# FOREWORD

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This Symposium is entitled, "Class Actions, Mass Torts, and MDLs: The Next 50 Years." It consists of a collection of articles by leading scholars and practitioners. All of the articles were presented at a live conference—co-sponsored by the Pound Civil Justice Institute—held at Lewis & Clark Law School on November 1 and 2, 2019.

This topic of this Symposium is timely and critical. Most of the recent high-profile civil cases of the last decade have been class actions arising in multidistrict litigation. These include *BP Deepwater Horizon*, *NFL Concussion*, *National Prescription Opiates*, *Equifax Data Breach*, and *Volkswagen Clean Diesel.*

During the past several years, several scholars have expressed concern about the future of class actions and other aggregate litigation. For instance, I have written about the myriad barriers that federal appellate courts have erected to class certification.[1] Professor Myriam Gilles has opined that "it is likely that, with a handful of exceptions, class actions will soon be virtually extinct."[2] Professor Brian Fitzpatrick has expressed fear of "a world without class actions."[3] By contrast, Professor Arthur Miller has asserted, more optimistically, that "reports of aggregate litigation's death are greatly exaggerated."[4]

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[1] Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 733 (2013). Four years later, I noted that the decline had subsided somewhat, at least temporarily. Robert H. Klonoff, *Class Actions II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 973 (2017).

[2] Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005).

[3] Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015).

[4] Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 306 (2014).

At the conference, a number of scholars and practitioners presented papers on various aspects of aggregate litigation. In addition, I conducted a question/answer session with Professor Arthur Miller, excerpts of which appear in this symposium. Topics featured at the conference included state multidistrict litigation (MDL) cases; social justice class actions; the future of aggregate litigation generally; federal MDLs and class actions; class action settlements; class action arbitration; deregulation and private enforcement; and mass torts.

## 1. STATE MDLS

Professor Theodore Rave is the George A. Butler Research Professor and Associate Professor of Law at the University of Houston Law Center. Professor Zachary Clopton is a professor at Northwestern Pritzker School of Law. They have written an article focusing on state-level multidistrict litigation procedures. Their article is a case study on Texas's MDL procedure. As they explain, the Texas MDL, adopted in 2003, creates an MDL Panel of five judges, appointed by the Chief Justice of the Texas Supreme Court. The Panel is authorized to transfer cases from various parts of the state for pretrial purposes. Like the federal MDL, the statute provides that transfer is only appropriate if the cases share a common question of fact and if transfer would facilitate the convenience of the parties and witnesses and promote the just and efficient conduct of the actions. When an MDL is established, newly filed cases can be transferred as tag-along cases. The usual rules against interlocutory appeal apply, although mandamus is available in exceptional circumstances.

The largest percentage of Texas MDL consolidations have been weather-related insurance litigation (33%), followed by products-liability and mass tort cases. High profile cases, such as *Opioids* and *Volkswagen Clean Diesel* have also been subject to the Texas MDL procedure. The MDLs are mainly established in heavily populated areas, such as Houston and Dallas. Importantly, although judges in Texas are elected, Rave and Clopton have found no evidence that MDL assignments have been driven by political considerations. Indeed, even though every MDL Panel has been majority Republican, the Panel has appointed slightly more Democratic MDL judges than Republican MDL judges.

## 2. PUBLIC INTEREST CLASS ACTIONS

Professor David Marcus is a professor at UCLA School of Law. His paper examines trends in social justice class actions in light of *Wal-Mart Stores, Inc. v. Dukes.*[5] *Wal-Mart* adopted a stringent test of commonality in class actions seeking injunctive relief. Prior to *Wal-Mart*, commonality was not a significant barrier in certifying a public interest class under Rule 23(b)(2). Marcus found that, although early cases

[5] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

following *Wal-Mart* suggested that certification of public interest class actions would be more difficult, the current state of the law suggests that such fears were unwarranted. Public interest class actions have been repeatedly certified, and those rulings have generally prevailed on appeal. Nonetheless, there has been some impact in what Marcus calls Type III cases, in which there are plausibly interdependent claims and plausibly indivisible remedies, but class members experience bureaucratic mismanagement of a program in different ways, thus resulting in individualized issues. But even Type III cases continue to be certified by many courts. Marcus expresses concern going forward, however, in part because of the conservative-leaning judicial appointments of President Trump.

## 3. AGGREGATE LITIGATION AND RELATED TOPICS—A CONVERSATION

Professor Arthur Miller, currently University Professor at New York University School of Law, is one of the most prominent civil procedure professors of all time. Co-author (with Charles Alan Wright) of the leading treatise on civil procedure, Professor Miller was a reporter for the Rules Committee that drafted modern Rule 23, which took effect in 1966. Miller has written widely on aggregate litigation and has argued leading cases in the Supreme Court and other federal appellate courts. In the question/answer session, Professor Miller opines on various aspects of aggregate litigation and other related topics.

## 4. FEDERAL MDLS AND FEDERAL CLASS ACTIONS

### *A. MDL Leadership*

David Noll is a professor at Rutgers Law School. His article focuses on leadership appointments in MDL cases. He studied plaintiff leadership appointment orders by MDL judges as of June 2019. His study reveals that such orders are common in MDLs but that the substance of such orders differs considerably from case to case. Some orders are extremely detailed, focusing on the precise structure of the leadership and the tasks that leadership counsel are assigned to perform. By contrast, some leadership orders are very brief, merely designating a small number of names of co-lead attorneys but providing no other information. Noll also finds that leadership appointments for the defense side are rare.

### *B. Obligations of Leadership Attorneys and Individually Retained Private Attorneys*

Professor Lynn Baker is the Frederick M. Baron Chair at the University of Texas School of Law. Steve Herman is a partner at Herman, Herman & Katz and an adjunct professor at Loyola University New Orleans College of Law and at Tulane University School of Law. Their article addresses the obligations that various

lawyers in MDL proceedings have to individual claimants, including lawyers appointed by the district court to leadership positions and lawyers who were retained by individual plaintiffs. After explaining these layers of representation, Baker and Herman argue that (1) individually retained lawyers have direct fiduciary obligations to their clients; (2) leadership lawyers have responsibilities to individual plaintiffs with respect to those matters that encompass their leadership roles; and (3) leadership lawyers do not displace individually retained lawyers for matters not encompassed by the orders appointing leadership. The authors provide case studies of the allocation of attorney obligations and attendant liability in two contexts of recurring significance in mass tort MDLs: disclosure and consent obligations under the aggregate settlement rule, and potential conflicts arising from dual roles as leadership counsel and individually retained counsel. The authors conclude by recommending various "best practices" for MDL judges, including: that the MDL judge set forth explicitly in an Order the specific duties of leadership counsel and that each plaintiff's individually retained counsel remains responsible for all other aspects of the plaintiff's representation; that the MDL judge explicitly require that any leadership attorney notify the court if the attorney becomes a signatory to a settlement agreement that resolves one-half or more of her inventory of cases in the MDL; and that the MDL judge explicitly require that when leadership attorneys negotiate a truly global settlement, they must comply with the disclosure and consent obligations of the aggregate settlement rule. The authors also urge that leadership appointments be designated for one-year renewable terms.

### *C. Interlocutory Appeals in MDLs*

Professor Joshua Davis is a professor and Director of the Center for Law and Ethics at the University of San Francisco School of Law. Brian Devine is a partner at Seeger Salvas & Devine, LLP. Their article addresses on proposals by the defense bar to allow immediate appeal of certain non-final orders in MDL cases, such as denials of summary judgment. They argue that such proposals should be rejected. First, they maintain that there are strong policies supporting the final judgment rule, such as judicial efficiency, and that the various existing exceptions to that rule are appropriately nuanced and limited. Second, they reject the defense bar's argument that the current final judgment rule unfairly favors plaintiffs. Third, they argue that expanded interlocutory review is not necessary to correct district court rulings. They note that they could not find a single instance in MDL cases in which a ruling that the defense tried unsuccessfully to challenge on an interlocutory basis ended up being reversed after final judgment. Fourth, they dispute the defense bar's position that the lack of more robust interlocutory review coerces defendants to enter into unfair settlements. Finally, they argue that the defense bar is wrong in thinking that expanded interlocutory review will work to the defendant's strategic advantage.

### *D. Judicial Discretion in MDLs*

Alexandra Lahav is the Ellen Ash Peters Professor of Law at the University of Connecticut School of Law. On the 50th Anniversary of the Multidistrict Litigation Act in 2018, the Act has received more attention than ever. One area that has led to significant controversy is the use of judicial discretion in MDL. It is generally agreed that judges exercise discretion to create innovative procedures to resolve large scale aggregate litigation transferred to their courts, and that judges learn from approaches in previous MDLs that they think were successful. The controversy is that some think that this procedural approach is both exceptional and lawless. Lahav's article argues against that view, showing how the judicial approach to MDL procedure is the same as the judicial approach across procedural areas, which is to say that procedures develop in a common law like fashion with extensive reliance on judicial discretion. This argument about rulemaking processes is a distraction from what should really matter, which is the normative underpinnings of the procedural regime, what it is trying to achieve, and whether the procedures currently in use adequately meet those normative goals.

## 5. CLASS ACTION SETTLEMENTS

### *A. Serial Objectors*

Elizabeth Cabraser is a partner at Lieff Cabraser Heimann & Bernstein, LLP. Adam Steinman is the University Research Professor of Law at the University of Alabama Law School. Their article addresses the 2018 amendment to Federal Rule of Civil Procedure 23 governing serial objectors in class action settlements. Cabraser and Steinman focus on the new requirement that payments to objectors in exchange for dismissal or withdrawal of objections must be approved by the court, as well as the history leading to that amendment. In their view, a payment would not be justified solely to compensate an objector for dismissing or withdrawing an objection. Rather, the only legitimate basis for paying an objector is when the objection has improved a settlement or the settlement process. Such benefit, however, is not from withdrawing an objection, but rather from pursuing it and thereby assisting the class.

### *B. Cy Pres Settlements Part I*

Professor Robert Bone holds the G. Rollie White Chair at the University of Texas School of Law. His article discusses cy pres settlements (in which settlement proceeds go in whole or in part to third party charities). Bone distinguishes between cy pres settlements involving residual funds after distributions to the class and cy-pres-only settlements, in which the entire fund goes to a third party. He focuses on the latter type of cy pres, which has generated more controversy than the use of cy pres to distribute residual funds, and in particular on cases in which courts certify

settlement-only class actions where the settlement provides explicitly for a cy-pres-only distribution. Bone rejects the usual criticisms of cy pres—that it encourages bad deals for plaintiffs, risks attorneys and judges selecting their pet charities, and misallocates money belonging to the class. He argues that these criticisms, as well as those based on concerns about adequacy of representation under Rule 23(a)(4), superiority under Rule 23(b)(3), settlement adequacy under Rule 23(e), and constitutionality under Article III, only make sense on the assumption that courts are limited to producing outcomes that closely match substantive legal rights as defined—what he calls the "legal rights view." Bone sets aside possible objections to the legal rights view itself in order to show that, when properly understood, the legal rights view can accommodate the cy-pres-only class action in suitable cases.

### *C. Cy Pres Settlements Part II*

Gerson Smoger of is partner in the firm of Smoger & Associates. He too has written about cy pres. Smoger demonstrates that cy pres has become common throughout the United States in both federal and state courts. Smoger believes that cy pres remedies are essential to (1) distribute unclaimed funds in settlements, (2) deter corporate wrongdoing even when the injuries to any individual are relatively small (but large in the aggregate), and (3) facilitate classwide settlements in situations involving claims that do not justify individual distributions. He strongly favors cy pres distributions over settlements in which unclaimed funds revert to the defendant. He rejects concerns that cy pres settlements violate Article III standing, the Rules Enabling Act, or the First Amendment. He also rejects the argument that cy pres settlements will encourage improper conduct by class counsel. In Smoger's view, the first goal should be to distribute settlement proceeds to individual class members. But that is not always feasible. When cy pres is appropriate, the class representative should make the initial selection of the cy pres recipient, without involvement by the defendant. Once the class representative has made the selection, the court can scrutinize that choice. Finally, Smoger argues that organizations designated for cy pres should align logically with the underlying claims in the lawsuit (*e.g.*, legal aid and access to justice organizations that focus on the statutes or claims at issue).

## 6. CLASS ACTIONS AND ARBITRATION

Professor Judith Resnik is the Arthur Liman Professor of Law and Founding Director of the Liman Center for Public Interest Law at Yale Law School. Stephanie Garlock and Annie Wang are recent graduates of Yale Law School. In their article, these authors note that when courts enforce mandates to arbitrate, jurists describe themselves as respecting the individuals' autonomy to enter into contracts that route claimants to a process that is more user-friendly than adjudication. But those ration-

ales are disjunctive with the practices of providers of goods and services and of employers. These companies neither offer individuals choices about dispute resolution mechanisms nor welcome the exchange of information about experiences with arbitration. Instead, companies impose obligations to arbitrate and set the terms. In addition to the increasingly commonplace bans on joint and collective actions in any forum, many providers and employers also seek to mandate a cone of silence by instructing individuals not to disclose the content of claims, the use of arbitration, or the outcomes.

But as these authors document, during the last decade, very few individuals filed claims, single-file, in arbitration. Given the success in precluding class actions and the rarity of filings, they ask why there are market actors seeking to silence the few who do arbitrate and whether such mandates are enforceable by courts.

In their article, the authors interrupt these silencing provisions through disseminating information about the rules of and use of arbitration. They track efforts to limit information about arbitration, outline the growing body of law on non-disclosure, and analyze the data about consumer use of arbitration. As the authors recount, some jurists have held non-disclosure obligations unenforceable. Yet many decisions condone their imposition despite the repeat-player advantages that accrue to the clauses' drafters, who have access to information that one-shot participants do not have.

In addition to information about efforts to silence litigants that can be gleaned from the case law, the authors have also mined materials posted by the American Arbitration Association (AAA), which has complied with state statutes requiring administrators of consumer arbitration to make accessible the number of claims filed and the results. The picture that emerges is that, of the millions of people using services and products, virtually none file individual arbitration claims.

Because AT&T succeeded in persuading the U.S. Supreme Court to enforce bans on collective action and require claimants to use the AAA, the authors researched arbitration filings against AT&T. Between 2009 and 2019, when the AT&T wireless services customer base ranged from 85 to 165 million, about 90 individuals a year filed an arbitration claim.

The available data also provide insight into why, given that remarkably low level of claims, providers of services seek to silence the few who are arbitration users. Law firms and other aggregators have begun a market in de facto collective actions by bundling similar claims against individual providers. And, outside of courts and arbitration, collective consumer action can seek remedies by putting information into the public realm that can affect purchasing decisions and press for changes in the behavior of service providers and employers.

Episodic filings through bundlers, claims pursued by government regulators when focused on consumer protection, and networking through web posts are important avenues. But the current legal landscape does not provide systematic access

for consumers who have been harmed but lack knowledge of their injuries or connections to aggregators.

The privatization of process and non-disclosure mandates prevent similarly-situated individuals from learning about the potential to obtain redress and from sharing lawyers. Moreover, the development of law through cases or statutes and public debates about rights and remedies are stymied by information deficits. In short, after decades of conflicts often termed "class action wars," we are now in the "information wars," replete with energetic efforts to mandate silence that, the authors argue, law should rebuff.

## 7. DEREGULATION AND PRIVATE ENFORCEMENT

Professor Brian Fitzpatrick is a professor of law at Vanderbilt Law School. He offers insights from his provocative new book, *The Conservative Case for Class Actions*, in which he argues that class action lawsuits are the most conservative way to police the marketplace. He shows that class action lawsuits are superior to either of the viable alternatives: no policing at all or policing by the government. To make the latter point, he draws extensively on the privatization literature, identifying six reasons why conservatives favor private sector solutions over government solutions: 1) smaller government is better than bigger government; 2) self help is preferable to dependence on government; 3) private actors have better incentives; 4) private actors have access to better resources; 5) private actors are more independent from special interests; and 6) private actors are less centralized.

Perhaps no reason for privatization is more important to conservatives than incentives—*i.e.*, harnessing the profit motive. Professor Fitzpatrick acknowledges that the profit motive can go too far, but, he says, the right response is not to give up on the private sector, but to put rules in place to align the profit motive with the public good. Professor Fitzpatrick gathers the available data on class actions in his book to show that the rules we have in place now largely already do this, but he offers several ideas to tighten up the system. Indeed, not only does he argue that conservatives should embrace class actions on their own merits, but he suggests that conservatives need to keep the class action around to make progress on another important goal: to roll back the administrative state. These are very thought provoking ideas.

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These articles, taken together, provide a rich overview of the myriad important issues that are likely to dominate the aggregate litigation landscape for the next 50 years.