLOWAY: Absolutely.

16 JUDGE SMITH: Has she really been injured -  
17 - -

18 MR. SOLOWAY: Abso - - - listen - - -

19 JUDGE SMITH: - - - or did she win the - -  
20 - she won the lottery?

21 MR. SOLOWAY: Ab - - - in our cases - - -  
22 in - - - in this case, we have - - - we have only  
23 building of six that are - - - or two buildings of  
24 six that are receiving J-51 benefits. Some of these  
25 tenants are absolutely going to receive a windfall.

1 They were never expecting this to be the state of  
2 affairs, and we - - - I would respectfully submit - -  
3 -

4 JUDGE SMITH: And you can't - - - and you  
5 can't - - - and you can't raise that as a defense to  
6 the overcharge?

7 MR. SOLOWAY: No.

8 JUDGE SMITH: You can't say, oh, well, this  
9 is a windfall to you?

10 MR. SOLOWAY: No, not at all.

11 JUDGE SMITH: Because the statute gives - -  
12 -

13 MR. SOLOWAY: Not at all.

14 JUDGE SMITH: Because the statute gives  
15 them a windfall. I guess I'm - - -

16 MR. SOLOWAY: They're - - - they're - - -

17 JUDGE SMITH: - - - obviously - - -  
18 obviously you're going to be more receptive to this  
19 question than your adversary is, but I'm - - - I'm  
20 suggesting to you that in that - - - that it's fair  
21 to call even the single overcharge a penalty in - - -  
22 in light of all that.

23 MR. SOLOWAY: Your Honor, it was never the  
24 - - - our client's - - - from the owner's  
25 perspective, expectation, nor was it the tenant's

1 expectation that they would be in the position  
2 they're in today. No one signing these leases ever  
3 thought they were getting a dime of rent back. And  
4 so the idea is yes, if they were receiving - - -

5 JUDGE RIVERA: Well, but - - - but the  
6 tenants expected for the landlords to follow the law.

7 MR. SOLOWAY: Absolutely.

8 JUDGE RIVERA: And isn't the argument that  
9 you didn't?

10 MR. SOLOWAY: The argu - - -

11 JUDGE RIVERA: And under the law,  
12 therefore, they have an overcharge that they - - -

13 MR. SOLOWAY: They're absolute - - -

14 JUDGE RIVERA: - - - are entitled to  
15 receive.

16 MR. SOLOWAY: That's right, and that's why  
17 this is an action to recover a penalty, because the  
18 statute itself provides - - -

19 JUDGE RIVERA: Well, how is that a penalty?

20 MR. SOLOWAY: Be - - -

21 JUDGE RIVERA: You're re - - - they're  
22 recouping what they should never have paid to you  
23 under the law. Their expectation is you will follow  
24 the law.

25 MR. SOLOWAY: Sure, I'm not arguing - - -

1 not talking about the actual base amount of the  
2 overcharge. If you - - - under your scenario, Your  
3 Honor, no matter what, the treble damages component,  
4 which under this statute is mandatory - - -

5 JUDGE RIVERA: No, no, I'm sorry. I  
6 thought we were just referring to the overcharge, not  
7 the treble - - -

8 MR. SOLOWAY: I was just answering the  
9 Judge - - -

10 JUDGE RIVERA: But - - - but I was  
11 referring only to the overcharge.

12 MR. SOLOWAY: Sure. I mean - - -

13 JUDGE RIVERA: Are you then in agreement or  
14 are you still disputing that?

15 MR. SOLOWAY: I would be in agreement if  
16 the Court find - - - look, the - - - the cases below  
17 are developing that you overcharged - - - you  
18 overcharged. That - - - that you deregulated when  
19 you shouldn't have and therefore this amount - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but if it's - -  
21 -

22 JUDGE SMITH: Well, it's not - - - it's not  
23 a question of whether they can get it. Ob - - -  
24 everyone concedes they can get it. The question is,  
25 would you - - - are you conceding that if they get

1           only single - - - only the single overcharge, it's  
2           not a penalty?

3                     MR. SOLOWAY:   Your Honor, no.   The - - -  
4           the statute itself says - - -

5                     JUDGE SMITH:   You are not conceding or  
6           you're conceding it?

7                     MR. SOLOWAY:   No, we're not conceding it.

8                     CHIEF JUDGE LIPPMAN:   You don't think that  
9           there was two different purposes in the overcharge,  
10          as opposed to the treble damages?

11                    MR. SOLOWAY:   Yes, I do, Your Honor, there  
12          is.   And I want to be clear - - -

13                    CHIEF JUDGE LIPPMAN:   That one could view  
14          it as more compensatory in nature or compensatory in  
15          nature - - -

16                    MR. SOLOWAY:   Yes, I - - -

17                    CHIEF JUDGE LIPPMAN:   - - - and the other  
18          one is an obvious penalty.   What's - - - what's  
19          difficult about that concept?

20                    MR. SOLOWAY:   Yeah, no, Your Honor, I don't  
21          disagree with that concept.   I want to get the full  
22          thought out here.

23                    CHIEF JUDGE LIPPMAN:   Go ahead.   Sure.

24                    MR. SOLOWAY:   The ba - - - the base point  
25          is definitely more compensatory in nature and there

1 are - - - and a lot of the courts have talked about  
2 it that way before - - -

3 CHIEF JUDGE LIPPMAN: Right.

4 MR. SOLOWAY: - - - the language of the  
5 statute does use the word "penalty", so if the court  
6 wanted to look at it, and - - -

7 CHIEF JUDGE LIPPMAN: If we want to make a  
8 value judgment - - -

9 MR. SOLOWAY: Judgment.

10 CHIEF JUDGE LIPPMAN: - - - that it's a  
11 penalty - - -

12 MR. SOLOWAY: It - - -

13 CHIEF JUDGE LIPPMAN: - - - and using a  
14 word, but in the context - - -

15 MR. SOLOWAY: In the context - - -

16 CHIEF JUDGE LIPPMAN: - - - so the treble  
17 damages versus what would appear to be compensatory,  
18 it doesn't seem like a penalty if you use it - - -

19 MR. SOLOWAY: Yes.

20 CHIEF JUDGE LIPPMAN: - - - in that  
21 context.

22 MR. SOLOWAY: In that context I would  
23 agree, Your Honor, that it is compensatory in nature,  
24 where the treble is clearly a penalty. All of the  
25 courts discussing it have - - - have referred to the

1           treble as a penalty.

2                       But going back to the statute here, 26-  
3           516(a), rent - - - that - - - that penalty is  
4           mandatory. It's the question of what you're asking  
5           when you're coming - - - walking into the courtroom.  
6           That's what 901(b) is about.

7                       JUDGE PIGOTT: But I - - - I'm looking at  
8           it, almost selfishly, from the point of view of the  
9           courts.

10                      MR. SOLOWAY: Sure.

11                      JUDGE PIGOTT: I don't know how many of  
12           these there are out there. There's quite a few. And  
13           it seems to me - - - this is just the way I look at  
14           it - - - that the punitive damages are going nowhere.  
15           Now, I could be wrong. I mean, somebody could, you  
16           know, say that you guys are doing this intentionally,  
17           and I mean, it was our decision that - - - that kind  
18           of rocked this place with respect to that.

19                      So if we assume that there aren't any, now  
20           you've got all of these people who, windfall or not,  
21           are saying, gee, I - - - you know, I - - - I - - -  
22           I've been told that I overpaid for my apartment. Why  
23           wouldn't that be a computational thing that we ought  
24           to handle in - - - in the square of one courtroom,  
25           rather than 1,700 or - - -

1 MR. SOLOWAY: Sure, well, Ms. Cruz will  
2 talk in great deal - - - in depth about the issue of  
3 - - - of whether or not they meet the standards for -  
4 - - for a class action, but Your Honor, each one of  
5 these apartments does have a lot of unique  
6 characteristics. You know, whether you were, in fact  
7 - - - when you came into occupancy, major capital  
8 improvements to each apartment, all of these - - -

9 JUDGE PIGOTT: But isn't that damages?

10 MR. SOLOWAY: That may be damages or may  
11 not.

12 JUDGE PIGOTT: Which is in any summary  
13 judgment motion, if you find liability and you get  
14 down to damages, it's always a mess. And then - - -

15 MR. SOLOWAY: Well, the - - - the - - - in  
16 these landlord-tenant cases, there are very unique  
17 facts that are presented in each one of these cases.

18 JUDGE SMITH: Is liability a slam-dunk in  
19 all these cases?

20 MR. SOLOWAY: If it's determined that  
21 people - - - that they are Roberts tenants, I would  
22 have to respectfully submit that yeah, there's going  
23 to be some - - -

24 JUDGE SMITH: Is that - - - is that good  
25 for you or bad for you?

1 MR. SOLOWAY: Well, I - - -

2 JUDGE SMITH: Does that mean that the  
3 common issue predominates or it doesn't predominate?

4 MR. SOLOWAY: I - - - I could tell you that  
5 - - - that I'm not as fully versed in the issue of  
6 predomination - - -

7 JUDGE SMITH: Okay, I'll ask her, okay.

8 MR. SOLOWAY: - - - but I apologize, Your  
9 Honor.

10 JUDGE RIVERA: Counsel, can I just get to  
11 the - - -

12 MR. SOLOWAY: Sure.

13 JUDGE RIVERA: - - - the purpose behind the  
14 foreclosure of the penalty claims in a 901? Isn't  
15 that to insure that the defendants in those cases  
16 don't have to bear the burden of those types of  
17 claims? So if they waive that claim, isn't that  
18 really addressing what this purpose of - - -

19 MR. SOLOWAY: Sure, thank you - - -

20 JUDGE RIVERA: - - - 901 is?

21 MR. SOLOWAY: - - - for asking that  
22 question, because - - -

23 JUDGE RIVERA: Yes.

24 MR. SOLOWAY: - - - that's really what - -

25 -

1 JUDGE RIVERA: Yes.

2 MR. SOLOWAY: - - - the one thing I want to  
3 get to here. The actual distinction between our case  
4 and the Labor Law wage claim cases that have come up  
5 below is that the plaintiffs in those cases have a  
6 burden of proof.

7 JUDGE RIVERA: Um-hum.

8 MR. SOLOWAY: And what the court in both  
9 Smellie and in the Klein v. Ryan Beck case  
10 specifically noted was that those plaintiffs could -  
11 - - and here's the quote - - - "could choose to forgo  
12 the opportunity to prove willfulness, and thus in  
13 effect, waive the penalty provision".

14 Here, there's no burden. They - - - they  
15 all - - - the only question to be asked of the  
16 plaintiffs here is, are you bringing the claim or  
17 not? And once you do - - -

18 JUDGE SMITH: Yeah, but are they - - - are  
19 they - - -

20 MR. SOLOWAY: - - - it's in play.

21 JUDGE SMITH: If they say - - - if they say  
22 I'm - - - I'd be happy with the single overcharge,  
23 not the treble overcharge. I don't want the treble  
24 overcharge. But - - - yeah, let's say, first an  
25 individual plaintiff; forget about a class action.

1 Any reason an individual plaintiff can't say that?

2 MR. SOLOWAY: It's of no effect. The  
3 legislature - - -

4 JUDGE SMITH: And - - - and - - - and - - -

5 MR. SOLOWAY: - - - has spoken here.

6 JUDGE SMITH: - - - you can't force him to  
7 recover more than he's suing you.

8 MR. SOLOWAY: No - - - no, be - - - it's  
9 not up to them. The plaintiff, you need - - -

10 JUDGE SMITH: They have to take the treble  
11 damages, even if they say - - -

12 MR. SOLOWAY: They - - - they - - -

13 JUDGE SMITH: - - - please don't give it to  
14 me?

15 MR. SOLOWAY: That's right. It's so  
16 important that the legislature has divested the  
17 plaintiffs of the option to choose - - -

18 JUDGE PIGOTT: I don't know where you get  
19 the standing to do that, but I - - - I'm going to con  
20 - - - well, I'll read it - - -

21 MR. SOLOWAY: Sure, no, I - - -

22 JUDGE PIGOTT: - - - I know it's in the  
23 statute.

24 MR. SOLOWAY: No, in the - - -

25 JUDGE PIGOTT: But if - - - if there's no

1 class action here, then there's going to be  
2 individual ones, right? How - - - do we know how  
3 many people we're talking about? How many tenants?

4 MR. SOLOWAY: I - - - I do not know. We  
5 have - - - we've had - - - in our record, in our  
6 case, I handed up to the judge at the motion court -  
7 - -

8 JUDGE PIGOTT: Ballpark?

9 MR. SOLOWAY: - - - some cases that were in  
10 landlord-tenant court - - -

11 JUDGE PIGOTT: Ballpark, ball - - -

12 MR. SOLOWAY: - - - that's where they  
13 should be.

14 JUDGE SMITH: Okay, we know of one - - - we  
15 know of one super - - -

16 JUDGE PIGOTT: Before - - - before he - - -  
17 before he take - - - cuts my question off, how many -  
18 - - how many cases do you think?

19 MR. SOLOWAY: I, honestly - - - I have no  
20 idea.

21 JUDGE PIGOTT: 5,000?

22 MR. SOLOWAY: No, there might be actually -  
23 - - there might not actually be a lot. There might  
24 be fewer. There's a lot of time that's passed - - -

25 JUDGE PIGOTT: Let's say 2,000, all right?

1 Are you suggesting that 2,000 people paying the - - -  
2 the 175 dollars for an index number, and starting an  
3 - - - an individual action is better for everyone  
4 than just roping these things in and getting them  
5 done?

6 MR. SOLOWAY: I don't - - - I - - - this is  
7 not consolidation. This is not consolidation for  
8 joint trial. This is - - - this is a matter whether  
9 something can be brought as a class action - - -

10 JUDGE PIGOTT: Right.

11 MR. SOLOWAY: - - - and the class action  
12 statute - - -

13 JUDGE SMITH: Okay, are we talking about -  
14 - - are we talking about - - -

15 MR. SOLOWAY: - - - says if you don't meet  
16 these standards, you're not without a remedy; go next  
17 door down. Judge Ramos, who's - - - who's close to  
18 these - - -

19 JUDGE SMITH: Can I - - - can I just - - -  
20 can I just get a fact straight? Are we talking about  
21 one cross - - - class action for all the Roberts  
22 tenants in the city, or are we talking about  
23 different class actions?

24 MR. SOLOWAY: Well, there's going to be  
25 different classes for every single case.

1 JUDGE SMITH: So there - - - so every - - -  
2 every building has - - - I mean, that's the way - - -

3 MR. SOLOWAY: Absolutely.

4 JUDGE SMITH: - - - so every building has  
5 its own class.

6 MR. SOLOWAY: I think you might have class  
7 actions coming out of this in all different kinds of  
8 cases.

9 JUDGE SMITH: So as - - - as I understand  
10 it, these are - - - these are your - - - what we're  
11 going to get is 20, 30, 50, 100 class actions of 50,  
12 100, 200 people each?

13 MR. SOLOWAY: And - - - and, yes.

14 CHIEF JUDGE LIPPMAN: So you're - - -

15 JUDGE SMITH: And what's - - - what's the  
16 big deal if instead of doing that, they tell you, you  
17 - - - you have - - - you juice up your word processor  
18 and type all hundred names on the complaint? Who  
19 cares?

20 MR. SOLOWAY: There's no difference, and in  
21 fact, in each one of these - - -

22 JUDGE SMITH: Well, why - - - why - - - why  
23 are all - - - why are all these lawyers fretting  
24 about this question?

25 MR. SOLOWAY: Right, well, in - - - in that

1 - - - in these cases, every single tenant is going to  
2 have to come to court and testify anyway. There's no  
3 benefit here.

4 CHIEF JUDGE LIPPMAN: Counsel, do you think  
5 judicial economy does not favor a class action - - -

6 MR. SOLOWAY: It - - - no - - -

7 CHIEF JUDGE LIPPMAN: - - - is that what  
8 you're saying?

9 MR. SOLOWAY: I don't think that - - - I  
10 don't think that's what this statute is about. This  
11 statute - - - the - - -

12 CHIEF JUDGE LIPPMAN: I'm asking you a  
13 question. Do you think the - - -

14 MR. SOLOWAY: No, it's not.

15 CHIEF JUDGE LIPPMAN: - - - judicial  
16 economy is better served - - -

17 MR. SOLOWAY: No.

18 CHIEF JUDGE LIPPMAN: - - - by having a  
19 class action?

20 MR. SOLOWAY: No, it does not help here.  
21 Every tenant is going to have to come in court and  
22 have to be deposed, offer evidence - - -

23 JUDGE RIVERA: But they're not - - -  
24 they're not in separate cases. They're not before  
25 potentially different judges. Let me go back to this

1 question about 901. If we disagree with you about  
2 the ability to waive, do you lose?

3 MR. SOLOWAY: No, there's a - - - there's a  
4 number of different items of - - - of waiver here.  
5 There's two layers of the waiver. Mr. Turkel will  
6 talk about the - - - the language of the rent  
7 stabilization laws and whether or not as a matter of  
8 policy, and whether you can waive under that. On the  
9 issue of the waiver here, no. The - - - the point is  
10 that this a mandatory provision.

11 CHIEF JUDGE LIPPMAN: Okay, counsel, let's  
12 hear from your colleagues and we'll get all these  
13 arguments out, I would trust, maybe. Go ahead.

14 Counselor?

15 MR. TURKEL: Good afternoon, Your Honors -  
16 - -

17 CHIEF JUDGE LIPPMAN: What are - - - what  
18 are you arguing?

19 MR. TURKEL: Well, I'm going to argue about  
20 the public policy and why treble damages are in the  
21 statute, and why it can't be waived.

22 CHIEF JUDGE LIPPMAN: Yeah, tell us.

23 MR. TURKEL: I just want to pick up on  
24 something first that several - - -

25 CHIEF JUDGE LIPPMAN: Even the - - - but -

1           - - but let me ask you something first.  If you  
2           accept the premise that it would be very rare that a  
3           tenant would be entitled to treble damages, is it  
4           still consistent with the - - - with the statute to  
5           hold them to that?

6                       MR. TURKEL:  No, Your Honor, because as Mr.

7           - - -

8                       CHIEF JUDGE LIPPMAN:  No, it's not  
9           consistent with the statute?

10                      MR. TURKEL:  Maybe I'm trapped in a double  
11           negative.  I don't think - - -

12                      CHIEF JUDGE LIPPMAN:  And yeah - - - maybe,  
13           go ahead.

14                      MR. TURKEL:  I don't think that - - - I  
15           think Mr. Soloway is correct.  What 901(b) looks at  
16           is what you're seeking, not what you ultimately get  
17           or what the chances of - - -

18                      CHIEF JUDGE LIPPMAN:  Yeah, but - - - but -  
19           - -

20                      MR. TURKEL:  - - - ultimately getting  
21           something.

22                      CHIEF JUDGE LIPPMAN:  - - - if you can't  
23           get treble - - - let - - - accept - - - for the  
24           premise of this question, accept the fact you could  
25           almost never get treble damages.  Therefore, you're

1 going to be held to that; that's consistent with the  
2 purpose of the statute? You're going to be held - -  
3 - and you can't - - - you can't get the class action?

4 MR. TURKEL: When you say consistent with  
5 the statute - - -

6 CHIEF JUDGE LIPPMAN: Yes.

7 MR. TURKEL: - - - it's certainly  
8 inconsistent with the rent stabilization law. And  
9 that's the real statute here.

10 CHIEF JUDGE LIPPMAN: It's certainly  
11 inconsistent with the rent stabilization law.

12 MR. TURKEL: Right. I want to just pick up  
13 as I - - -

14 JUDGE GRAFFEO: Well, let me - - - let me  
15 ask if - - -

16 CHIEF JUDGE LIPPMAN: Let me - - - let me  
17 interrupt, Judge Graffeo, for one second.

18 Do you want rebuttal time?

19 MR. TURKEL: Oh, yes, I'm sorry. One  
20 minute, Your Honor.

21 CHIEF JUDGE LIPPMAN: One minute.

22 Go ahead, Judge Graffeo.

23 JUDGE GRAFFEO: In - - - in looking at the  
24 rent stabilization statute, where we're dealing with  
25 buildings here, it seems to me that there's some

1 realistic advantage to saying that everybody in one  
2 building or one complex is going to be dealt with  
3 similarly in one class action. You know, one judge,  
4 one proceeding, one set of - - - two sets of  
5 attorneys or however many attorneys we're going to  
6 end up with.

7 But there's a certain consistency there, as  
8 opposed to saying, no, they can't waive, so we've got  
9 to have a hundred separate lawsuits pending, which  
10 may have inconsistent calculations or results. I'm -  
11 - - I - - - that, to me, seems like an overriding  
12 policy concern here.

13 MR. TURKEL: Well, Your Honor, I - - - I  
14 think we're putting the cart before the horse. The  
15 first question - - - we don't get to superiority,  
16 numerosity and all of those things, until we get to,  
17 can you actually bring a class action?

18 JUDGE GRAFFEO: Right. But I think - - -  
19 to me, it's the opposite, because we're the ones that  
20 issued Roberts. We certainly never said this was  
21 being - - - we were doing this because we saw  
22 willfulness here.

23 MR. TURKEL: Understood, Your - - -

24 JUDGE GRAFFEO: You're - - - you're  
25 presuming that - - - that there's going to be a lack

1 of success on - - -

2 MR. TURKEL: Well, may I address that, Your  
3 Honor?

4 JUDGE GRAFFEO: - - - the pending the will  
5 - - - the willfulness aspect of this.

6 MR. TURKEL: May I address that? Several  
7 members of the court have already said, well, this is  
8 not willful; there's not going to be any treble  
9 damages. I think that's incorrect. And let me  
10 explain why.

11 Under the rent stabilization law, the  
12 tenant has no burden of proof on anything. They  
13 don't have to prove that there was a rent overcharge.  
14 The landlord has to prove that the rent was legal.  
15 They don't have to prove willfulness. The landlord  
16 has to prove a lack of willfulness. In my case,  
17 there are dozens of rent stabilized apartments. In  
18 Mr. Soloway's case, there are hundreds of rent  
19 stabilized apartments.

20 When a landlord treats - - - as these  
21 landlords treated pre-Roberts - - - an apartment as  
22 deregulated, the rent had to get up to 2,500 dollars  
23 first. Did that happen legally? I don't know. The  
24 landlord has the burden of proof. I can't tell this  
25 court, and I can't tell - - -

1                   JUDGE PIGOTT: I run over somebody with my  
2 car. And I get sued because I negligently hit the  
3 person. I am not - - - coming to court to say I did  
4 it intentionally; I murdered him. I don't have  
5 insurance coverage. Please, understand, I don't want  
6 insurance coverage. I'd be crazy. They'd - - -  
7 they'd admit me to a - - - an institution.

8                   And - - - but you want to say, I know  
9 you're suing for - - - for an overage in rent, but  
10 I'm telling you, we did it intentionally. We want  
11 you to charge us intentionally. We want you to prove  
12 it. And in fact, we're going to help you. And - - -

13                  MR. TURKEL: Your Honor, our position is  
14 not more - - - is not any more cynical or any more  
15 absurd than the tenants' position saying, please, let  
16 them off the hook for two-thirds of the damages.

17                  JUDGE RIVERA: No, no, no, but you - - -  
18 you asserted - - - I'm sorry. Did I miss this?  
19 Didn't you guys assert affirmatively that you were  
20 not willful? Did I miss something?

21                  MR. TURKEL: Just as they asserted - - -

22                  JUDGE RIVERA: I'm so - - - no, no, yes or  
23 no on that.

24                  MR. TURKEL: Yes.

25                  JUDGE RIVERA: Okay.

1 MR. TURKEL: But we still have to prove it.

2 JUDGE RIVERA: Fine, but - - - but please  
3 don't - - - I thought you were suggesting that  
4 somehow you were not ever going to assert - - -

5 JUDGE SMITH: Suppose - - - suppose - - -

6 JUDGE RIVERA: - - - that you didn't act  
7 willfully.

8 JUDGE SMITH: Suppose there are sti - - -  
9 suppose you have a stipulation. You stip - - - they  
10 stipulate with you that - - - that you weren't  
11 willful. And at - - - later in discovery, strong  
12 evidence of willfulness comes out, and - - - and the  
13 tenant says, you know what? I don't like that  
14 stipulation anymore; I'm walking from it. Can they  
15 do it?

16 MR. TURKEL: I don't think you can  
17 stipulate rights - - -

18 JUDGE SMITH: Well, well, no, no, to - - -

19 MR. TURKEL: - - - under the rent  
20 stabilization law under any circumstances.

21 JUDGE SMITH: - - - well, is that a yes or  
22 a no? Can they walk from that stipulation? Is the  
23 stipulation valid or void?

24 MR. TURKEL: The stipulation was never  
25 valid to begin with. Your Honor, let - - - let me

1 try to - - -

2 JUDGE SMITH: So you're - - - you're saying  
3 that in - - - maybe, that's never going to happen.  
4 But if they do decide they don't like the limitation  
5 to si - - - to - - - to the single overcharge or to  
6 the single penalty or whatever it is, they - - - they  
7 are not bound - - - they are not bound by their  
8 agreement?

9 MR. TURKEL: They can't waive their rights  
10 so they would not be bound by their agreement.

11 JUDGE SMITH: That's under - - - that's  
12 because the rent stabilization law says you can't?

13 MR. TURKEL: Right. The - - - the - - -  
14 what this court said - - -

15 JUDGE RIVERA: Why doesn't the law let you  
16 waive? What's the purpose of not allowing waiver  
17 according to - - -

18 MR. TURKEL: Because we have to look at the  
19 legislative scheme. Treble damages only came into  
20 the rent stabilization law in 1983, pursuant to the  
21 Omnibus Housing Act. Before that, overcharges were  
22 refunded dollar-for-dollar without interest. And I  
23 was practicing at this time. And my clients  
24 understood that overcharging a tenant was a profit  
25 center, because if you got caught, all you had to do

1 was pay back the money; you could keep the interest.

2 In 1983, the legislature said, enough is  
3 enough. If landlords have an incentive to overcharge  
4 or no disincentive not to overcharge, we have to stop  
5 that. So they did two extraordinary things. They  
6 said, number one, we're going to have treble damages  
7 for the first time in the statute.

8 And number two, they said, we are going to  
9 assume, because we are so upset and so angry about  
10 treble damages, about rent overcharge, in - - - which  
11 completely undermines the rent stabilization system,  
12 that we're going to sock landlords with treble  
13 damages. We're going to assume that it was  
14 malicious, that it was willful.

15 That's a very strong legislative statement  
16 that we want treble damages. Under many other  
17 statutes, it is the plaintiff who has to establish  
18 willfulness. Not here. The legislature said, if you  
19 want to get out from willfulness, landlord, it's  
20 going to be - - - have to - - - you sustain your  
21 burden of proof.

22 Many statutes say, and it's at GBL 349(h),  
23 says, even if willfulness is established by the  
24 plaintiff, the court still has the discretion to not  
25 award treble damages. Well, there clearly - - - or

1 penalty damages - - - there clearly, the legislature  
2 sees penalty damages as not an integral,  
3 foundational, fundamental part of the statute. Under  
4 the rent stabilization law, the legislature - - -

5 JUDGE RIVERA: But counsel - - -

6 MR. TURKEL: - - - was saying enough is  
7 enough.

8 JUDGE RIVERA: - - - but counsel, in this -  
9 - - in this case, weren't your clients thinking they  
10 were acting lawfully, because they had the DHCR  
11 opinion? So the disincentive doesn't really work.

12 MR. TURKEL: Well, as I was saying, Your  
13 Honor, up until Roberts, landlords were treating  
14 these apartments as deregulated. You can only treat  
15 an apartment deregulated if you got the rent to 2,000  
16 dollars. There's lot of ways to get to 2,000 dollars  
17 - - -

18 JUDGE SMITH: So - - - so - - - so as  
19 you're saying - - -

20 MR. TURKEL: - - - some legal, some  
21 illegal.

22 JUDGE SMITH: - - - some of your clients  
23 may have - - - may have cheated by deregulating in  
24 the first place.

25 MR. TURKEL: Absolutely, Your Honor. And

1           it's actually worse than that, because the owner has  
2           the burden of proof. So let's say in a particular  
3           case - - -

4                         JUDGE SMITH: But - - - but why can't the  
5           plaintiff make a reasonable litigation judgment?  
6           Look, I understand there are going to be some of  
7           those out there. On the other hand, a class action  
8           is a great advantage to plaintiffs. It - - - it gets  
9           the money flowing; I - - - I'm going to waive that  
10          right.

11                        MR. TURKEL: Two reasons. Number one,  
12          litigation strategy never trumps public policy.  
13          That's number one. And number two is the rent  
14          stabilization law, when the legislature created the  
15          Omnibus Housing Act and the treble damages, the  
16          legislature said, we are not giving the tenants the  
17          choice. Treble damages are so important and so  
18          fundamental to the statute, we're not letting judges  
19          have any discretion whatsoever and they don't have  
20          discretion.

21                        If the court finds that the owner - - - the  
22          overcharge was intentional, they must award treble  
23          damages and visa versa.

24                        JUDGE RIVERA: For the willful - - -  
25          willful, correct?

1 MR. TURKEL: Willful, I'm sorry.

2 JUDGE RIVERA: Do you consider that a high  
3 standard to meet?

4 MR. TURKEL: Yes. I mean, in practice I  
5 can tell you, when DHCR sends out a treble damage  
6 notice, saying that we find an overcharge, and as  
7 pursuant to the statute, we are - - - have to assign  
8 - - - we have to give treble damages unless you can  
9 show it is not willful. At that point, I would say  
10 in ninety, ninety-five percent of the cases, it is  
11 treble. As Judge Smith said, you can get to 2,000  
12 legally or you can get to 2,000 not legally.

13 Let's say, in my particular case, the  
14 owner, the rent was - - - I don't know - - - 1,800 -  
15 - -

16 JUDGE PIGOTT: We're spending a lot of time  
17 with landlords talking about how bad they are. I'm -  
18 - - I'm mystified by this.

19 MR. TURKEL: It's no more ironic than  
20 tenants talking about how good we are, Your Honor.  
21 And just as we said that it wasn't a - - -  
22 intentional in our answer, the tenants said it was  
23 intentional in their complaint. Now they're running  
24 away from it; they've changed their position. We  
25 haven't. We have the burden the proof. Landlords in

1 civil court, in Supreme Court, having the burden of  
2 proof, often don't win.

3 CHIEF JUDGE LIPPMAN: Okay, counsel. We -  
4 - -

5 MR. TURKEL: And I - - - thank you, Your  
6 Honor.

7 CHIEF JUDGE LIPPMAN: - - - we know you're  
8 bad. Let's go on to your colleague and see if she's  
9 as bad as you.

10 MR. TURKEL: I'll report to the court  
11 officer.

12 CHIEF JUDGE LIPPMAN: Okay. Not yet.  
13 Counsel, go ahead.

14 MS. CRUZ: Good afternoon, Your Honors. I  
15 would like to reserve - - -

16 CHIEF JUDGE LIPPMAN: Do you want any  
17 rebuttal, counsel?

18 MS. CRUZ: Excuse me?

19 CHIEF JUDGE LIPPMAN: Rebuttal time?

20 MS. CRUZ: My client is - - -

21 CHIEF JUDGE LIPPMAN: No, do you want  
22 rebuttal time?

23 MS. CRUZ: Yes, yes, two minutes, please.

24 CHIEF JUDGE LIPPMAN: Two minutes, go  
25 ahead.

1 MS. CRUZ: My name is Magda Cruz for  
2 Jemrock Realty. And I would like to pick up  
3 specifically on the class certification criteria,  
4 because in the event that the statutory argument  
5 regarding the no waiver of a penalty that my  
6 colleagues have argued, and that I submit is  
7 controlling here, the court doesn't need to go to the  
8 classification crite - - -

9 CHIEF JUDGE LIPPMAN: Would ordinarily not  
10 disturb the finding of the trial court on something  
11 like this?

12 MS. CRUZ: Yes, you would, if the trial  
13 court abused its discretion as a matter of the law.

14 CHIEF JUDGE LIPPMAN: That's the standard.  
15 They have to abuse its discretion.

16 MS. CRUZ: That is correct.

17 CHIEF JUDGE LIPPMAN: Okay.

18 MS. CRUZ: And here, I would submit that -  
19 - -

20 JUDGE SMITH: Are you - - - are you going  
21 to address - - - I mean, I think a lot of the  
22 questions have been addressed on the basic - - -  
23 basic practical issue. Isn't it better to have a  
24 class? Isn't better for - - - for the administration  
25 of justice to have a class action, than to have

1 everybody on their own?

2 MS. CRUZ: Not in this - - -

3 JUDGE SMITH: You say, no, but explain in  
4 practical terms why.

5 MS. CRUZ: I - - - I will tell you why not  
6 in this instance, and I think it is most highlighted  
7 by the fact that in order to determine whether an  
8 apartment has been deregulated lawfully, it is not  
9 just a question of when J-51 tax benefits were  
10 received in the building or not. It is not, Your  
11 Honors.

12 I think that that is a misconception here.  
13 And it was made clear by the Appellate Division in  
14 72A Realty v. Lucas. One has to determine whether  
15 the point of deregulation was lawful. And that, Your  
16 Honor, can turn on a multitude of factors. And then  
17 - - -

18 JUDGE SMITH: Okay, but why - - - I mean,  
19 why is it better or worse, or doesn't it really make  
20 any difference despite all the energy that's been  
21 spent on it, to have - - - how many - - - how many  
22 tenants in your - - - how many Roberts tenants in  
23 your building?

24 MS. CRUZ: We submit there's at most  
25 seventy-eight tenants in - - -

1 JUDGE SMITH: How many do they say there  
2 are?

3 MS. CRUZ: I think that they - - - maybe  
4 eighty-two, eighty-five.

5 JUDGE SMITH: Okay.

6 MS. CRUZ: We're not that far apart.

7 JUDGE SMITH: So why - - - why isn't it  
8 better to have one plaintiff suing on behalf of all  
9 eighty-two, than all eighty-two of them on the same  
10 complaint?

11 MS. CRUZ: Because there is no one formula  
12 that a court can derive to determine the legal  
13 regulated rent - - -

14 JUDGE SMITH: Okay, isn't - - -

15 MS. CRUZ: - - - or whether the - - -

16 JUDGE SMITH: - - - isn't that going to be  
17 true, whether it's a class action or an action with  
18 eighty-two plaintiffs?

19 MS. CRUZ: Well, you - - - do you mean if  
20 there had been a consolidated - - -

21 JUDGE GRAFFEO: Why - - - why couldn't - -  
22 -

23 MS. CRUZ: - - - action with eighty-two - -  
24 -

25 JUDGE SMITH: Yes.

1 MS. CRUZ: - - - plaintiffs? Yes, Your  
2 Honor, that is correct.

3 JUDGE GRAFFEO: Why couldn't you have a  
4 special referee that then goes through and decides  
5 these issues for each of these individual plaintiffs  
6 - - -

7 MS. CRUZ: Because - - -

8 JUDGE GRAFFEO: - - - but at least you have  
9 an overarching class action so that there's some  
10 uniformity?

11 MS. CRUZ: Well, there cannot be uniformity  
12 in determining the legal regulated rent of each  
13 apartment. Every single apartment - - -

14 JUDGE PIGOTT: But then - - -

15 MS. CRUZ: - - - has a unique rent history.

16 JUDGE GRAFFEO: No, but the - - - but the -  
17 - - you know, the - - - the time line, the  
18 appearances, I mean, there's general judicial  
19 oversight that's similar.

20 MS. CRUZ: Well, I guess the one question  
21 could be, when did the building get J-51 tax  
22 benefits? But at the point of whether the apartment  
23 was illegally deregulated, if in - - - in my case,  
24 for instance, Ms. Gudz was not - - - that apartment  
25 was deregulated before J-51 was accepted at this

1 building.

2 JUDGE GRAFFEO: I'm sure that's true of  
3 more than just your client's apartment.

4 MS. CRUZ: There - - - exactly. And there  
5 are at least twenty-four apartments in my client's  
6 building like that. And the question of whether - -  
7 -

8 JUDGE SMITH: Suppose - - - suppose all  
9 seventy-eight tenants brought their own actions, and  
10 you moved to consolidate, that would be a pretty  
11 strong motion to consolidate, wouldn't it?

12 MS. CRUZ: It would be a very difficult  
13 motion to consolidate, Your Honor, because each  
14 tenancy does not have - - -

15 JUDGE SMITH: Do you think - - - you think  
16 the courts would not - - -

17 MS. CRUZ: - - - similar facts.

18 JUDGE SMITH: Do you think the courts would  
19 not consolidate seventy-eight cases, and it's the  
20 same defendant - - -

21 MS. CRUZ: I - - - I would submit it would  
22 not.

23 JUDGE SMITH: - - - on the same legal  
24 theory?

25 MS. CRUZ: I would submit it would not, and

1           - - - and I would like to briefly turn to the  
2           superiority of existing ways of determining legal  
3           regulated rents and coverage questions.

4                   CHIEF JUDGE LIPPMAN:  And you're not for  
5           either a class action or a consolidated action?

6                   MS. CRUZ:  Excuse me?  I'm sorry.

7                   CHIEF JUDGE LIPPMAN:  You - - - you do not  
8           argue for not only for a class action, but you don't  
9           argue for a consolidated action.

10                   MS. CRUZ:  Correct, Your Honor, because - -  
11           -

12                   CHIEF JUDGE LIPPMAN:  Go ahead, tell us  
13           why.

14                   MS. CRUZ:  - - - the - - - the forums that  
15           already exist in New York to determine these disputes  
16           are - - - are very expert in determining the - - -  
17           the legal regulated rents of - - - of individual  
18           apartments, and it is at no cost to a tenant who may  
19           wish to pursue that remedy.  That would be simply  
20           filing a rent overcharge complaint at DHCR.  No cost  
21           at all.

22                   JUDGE PIGOTT:  Are they required to do  
23           that?

24                   MS. CRUZ:  Does not even need to have an  
25           attorney.  And there will be a presumption that that

1           tenant will get - - -

2                   CHIEF JUDGE LIPPMAN: Judge Pigott asked a

3           - - -

4                   MS. CRUZ: - - - treble damages.

5                   CHIEF JUDGE LIPPMAN: - - - question.

6                   JUDGE PIGOTT: Are they required to do

7           that?

8                   MS. CRUZ: No, no one can - - - is required  
9           to bring a case, but they are incentivized to do  
10          that, Your Honor.

11                  JUDGE PIGOTT: So your real argument is, if  
12          we make it difficult for them to come to court, maybe  
13          they'll go to the administrative proceeding and  
14          that's better for everybody?

15                  MS. CRUZ: Well, in fact, they are  
16          incentivized to go to the administrative proceeding,  
17          because there, there will not be one plaintiff  
18          waiving treble damages.

19                  JUDGE PIGOTT: Well, then - - - are these  
20          people ignorant? I mean, you've got a bunch of  
21          people over here that see the difference - - -

22                  MS. CRUZ: Your Honor, I don't want to  
23          speculate as to their motivation, but clearly there  
24          are very easy ways for a tenant - - -

25                  CHIEF JUDGE LIPPMAN: Counsel, if they - -

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MS. CRUZ: - - - to receive the remedies -

- -

CHIEF JUDGE LIPPMAN: - - - if they don't -  
- - if they don't take advantage of that, would you  
agree that - - - that a class action is a better use  
of judicial time or judicial economy?

MS. CRUZ: No, Your Honor, I think it is  
not a - - - a better way.

CHIEF JUDGE LIPPMAN: Even if they all come  
into the court? But you're not - - - you already  
said you're not for - - - you're not for class action  
and you're not for consolidated action.

MS. CRUZ: Correct.

CHIEF JUDGE LIPPMAN: If they don't choose  
to take this administrative option, what's going to  
happen there?

MS. CRUZ: They can - - - there's another  
way also that tenants - - -

CHIEF JUDGE LIPPMAN: Go ahead.

MS. CRUZ: - - - many tenants have  
exercised their rights post-Roberts to determine the  
le - - - the regulated status of their apartment and  
the legal rents.

JUDGE PIGOTT: It sounds like you're

1 arguing against attorney's fees.

2 MS. CRUZ: Excuse me?

3 JUDGE PIGOTT: It sounds like you're  
4 arguing against attorneys' fees. That's what you're  
5 afraid of.

6 MS. CRUZ: Your Honor, in an individual  
7 case, tenants can also get attorneys' fees. In fact  
8 - - -

9 JUDGE PIGOTT: I know that. I'm - - - I'm  
10 saying, it sounds like you're arguing against  
11 attorneys' fees. You don't like consolidation. You  
12 don't like courts. You don't - - - you don't want  
13 these cases in court. You want them in an  
14 administrative proceeding.

15 MS. CRUZ: Not necessarily, Your Honor. In  
16 fact - - -

17 JUDGE PIGOTT: Where are you going to put  
18 them, then?

19 MS. CRUZ: In fact, in a nonpayment case, a  
20 tenant could simply withhold the rent if they feel  
21 that they're paying an illegal rent, and in a - - -  
22 as a defense, they can claim that they have been  
23 overcharged.

24 JUDGE PIGOTT: You want them to do that.

25 MS. CRUZ: Excuse me?

1 JUDGE PIGOTT: It's too late for that.

2 MS. CRUZ: No, not necessarily, Your Honor.

3 There are many, many cases that have been coming  
4 through the court system since 2009, since Roberts  
5 was decided, in which tenants have exercised multiple  
6 remedies to determine what their legal rents are and  
7 the regulatory status of their apartment.

8 JUDGE RIVERA: If they - - - if they  
9 withhold, aren't they risking potentially - - - if -  
10 - - God forbid, should they be wrong, that they're  
11 going to get evicted?

12 MS. CRUZ: No, Your Honor.

13 JUDGE RIVERA: Or did I misunderstand that?

14 MS. CRUZ: A housing court would allow the  
15 tenant to exercise their right - - -

16 JUDGE RIVERA: To then pay.

17 MS. CRUZ: - - - to articulate their  
18 defense - - -

19 JUDGE RIVERA: To then pay.

20 MS. CRUZ: - - - and if they are in fact  
21 wrong, that there has not been an illegal overcharge,  
22 then they will simply pay - - -

23 JUDGE PIGOTT: How's - - - how's - - -

24 MS. CRUZ: - - - whatever they owe.

25 JUDGE RIVERA: But otherwise they're at

1 risk of eviction, are they not?

2 MS. CRUZ: Your Honor, not realistically,  
3 because it's simply a defense as to why they have not

4 - - -

5 JUDGE PIGOTT: Well, if you're - - -

6 MS. CRUZ: - - - paid their rent.

7 JUDGE PIGOTT: - - - if you're saying - - -  
8 if you're saying that housing court is not going - -  
9 - they're going to get a notice of eviction, and then  
10 they're going to get a - - - a lawsuit to evict them.

11 MS. CRUZ: Your Honor, I'm just - - -

12 JUDGE PIGOTT: And that would wake them up,  
13 I would think.

14 MS. CRUZ: I'm just suggesting that that is  
15 one way that these claims have been - - -

16 JUDGE PIGOTT: Better than what these - - -  
17 better than what these lawyers are suggesting?

18 MS. CRUZ: Absolutely, Your Honor - - -

19 JUDGE PIGOTT: How?

20 MS. CRUZ: - - - because these types of  
21 class actions will turn into mini-trials of multitude  
22 types of claims - - -

23 JUDGE PIGOTT: As opposed to - - -

24 MS. CRUZ: - - - that, no, a referee - - -

25 JUDGE PIGOTT: As - - - as opposed to a

1 simple notice to evict and a - - - and a summary  
2 proceeding to throw them out of their apartment,  
3 which is simple.

4 MS. CRUZ: No, more - - - more likely as  
5 opposed to simply an administrative complaint in  
6 which a tenant alleges, I - - - my rent is not lawful  
7 - - -

8 JUDGE RIVERA: Since - - -

9 MS. CRUZ: - - - please determine what my  
10 legal rent is.

11 JUDGE RIVERA: Well, since DHCR got it  
12 wrong the last time, they might be a little suspect  
13 of that process.

14 MS. CRUZ: Well, but ultimately, the legal  
15 - - - the legality of a rent will turn on the  
16 interpretation of a multitude of regulations, Your  
17 Honor. In fact, at page 400, 401 of the record in  
18 the Gudz case, you have a letter from DHCR in which  
19 the Roberts Supreme Court asked it, can you give me a  
20 formula so that I can adjudicate all of these claims?  
21 In Stuyvesant Town there were 4,000 apartments  
22 affected. And DHCR responded that no, there is no  
23 individual formula to determine the legal regulated  
24 rent.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MS. CRUZ: There that was only the rent  
2 issue. It was not coverage.

3 CHIEF JUDGE LIPPMAN: Okay. Let's hear  
4 from your adversaries, and then you'll all have  
5 rebuttal time.

6 MS. CRUZ: Thank you.

7 MR. BRINCKERHOFF: Good afternoon, may it  
8 please - - -

9 CHIEF JUDGE LIPPMAN: Counsel?

10 MR. BRINCKERHOFF: - - - the court, my name  
11 is Matt Brinckerhoff. I represent the plaintiffs in  
12 the Downing case, which as you know was not a case  
13 that has yet - - - where we have yet moved for class  
14 certification.

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. BRINCKERHOFF: But I do want just  
17 address at the outset just a couple of issues that  
18 have come up.

19 One, first of all, when it comes to just  
20 efficiency of a class action versus individual  
21 actions, one of the things that hasn't come up that  
22 is critical here is that what we know is, if there is  
23 not a class action device in these cases, most of the  
24 people who are affected are not going to get any  
25 relief at all, period. End of story. That is why

1 the landlords - - -

2 JUDGE SMITH: Well, why - - - why can't  
3 they get it from DHCR?

4 MR. BRINCKERHOFF: They can get relief from  
5 many forums if they know what their rights are, if  
6 they have proper counseling. Most of the time, if  
7 they have attorneys. What we know is in housing  
8 court, eighty-five to ninety - - -

9 JUDGE SMITH: So - - - so you're - - -  
10 you're really - - - you're really saying that a class  
11 action is a way of - - - of causing people to become  
12 litigants who wouldn't otherwise?

13 MR. BRINCKERHOFF: Class actions are ways  
14 of protecting the rights of people who wouldn't  
15 otherwise be protected. There's no question - - -

16 JUDGE SMITH: Okay, you and I just said the  
17 same thing, but in diff - - -

18 JUDGE RIVERA: Well - - -

19 JUDGE SMITH: - - - I mean, in different  
20 slants, correct?

21 JUDGE RIVERA: Well, I think - - -

22 MR. BRINCKERHOFF: There's no question but  
23 with an orientation that I think is - - -

24 JUDGE RIVERA: I think you're saying more,  
25 if I'm not misunderstanding you. I think you're also

1 suggesting that this is about maintaining a  
2 particular stocks. It's not just about these  
3 individual rights, but about the goals of the  
4 legislature through rent stabilization of maintaining  
5 the stock in a regulated fashion.

6 MR. BRINCKERHOFF: There's - - - there's no  
7 question about that, and in fact, remember in - - -  
8 in our case and in all of the cases, there are  
9 multiple forms of relief being sought. Some are  
10 compensatory. But many - - - much of the relief that  
11 we're seeking is declaratory, to make sure that  
12 everybody is found to be rent stabilized.

13 Notwithstanding this court's decision, it  
14 doesn't mean that every landlord has gone out and  
15 sent a notice to their tenants saying, you know what?  
16 We deregulated you under J-51, and in 2009, the Court  
17 of Appeals issued a decision, so there - - -

18 JUDGE PIGOTT: But you're not going to do  
19 that either. You just said that. You said you can't  
20 find these people, so I assume you want to serve by  
21 publication.

22 MR. BRINCKERHOFF: Oh, no, we have no  
23 intention of serving by publication. Almost all  
24 these people - - -

25 JUDGE SMITH: You - - - you want to send

1           them a class action notice.

2                   MR. BRINCKERHOFF:   Excuse me?

3                   JUDGE SMITH:   You want to send them an opt-  
4 out notice from - - -

5                   MR. BRINCKERHOFF:   Absolutely.

6                   JUDGE SMITH:   - - - when you got a class  
7 action - - -

8                   JUDGE PIGOTT:   Then you'll know who they  
9 are, and you know their address.  I mean, I - - - I -  
10 - - I'm missing something.  You know, Mr. Soloway  
11 suggested, I think, you know, that consolidation by  
12 building would make some sense.  It's not - - - you  
13 know, it's - - - I'm missing what you - - - what you  
14 wanted to do.

15                   MR. BRINCKERHOFF:   What my point about  
16 people not getting any relief at all, isn't about  
17 providing them notice.  It's about the simple fact  
18 that people who are living in apartments and going  
19 about their daily lives, notwithstanding all of the -  
20 - - the work that we all do in - - - in this room on  
21 a daily basis, don't go litigate every day.

22                   JUDGE SMITH:   Yeah, and isn't that - - -  
23 isn't - - - doesn't the system usually go on the - -  
24 - on the theory that if people don't want to  
25 litigate, that's just fine.

1 MR. BRINCKERHOFF: If they're people - - -

2 JUDGE SMITH: It's up to them.

3 MR. BRINCKERHOFF: - - - who have the means  
4 and ability and the incentive to litigate otherwise,  
5 yes. But the whole purpose of the class action  
6 device - - -

7 JUDGE GRAFFEO: So - - - so why isn't  
8 consolidation an adequate remedy here as opposed to  
9 class action?

10 MR. BRINCKERHOFF: Because you would have  
11 to consolidate cases that actually exist. What we've  
12 seen is - - -

13 JUDGE PIGOTT: But of course - - -

14 MR. BRINCKERHOFF: - - - there are a number  
15 of class actions that have been filed. They're all  
16 in the larger buildings, not in the smaller ones. In  
17 the smaller buildings and even in some of the larger  
18 buildings, there aren't class actions pending; there  
19 aren't individual actions pending; there are no  
20 actions pending. And if you want to see how this  
21 actually operates in the real world, you don't look -  
22 - - have to look any further than the Roberts case  
23 itself.

24 JUDGE SMITH: Well, in the small - - - in  
25 the smaller buildings there aren't going to be class

1 actions anyway, are there?

2 MR. BRINCKERHOFF: No, depending on the  
3 size, likely not, and - - - and - - - but the - - -  
4 the net result of - - -

5 JUDGE SMITH: So - - - so we can forget  
6 about them for the present pur - - - the present  
7 argument.

8 MR. BRINCKERHOFF: Well, it was to  
9 illustrate the point that I was trying to make, which  
10 is that - - - that this - - - the sort of - - -  
11 what's - - - what's underlying the position of the  
12 landlords here, among other things, is that they know  
13 that they can continue to operate without  
14 compensating anyone, making them whole for what  
15 happened, being subjected to any kinds of strictures,  
16 because they won't sue.

17 JUDGE SMITH: I understand. Now let me - -  
18 -

19 MR. BRINCKERHOFF: And that's a traditional  
20 reason.

21 JUDGE SMITH: - - - let me ask you a  
22 different question, if I may. Can - - - visualize  
23 the trial of your class action. What's going to  
24 happen at trial?

25 MR. BRINCKERHOFF: Well, well before trial

1           there will be multiple - - - or not multiple - - -  
2           there will be summary judgment motions to resolve a  
3           host of legal and factual issues that will result in  
4           a mathematical formula that can be applied to every  
5           single person in the class.

6                   JUDGE SMITH:  You're saying - - - you're  
7           saying, don't worry; it won't be - - - they'll never  
8           come to trial.

9                   MR. BRINCKERHOFF:  And - - - no, but that -  
10          - - they'll come - - - I mean, probably they won't  
11          come to trial.  I can't imagine a factual dispute  
12          that would be material that would exist - - -

13                   CHIEF JUDGE LIPPMAN:  So you don't need - -  
14          - you wouldn't need a special referee like we  
15          discussed before that - - -

16                   MR. BRINCKERHOFF:  No, what would happen,  
17          either through adjudication or through settlement, is  
18          going to be what happened in Roberts.  What happened  
19          in Roberts - - -

20                   JUDGE SMITH:  But class actions do have a  
21          way of getting settled, and that's why some people  
22          are a little leery of them.

23                   MR. BRINCKERHOFF:  There's - - -

24                   JUDGE SMITH:  They - - - they get settled,  
25          because, in many cases, the dollars are so huge, the

1 defendant can't afford not to settle. Because you're  
2 saying that's not true here, as long as it's building  
3 by building. You're not - - - you're not talking  
4 about a billion-dollar class action.

5 MR. BRINCKERHOFF: Correct. And in - - - I  
6 can say in - - - in the Downing case, for instance,  
7 it's Lenox Terrace, the amounts of overcharge are not  
8 substantial. It's - - - it is the quintessential  
9 case that the legislature was thinking of where there  
10 are small amounts of damages, where they can be put  
11 together in a class action, so there's actually  
12 relief that can be given to people that otherwise  
13 would not get that relief.

14 And again, in Roberts, there was a formula  
15 - - -

16 JUDGE SMITH: Isn't - - - isn't that - - -  
17 isn't that what DHCR is for? Is to - - - where  
18 people who don't have lawyers not - - - can - - - can  
19 get a - - - and then the lawyers don't make a dime,  
20 and the guy just gets his refund?

21 MR. BRINCKERHOFF: And - - - DHCR is one  
22 avenue that one could pursue, although the statistics  
23 on that are not that people go to DHCR frequently.  
24 Again on the - - -

25 JUDGE SMITH: Should we - - - should we be

1 concerned, as we sometimes are in class actions, that  
2 we're essentially enriching the class action bar,  
3 rather than the - - - the people who - - - who they  
4 claim to represent?

5 MR. BRINCKERHOFF: There - - - there are  
6 multiple incentives for bringing class actions, for  
7 bringing cases for overcharge. There are attorneys'  
8 fees provided in all of them. Although to be clear,  
9 in the Roberts class action, again, my - - - my  
10 colleague, Mr. Siebott, who was one of the attorneys  
11 on that case, can speak to this in much more detail  
12 than me and I'm sure he will.

13 But - - - but one of the many things he  
14 will tell you is that all of those clients - - - all  
15 of the people, for the most part, got fully  
16 compensated, or very close thereto, even though the  
17 attorneys also got paid. And so in the end what you  
18 have is - - -

19 JUDGE SMITH: So you got - - - so - - - so  
20 defendants paid more than a hundred percent of their  
21 liability?

22 MR. BRINCKERHOFF: It's more complicated  
23 than that, and I will leave it to Mr. Siebott to  
24 explain the details, but it is not unusual for many,  
25 many reasons. The biggest one in class actions,

1 typically, is the same thing I was alluding to  
2 earlier.

3 Even when you have a class action, and even  
4 when you adjudicate the rights of everyone, you - - -  
5 we can adjudicate what the rent level should be in  
6 every apartment, but there will be people who, you  
7 can send a notice to them and say, sign on the dotted  
8 line and you will get 2,000 dollars, and they will  
9 not respond.

10 It happens in every class action, and it's  
11 almost always that pool of money that's used to  
12 compensate the attorneys, because that way it doesn't  
13 come out of the compensatory amounts that are due to  
14 the plaintiffs who respond. It happens in securities  
15 fraud class actions - - -

16 JUDGE SMITH: It's great for - - - yeah,  
17 it's great for defendants and it's great for the  
18 lawyers, and a lot of people don't show up. And  
19 there's a - - - but isn't - - - I mean, is that what  
20 we should be doing? Like, create - - - creating a  
21 fund to pay lawyers from people on the fiction that  
22 there are people who are going to take this money?

23 MR. BRINCKERHOFF: It's - - - it's the - -  
24 - the - - - the system that has been set up by the  
25 legislature and set up by the U.S. Congress as well

1 under Rule 23, and it's been used for decades and  
2 decades.

3 CHIEF JUDGE LIPPMAN: And your - - - your  
4 view is that it vindicates people's rights in an  
5 economical way in terms of judicial economy?

6 MR. BRINCKERHOFF: There's no - - -

7 CHIEF JUDGE LIPPMAN: It's the best way to  
8 vindicate the most people's rights in an efficient,  
9 judicially economical way?

10 MR. BRINCKERHOFF: Of course, and I think -  
11 - -

12 CHIEF JUDGE LIPPMAN: That's the basic - -  
13 - why you want a class action?

14 MR. BRINCKERHOFF: I think that - - - that  
15 conclusion is undeniable. I think the Roberts case  
16 proves it. I think these cases will prove it. I  
17 think countless class actions do prove it.

18 CHIEF JUDGE LIPPMAN: And it won't require,  
19 in your view, a computation for each case?

20 MR. BRINCKERHOFF: It will require a  
21 computation based on legal - - -

22 CHIEF JUDGE LIPPMAN: On a formula that - -  
23 - that works.

24 MR. BRINCKERHOFF: - - - legal principals  
25 that will established for particular categories of -

1 - - of tenants depending on their circumstances.

2 It's - - -

3 JUDGE PIGOTT: There - - - there are people  
4 that can look at this, because Roberts, as I say - -  
5 - you know, we do get the newspapers here - - - was  
6 kind of a bombshell to - - - to some people on how we  
7 found - - - you know, how we ruled on that. And - -  
8 - so there's a lot a people who were perfectly happy  
9 before Roberts with the way everything was going,  
10 landlords, tenants, and everything else.

11 We then said, you know, because you're  
12 getting J-51, you can't do this, and now we've got  
13 this situation where - - - not you, but others are  
14 expressing outrage. Well, I don't know why anybody's  
15 outraged. I mean, everything was fine until we did  
16 it.

17 We did it because that's the law, and I  
18 don't see where landlords were doing anything  
19 particularly nefarious that they weren't doing  
20 previously, or that tenants were being beaten up.  
21 That happened afterwards. I - - - it just seems to  
22 me that this is typical lawsuit.

23 And if - - - if building by building, that  
24 they're consolidated and decided, what's the downside  
25 to that?

1 MR. BRINCKERHOFF: The downside to that is  
2 you can't consolidate cases that aren't before you.

3 JUDGE PIGOTT: Right, but - - -

4 MR. BRINCKERHOFF: And so the only cases -  
5 - -

6 JUDGE PIGOTT: No, but that's my point.  
7 There's a lot of people out there that you want to  
8 reach who don't have a clue, don't care. I mean,  
9 they - - - everything was fine before Roberts.  
10 Things haven't changed since, and that's the way life  
11 goes.

12 MR. BRINCKERHOFF: I mean, the fact is it's  
13 - - - as in many things - - - it's more complicated  
14 than that.

15 JUDGE PIGOTT: Right.

16 MR. BRINCKERHOFF: There are many people -  
17 - - myself and my co-counsel represent many tenants  
18 associations. We're in constant communication with  
19 vast numbers, but not all, by any stretch. People  
20 move out. People move out before the two years prior  
21 to the filing of the complaint, so the only - - - the  
22 only claim they have is for compensatory damages.  
23 They have no treble damage claim to waive, because  
24 they have no treble damage claim.

25 I mean, just to - - - to address that for a

1 moment, it - - - it is true that the scheme is set up  
2 so willfulness is - - - is presumed and the - - - the  
3 presumption is in favor of the tenant and it has to  
4 be rebutted by the landlord. But the statute also  
5 provides specifically and expressly that if it's for  
6 a two year - - - more than two years prior to the  
7 filing of the complaint, there are no trebles at all.  
8 It's compensatory purely. Even the DHCR in their own  
9 policy statement, 89 - - -

10 JUDGE SMITH: But putting - - - putting  
11 aside the trebles, the - - - the statute does call  
12 what you would call single damages a penalty, doesn't  
13 it?

14 MR. BRINCKERHOFF: It - - - it - - - well -  
15 - -

16 JUDGE SMITH: So the penalty shall be the  
17 overcharge. The amount of the overcharge.

18 MR. BRINCKERHOFF: The - - - the title of  
19 the provision is penalty.

20 JUDGE SMITH: The - - - the statute says,  
21 the penalty shall be equal to the amount of the  
22 overcharge. Isn't that a fair paraphrase of what it  
23 says?

24 MR. BRINCKERHOFF: Tenant for a penalty - -  
25 - yes, correct. You're absolutely correct.

1                   JUDGE SMITH: So in call - - - in - - - and  
2 why - - - yeah, with all - - - with all the effort we  
3 spent on this, why doesn't that answer? We're asking  
4 whether it's a penalty. The legislature said it was.

5                   MR. BRINCKERHOFF: Because the question of  
6 whether something is a penalty as this court  
7 struggled with in Sperry and has in some other cases,  
8 isn't as simple as whether you call it a penalty or  
9 don't - - -

10                  JUDGE SMITH: Well, what the legislature  
11 called it is relevant, though.

12                  MR. BRINCKERHOFF: It's certainly relevant;  
13 of course, it's relevant, but it's - - -

14                  JUDGE SMITH: And isn't there a sense, in  
15 which - - - as I was doing this with your adversary;  
16 you may be a little less receptive than he was - - -  
17 but isn't there - - -

18                  MR. BRINCKERHOFF: He didn't have an  
19 answer.

20                  JUDGE SMITH: - - - a sense in which there  
21 is a penalty in that your - - - your people are not  
22 poor victims who got gouged. They're people who are  
23 perfectly happy to rent at a deregulated rent who are  
24 now able to pay a stabilized rent.

25                  MR. BRINCKERHOFF: But - - - but that

1 analysis applies to almost everybody in the city of  
2 New York who's ever had an overcharge complaint with  
3 all respect.

4 JUDGE SMITH: Yeah, yeah - - - yes.

5 MR. BRINCKERHOFF: Everybody.

6 JUDGE SMITH: And isn't that what - - - and  
7 isn't that why the legislature calls it a penalty?

8 MR. BRINCKERHOFF: But it's because  
9 somebody moves in; they don't know the rent history  
10 of the apartment. There's no way for them to know  
11 that they're being overcharged. They agree to a rent  
12 in a fair market system that doesn't actually exist,  
13 because this is a regulated apartment, and then they  
14 find out, luckily, if they have counsel and if they  
15 end up in court, that - - - that they actually were  
16 entitled to something much - - -

17 JUDGE SMITH: But isn't - - - but isn't - -  
18 - isn't it really the purpose of the statute to  
19 protect, not your clients who agreed to pay 2,500  
20 dollars or whatever it was a month or 4,000 or  
21 whatever, but the - - - but the people who can't, who  
22 could never have afforded to move into - - - to move  
23 in at that price who could've afforded it if it was  
24 the right regulated rent?

25 MR. BRINCKERHOFF: With - - -

1                   JUDGE SMITH: Aren't they - - - aren't they  
2 the real beneficiaries of the statute?

3                   MR. BRINCKERHOFF: With all respect, if you  
4 look at the entire statute, that can't possibly be  
5 true, because - - -

6                   JUDGE SMITH: Do you really think the  
7 legislature cared as much about the rich as the poor  
8 here?

9                   MR. BRINCKERHOFF: I - - - I think what the  
10 legislature cared about was the - - - the one area  
11 where the vast majority - - - it's got to be nine  
12 percent of all overcharges occur, which is when  
13 there's a vacancy. Overcharges do not typically  
14 occur to a person who's in an apartment and being  
15 charged a specific rent.

16                   JUDGE SMITH: Yeah, okay, but - - - but by  
17 hypothesis, then you've got a tenant who was able to  
18 pay the overcharged amount or at least thought that  
19 he or she was able to pay the overcharged amount.  
20 What about all those people out there who would be  
21 lining up for the apartment if it had had the lawful  
22 rent? Aren't they the real victims?

23                   MR. BRINCKERHOFF: Well, to me that sounds  
24 like a quarrel with the issue - - - with rent  
25 regulation itself.

1           JUDGE SMITH: No, I'm not - - - no issue -  
2           - - it's not, although I - - - I might quarrel with  
3           it, but what I'm suggesting to you is not that the -  
4           - - that it's a bad idea, although maybe it is, but  
5           that the true - - - that the purpose of it - - - the  
6           underlying legislative purpose is not to benefit the  
7           people who are getting the money, but to deter the  
8           landlords from the overcharge.

9           MR. BRINCKERHOFF: It - - - it's in part to  
10          deter and - - - and it - - -

11          JUDGE SMITH: And doesn't that - - -  
12          doesn't that give some basis for the legislature  
13          calling it a penalty?

14          MR. BRINCKERHOFF: It gives it some basis,  
15          but typically, when you're talking about compensating  
16          someone, making them whole, returning money that was  
17          - - - they should not have paid that was paid  
18          illegally, and providing them with interest as well,  
19          no courts that I'm aware of have ever determined that  
20          kind of scheme to be anything other than compensatory  
21          and make-whole sort of damages.

22          And another issue that - - -

23          JUDGE PIGOTT: Well, unless Mr. Turkel was  
24          describe - - - describing a different statute, this  
25          is exact - - - what he said when they dis - - - when

1           they made this mandatory, this - - - this whole idea  
2           of punitive damages was - - - was because landlords  
3           were overcharging and - - -

4                       MR. BRINCKERHOFF:  They - - - they - - -

5                       JUDGE PIGOTT:  - - - keeping the interest?

6                       MR. BRINCKERHOFF:  - - - they wanted treble  
7           damages to be available.  They wanted those treble  
8           damages to deter.  But - - - but, you know, in the  
9           reality of what actually takes place day-to-day,  
10          there are a couple of things I really do want just  
11          try to get in.

12                      One is, this policy statement that DHCR has  
13          had since 1989.  It's 89-2.  It makes it clear in  
14          just the way that Mr. Turkel said, landlords were  
15          behaving before 1984.  They can continue to do that.

16                      It says expressly, if you bring an  
17          overcharge complaint in front of the DHCR, and the  
18          landlord immediately lowers your rent and refunds  
19          your money, the landlord does not have to do anything  
20          more.  He will not be subject to treble damages.

21                      They make it clear that where it is  
22          apparent - - - or where it's demonstrated, but even  
23          when it's apparent that the landlord hasn't behaved  
24          in a willful way, they will determine without any  
25          presumption, without any proof other than the return

1 of the money, or if there was a judicial sale, where  
2 there was no indication that the landlord knew, or, I  
3 would submit, if they will - - - they will add to  
4 this policy statement or if somebody relied on the  
5 DHCR statement that allowed you to deregulate, and  
6 then found out that it was inconsistent with the  
7 statute in 2009, those will all be areas where the  
8 DHCR will determine that you are not entitled to  
9 treble damages.

10 CHIEF JUDGE LIPPMAN: Okay, thank you,  
11 counsel.

12 Counsel?

13 MR. SIEBOTT: Can I have a moment, please?

14 CHIEF JUDGE LIPPMAN: Counsel - - - well,  
15 wait, counsel, come to the - - - come to the podium.

16 MR. SIEBOTT: Sorry, Your Honor. Well, I  
17 guess I - - - my firm was - - - was counsel in  
18 Roberts, so I'd like to pick up and describe to the  
19 court exactly - - - exactly how Roberts was resolved,  
20 because it answers some of the issues that were  
21 raised by - - -

22 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

23 MR. SIEBOTT: - - - by the defendants.

24 First with respect to DHCR's involvement.  
25 It's true that Justice Lowe did request DHCR about

1 developing a formula for resolving the case. And  
2 DHCR essentially punted in their - - - in their  
3 initial response. What happened after that is very  
4 instructive to how these cases can - - - can be  
5 resolved.

6 The - - - the plaintiffs and defendants  
7 ultimately negotiated a formula that could be applied  
8 generally, commonly across all of the units. There  
9 were 4,000 - - - more than 4,000 units at issue. And  
10 then that formula was presented to Justice Lowe in  
11 connection with a settlement proposal.

12 Justice Lowe wanted DHCR's expertise and he  
13 called them into testify at the settlement hearing,  
14 and DHCR came in and gave their imprimatur to the  
15 formula. They said it was workable, and they also  
16 said that - - - that if anyone opted out of the  
17 Roberts class and then came to them for a resolution  
18 of their claim, they were going to apply that  
19 formula, the very same formula.

20 So it - - - it - - - I think it  
21 demonstrates that contrary to what the defendants are  
22 asserting, these - - - these can be done. The  
23 formulas can be done.

24 JUDGE SMITH: Well, you're - - - you're  
25 saying it's manageable because we settle it, but

1           that's - - - that's the reservation that some people  
2           have about class actions. Yeah, they all - - - they  
3           all get settled. They're manageable in that sense.

4                       MR. SIEBOTT: Well, manageability only  
5           comes - - - comes into play if you're talking about  
6           manageability of a trial, but you're right. In that  
7           context, manageability was taken out of the - - - out  
8           of the equation because it was a settlement.

9                       JUDGE SMITH: What - - - what would a trial  
10          look like?

11                      MR. SIEBOTT: Well, I - - - I think that -  
12          - - there are many common - - - common pieces of  
13          evidence that are - - - that would be introduced at a  
14          trial. First of all, the base - - - the base rents  
15          would be just simply the - - - the rent rules for  
16          whatever the base state is. That's a - - - that's a  
17          piece of paper that the - - - that the landlords - -  
18          -

19                      JUDGE SMITH: Well, what would be - - -  
20          what would be the contem - - - I mean, you're talking  
21          about things that could probably be stipulated. What  
22          would be the contested issues at a trial?

23                      MR. SIEBOTT: Well, I'm not sure. I mean,  
24          I think liability is - - - is simple.

25                      JUDGE SMITH: Isn't it?

1 MR. SIEBOTT: That - - - that's probably  
2 would be contested. I think ultimately - - -

3 JUDGE SMITH: I'm not sure - - - I'm not  
4 sure which way it cuts, but it sounds to me like this  
5 is the case where the big issues have already been  
6 decided, and the real dispute is, well, wait a  
7 minute; you know, when did - - - yeah - - -

8 MR. SIEBOTT: Well - - -

9 JUDGE SMITH: - - - when did J-51 kick in?  
10 Was the rent legitimate at that point? What is the -  
11 - - the - - -

12 MR. SIEBOTT: Well, they're all common  
13 issues - - -

14 JUDGE SMITH: - - - the issues - - - the  
15 issues remain for dispute are apartment-by-apartment  
16 issues.

17 MR. SIEBOTT: Which is just damage  
18 calculations. Which is truly just damage  
19 calculations.

20 JUDGE SMITH: Yeah, but I guess I - - -

21 MR. SIEBOTT: And the - - - and there are  
22 many common - - -

23 JUDGE SMITH: All right. Maybe - - - let  
24 me rephrase my question. Suppose you got a case  
25 where liability is stipulated and the damages issues

1 are - - - are monstrous and completely non-common.

2 Is that - - - should that be a class action, or not?

3 MR. SIEBOTT: That should be a class action

4 - - -

5 JUDGE SMITH: Why - - -

6 MR. SIEBOTT: - - - just because - - -

7 JUDGE SMITH: - - - when you - - - why

8 you've already got liability behind you?

9 MR. SIEBOTT: Just because the liability  
10 issue is easily resolved, doesn't mean that it's a  
11 common issue. It's still a common issue. Liability  
12 is very huge to the case. It's still predominant.

13 JUDGE SMITH: But doesn't - - - doesn't it  
14 mean that it doesn't predominate over other - - -  
15 other issues?

16 MR. SIEBOTT: It does mean that it  
17 predominates. It does - - - it does predominate.

18 JUDGE SMITH: It predominates even though -  
19 - -

20 MR. SIEBOTT: But in this - - - but that's  
21 not this - - -

22 JUDGE SMITH: - - - it predominates even  
23 though it was settled last week and you don't have to  
24 spend one minute on it.

25 MR. SIEBOTT: Yes, it predominates, because

1           it's - - - it - - - predominate means there's this -  
2           - - there's this question for every single class  
3           member. That's how you measure predominance, not  
4           whether or not it's really hard, how much time we  
5           have to spend on resolving it. It's how many people  
6           does it affect? That's what the predominance inquiry  
7           is about. And in - - - and when an issue is  
8           stipulated - - -

9                         JUDGE SMITH: Predominance is about how  
10           many people it affects? I'm not following you.

11                        MR. SIEBOTT: Okay. When - - - when you're  
12           looking at commonality, the question is do - - - do  
13           common issues predominate over individual issues, not  
14           whether common issues are easier or harder to  
15           resolve. It's whether common issues predominate over  
16           individual issues.

17                        JUDGE SMITH: Well, predom - - - I - - - I  
18           - - -

19                        MR. SIEBOTT: The question is whether may -

20                        JUDGE SMITH: - - - maybe I was wrong;  
21           these things never really get tried, so you never  
22           find out.

23                        MR. SIEBOTT: Well - - -

24                        JUDGE SMITH: But - - - but I - - - I had  
25           thought that the common issues predominate meant that

1 the amount of judicial time and effort - - -

2 MR. SIEBOTT: No.

3 JUDGE SMITH: - - - that was going to be  
4 put into the issue would be predominately on common  
5 issues. You say that's not what it means.

6 MR. SIEBOTT: Exactly right. That is not  
7 what it means. It means - - - it means that it - - -  
8 that it a question common to each of the class  
9 members.

10 JUDGE READ: Even if it's - - -

11 MR. SIEBOTT: A case in point is a Second  
12 Circuit case - - -

13 JUDGE READ: - - - even if it's been  
14 resolved, just stipulated.

15 MR. SIEBOTT: Especially if it's been  
16 resolved.

17 JUDGE READ: Even - - - okay.

18 MR. SIEBOTT: Right.

19 JUDGE READ: So it's not contested.

20 MR. SIEBOTT: It's not contested. And I'll  
21 cite to a case - - -

22 JUDGE READ: It can still predominate?

23 MR. SIEBOTT: That's right. And I'll cite  
24 to a case - - -

25 JUDGE PIGOTT: I'm not sure.

1 MR. SIEBOTT: I'm positive.

2 JUDGE SMITH: How - - - how is it an issue  
3 if it's resolved? It's not even an issue.

4 MR. SIEBOTT: Well, it's res - - -

5 JUDGE SMITH: An issue is something people  
6 are arguing about.

7 MR. SIEBOTT: It is an issue, but it's  
8 resolved by agreement and that's fine.

9 JUDGE SMITH: But it's not an issue  
10 anymore.

11 MR. SIEBOTT: I - - - I direct the court to  
12 Nassau County Strip Searches; it's a Second Circuit  
13 case in 2006.

14 JUDGE PIGOTT: We're - - - I - - - I - - -  
15 maybe we're just fencing over wording. I - - - I  
16 think of Love Canal, you know, where, Jesus, half the  
17 - - - half the bench was - - - was trying damages. I  
18 mean, lia - - - liability had been decided. But then  
19 the question was damages and you know, that wasn't in  
20 front of one jury.

21 MR. SIEBOTT: And that may very well be,  
22 but that doesn't detract from the predominance of the  
23 common issue that was determined - - -

24 JUDGE PIGOTT: No, what I'm say - - - what  
25 I'm saying is that - - - that - - - it's wording, I

1 guess. But if - - - if they say, look, we under - -  
2 - we get it; J-51, we're cooked. We got these  
3 tenants. Here they are; here's the leases, you know,  
4 we're done. And you want to say, well, no, you're  
5 not done. We now want to take that and put it into  
6 one cauldron and then decide on how much and then  
7 allocate it among the bunch and - - -

8 MR. SIEBOTT: That's right. That's right.

9 JUDGE PIGOTT: They're saying they don't  
10 want to do that. They want - - - they want to try  
11 each one individually because of the length of the  
12 lease - - -

13 MR. SIEBOTT: Right, and I would like - - -

14 JUDGE PIGOTT: - - - some people aren't  
15 interested, some people are.

16 MR. SIEBOTT: That's right. But I would  
17 like to take a moment to explain why what they're  
18 portraying as individualized issues, really aren't  
19 that individual.

20 The - - - the - - - common evidence can be  
21 used to set the new rent, to - - - to say what rent  
22 we should start at in determining what the damages  
23 are. Co - - - common evidence can be used for the -  
24 - - certainly the rent guidelines board increases is  
25 common evidence. That applies to everybody in one or

1 two ways only, for each year. Major capital  
2 improvements or building-wide improvements, that's  
3 common evidence. That - - - that applies to  
4 everybody equally. That - - -

5 JUDGE PIGOTT: But only in that building.

6 MR. SIEBOTT: Only in that building, but  
7 these cases are being brought on a building-by-  
8 building basis.

9 JUDGE READ: So you're not going to have to  
10 go apartment by apartment?

11 MR. SIEBOTT: Well, you - - - only - - -  
12 only in terms of doing the math, you have to go by  
13 apartment- by-apartment, but that's true for every  
14 class action. In a securities class action, every  
15 claimant has to submit proof that they bought it,  
16 when they bought it, how much they bought it at, and  
17 what they sold it out, and - - -

18 JUDGE SMITH: The typical - - - looking at  
19 brokers' confirmations might be easier than looking  
20 at the rent history of the apartment.

21 MR. SIEBOTT: It might be. It might be  
22 easier, but I - - - I think that it illustrates the  
23 point that it's still an individual calculation for  
24 each - - - for each - - -

25 JUDGE SMITH: Isn't it - - -

1 MR. SIEBOTT: - - - for each claimant.

2 JUDGE SMITH: Isn't it the real different -  
3 - - I mean, I - - - I keep asking what difference  
4 does it make whether you type the plaintiff's names  
5 or call it a class action. Isn't the real difference  
6 the one that - - - that Mr. Brinckerhoff you're going  
7 to have more claimants if you have a class action,  
8 because class actions are opt out? Isn't that what's  
9 really going on?

10 MR. SIEBOTT: You are going to have more  
11 claimants. And in fact, this is - - - this was - - -  
12 this was experience in Roberts. We - - - I - - - in  
13 fourteen years of practicing class action law, I have  
14 never seen a - - - a participation rate that we had  
15 in Roberts. It was something like seventy percent of  
16 former tenants filed claim forms, and ninety-nine  
17 percent of the current tenants filed claims forms.  
18 But there - - -

19 JUDGE SMITH: Well, the - - -

20 MR. SIEBOTT: There were - - -

21 JUDGE SMITH: And what - - - and what would  
22 have happened if they had had to sign their own - - -  
23 it had not been a class action?

24 MR. SIEBOTT: I - - - I can't speculate.

25 JUDGE SMITH: You might - - - you might

1 have had the - - - those ninety-nine percent would  
2 have signed the bottom of a complaint, rather than  
3 sign a claim form, right?

4 MR. SIEBOTT: They may very well have. I -  
5 - - I can't speculate. I mean, I - - - certainly - -  
6 - certainly, the fact is thirteen - - -

7 JUDGE SMITH: But isn't it - - - isn't it  
8 the general tendency and the - - - and the advocates  
9 of class actions say it's a good thing, and the  
10 opponents say it's a bad thing. But isn't the  
11 general tendency of a class action to increase the  
12 number of people who, if you like, are vindicating  
13 their rights?

14 MR. SIEBOTT: Yes, and I would - - - I  
15 would add also the purpose is people who otherwise  
16 might not - - - might not have the incentive to bring  
17 a lawsuit, because your damages are relatively small.  
18 And when you aggregate those damages for the benefit  
19 of the defendant, the defendant experiences a  
20 windfall, because he's only taken 500 dollars out of  
21 everyone's pocket. None of them are incentivized to  
22 bring a lawsuit. He made a million dollars  
23 illegally. That's - - - that's why class action  
24 exist to kind of remedy that - - - that - - - that  
25 disparity.

1 JUDGE SMITH: Is this a particularly good  
2 case for being sure that the landlords here don't get  
3 a windfall and that the tenants - - - I mean, are the  
4 tenants really - - - I suggest to you that maybe the  
5 tenants aren't quite as pathetic as the victims in  
6 some other cases? I mean, these aren't people who  
7 got cancer from Love Canal.

8 MR. SIEBOTT: No, certainly they aren't,  
9 but it - - - but I - - - the rents stabilization law  
10 - - -

11 JUDGE SMITH: They're - - - they're people  
12 who thought they had market-rent apartments and - - -

13 MR. SIEBOTT: But that isn't - - -

14 JUDGE SMITH: - - - and woke up one morning  
15 to find they had stabilized apartments. They won the  
16 lottery.

17 MR. SIEBOTT: And that may very well be and  
18 I might even agree with you, but that is an issue for  
19 the legislature to change in the rent stabilization  
20 law - - - law, not - - - not for this court,  
21 respectfully.

22 Let me just finish about - - -

23 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

24 MR. SIEBOTT: - - - the conclusion of  
25 Roberts, if you would. More common evidence. I was

1           - - - I was going through the common evidence.

2                       Even the individual apartment improvements,  
3 often, and this has been the experience of many cases  
4 that we're litigating, the improvements - - -  
5 individual apartment improvements - - - landlords do  
6 them in bulk. They buy the material in bulk. They  
7 contract for the labor in bulk. And then they do  
8 several apartments all at once. That's common  
9 evidence.

10                      And - - - and to that point also, the  
11 individual apartment improvements, which sound so  
12 individual, really are about the unit. These are  
13 about the units. The rent is for the unit. This is  
14 not for the claimant. So when you're figuring out  
15 the rent for a new - - - for an apartment, when you  
16 add that individual apartment improvement increase  
17 into the rent, that's going to have a cascading  
18 effect for multiple claimants, subsequent tenants to  
19 the same apartment. It's still - - - it's still  
20 rings common.

21                      So all the - - - all the pulling the hair  
22 out about, oh, this would impossible; it would take -  
23 - - we'd have to do a mini-trial for every single - -  
24 - it's - - - it's just simply not true.

25                      JUDGE PIGOTT: I'm losing track of who said

1 what, but it is your position that - - - that any  
2 class action would involve only one building?

3 MR. SIEBOTT: Well, no, I shouldn't say  
4 that. I guess, they're - - - they're really  
5 consolidated around building owner, the defendant.

6 JUDGE RIVERA: The land - - -

7 JUDGE PIGOTT: The building owner.

8 JUDGE RIVERA: The landlord.

9 MR. SIEBOTT: The landlord, right.

10 JUDGE SMITH: No - - - no one has tried to  
11 bring a citywide class action?

12 MR. SIEBOTT: I do think there was a  
13 citywide class action that - - - well, was that - - -  
14 was that - - - I think that might have been the Sandy  
15 action, the San - - - the hurricane action.

16 JUDGE RIVERA: Oh.

17 MR. SIEBOTT: That - - - that's different.  
18 So no, there - - - to my knowledge there's no  
19 citywide class action over - - - over J-51. They've  
20 been brought - - - they've been brought by owner-  
21 defendant.

22 JUDGE SMITH: How many law - - - how many  
23 lawsuits are we talking about, any idea?

24 MR. SIEBOTT: That I'm aware of - - - you'd  
25 say - - -

1 CHIEF JUDGE LIPPMAN: Okay, counsel, talk  
2 to us.

3 MR. SIEBOTT: Yeah, twenty - - -

4 CHIEF JUDGE LIPPMAN: Yes.

5 MR. SIEBOTT: Twenty or so.

6 JUDGE SMITH: Twenty or so.

7 MR. SIEBOTT: My firm has about a dozen.

8 JUDGE SMITH: And a few - - - I mean, for  
9 what? A few thousand claimants, if you add it up?

10 MR. SIEBOTT: I wouldn't want to - - -

11 JUDGE SMITH: Or maybe 10 or 20,000?

12 MR. SIEBOTT: Yeah, maybe. I - - - I'm  
13 speculating. There were 20,000 claimants in - - - in  
14 Roberts alone, yeah.

15 JUDGE RIVERA: Wait, I'm sorry. Are you  
16 prepared to argue the waivability issue?

17 MR. SIEBOTT: I'm sorry?

18 JUDGE RIVERA: Are you prepared to argue  
19 the waivability issue?

20 MR. SIEBOTT: Mr. Brinckerhoff is going to  
21 be talking about the waivability issue. I can cede  
22 some of my time - - -

23 CHIEF JUDGE LIPPMAN: No, no, he's - - -  
24 he's already talked about whatever he's going to talk  
25 about.

1 MR. SIEBOTT: - - - back to him.

2 CHIEF JUDGE LIPPMAN: What do you want to  
3 talk about?

4 MR. SIEBOTT: Well, I was - - - I was  
5 completing - - - I was completing my discussion about  
6 - - -

7 CHIEF JUDGE LIPPMAN: What about the issue  
8 that Judge Rivera is raising?

9 JUDGE SMITH: Well, I think I - - - maybe  
10 I'm wrong - - - but I thought she meant waivability  
11 under the rent stabilization law, not the class - - -

12 JUDGE RIVERA: That's correct.

13 JUDGE SMITH: Yeah, they - - - yeah, they  
14 do - - - why - - - why doesn't the rent stabilization  
15 code which says you can't - - - you can't give up  
16 your rights, why doesn't that ne - - - negate the  
17 waiver?

18 MR. SIEBOTT: Our position is that it  
19 doesn't say that. It - - - what it says is that you  
20 cannot agree to waive a benefit under - - - under the  
21 code.

22 JUDGE SMITH: Okay. Suppose - - - suppose  
23 you - - - you people do what you say you're going to  
24 do, which is to waive the treble - - - the trebling -  
25 - -

1 MR. SIEBOTT: Right.

2 JUDGE SMITH: - - - and take only, what you  
3 call, single damages.

4 MR. SIEBOTT: Right.

5 JUDGE SMITH: And suppose one of your  
6 clients wakes up one morning, and says, I can prove  
7 that this guy was a complete crook, and I'm entitled  
8 to treble damages, and I don't care that my class-  
9 action lawyer - - -

10 MR. SIEBOTT: I can speak - - -

11 JUDGE SMITH: - - - said I wasn't going to  
12 do it. Is he bound?

13 MR. SIEBOTT: I can speak from personal  
14 experience. This happened in one of our cases, and  
15 we were obligated to - - - to file an amended  
16 complaint, dropping the class action claims. And  
17 that's what we did.

18 JUDGE SMITH: You dropped him out of the  
19 class action? But my question is, is he bound by his  
20 agreement? Can he sue separately - - -

21 MR. SIEBOTT: He didn't make an agreement.  
22 He didn't make an agreement.

23 JUDGE SMITH: So you're saying these guys  
24 aren't really bound at all.

25 MR. SIEBOTT: Not - - -

1                   JUDGE SMITH: I mean, you - - - you haven't  
2 waived anything. You've just announced an intention  
3 not to seek it.

4                   MR. SIEBOTT: That's correct. We count it  
5 as a waiver, but it's a really a selection of remedy.

6                   JUDGE SMITH: But not a binding one.

7                   MR. SIEBOTT: We're choosing - - - well, it  
8 will become binding ultimately, certainly. But it -  
9 - -

10                  JUDGE SMITH: How does it become binding?

11                  MR. SIEBOTT: Well, once a class is  
12 certified and - - - and there's - - - there's an  
13 agreement with the defendants that - - - then it  
14 becomes binding.

15                  JUDGE SMITH: Well, you mean - - - what if  
16 - - - what if the guy wake - - - an agreement - - -  
17 an agreement can't - - -

18                  MR. SIEBOTT: I mean, it's not - - - it  
19 certainly isn't binding on someone who's going to opt  
20 out of the class.

21                  JUDGE SMITH: Okay, suppose - - - but  
22 suppose the opt-out deadline has passed, and you got  
23 a class member who says, wait a minute; wait a  
24 minute. I should never have - - - I - - - I know I  
25 agreed not to opt out. I should never have agreed to

1           that. I can get treble damages. Why doesn't the  
2           statute protect him?

3                   MR. SIEBOTT: Well, depending on the  
4           language of - - - of the notice, if the opt-out  
5           period is over, it may be that he's - - - he's slept  
6           on his rights, and that he can no longer opt out.

7                   JUDGE SMITH: Okay, but - - - but you can't  
8           - - - my point is you can't give up rent control  
9           rights by sleeping on them.

10                   MR. SIEBOTT: Well, you - - - you can when  
11           they're - - - when a court has approved them, even  
12           under - - - even under the provision that they point  
13           to that says you can't waive benefits. It actually  
14           says, you can - - - you can drop a complaint, though,  
15           that you've brought. You're not forced to pay - - -

16                   JUDGE SMITH: You can - - - you can settle  
17           - - - you can settle a case.

18                   MR. SIEBOTT: If - - - it - - - the  
19           provision that they point to contemplates the  
20           compromise of claims and the dropping of claims, so  
21           it certainly encourages settlement. So it's true  
22           that - - -

23                   JUDGE SMITH: They don't want - - - they  
24           don't want to settle with you. They want the treble  
25           damages claims in the case.

1 MR. SIEBOTT: The - - - right, the  
2 provision says you can't waive a benefit except in a  
3 context of a compromise where you have a lawyer, or a  
4 court approves it, or DHCR approves it.

5 JUDGE PIGOTT: I - - - I thought you were -  
6 - -

7 MR. SIEBOTT: And that's the context here,  
8 certainly.

9 JUDGE PIGOTT: I thought you were going to  
10 bring up an exam - - - like if someone lived in New  
11 York, now lives in Chicago, and ends up, you know,  
12 finding out from Aunt Tilly when he comes back for  
13 Christmas three years from now that there's a  
14 lawsuit, and that he was part of it, and that it's  
15 been settled, and that it's been settled, and he  
16 didn't - - -

17 MR. SIEBOTT: Well, this is a unique class  
18 action in that we - - - the landlords know every  
19 single class member, because they were their tenants.  
20 They have contracts in their files as a general rule.

21 JUDGE GRAFFEO: Do they know where the  
22 tenants - - - former tenants - - - are living?

23 MR. SIEBOTT: They're going to - - - but  
24 what we did in Roberts - - -

25 JUDGE GRAFFEO: They don't know that.

1                   MR. SIEBOTT: But what we did in Roberts is  
2 ultimately a claims administrator, which - - - which  
3 crunched the numbers - - - just crunched the numbers  
4 and put them into the formula, took all the evidence  
5 and crunched the numbers, and sent a notice to every  
6 single person we could find - - - and we tried hard  
7 to find them; we spent a lot of money to try to find  
8 them - - - exactly how much they were entitled to if  
9 they filed a claim.

10                   And there's no reason why you couldn't do  
11 that in every case.

12                   CHIEF JUDGE LIPPMAN: Okay, counselor,  
13 thanks.

14                   Rebuttal, counselors?

15                   MR. SOLOWAY: Your Honors, if I am going to  
16 sleep tonight or - - - or not drive off the road on  
17 the way home, I have to get out this point.

18                   CHIEF JUDGE LIPPMAN: Yeah, we don't want  
19 you to - - -

20                   JUDGE RIVERA: Please, please.

21                   MR. SOLOWAY: Your Honors, the courts below  
22 - - - I'm afraid we're not talking enough about  
23 901(b). The courts below are making a very  
24 particular mistake that I think not only turns these  
25 cases, but sets the standard going forward.

1           In my case, in - - - in Downing, what the  
2           court wrote was, in finding that our statute here,  
3           the RSL 26-516(a) was more like the Labor Law cases,  
4           and not like the Donnelly Act, which barred claims  
5           from being brought as a class action, the court wrote  
6           that under the Donnelly Act, "treble damages are  
7           award upon - - - awarded upon a finding of liability;  
8           the statute does not require a finding of willfulness  
9           or bad faith. In contrast, the rent stabilization  
10          law only requires treble damages where the landlord  
11          cannot demonstrate that it did not act willfully, and  
12          is analogous to the Labor Law wage claims".

13                 In the Labor Law wage claims cases, the  
14          plaintiff had a burden of proof. So as the court in  
15          Smellie and in Klein v. Ryan Beck noted that the  
16          plaintiff could say, I choose not to sustain my  
17          burden of proof. I have my cup; I choose not to fill  
18          it up. My choice. Here the legislature has  
19          conferred no such right upon the plaintiffs.

20                 901(b) has a policy we need to talk about  
21          too. 901(b) says this is a gate-keeping statute.  
22          That not every case, unfortunately, gets to be  
23          brought as a class action.

24                 JUDGE RIVERA: Well, they - - - they do  
25          have to establish the overcharge, so they have some

1           burden.

2                   MR. SOLOWAY:  No, not even - - - when they  
3           submit to DHCR, they don't.  They all - - - the only  
4           thing that happens is the landlord then has to prove  
5           it wasn't overcharging.  They don't do anything  
6           except put the postage stamp on and send it in the  
7           mail.

8                   JUDGE RIVERA:  And say I've been  
9           overcharged.

10                  MR. SOLOWAY:  And - - - yes.

11                  JUDGE RIVERA:  Go look it up.  Check it - -  
12           -

13                  JUDGE SMITH:  You're - - - you're - - -

14                  MR. SOLOWAY:  Yes, that's all they do.  
15           They - - - and they have no burden with respect, but  
16           the issue on willfulness or bad faith, that's where  
17           these cases turn.

18                  JUDGE RIVERA:  Is that true if they go to  
19           court?

20                  MR. SOLOWAY:  Yeah, it's essentially the  
21           same thing too.

22                  JUDGE PIGOTT:  Well, if that's true, why  
23           did - - - why wouldn't a landlord do it, as they're  
24           suggesting, get your list and send it in to the DHCR,  
25           and say, call these people, because we owe them

1 money?

2 MR. SOLOWAY: I'm not sure I understand  
3 what's the point.

4 JUDGE PIGOTT: Well, you're - - - you're  
5 saying that - - - that DHCR will do this and they can  
6 do it administratively, and - - -

7 MR. SOLOWAY: Well - - -

8 JUDGE PIGOTT: - - - it would seem to me  
9 that, you know, if you want to cut these people out,  
10 you can call DHCR - - -

11 MR. SOLOWAY: No, whe - - - whether they go  
12 - - - whether they go to court or whether they go to  
13 DHCR, to me, is irrelevant.

14 JUDGE SMITH: But isn't it - - - isn't it -  
15 - -

16 MR. SOLOWAY: I think they should go  
17 anywhere they want to.

18 JUDGE SMITH: Isn't it a fact of life as  
19 your adversaries were suggesting, that there are  
20 going to be a certain number of these people, a  
21 nontrivial number of them, who are never going to put  
22 the stamp on the envelope, no matter - - - yeah, no  
23 matter what happens?

24 MR. SOLOWAY: There could not be a statute  
25 that provides more incentive for a plaintiff to bring

1 a case than this one.

2 JUDGE SMITH: Okay, I grant - - - grant - -  
3 -

4 MR. SOLOWAY: You get your overcharge. You  
5 get - - -

6 JUDGE SMITH: - - - granting that, isn't -  
7 - - isn't - - - isn't what you're really arguing  
8 about here is that they want to - - - they want more  
9 claimants recovering money and you want fewer? Isn't  
10 that what it's all about?

11 MR. SOLOWAY: Well, do I - - - do I - - - I  
12 don't want to be crude when I say, are they ginning  
13 up a class that otherwise wouldn't exist? Yes.

14 JUDGE SMITH: And that - - - you - - -

15 MR. SOLOWAY: Yes.

16 JUDGE SMITH: - - - you, yeah - - - and  
17 they - - -

18 MR. SOLOWAY: The statute contemplates  
19 that.

20 JUDGE SMITH: That's the way you say it,  
21 and then - - - that's the way I sort of said it when  
22 I was talking to them. When I'm talking to you, and  
23 say, aren't you trying to leave some poor, hopeless,  
24 ignorant people without - - - without benefit - - -

25 MR. SOLOWAY: I - - -

1 JUDGE SMITH: - - - without vindicating  
2 your rights?

3 MR. SOLOWAY: You know - - - you know, Your  
4 Honor, I appreciate that this court has to be  
5 concerned with policy concerns like that. I get it,  
6 of course. But the fact of the matter is, this  
7 statute incentivizes people to bring claims. They  
8 get their base overcharge. They get interest. They  
9 get - - -

10 CHIEF JUDGE LIPPMAN: But counsel - - - but  
11 counsel, but we're not - - -

12 MR. SOLOWAY: They get attorney fees and  
13 the treble damages.

14 CHIEF JUDGE LIPPMAN: We're not rearguing  
15 what the legislature did or didn't do.

16 MR. SOLOWAY: No, no, I'm saying that they  
17 actually have spoken to the issue here. They have  
18 afforded these plaintiffs no burden of proof, but the  
19 discretion - - -

20 JUDGE SMITH: You're - - - you're - - -  
21 you're saying that this is the sort of case when it's  
22 consistent with the legislative intent not to use a  
23 class action, because there's a good alternative.

24 MR. SOLOWAY: Not just the legislative  
25 intent, but the actual statute itself.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
2 have your two other colleagues.

3 MR. SOLOWAY: Now I can sleep.

4 CHIEF JUDGE LIPPMAN: Now you can sleep,  
5 but don't go off the road, either.

6 JUDGE RIVERA: Yeah, don't go off the road.

7 CHIEF JUDGE LIPPMAN: Go ahead.

8 MR. TURKEL: One thing that we've barely  
9 talked about is whether tenants can waive their  
10 rights under the rent stabilization law, and that's  
11 the ultimate question in this case. Because if they  
12 can't, it's over. They can't have a class action.

13 2520.13, Waiver of benefit void: "An  
14 agreement by the tenant to waive the benefit of any  
15 provision of the RSL or this Code is void". It  
16 doesn't say in agreement with the landlord. It says  
17 any agreement. Page 631 of the record is the  
18 retainer letter.

19 JUDGE PIGOTT: You know, but that - - -  
20 I'll ask you this because it - - - if - - - if the  
21 DHCR is the place to be, why aren't you there?

22 MR. TURKEL: Oh, because I brought a  
23 complaint with DHCR and my adversary went to Supreme  
24 Court and got an injunction against me. I tried. It  
25 didn't work.

1 JUDGE PIGOTT: So he - - -

2 MR. TURKEL: The Supreme Court wouldn't let  
3 me do it.

4 CHIEF JUDGE LIPPMAN: What was your  
5 complaint with DHCR?

6 MR. TURKEL: Establish the rent. It wasn't  
7 a complaint. It was an administrative application to  
8 establish the rent. We think the tenant's rent,  
9 taking Roberts into account, is 25- or 2,600 dollars  
10 a month. They think it's 800. And the tenant is  
11 paying 800. So we went to DHCR, and we said, listen,  
12 you guys are the experts; you figure it out. They  
13 went to Supreme Court to get an injunction.

14 JUDGE RIVERA: For - - - for each and every  
15 - - - for each and every potential class member you -  
16 - -

17 MR. TURKEL: No, just for the - - - just  
18 for this particular claimant.

19 JUDGE RIVERA: Oh, just for the named - - -

20 MR. TURKEL: Just for this particular  
21 plaintiff, Your Honor.

22 JUDGE RIVERA: - - - okay. But not - - -  
23 so why not do it for everybody?

24 MR. TURKEL: Because nobody else is  
25 complaining. You know, Justice Smith began - - -

1                   JUDGE RIVERA: Well, that's the whole  
2 point, isn't it?

3                   MR. TURKEL: Well, Judge - - -

4                   JUDGE RIVERA: I mean, that's really their  
5 point at the end of the day.

6                   MR. TURKEL: Yes, I understand that, but  
7 there's also Judge Smith's point which is that these  
8 tenants hit the lottery - - -

9                   JUDGE RIVERA: I know but I'm giving you my  
10 - - -

11                  MR. TURKEL: - - - and perhaps we don't  
12 care as much about them.

13                  JUDGE RIVERA: But I'm asking you to  
14 address this point. I understand my colleague's  
15 point. What about this point?

16                  MR. TURKEL: Could you just rephrase the  
17 question for us, restate it?

18                  JUDGE RIVERA: Their point is that the  
19 reality, even with legislation that appears on its  
20 face to incentivize tenants, that tenants, either  
21 current or past tenants, who may very well have a  
22 claim, are unlikely to do this. In fact, for other  
23 reasons, not the statute, have a disincentive to do  
24 this.

25                  And so they see - - - they're arguing,

1 we'll decide - - - that there is no prohibition on  
2 them trying, through this particular procedural  
3 vehicle, to get those tenants the kinds of remedies  
4 that the legislature envisioned.

5 MR. TURKEL: And there's nothing wrong with  
6 that, as long as the price of admission to the class  
7 action statute is not waiving a right under the rent  
8 stabilization law. In sixty years, this court has -  
9 - -

10 JUDGE RIVERA: Okay, but why - - - why  
11 can't you waive it? Let's get to your question now.  
12 Why can't you waive it?

13 MR. TURKEL: Because - - -

14 JUDGE RIVERA: You've - - - you've named  
15 that one section. Is that the entire essence of your  
16 argument?

17 MR. TURKEL: Oh, no, no, no. 2520.13, I  
18 mean, we win under 2520.13 - - -

19 JUDGE RIVERA: Okay.

20 MR. TURKEL: - - - because this is an  
21 agreement by a tenant to waive. It's an agreement  
22 with their attorneys that they - - - that the  
23 attorneys, in exchange for doing this on a  
24 contingency basis - - - basis - - - will make this a  
25 class action lawsuit. The tenant necessarily had to

1 waive her rights. So that's the agreement.

2 JUDGE RIVERA: If we disagree, is there  
3 something else - - -

4 MR. TURKEL: Yes.

5 JUDGE RIVERA: - - - that forecloses the  
6 waiver?

7 MR. TURKEL: Absolutely. Estro. The Estro  
8 case was a rent regulatory case in 1951. This court  
9 held, "a statutory right conferred on a private  
10 party, but affecting the public interest" - - - which  
11 is exactly what this is - - - "may not be waived or  
12 released if such waiver or release contravenes the  
13 statutory policy".

14 The legislature wanted treble damages.  
15 They stuck it to the landlords. They said we're  
16 going to presume that it's legal. We think that you  
17 people are so bad that we're going to presume that  
18 you overcharged and the only way - - -

19 JUDGE PIGOTT: And you're prepared to prove  
20 it. I - - - I'm still amazed at that. I - - -  
21 you're standing here saying, we are so bad - - -

22 MR. TURKEL: No, no, no, no, Your Honor.  
23 No, I'm - - -

24 JUDGE PIGOTT: - - - here that treble  
25 damages are - - - and by God, they got to assert it

1           against us, because that's what the legislature said  
2           they had to do.

3                   MR. TURKEL:   It's not that they have to  
4           assert it.  It's that the statute does not permit  
5           them to give it away.  And as I keep on saying - - -

6                   CHIEF JUDGE LIPPMAN:  Because - - -

7                   JUDGE SMITH:  You're - - - you're not - - -  
8           you're not actually planning to pay them the treble.  
9           Actually, if - - - if - - - you know what?  If you  
10          offer to pay them the treble damages, they might  
11          withdraw the class action.

12                   MR. TURKEL:  I understand that, Your Honor.  
13          But what I'm saying is that in sixty years, this  
14          court has never once held that a right granted by the  
15          legislature under a rent regulatory statute is  
16          waivable.

17                   CHIEF JUDGE LIPPMAN:  Counsel, okay.

18                   MR. TURKEL:  Thank you.

19                   CHIEF JUDGE LIPPMAN:  Okay, we've got it.  
20          Thanks, you're still bad.  Let's hear - - -

21                   MR. TURKEL:  To the bone, Your Honor.

22                   JUDGE PIGOTT:  One's going off the road;  
23          one's bad.

24                   CHIEF JUDGE LIPPMAN:  Go ahead, counsel.

25                   MS. CRUZ:  Your Honors - - -

1 CHIEF JUDGE LIPPMAN: You're not bad. He's  
2 bad - - -

3 MS. CRUZ: Your Honors - - -

4 CHIEF JUDGE LIPPMAN: - - - you're okay.

5 MS. CRUZ: It's just - - - I just will pick  
6 up on the concept of waiver in the - - - in the realm  
7 of whether the waiver renders the class  
8 representative an inadequate class representative,  
9 which is one of the criteria that have - - - has to  
10 be satisfied.

11 JUDGE PIGOTT: Well, it's part of - - - as  
12 Mr. Turkel just read, they can't agree to waive it.

13 MS. CRUZ: That's - - - that's correct and  
14 - - -

15 JUDGE PIGOTT: Now, the agreement would be  
16 presumably with the landlord. You can't agree with  
17 the landlord to waive it.

18 MS. CRUZ: Well - - -

19 JUDGE PIGOTT: He's arguing you can't even  
20 agree with your own lawyer to waive it. I'm not sure  
21 that's what the statute means. Do you?

22 MS. CRUZ: Well, the regulation uses the  
23 word an agreement by tenant, not an agreement by  
24 tenant and landlord. Presumably - - -

25 CHIEF JUDGE LIPPMAN: Well, isn't that the

1 purpose, you shouldn't collude in some way?

2 MS. CRUZ: Yes, many of the cases that have  
3 come before this court that involved waivers that  
4 were not acceptable involved collusion - - -

5 JUDGE SMITH: Wouldn't - - - wouldn't you  
6 agree - - -

7 MS. CRUZ: - - - but some of them did not,  
8 Your Honor. Some of them did not.

9 JUDGE SMITH: Whoever - - - whoever you  
10 make the agreement with - - - I mean, you could make  
11 it with your brother-in-law, but it's - - - but the  
12 landlord - - - yeah, it does - - - if the landlord  
13 can't get the benefit of it, it's illusory,  
14 presumably. Your brother-in-law might let you out of  
15 the agreement, but the - - - isn't the question  
16 whether you can make an agreement that will bind you  
17 and protect the landlord, if you decide later you  
18 want the treble in after all?

19 MS. CRUZ: Well, it will - - - we submit  
20 that that there's no ability by this class  
21 representative to - - -

22 JUDGE SMITH: You're - - - you're saying  
23 that that agreement, no matter who it's with, is  
24 invalid.

25 MS. CRUZ: Is invalid. Is void. It is a

1 benefit that is not waivable because it is a public  
2 benefit. I think this morning - - - earlier in this  
3 afternoon, we talked a lot about that in the earlier  
4 case.

5 The dissenting justices in Gudz highlighted  
6 that in finding that the waiver - - - that act - - -  
7 rendered the plaintiff an inadequate class  
8 representative, because that is such a fundamental  
9 aspect of the - - - of the overcharge scheme that a  
10 person that is claiming to be representing the  
11 interests of the class of tenants giving up a  
12 fundamental tenant protection is - - -

13 JUDGE RIVERA: But what if the class was  
14 defined by only those people who are outside the two-  
15 year - - - whatever that two-year limitation period?

16 MS. CRUZ: That has to do - - -

17 JUDGE RIVERA: Can they - - - can they  
18 pursue that on a 901?

19 MS. CRUZ: The - - - those individuals, if  
20 they are to opt out. But as - - -

21 JUDGE RIVERA: No, no, no, I'm sorry. The  
22 individuals that by - - - by the language, the text,  
23 do not have treble damages, because they're outside  
24 the two-year period - - -

25 MS. CRUZ: Well - - -

1 JUDGE RIVERA: - - - could they pursue the  
2 class action on a 901?

3 MS. CRUZ: No, they cannot pursue the - - -  
4 the - - -

5 JUDGE RIVERA: Okay, why not?

6 MS. CRUZ: Because the two-year time frame  
7 is - - - is calculated from when the complaint is  
8 filed.

9 JUDGE RIVERA: Okay.

10 MS. CRUZ: And presumably, the overcharge  
11 has been taking place up through the time that the  
12 complaint has been filed.

13 JUDGE RIVERA: You're saying no one fits  
14 that group.

15 MS. CRUZ: Absolutely.

16 JUDGE RIVERA: If anyone did, could they  
17 pursue the 901(b)?

18 MS. CRUZ: That would - - - that - - -

19 JUDGE RIVERA: Could they - - - could they  
20 come as a class action?

21 MS. CRUZ: No, Your Honor, I do not believe  
22 that they would - - -

23 JUDGE RIVERA: Okay.

24 MS. CRUZ: - - - because in that instance,  
25 you still are precluded from suing for a penalty.

1 And there is no question that the statute under the  
2 RSL defines both the treble damages - - -

3 JUDGE RIVERA: All right.

4 MS. CRUZ: - - - that is nonwaivable as a  
5 penalty - - -

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 MS. CRUZ: - - - as well as the  
8 compensatory element.

9 CHIEF JUDGE LIPPMAN: Thank you all.  
10 You're all very good.

11 MS. CRUZ: Thank you, Your Honors.

12 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Borden v. 400 E. 55th Street Associates, L.P., No. 182, and Gudz v. Jemrock Realty Corp., No. 183, and Downing v. First Lenox Terrace Associates, No. 184, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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