

# AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS



2019 FORUM FOR STATE APPELLATE COURT JUDGES





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“One of the primary motivations behind aggregate or class litigation is to promote fairness. If plaintiffs are bringing a claim against a giant behemoth corporation to right a \$10 wrong, that just won’t happen unless we allow aggregate or class certification.”

*—A judge attending the 2019 Forum*

“I think states’ rights is an important issue here. Where I am from, we elect our judges. The people are saying, ‘This is the court where I want to be.’ And then a ‘higher power,’ so to speak, says, ‘No, over there is where you are going to go.’ It seems a slap in the face of states’ rights.”

*—A judge attending the 2019 Forum*



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# Foreword

The topic of aggregate litigation in the state courts brought together a diverse group of judges, attorneys, and legal scholars for the Pound Civil Justice Institute's twenty-seventh Forum for State Appellate Court Judges on July 27, 2019, in San Diego, California. Participants mulled over key issues with aggregate lawsuits, including the impact of recent federal legislation and court rules and the several types of aggregate litigation available to litigants in state courts. Feedback forms told us that the audience found it stimulating and enjoyable, in keeping with our past forums.

The Pound Institute recognizes that state courts are the main dispensers of justice in the United States, and that they shoulder, by far, the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where appellate judges, academics, and practitioners can have a relevant, focused dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise always bears fruit. Forum participants bring different points of view with them, and we work hard to include panelists with outlooks that differ from those of most of the Institute's Fellows.

That diversity of viewpoints emerges in our Forum reports, like this one you now hold in your hands.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court-funding crisis to the decline of jury trial, to separation of powers, rulemaking, forced arbitration, judicial transparency, and state constitutionalism. We are proud of our Forums, and are gratified by the growth in attendance we have experienced since their inception, as well as by the very positive comments we have received from judges and faculty members who have participated. A full listing of our prior Forums is provided in an appendix to this report, and their reports and research papers—along with most of our other publications—are available for free download on our website: [www.poundinstitute.org](http://www.poundinstitute.org).

The Pound Institute is indebted to many people for the success of the 2019 Forum for State Appellate Court Judges:

- Professors Theodore Rave and Myriam Gilles, who wrote and presented the papers that sparked our discussions;
- Hon. Patricia Guerrero, of the California Court of Appeal, who welcomed us to San Diego;
- Our lunch keynote speaker, Professor Robert Klonoff of the Lewis & Clark Law School, for a fascinating discussion of serial objectors in class actions;
- Our panelists—Professors Adam Zimmerman and Nora Engstrom, Hon. Brent Appel and Hon. Joseph Maltese, Philip Willman, James Bruen, Eric Gibbs, and Ellen Relkin;
- The moderators of our small-group discussions—David Arbogast, Linda Atkinson, Lauren Barnes, Leslie Brueckner, Kathryn Clarke, Andre Mura, Florence Murray, Rebecca Phillips, Ben Siminou, Gerson Smoger, Alinor Sterling, John Vail, and Peggy Wedgworth; and

- The Pound Civil Justice Institute's dedicated and talented staff—Mary Collishaw, our executive director, and Jim Rooks, our Forum reporter—for their diligence and professionalism in organizing and administering the 2019 Judges Forum.

Most of all, we appreciate the participation of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reading this report of the Forum, and that you will find it useful in your consideration of matters relating to aggregate litigation.

A handwritten signature in black ink that reads "Pat Malone". The signature is fluid and cursive, with "Pat" on the first line and "Malone" on the second line.

Patrick A. Malone  
President, Pound Civil Justice Institute, 2018-19

# Introduction

On July 27, 2019 in San Diego, California, 122 judges, representing 30 states, took part in the Pound Civil Justice Institute's twenty-seventh annual Forum for State Appellate Court Judges.

The judges examined the topic "Aggregate Litigation in State Courts: Preserving Vital Mechanisms." Their deliberations were based on original papers written for the Forum by Professor Theodore Rave of the University of Houston Law Center ("Federal Trends Affecting Aggregate Litigation in the State Courts"), and Professor Myriam Gilles of Cardozo Law School ("Rethinking Multijurisdictional Coordination of Complex Mass Torts"). The papers were distributed to participants in advance of the meeting, and the authors made less-formal oral presentations of their papers to the judges during the plenary sessions.

The paper presentations were followed by discussion by panels of distinguished commentators: Hon. Brent Appel of the Supreme Court of Iowa; Hon. Joseph Maltese of the New York State Supreme Court, Appellate Division, Second Department; Professor Adam Zimmerman of Loyola Law School, Los Angeles; Professor Nora Engstrom of Stanford Law School; Philip Willman, President-Elect of DRI—The Voice of the Defense Bar; James Bruen of Farella Braun + Martel; Eric Gibbs of the Gibbs Law Group; and Ellen Relkin of Weitz & Luxenberg.

The judges also heard a luncheon keynote address by Professor Robert Klonoff of Lewis & Clark Law School, speaking on the topic "Serial Objectors: A Challenge for our Civil Justice System."

After each plenary session, the judges separated into smaller groups to discuss the issues, with attorney Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were audio-recorded and transcribed. Under ground rules set in advance of the discussions, comments by the judges were not made for attribution in this report of the Forum. A representative selection of the judges' comments appears in this report.

At the concluding plenary session, the Forum Reporter, James E. Rooks, Jr., summarized points of apparent agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Rave and Gilles, and on transcripts of the Forum's plenary sessions and group discussions.



James E. Rooks, Jr.  
Forum Reporter



# Morning Paper, Oral Remarks, and Comments

## Federal Trends Affecting Aggregate Litigation in the State Courts

D. Theodore Rave,<sup>1</sup> University of Houston Law Center

### Executive Summary

*Professor Rave's paper focuses on two parallel trends that have had great impact on aggregate litigation brought in state courts: the expansion of federal court jurisdiction effected by both legislation and the actions of the federal courts themselves; and the constriction, by essentially the same process, of state court personal jurisdiction.*

*In Part I, "Expanding Federal Subject Matter Jurisdiction," Professor Rave explains the background and main provisions of the Class Action Fairness Act (CAFA), which is the most significant expansion of federal subject matter jurisdiction over aggregate litigation. CAFA extends diversity jurisdiction over class actions and facilitates their removal to federal court, where they face increased requirements to achieve certification. As a result, class action plaintiffs look for ways to avoid the effects of CAFA, for instance by satisfying one of the Act's exceptions, limiting the amount in controversy, dividing classes into smaller groups, or bringing class actions as counterclaims.*

*In Part II, "Constricting State Court Personal Jurisdiction," Rave reviews the ways in which the U.S. Supreme Court has employed constitutional doctrine to restrict the jurisdiction of state courts in all types of litigation, whether aggregate or not. He traces the evolution of personal, general, and specific jurisdiction doctrine, with particular attention to Daimler A.G. v. Bauman and Bristol-Myers Squibb v. Superior Court. In Daimler, the Supreme Court rejected jurisdiction over a defendant with very substantial business ties to the forum state. In Bristol-Myers, the Court rejected a California court's assertion of specific jurisdiction over non-resident plaintiffs in a nationwide mass tort action of just under 600 plaintiffs, filed in state court, alleging injuries and deaths resulting from their ingestion of the blood-thinning medication Plavix.*

*In Part III, "Open Questions after CAFA, Daimler, and Bristol-Myers," Professor Rave considers questions left unanswered by the legislation and court decisions. These include how closely the plaintiffs' claims must be related to the forum state; whether a class action may be maintained only where a state can exercise general jurisdiction over the defendant; the utility of "settlement classes" (in which defendants consent to jurisdiction); and whether corporate registration statutes can confer general jurisdiction.*

*In Part IV, "What's Left for the State Courts in Aggregate litigation?", Rave briefly describes six types of aggregate litigation that may still be maintainable in state court: single-state class actions raising state law claims; single-state mass joinders raising state law claims; multistate class actions in the defendant's home state where more than a third of the class members are also from that state; nationwide mass joinders in the defendant's*

*home state; multistate settlement class actions where the defendant consents to personal jurisdiction; and parens patriae actions or other public enforcement actions by state governments.*

*Professor Rave concludes that, after years of restrictive legislation and court decisions, aggregate litigation will be found increasingly in federal court. However, important questions do remain open, as do several avenues for state court aggregation.*

## Introduction

Recent trends in federal law have important effects on aggregate litigation in the state courts. This paper focuses on two trends: (1) the expansion of federal court subject matter jurisdiction and (2) the constriction of state court personal jurisdiction. Both trends have restricted the availability of state courts as a viable forum for many forms of large-scale aggregate litigation. And the result, as litigants adjust to the changing incentive structures that these trends create, may be to push more aggregate litigation into federal court—particularly federal multidistrict litigation (MDL), which has been growing explosively in recent years.

Many important questions—particularly about how the U.S. Supreme Court’s recent personal jurisdiction decisions will play out—remain open.

open. And state courts will have to adjust and work cooperatively with their federal counterparts to handle the aggregate litigation that remains under their purview.

This paper begins by surveying recent trends in federal law on subject matter and personal jurisdiction. And it finishes by highlighting some of the open questions left by these changes in federal law and cataloging the types of aggregate cases that are likely to remain in state court.

### 1. Expanding Federal Subject Matter Jurisdiction

The most significant expansion of federal subject matter jurisdiction over aggregate litigation was the Class Action Fairness Act (CAFA).<sup>2</sup> The story of CAFA has been well told elsewhere, so I will move quickly and paint with a broad brush.<sup>3</sup> But having a basic grasp on what CAFA did and how it works is essential to understanding the U.S. Supreme Court’s more recent constrictions of personal jurisdiction.

#### A. CAFA’s Origins and Main Provisions

Congress passed CAFA in 2005 in response to a perceived problem with how some state courts were handling class actions. While the federal courts were becoming less hospitable to class actions in the late 1990s and early 2000s, some state courts—known as “magic jurisdictions” or “judicial hellholes,” depending on your perspective—became magnets for nationwide class actions.<sup>4</sup> The concern was that a handful of state courts were particularly solicitous of class actions and willing to certify even questionable classes in situations where the vast majority of state and federal courts would never have dreamed of doing so.<sup>5</sup> Thus an outlier state court—often applying its own substantive law under the U.S. Supreme Court’s loose constitutional limits on choice of law—could

effectively rule on the defendant's conduct nationwide and subject the defendant to potentially firm-threatening liability.<sup>6</sup>

Congress's solution was to expand federal subject matter jurisdiction over class actions and to make it easier for defendants to remove them from state court to federal court. CAFA does two basic things with respect to class actions (subject to exceptions discussed below). First, it extends federal diversity jurisdiction over putative class actions with 100 or more class members where at least one class member is diverse from at least one defendant and where the aggregate amount in controversy exceeds \$5 million.<sup>7</sup> So, unlike the regular diversity statute, which requires every plaintiff to be diverse from every defendant,<sup>8</sup> CAFA requires only minimal diversity. And instead of requiring the class representative's claim to meet the \$75,000 amount-in-controversy requirement individually,<sup>9</sup> CAFA looks to the aggregate amount that the class is seeking.

Congress's solution was to expand federal subject matter jurisdiction over class actions and to make it easier for defendants to remove them from state court to federal court.

Second, CAFA makes it easier for defendants to remove class actions to federal court by loosening some of the procedural restrictions in the ordinary removal statute.<sup>10</sup> Under CAFA's new removal statute, *any* defendant may remove a putative class action that meets CAFA's jurisdictional requirements to federal court.<sup>11</sup> This includes home-state defendants, who are normally barred from removing cases.<sup>12</sup> Unlike the ordinary removal statute, CAFA does not require the consent of all defendants to remove.<sup>13</sup> And there is no one-year time limit on CAFA removals.<sup>14</sup> Further, the federal district court's decision to remand the case to state court—which is ordinarily unreviewable—is subject to discretionary appellate review under CAFA.<sup>15</sup>

In part because not all states have class-action rules and in part to prevent plaintiffs from circumventing removal through creative efforts at non-class joinder, CAFA also allows the removal of "mass actions."<sup>16</sup> CAFA defines a "mass action" as a civil action where the monetary claims of 100 or more plaintiffs "are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact."<sup>17</sup> But to be removable as a mass action, the plaintiffs have to be the driving force behind the consolidation. Removable mass actions exclude claims that are "joined upon the motion of a defendant,"<sup>18</sup> claims that are "consolidated or coordinated solely for pretrial proceedings,"<sup>19</sup> claims that are consolidated (even for trial) *sua sponte* by the state courts,<sup>20</sup> and *parens patriae* actions brought by state public officials.<sup>21</sup>

CAFA's ostensible aim was to move nationwide class actions into federal court on the theory that controversies that are national in scope belong in national courts.

CAFA's ostensible aim was to move nationwide class actions into federal court on the theory that controversies that are national in scope belong in national courts.<sup>22</sup> But support for CAFA fell starkly along plaintiff/defendant lines, with defense-side interest groups being the primary drivers behind the law's passage.<sup>23</sup> And

the more cynical view of CAFA is that its sends class actions to federal court to die there.<sup>24</sup> The critical doctrinal roadblock is that nationwide or multistate class actions based on state law will typically involve applying many different states' substantive laws to different class members.<sup>25</sup> When faced with fifty different sets of applicable substantive law, most federal courts will not certify a class action because common questions do not predominate over individual questions, as required by Federal Rule of Civil Procedure 23(b)(3).<sup>26</sup> And because the federal courts retain jurisdiction under CAFA even if class certification is denied, removal can sound the death knell for a putative class action.<sup>27</sup>

The federal courts have only grown less hospitable to class actions in the years since CAFA's passage with decisions like *Wal-Mart v. Dukes*<sup>28</sup> and *Comcast Corp. v. Behrend*<sup>29</sup> raising the bar for showing commonality and predominance under Federal Rule of Civil Procedure 23.<sup>30</sup> These developments have sparked efforts by plaintiffs, who often prefer state court, to structure their aggregate claims to avoid removal under CAFA.<sup>31</sup>

## B. Avoiding CAFA

Plaintiffs have several strategies for avoiding CAFA and keeping their aggregate claims in state court. If they are content to file single-state class actions, plaintiffs may be able to keep their cases in state court under CAFA's exceptions for local controversies. If plaintiffs wish to pursue aggregate litigation in state court on a nationwide or multistate basis, however, they have two basic strategies for avoiding CAFA: they can limit the amount in controversy or they can limit the number of plaintiffs by breaking up the litigation into smaller bundles. Additionally, a new strategy has recently emerged: file a class action as a counterclaim.

Plaintiffs have several strategies for avoiding CAFA and keeping their aggregate claims in state court.

I discuss each of these strategies below. On the whole, the federal courts have been fairly tolerant of these strategies, even when they are rather transparent attempts to evade CAFA. Congress, not the federal courts themselves, has been leading the charge to expand federal subject matter jurisdiction.

### 1. Fitting Into CAFA's Exceptions

While CAFA sought to move large-scale multistate class actions to federal court, it preserved a role for state courts to adjudicate class actions that are more local in nature. The statute thus contains exceptions to federal jurisdiction when all or most of the parties are from the forum state.

If more than two-thirds of the class members are citizens of the forum state, a federal court *must* decline subject matter jurisdiction under CAFA when either (1) the primary defendant is also from the forum state or (2) a significant defendant is from the forum state, the plaintiffs' principal injuries were incurred in that state, and no other class action has been filed in the preceding three years.<sup>32</sup> If more than one-third, but less than two-thirds, of the class members are citizens of the forum state and the primary defendants are also citizens of that state, the federal court *may*, in the interest of justice, decline jurisdiction under CAFA.<sup>33</sup> Thus, when a defendant is sued at home in state court, the likelihood of federal jurisdiction existing goes down as the percentage of in-state class members goes up.<sup>34</sup>

CAFA . . . preserved a role for state courts to adjudicate class actions that are more local in nature.

In applying these exceptions, issues can arise in determining the citizenship of class members because "citizenship" for federal diversity purposes is based on the subjective concept of domicile. The simplest way for plaintiffs to avoid those issues and make sure that they fit into one of these exceptions is to define the class as citizens of the forum state, thereby aligning the class definition with the statutory requirement.<sup>35</sup>

CAFA also contains exceptions for class actions against state governments or officials<sup>36</sup> and class actions involving most securities and corporate law cases (the so-called "Delaware carve-out").<sup>37</sup>

## 2. Limiting the Amount in Controversy

Another way that plaintiffs have attempted to avoid CAFA, even in multistate cases, is to limit the amount in controversy to less than \$5 million. If the plaintiff class alleges less than \$5 million in damages or does not specify the amount in controversy, the defendant can still remove under CAFA, so long as it can allege in good faith that the true amount in controversy is greater.<sup>38</sup> But if the plaintiffs seek a remand, the defendant must show by a preponderance of the evidence that the true amount in controversy exceeds \$5 million.<sup>39</sup> Genuinely small claims will remain in state court, but plaintiffs cannot avoid federal court simply by understating or failing to specify their damages in the complaint.

Another way that plaintiffs have attempted to avoid CAFA, even in multistate cases, is to limit the amount in controversy to less than \$5 million.

Some plaintiffs, however, have attempted to avoid removal by stipulating that the class will seek no more than \$5 million in damages. A unanimous U.S. Supreme Court rejected this strategy in *Standard Fire Insurance Co. v. Knowles*.<sup>40</sup> The Court held that a “a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.”<sup>41</sup>

Therefore, while the stipulation might tie the named plaintiff’s hands, it could not limit the amount in controversy for the rest of the class. Though *Standard Fire* may say more about the nature of class actions—that a self-appointed putative class representative cannot bind absentees before the proposed class is certified by a court—than it does about federal jurisdiction.<sup>42</sup>

## 3. Breaking Up Aggregate Litigation into Smaller Bundles

Plaintiffs have had more success with another strategy for avoiding CAFA: eschewing class actions altogether, breaking up their aggregate claims into bundles of 99 or fewer plaintiffs to avoid CAFA’s trigger for “mass actions,” and then filing a series of largely identical complaints in state court. If the actions are then consolidated through state court procedures, this slice-and-dice strategy will have succeeded in effectively recreating a CAFA-proof nationwide aggregation.

While defendants often object to this slice-and-dice strategy as a transparent attempt to circumvent CAFA’s mass action provision, the federal courts have been largely tolerant. So long as the plaintiffs do not propose to try the bundles of cases jointly, the federal circuit courts have uniformly held that when the same lawyers file separate but largely identical complaints each with 99 or fewer plaintiffs, that does not create a mass action under CAFA.<sup>43</sup> This is so even when the plaintiffs’ lawyers are quite transparent about what they are doing.<sup>44</sup>

While defendants often object to this slice-and-dice strategy as a transparent attempt to circumvent CAFA’s mass action provision, the federal courts have been largely tolerant.

Whether this strategy will be successful in recreating a large aggregate litigation in state court depends greatly on who seeks coordination or consolidation of the sliced-and-diced case bundles. If the plaintiffs propose that the bundles be tried jointly, they will trigger CAFA’s mass action provision and the defendant can remove.<sup>45</sup> But CAFA is explicit that if the defendant moves to join the claims, there is no federal jurisdiction.<sup>46</sup> And generally if the state courts decide to consolidate or coordinate the cases *sua sponte*, there is no federal jurisdiction.<sup>47</sup>

CAFA is also explicit that there is no removable “mass action” if “the claims have been consolidated or coordinated solely for pretrial proceedings.”<sup>48</sup> So if a state has a multidistrict litigation procedure that mirrors the federal model and consolidates cases for pretrial purpose only (like Texas and New York<sup>49</sup>), then the plaintiffs’ lawyers can safely break their claims up into identical 99-plaintiff complaints and then move to consolidate them in state court for pretrial proceedings. But in states that have multidistrict litigation procedures that consolidate cases for all purposes, including trial (like California and many other states<sup>50</sup>), plaintiffs cannot move to consolidate without risking removal to federal court.<sup>51</sup> Instead, they have to hope that the defendant or court will initiate the consolidation.

#### 4. Bringing Class Actions as Counterclaims

A final strategy for avoiding CAFA has emerged recently, but it is only available under certain conditions. That strategy is to wait to be sued for something and then file a class action as a counterclaim or third-party claim. This strategy was first proposed by Professor Jay Tidmarsh in a law review article,<sup>52</sup> and it was blessed by the U.S. Supreme Court this term in *Home Depot U.S.A., Inc. v. Jackson*.<sup>53</sup>

In *Jackson*, Citibank filed a debt collection action against Jackson in North Carolina state court. Jackson counterclaimed against Citibank and brought a third-party class action claim against Home Depot and Carolina Water Systems, alleging that they had engaged in an unlawful scheme to inflate the price of water treatment systems that he had bought with his Citibank-issued credit card.<sup>54</sup> Home Depot removed the case to federal court, but the U.S. Supreme Court held that a third-party counterclaim defendant like Home Depot is not a “defendant” under either the general removal statute (28 U.S.C. § 1441) or CAFA’s removal statute (28 U.S.C. § 1453(b)), and thus Home Depot was not entitled to remove the class action claims filed against it.<sup>55</sup> The case was

thus remanded to state court where the class action against Home Depot can proceed, even though it would fall within CAFA’s jurisdictional grant.

At the same time that Congress has expanded federal subject matter jurisdiction, the U.S. Supreme Court has been using constitutional doctrine to cut back on state court personal jurisdiction.

Obviously, this strategy for keeping class actions in state court has limited application—you have to wait to get sued before you can use it. But there may be many instances where consumers who are defendants in debt collection claims in state court could bring class action counterclaims

against their creditors on behalf of other similarly situated consumers. And under the holding and logic of *Jackson*, consumers who wish to avoid CAFA removal are not limited to bringing class actions against the creditor that sued them; they can also bring class actions against impleaded third parties.

## II. Constricting State Court Personal Jurisdiction

At the same time that Congress has expanded federal subject matter jurisdiction, the U.S. Supreme Court has been using constitutional doctrine to cut back on state court personal jurisdiction. Restrictions on personal jurisdiction have taken the front seat in recent years with major decisions on both general and specific jurisdiction.

The Court’s latest personal jurisdiction decision, *Bristol-Myers Squibb Co. v. Superior Court*,<sup>56</sup> has the potential to reshape possibilities for aggregate litigation in state courts and create incentives for plaintiffs to file more cases in federal court. But lots of open questions remain.

## A. Evolution of Personal Jurisdiction Doctrine

Way back in 1878, the U.S. Supreme Court declared in *Pennoyer v. Neff* that a state court's exercise of personal jurisdiction over a defendant is a matter of federal constitutional due process.<sup>57</sup> Since then, the constitutional law of personal jurisdiction has continued to evolve in fits and starts to accommodate the need to resolve disputes in an increasingly interconnected national and international marketplace.<sup>58</sup> The Court's 1945 decision in *International Shoe Co. v. Washington* marks the beginning of the modern era of personal jurisdiction.<sup>59</sup> There Chief Justice Stone explained that a state's authority to exercise jurisdiction over a defendant was a function of fairness, not territorial borders: hence the catechism that a state's jurisdiction depends on whether the defendant has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>60</sup>

Having been freed from the rigid territorial conceptions of *Pennoyer*, the states passed "long-arm" statutes to extend their jurisdictional reach as far as they could, sometimes quite literally to the constitutional limit.<sup>61</sup> And over the next several decades, the U.S. Supreme Court sporadically decided personal-jurisdiction cases in an attempt to put meat on the bones of the *International Shoe* test.<sup>62</sup> The Court continued in this vein throughout the 1980s, but after two cases in which a majority opinion could not emerge, the Court, for whatever reason, did not decide another personal jurisdiction case for twenty years.<sup>63</sup>

With the benefit of hindsight, two aspects of the cases from the 1970s and 1980s seem to have been the most important. First, the Court settled on a two-step analysis for personal jurisdiction: (1) an assessment of "minimum contacts" among the forum, the defendant, and the dispute, and then (2) an assessment of whether a state's assertion of jurisdiction was nevertheless unreasonable, based on a laundry list of factors synthesized by Justice Brennan in *Burger King Corp. v. Rudzewicz*.<sup>64</sup>

With the benefit of hindsight, two aspects of the cases from the 1970s and 1980s seem to have been the most important.

Second, the Court had come to embrace the concepts of "general" and "specific" jurisdiction as a mode of analysis springing from *International Shoe*.<sup>65</sup> Without belaboring the point, general jurisdiction is all-purpose jurisdiction over a defendant. If a state has general jurisdiction over a defendant, that defendant can be sued in that state on any claim, regardless of whether there is any connection between the state and the claim. Specific jurisdiction, as the label would suggest, is far narrower and requires a link between the facts of the case and the forum state. Without such a link, the state cannot assert jurisdiction over the defendant without its consent.<sup>66</sup>

In 2011, the Supreme Court broke its twenty years of silence and got back into the personal jurisdiction business with two new cases: *Goodyear Dunlop Tires v. Brown*<sup>67</sup> and *J. McIntyre Machinery, Ltd. v. Nicastro*,<sup>68</sup> both of which reversed state courts' assertions of jurisdiction, one for lack of general jurisdiction and the other for lack of specific jurisdiction. Since then, the Court has exhibited a newfound vigor when it comes to policing the states—and plaintiffs' attempts at forum shopping. Indeed, the Court has now heard six personal jurisdiction cases since 2011, and in each it has concluded that the trial court exceeded the limitations of the Fourteenth Amendment.<sup>69</sup> The Court's rather aggressive reentry into the fray after two decades of benign neglect has generated a series of new questions, in large part because the Court has been rather obscure about the purposes of jurisdictional limitations underlying its new doctrinal rules.<sup>70</sup>

## B. Developments in General Jurisdiction

Until recently, the scope of general jurisdiction was thought to be quite broad.<sup>71</sup> Drawing from language in *International Shoe*, a state was thought to have general jurisdiction over a defendant when “the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.”<sup>72</sup> Although the U.S. Supreme Court did little to clarify the concept, the kind of operations that most courts treated as justifying a state’s exercise of general jurisdiction tended to roughly correspond with doing business in the state—so if a corporation had a significant footprint in the state, such as through employees, sales, or physical plants, general jurisdiction was thought to exist.<sup>73</sup>

That understanding changed radically with *Goodyear*. Writing for a unanimous Court, Justice Ginsburg explained that general jurisdiction is almost always limited to the states in which a defendant is “essentially at home.”<sup>74</sup> For a corporation, that typically means the state of incorporation and the state where the defendant’s principal place of business is located. This result was a surprising shift and unsettled quite a lot of case law.<sup>75</sup>

But in case there was any lingering doubt about the Court’s intentions, the Court has twice reiterated that general jurisdiction over a corporate defendant will almost always be limited to those two states: its principal place of business and state of incorporation. Although it left open the possibility that in an “exceptional case” a corporation could be “at home” in a third state, the Court held in *Daimler A.G. v. Bauman* that California lacked general jurisdiction over an automobile manufacturer that had multiple facilities and sold billions of dollars’ worth of cars in the state.<sup>76</sup> And it reiterated the point in *BNSF Railway Co. v. Tyrrell*, where it held that Montana lacked general jurisdiction over a railroad with more than 2,000 employees and 2,000 miles of track in the state.<sup>77</sup> Simply doing a substantial amount of business in a state will no longer suffice for general jurisdiction.

Until recently, the scope of general jurisdiction was thought to be quite broad.

## C. Developments in Specific Jurisdiction

In part because the dominant pre-*Goodyear* conception of general jurisdiction was so broad, the questions that reached the U.S. Supreme Court during the 1980s tended to deal with states’ assertions of specific jurisdiction over defendants whose *only* contact with the forum related to the particular lawsuit.<sup>78</sup> The central question, as the Court put it in *World-Wide Volkswagen Corp. v. Woodson*, was whether the defendant “purposefully avails itself of the privilege of conducting activities within the forum state.”<sup>79</sup> The question of how related that particular lawsuit must be to the forum state was not addressed until very recently.<sup>80</sup>

### 1. Purposeful Availment

On the question of what constitutes purposeful availment, the Court has achieved little clarity or consensus. After fragmenting in the 1980s, the Court was still divided in *Nicastro* in 2011, which failed to produce a majority opinion.<sup>81</sup> Instead, the Court split four-two-three, with Justice Kennedy’s plurality opinion generating more confusion than it resolved. The Court rejected New Jersey’s exercise of specific jurisdiction over a British manufacturer when one of its machines injured a New Jersey resident in the state. Justice Kennedy reasoned that

the manufacturer's contacts with New Jersey were insufficient to show purposeful availment because it sold its machines through a distributor and had targeted the U.S. market as a whole, not New Jersey specifically.<sup>82</sup>

Following *Nicastro*, the Court again appeared to narrow the meaning of purposeful availment in *Walden v. Fiore*.<sup>83</sup> There it held that a police officer who confiscated money at the Atlanta airport from a pair of gamblers on their way home to Nevada did not have sufficient minimum contacts with Nevada (where he had never been), even though he knew that his conduct would cause harm to the plaintiffs in Nevada.<sup>84</sup>

On the question of what constitutes purposeful availment, the Court has achieved little clarity or consensus.

## 2. Relatedness

While interesting, questions of purposeful availment have only limited impact on most aggregate litigation. Far more important have been developments on the relatedness prong of specific jurisdiction. After *Goodyear* restricted the scope of general jurisdiction, the question of relatedness came to the fore: How related to the forum state does a plaintiff's claim have to be when the defendant purposefully avails itself of the markets in every state through a nationwide course of conduct? The U.S. Supreme Court squarely addressed this question for the first time in *Bristol-Myers Squibb Co. v. Superior Court*.<sup>85</sup>

The *Bristol-Myers* litigation involved a nationwide mass tort action carefully structured to avoid removal under CAFA. Five hundred and ninety two plaintiffs from around the country joined together with 86 Californians to file eight separate, but largely identical, complaints (each with fewer than 100 plaintiffs) in California state court against the pharmaceutical giant Bristol-Myers Squibb (a Delaware corporation with its principal place of business in New Jersey) and California-based distributor McKesson. The plaintiffs alleged injuries from the blood-thinning

drug Plavix.<sup>86</sup> The actions were assigned as a coordinated matter to a single judge. Bristol-Myers challenged the California court's personal jurisdiction over it with respect to the out-of-state plaintiffs' claims (though it conceded that the court had jurisdiction for the Californian's claims).

While interesting, questions of purposeful availment have only limited impact on most aggregate litigation.

The California Supreme Court acknowledged that Bristol-Myers was not subject to general jurisdiction despite its extensive contacts with the state—namely its nearly one billion dollars in sales of Plavix in California, its registration to do business in the state, and therefore, its appointment of an agent to receive service of process, and its operation of five offices and employment of some 400 people in the state—because, under *Goodyear*, Bristol-Myers was not “at home” in California.<sup>87</sup>

But the California Supreme Court held that Bristol-Myers was subject to *specific* jurisdiction with respect to the out-of-state plaintiffs' claims. In reaching that determination, the California Supreme Court applied a “sliding scale approach,” under which “the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim.”<sup>88</sup> Because Bristol-Myers's contacts with California were extensive, the California courts could exercise specific jurisdiction on a lesser showing of how the claims were related to California. In the California Supreme Court's view, the fact that Bristol-Myers marketed and sold large

quantities of the same drug in California to some of their co-plaintiffs was sufficient to establish the relatedness of the out-of-state plaintiffs' claims.<sup>89</sup>

The U.S. Supreme Court roundly rejected the California court's sliding scale approach to specific jurisdiction, calling it a "loose and spurious form of general jurisdiction."

In an 8-1 decision, the U.S. Supreme Court roundly rejected the California court's sliding scale approach to specific jurisdiction, calling it a "loose and spurious form of general jurisdiction."<sup>90</sup> Writing for the Court, Justice Alito explained that specific jurisdiction requires a connection between *each* plaintiff's claim and the forum.<sup>91</sup> And that connection was lacking here because the out-of-state plaintiffs did not reside in California, were not prescribed Plavix in California, did not ingest the drug in California, and did not suffer injury in California.<sup>92</sup>

"The mere fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims."<sup>93</sup>

### 3. The Impact of *Bristol-Myers*

The *Bristol-Myers* decision is likely to have profound effects on aggregate litigation in the state courts. It significantly limits plaintiffs' menu of forums for bringing a nationwide or multistate aggregated action—either as a class action or nonclass mass joinder—in state court.<sup>94</sup> Plaintiffs can no longer engage in large-scale multistate aggregation in the state courts of their choice just because some of them were injured in, or reside in, that state (as they tried to do in the *Bristol-Myers* litigation).<sup>95</sup>

If plaintiffs from around the country want to aggregate their claims in state court, they will have to do so on defendants' terms.<sup>96</sup> They can sue in the defendant's home state, where it has chosen to incorporate or locate its principal place of business and is thus subject to general jurisdiction.<sup>97</sup> Or, if there is a single state where the defendant engaged in conduct that gave rise to all of the plaintiffs' claims nationwide (such as designing or manufacturing a defective product), a nationwide aggregation of plaintiffs might be able to invoke specific jurisdiction in the state where the defendant chose to engage in that conduct.<sup>98</sup>

If plaintiffs from around the country want to aggregate their claims in state court, they will have to do so on defendants' terms.

Indeed, in some cases, there may be no state where plaintiffs from around the country can aggregate their cases. As Justice Sotomayor pointed out in her dissent in *Bristol-Myers*, if there are two defendants with their headquarters and principal places of business in different states, no single state would have general jurisdiction over both.<sup>99</sup> Similarly, no state would have general jurisdiction over a defendant incorporated and headquartered abroad.<sup>100</sup>

Plaintiffs can, of course, still sue individually in the states where they suffered injury. But to do so, they have to give up the benefits that come with aggregation, e.g., the ability to pool resources, spread costs, share risk, and potentially offer the defendant peace in exchange for a premium.<sup>101</sup> And suing individually may be cost-prohibitive in many types of cases, like consumer cases, where recoveries are typically small, or mass tort cases, where litigation costs are typically very high.<sup>102</sup>

Smaller groups of plaintiffs can “probably sue together” if they were injured or reside in a single state; that state would likely have specific jurisdiction over all of their claims.<sup>103</sup> But by doing so, they give up the economies of scale and leverage that come with being part of a nationwide aggregation.<sup>104</sup> And many of these single-state aggregations brought outside of the defendant’s home state will be removable to federal court, unless the plaintiffs can properly join a local defendant or recruit a non-diverse co-plaintiff.<sup>105</sup> The latter strategy is made more difficult by the relatedness requirement of *Bristol-Myers*; the plaintiff who is citizen of the same state as the defendant must have a claim that is sufficiently related to the forum state to make specific jurisdiction proper.<sup>106</sup> In short, single-state aggregations may be viable in some states where large numbers of plaintiffs reside or were injured and where they can join a nondiverse defendant. But in many states, plaintiffs may not find such strategies economically viable.

### Many plaintiffs may abandon the state courts altogether.

Given the choice between aggregate litigation on the defendant’s home turf and individual (or small group) litigation in the state where the plaintiff resides or was injured, many plaintiffs may abandon the state courts altogether. Instead, these plaintiffs may file their cases in (or allow them to be removed to) federal court, where they will be transferred and consolidated under 28 U.S.C. § 1407 into a federal MDL action.<sup>107</sup> Plaintiffs may prefer nationwide aggregation in federal court to either individual litigation or aggregation on the defendant’s home in state court.

Federal MDL is not subject to the same personal jurisdiction constraints as state court aggregation. Although Federal Rule of Civil Procedure 4(k) ties the personal jurisdiction of the federal district courts to the states in which they sit, MDL gets around this limit because of the unique way it is constructed. Because transfer into an MDL is limited to pretrial proceedings only, and the cases will have to be remanded to the districts where they were originally filed for trial, MDL is “simply not encumbered by considerations of in personam jurisdiction and venue.”<sup>108</sup> It’s the personal jurisdiction of the transferor court that matters. As long as the cases were originally filed in (or removed to) a federal district court that has personal jurisdiction, the MDL transferee court doesn’t need an independent basis for personal jurisdiction over the temporarily transferred cases.<sup>109</sup> But once the cases have been consolidated into the MDL, they are generally litigated on an aggregate basis and almost always resolved in the MDL court—only a small fraction (less than 3%) are ever sent back.<sup>110</sup>

If this prediction is correct, then much of the mass-tort litigation that has been aggregated in state courts will wind up in federal MDL.<sup>111</sup> The combination of *Goodyear*, *Daimler*, and *Bristol-Myers* restricts plaintiffs’ options for filing aggregate litigation in state court to those forums they are likely to find least attractive. And CAFA’s expansion of federal subject matter jurisdiction combined with MDL’s personal jurisdiction flexibility makes the federal courts more accommodating of aggregate litigation. Plaintiffs who wish to aggregate their claims nationwide may prefer to do so in front of a federal MDL judge chosen by the Judicial Panel on Multidistrict Litigation rather than in front of a state court judge in the defendant’s home state.

Federal MDL is not subject to the same personal jurisdiction constraints as state court aggregation.

### III. Open Questions After CAFA, *Daimler*, and *Bristol-Myers*

The developments in subject-matter and personal jurisdiction at the federal level—particularly in the wake of *Bristol-Myers*—raise many unanswered questions. Justice Alito’s opinion in *Bristol-Myers* professed modesty and purported to make no new law.<sup>112</sup> But in crafting such a narrow opinion, the Court ducked several thorny

The developments in subject-matter and personal jurisdiction at the federal level . . . raise many unanswered questions.

questions. Most importantly for our purposes: (1) Exactly how related must the claims be to the forum to establish specific jurisdiction? And (2) what about class actions? The new limitations on specific jurisdiction in aggregate litigation announced in *Bristol-Myers* also put pressure on courts and litigants to resolve a question left open after

*Daimler*: (3) Do defendants consent to general jurisdiction by registering to do business in a state and appointing an agent to receive service of process?

#### A. How Closely Related Must the Plaintiffs Claims Be to the Forum State?

While the U.S. Supreme Court in *Bristol-Myers* held that a state has no specific jurisdiction over the claims of plaintiffs who did not reside, purchase or use the defendant’s product, or suffer injury in that state, it never explains what sorts of contacts *would* be sufficient. Could residents sue for injuries that occurred out of state? Could a plaintiff who purchased a product in another state sue in the state where he was injured (and where the defendant sells identical products to other consumers)? Could he sue in the state where he bought the product but did not suffer injury? At times the Court suggests that any of those connections might be enough.<sup>113</sup> But the Court never clarifies what kind of a “connection between the forum and the specific claims at issue” specific jurisdiction requires.<sup>114</sup>

The U.S. Supreme Court did not adopt *Bristol-Myers*’s argument that the defendant’s purposeful contacts with the forum state must be the “proximate cause” of the plaintiff’s alleged injury—an approach that would have wreaked havoc on even simple claims arising out of products that cross state lines.<sup>115</sup> And the Court is careful to use the phrase “arises out of or relates to”—not just “arises out of”—when it refers to that prong of the specific jurisdiction analysis.<sup>116</sup> But the Court never explained exactly how “related” the plaintiffs’ claims must be to the defendant’s contacts with the forum state.<sup>117</sup>

The U.S. Supreme Court did not adopt *Bristol-Myers*’s argument that the defendant’s purposeful contacts with the forum state must be the “proximate cause” of the plaintiff’s alleged injury.

#### B. What About Class Actions?

##### 1. Litigation Classes

In *Bristol-Myers*, the U.S. Supreme Court did not address the question of personal jurisdiction in class actions.<sup>118</sup> Although the Court purports to leave the question open,<sup>119</sup> it is difficult to see how, under the logic of *Bristol-Myers*, most nationwide or multistate class actions could be maintained outside of a state where the defendant is subject to general jurisdiction. If specific jurisdiction over the defendant requires a connection between each

plaintiff's claim and the forum state, then it will be difficult to find a single state (other than the defendant's home state) that would have the requisite connection with every class member's claim in a nationwide class.<sup>120</sup>

There may be some cases where all of the conduct that causes the class members' injuries nationwide occurred in some other single state (perhaps where the defendant has its manufacturing operations or directs a nationwide policy), and thus that state would have specific jurisdiction over all of the class members' claims. But, except in these sorts of circumstances, *Bristol-Myers* suggests that a multistate or nationwide class action may only be maintained in a state that can exercise general jurisdiction over the defendant—or in a state where the defendant consents to personal jurisdiction.<sup>121</sup>

While no federal circuit court has yet addressed the issue, several federal district courts have declined to apply *Bristol-Myers* to multistate class actions.<sup>122</sup> Some have simply ducked the issue, saying that *Bristol-Myers* addressed a mass action and has no direct impact on class actions.<sup>123</sup> Others have distinguished *Bristol-Myers* by characterizing absent class members as non-parties for the purposes of personal jurisdiction analysis; thus as long as the class representative's claim has a sufficient connection to the forum state there is personal jurisdiction over the class's claims, even if the class includes out-of-staters.<sup>124</sup>

While no federal circuit court has yet addressed the issue, several federal district courts have declined to apply *Bristol-Myers* to multistate class actions.

This approach is plausible. *Bristol-Myers* did not overrule *Phillips Petroleum Co. v. Shutts*, which held that Oklahoma had personal jurisdiction over a nationwide class of plaintiffs (jurisdiction over the out-of-state defendant was not contested, most likely because everyone assumed it was subject to general jurisdiction in the days before *Goodyear*).<sup>125</sup> And the U.S. Supreme Court has, in the past, treated absent class members as parties for some purposes and not for others.<sup>126</sup> Having left the question open, the Court could treat the class more like an entity than an aggregation of individual claims, and look only to the class representative's claims when assessing

personal jurisdiction, much as it ignores the citizenship of absent class members when assessing diversity jurisdiction under 28 U.S.C. § 1332(a).<sup>127</sup>

The decision's apparent limitation on nationwide or multistate class actions is probably more consequential for the federal courts than for the state courts.

But, given recent trends in the Supreme Court's approach to personal jurisdiction, subject matter jurisdiction, and class action law, I wouldn't bet on it.<sup>128</sup> The more likely outcome is the one adopted by several other federal district courts: *Bristol-Myers* applies to class actions and makes multistate class actions difficult to sustain in states where the defendant is not subject to general jurisdiction.<sup>129</sup> The state courts do not appear to have given much consideration to whether *Bristol-Myers* applies to multistate class actions—most likely because CAFA largely keeps those cases out of state court.

The decision's apparent limitation on nationwide or multistate class actions is probably more consequential for the federal courts than for the state courts. CAFA had already moved most multistate class actions of any significant size to federal court anyway.<sup>130</sup> And *Bristol-Myers* poses no new obstacles for single-state class actions suing in the state where the class members were injured or reside<sup>131</sup>—though even these may be removable under § 1332(a) or CAFA. Indeed, *Bristol-Myers* may render CAFA largely superfluous in many of the scenarios the

statute was intended to address. After *Bristol-Myers*, the central problem that CAFA aimed to fix—plaintiffs forum shopping for a rogue state court that would certify a tenuous nationwide class action to determine liability at a national scale—no longer exists.<sup>132</sup> Multistate class actions outside of the defendant’s home state are largely a thing of the past. And CAFA is relegated primarily to allowing hometown defendants to remove multistate class actions filed in states where they are subject to general jurisdiction and mopping up single-state class actions that join non-diverse defendants.<sup>133</sup>

## 2. Settlement Classes

One type of multistate class action that can survive in state court after *Bristol-Myers*, however, is the settlement class action. While *Bristol-Myers* limits plaintiff-side forum shopping when the defendant objects, the defendant can always consent to personal jurisdiction in any state.<sup>134</sup> Because of this, state court judges need to be alert to

the possibility that settlement class actions might be the product of the collusive practice known as a “reverse auction,” where the defendant essentially shops a class action settlement around to the lowest bidder.<sup>135</sup>

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A class action settlement binds all class members who do not opt

out, forming a valuable shield for defendants from future liability.<sup>137</sup> Recognizing the peace that a class action settlement can provide and knowing that there are multiple plaintiffs’ lawyers out there who would be delighted to serve as class counsel, the defendant can strike a deal with the lawyer willing to take the smallest sum for the largest class and then shop around for a state court willing to certify the class and approve the settlement (even if a state or federal court in its home state would not have).<sup>138</sup> The implicit bargain is that class counsel will collect a hefty fee award for little work and the defendant maximizes the preclusive effect of the class action settlement on the cheap.<sup>139</sup>

*Bristol-Myers*’s constriction of specific jurisdiction and the resulting limits on plaintiff-side forum shopping does little to limit the ability of the defendant and class counsel to shop for a forum that will approve their collusion at the expense of absent class members.<sup>140</sup> Defendants are not limited to settling class actions in their home states because they can consent to personal jurisdiction in any state. But under *Phillips Petroleum Co. v. Shutts*, absent class members will be deemed to have consented to the personal jurisdiction of the defendant and class counsel’s handpicked state court, unless they opt out.<sup>141</sup> Class action settlements in state court are binding on class members and will have preclusive effect in all other courts, state and federal, even if they resolved claims that could never have been litigated there because the defendant would have objected to personal jurisdiction or some of the claims are beyond the state court’s subject matter jurisdiction.<sup>142</sup> And CAFA does not allow absent class members to intervene and remove the class action to federal court to short circuit this sort of forum shopping.<sup>143</sup>

State courts must be on guard for this sort of collusion. If the defendant is consenting to personal jurisdiction in order to settle a nationwide class action, red flags should go up—particularly if there is parallel litigation pending in other states or in the federal courts that the settlement might undercut. This is not to say that every deal will be a bad deal. Peace can have value for both sides and a class action settlement is a good way to achieve peace.<sup>144</sup> But when parties start acting in ways that aren’t consistent with their normal strategic moves, it’s worth a close look.

## C. Can Corporate Registration Statutes Support General Jurisdiction?

All states require out-of-state corporations to register if they want to do business in the state and use that state's court system.<sup>145</sup> And many states, in their registration statutes, require the out-of-state corporation to appoint an in-state agent to receive service of process.<sup>146</sup> These registration statutes raise the question: is registration and appointment of an agent to receive service of process enough to deem the corporation to have consented to general jurisdiction in the state? If the answer is "yes," then plaintiffs could aggregate nationwide claims against a corporation in any state where the defendant registered to do business, effectively circumventing *Goodyear* and *Daimler*.

All states require out-of-state corporations to register if they want to do business in the state and use that state's court system.

Since *Pennoyer*, consent has always been a traditional basis for personal jurisdiction.<sup>147</sup> Over one hundred years ago, the U.S. Supreme Court held that a corporation's appointment of an in-state agent to receive service of process (as required by a state registration statute) could constitutionally be construed as consent to general jurisdiction within that state.<sup>148</sup> And since then, courts in a handful of states have interpreted their corporate registration statutes to confer general jurisdiction.<sup>149</sup> But the ground has shifted significantly with the Court's decisions in *Goodyear* in 2011 and *Daimler* in 2014. And it is an open question

whether those earlier decisions survive the recent changes in personal jurisdiction doctrine. Since *Daimler*, courts have done one of three things:

Since *Pennoyer*, consent has always been a traditional basis for personal jurisdiction.

(1) Many courts have attempted to duck the constitutional question by reading corporate registration statutes narrowly as consent to only *specific* jurisdiction or as simply a procedural mechanism for securing service of process with no jurisdictional effect (sometimes overruling prior decisions that had suggested a broader reading).<sup>150</sup> These courts reason that a registration statute that only requires appointment of an in-state agent to receive service of process does not give the corporation fair notice that it is implicitly consenting to be sued on any cause of action arising anywhere in the world.<sup>151</sup> Most corporate registration statutes are easily amenable to such a reading, as only Pennsylvania's statute expressly requires consent to general jurisdiction.<sup>152</sup> Though the state courts in a small number of other states have definitively construed their registration statutes to require consent to general jurisdiction, which could arguably give corporations adequate notice.<sup>153</sup>

(2) Other courts have refused to recognize corporate registration statutes as a basis for general jurisdiction. These courts reason that using registration statutes to force corporations to consent to general jurisdiction as a condition of doing business within the state runs contrary to *Daimler* and *Goodyear*'s limitations on general jurisdiction.<sup>154</sup> In fact, in June 2019, a federal district court in Pennsylvania held that Pennsylvania's corporate registration statute, which expressly requires consent to general jurisdiction, is unconstitutional.<sup>155</sup> Other federal and state courts in Pennsylvania have reached contrary conclusions.<sup>156</sup>

(3) Finally, a handful of courts have recognized corporate registration statutes as implicit consent to general jurisdiction.<sup>157</sup> These courts reason that *Daimler* said nothing about consent and left intact the U.S. Supreme Court's 1917 decision in *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, recognizing that registering to do business and appointing an agent to receive service of process amounts to consent to general jurisdiction.<sup>158</sup> These courts see no unfairness in conditioning the privilege to do business in

a state on out-of-state corporations consenting to the same jurisdiction that in-state corporations are subject to. And because consent is an independent basis for exercising jurisdiction, *Daimler*'s "at home" analysis does not apply.<sup>159</sup> Indeed, implied consent may be the foundation for holding a corporation subject to general jurisdiction in its state of incorporation, where it may have no other contacts whatsoever.<sup>160</sup>

The vast majority of states have not interpreted their corporate registration statutes to require consent to general jurisdiction.

It is worth noting that the vast majority of states have not interpreted their corporate registration statutes to require consent to general jurisdiction. And no state has amended its corporate registration statute since *Goodyear* to expressly require consent to general jurisdiction, though there has been some movement in that direction in the New York legislature.<sup>161</sup> So, constitutional questions aside, most states will not find themselves playing host to multistate aggregate litigation against out-of-state defendants who have registered to do business in the state.

It remains an open question whether even corporate registration statutes that expressly require consent to general jurisdiction could survive a federal constitutional challenge. Aside from the due process argument that such statutes are inconsistent with *Goodyear* and *Daimler*, the statutes would also have to survive challenges based on unconstitutional conditions and the dormant Commerce Clause.<sup>162</sup> Some have questioned whether a corporation's consent to general jurisdiction could be genuine if it is extracted as a condition of doing business in the state.<sup>163</sup> The U.S. Supreme Court will have to weigh in eventually. It would be a strange irony for the Court to find corporate consent to an explicit registration statute invalid, but to enforce forum selection clauses and arbitration clauses in consumer contracts of adhesion based on a similarly thin reed of consent.<sup>164</sup> But perhaps not a surprising irony.<sup>165</sup>

## IV. What's Left for the State Courts in Aggregate Litigation?

While recent federal trends in both subject matter and personal jurisdiction doctrine act to limit opportunities for aggregate litigation in state court and may encourage either plaintiffs or defendants or both to invoke federal jurisdiction, several viable avenues remain. What kinds of aggregate cases are likely to be left in state courts? The major forms are likely to be:

- *Single-state class actions raising state law claims*: If the class is composed solely of forum state residents and at least one significant defendant is also a forum state resident, then the state court should have specific jurisdiction over all of the class members' claims under *Bristol-Myers*, and the class action will fit into the CAFA exceptions.
- *Single-state mass joinders raising state law claims*: Similarly, if all of the plaintiffs in a mass joinder are forum state residents, *Bristol-Myers* is likely satisfied, and it shouldn't be hard for the plaintiffs to structure the action to avoid CAFA. The real question is whether these cases are economically viable for plaintiffs' lawyers or whether they would prefer some form of multistate aggregation in a different forum.

Recent federal trends in both subject matter and personal jurisdiction doctrine act to limit opportunities for aggregate litigation in state court.

- *Multistate class actions in the defendant's home state where more than a third of the class members are also from that state:* Personal jurisdiction is no obstacle when the defendant is sued at home, but a significant number of class members will also have to be from the forum state to fit into CAFA's exceptions. This may be a small set of cases, as the exception to CAFA is discretionary until the proportion of home-state class members reaches two thirds, and personal jurisdiction would become a problem if the plaintiffs tried to join an out-of-state defendant.
- *Nationwide mass joinders in the defendant's home state:* Again, personal jurisdiction is no obstacle when the defendant is sued at home, and plaintiffs should be able to structure their actions to avoid CAFA. But personal jurisdiction becomes a problem again if plaintiffs try to join an out-of-state defendant. And plaintiffs may prefer to file in federal court and allow their claims to be consolidated into an MDL than to litigate on the defendant's home turf.
- *Multistate settlement class actions where the defendant consents to personal jurisdiction:* If both the defendant and class counsel wish to resolve a multistate class action through settlement, they can do so in the state court of their choice by consenting to personal jurisdiction and not invoking CAFA. State courts should be alert to the possibility that these are collusive settlements.
- *Parens patriae actions or other public enforcement:* When a state sues in its own courts on behalf of its own citizens, CAFA does not apply, and personal jurisdiction is unlikely to be a serious obstacle.

Several viable avenues for state court aggregation remain open.

## Conclusion

Recent federal trends have made it more difficult to maintain many forms of aggregate litigation in state court. CAFA's expansion of federal subject matter jurisdiction has opened the federal courts to more forms of aggregate litigation and made it easier for defendants to remove aggregate litigation from the state courts, even if plaintiffs would prefer to litigate there. The U.S. Supreme Court's recent constriction of both general and specific personal jurisdiction has further limited which states will be available to hear aggregate claims on a nationwide basis. Although several important questions remain open, the combined effect of these changes will likely drive more aggregate litigation into federal court. Still, several viable avenues for state court aggregation remain open.

## Notes

<sup>1</sup> George A. Butler Research Professor, University of Houston Law Center. Portions of this paper are drawn, with permission, from Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251 (2018). To facilitate readability, I will not make extensive use of quotation marks or block quotations.

<sup>2</sup> 28 U.S.C. § 1332(d).

<sup>3</sup> For just a few of the many excellent academic treatments of CAFA, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); David Marcus, Erie, *The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247 (2007); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

<sup>4</sup> Much of this discussion about CAFA's background is drawn from Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass Tort Litigation*, 59 B.C. L. REV. 1251, 1264-68 (2018).

<sup>5</sup> See SENATE REPORT, CLASS ACTION FAIRNESS ACT OF 2005, S. REP. NO. 109-14, at 22-27 (2005).

<sup>6</sup> Bradt & Rave, *supra* note 3, at 1264-65; see also In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766-67 (7th Cir. 2003), abrogated by Smith v. Bayer Corp., 564 U.S. 299 (2011).

<sup>7</sup> 28 U.S.C. § 1332(d).

<sup>8</sup> See *id.* § 1332(a).

<sup>9</sup> See Exxon Mobil Corp. v. Allappattah Servs. Inc., 545 U.S. 546 (2005).

<sup>10</sup> See generally 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 6:14 (5th ed. June 2019 update).

<sup>11</sup> 28 U.S.C. § 1453(b).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* § 1453(c).

<sup>16</sup> See 2 NEWBERG, *supra* note 9 § 6:24.

<sup>17</sup> 28 U.S.C. § 1332(d)(11)(B)(i).

<sup>18</sup> *Id.* § 1332(d)(11)(B)(ii)(II).

<sup>19</sup> *Id.* § 1332(d)(11)(B)(ii)(IV).

<sup>20</sup> Koral v. Boeing Co., 628 F.3d 945, 947 (7th Cir. 2011); see also 2 NEWBERG *supra* note 9 § 6:17.

<sup>21</sup> Mississippi ex re. Hood v. AU Optronics Corp., 571 U.S. 161 (2014).

<sup>22</sup> SENATE REPORT, CLASS ACTION FAIRNESS ACT OF 2005, S. REP. NO. 109-14, at 24–27.

<sup>23</sup> See, e.g., Burbank, *supra* note 2, at 1528.

<sup>24</sup> See, e.g., *id.*; Purcell, *supra* note 2, at 1918; Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1942 (2006) (“[It should be] apparent to any sentient reader of the statute’s statement of findings and purposes . . . [that] [t]hey are, at best, window dressing. Less charitably, they meet the philosopher Harry Frankfurt’s definition of ‘bullshit,’ because they are made with apparent indifference to their truth content.”).

<sup>25</sup> Bradt & Rave, *supra* note 3, at 1265; Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2034 (2008).

<sup>26</sup> See, e.g., Cole v. Gen. Motors Corp., 484 F.3d 717, 724 (5th Cir. 2007); In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015–16 (7th Cir. 2002); Genevieve G. York-Erwin, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1794 (2009).

<sup>27</sup> Although there are some outliers, this appears to be the consensus approach. See 2 NEWBERG, *supra* note 9 § 6:18; Louisiana v. American Nat. Property Cas. Co., 746 F.3d 633, 639 (5th Cir. 2014) (“Every circuit that has addressed the question has held that post-removal events do not oust CAFA jurisdiction.”); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 444 n.281 (2018) (collecting cases). One exception is worth further elaboration: If, after removal, the federal court finds that the plaintiff class lacks Article III standing (as many defendants have argued since the U.S. Supreme Court’s decision in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016)), most courts will remand the class action back to the state court from which it was removed (which, of course, is not limited by Article III standing doctrine). See, e.g., Terrell v. Costco Wholesale Corporation, 2017 WL 2169805, at \*1–2 & n.2 (W.D. Wash. 2017); Barnes v. ARYZTA, LLC, 2017 WL 6947882, at \*4 (N.D. Ill. 2017); Mocek v. Allsaints USA Limited, 220 F. Supp. 3d 910, 913 (N.D. Ill. 2016); 2 NEWBERG *supra* note 9, § 6:15. But see St. Louis Heart Center, Inc. v. Nomax, Inc., 2017 WL 1064669, at \*3 (E.D. Mo. 2017).

<sup>28</sup> 564 U.S. 338, 356 (2011).

<sup>29</sup> 569 U.S. 27, 34 (2013).

<sup>30</sup> See generally Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

<sup>31</sup> Bradt & Rave, *supra* note 3, at 1268.

<sup>32</sup> 28 U.S.C. § 1332(d)(4).

<sup>33</sup> *Id.* § 1332(d)(3). Courts apply a totality of the circumstances test when exercising their discretion to decline jurisdiction, guided by six factors listed in the statute: “(A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.” *Id.*

<sup>34</sup> 2 NEWBERG, *supra* note 9 § 6:19.

<sup>35</sup> *Id.* (collecting cases).

<sup>36</sup> 28 U.S.C. § 1332(d)(5).

<sup>37</sup> *Id.* § 1332(d)(9).

<sup>38</sup> Dart Cherokee Basin Operating Co., LLC v. Owens, 574 U.S. 81 (2014).

<sup>39</sup> *Id.*

<sup>40</sup> 568 U.S. 588 (2013).

<sup>41</sup> *Id.* at 593.

<sup>42</sup> See also Smith v. Bayer Corp., 564 U.S. 299, 314 (2013) (“Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.”).

<sup>43</sup> 2 NEWBERG, *supra* note 9 § 6:17; see, e.g., Anderson v. Bayer Corp., 610 F.3d 390, 392 (7th Cir. 2010); Tanoh v. Dow Chemical Co., 561 F.3d 945, 953 (9th Cir. 2009); Scimone v. Carnival Corp., 720 F.3d 876, 879, 881 (11th Cir. 2013); Abrahamsen v. ConocoPhillips, Co., 503 Fed. App’x. 157 (3d Cir. 2012); cf. Atwell v. Boston Scientific Corp., 740 F.3d 1160, 1161 (8th Cir. 2013).

<sup>44</sup> See 2 NEWBERG, *supra* note 9 § 6.17 (describing *Tanoh v. Dow Chemical Co.*, 561 F.3d 945 (9th Cir. 2009), where the plaintiffs’ lawyers had broken their case inventory up alphabetically into a series of seven identical 99-plaintiff complaints (i.e., A–F in one complaint, G–J in the next, and so on), but the court still held that remand was appropriate).

<sup>45</sup> See *Atwell*, 740 F.3d at 1161.

<sup>46</sup> 28 U.S.C. § 1332(d)(11)(B)(ii)(II).

<sup>47</sup> See, e.g., *Koral v. Boeing Co.*, 628 F.3d 945, 947 (7th Cir. 2011).

<sup>48</sup> 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

<sup>49</sup> See Tex. Gov. Code § 74.162; N.Y. Ct. Rules § 202.69; see also 28 U.S.C. § 1407.

<sup>50</sup> See Cal. Civ. Proc. Code § 404. For more on state multidistrict litigation procedures, see Zachary D. Clopton & D. Theodore Rave, *MDL and the States* (manuscript on file with author).

<sup>51</sup> But see *Romo v. Teva Pharmaceuticals USA, Inc.*, 731 F.3d 918, 923 (9th Cir. 2013) (holding that plaintiff's petition under California's MDL procedure to coordinate cases for all purposes did not constitute a motion for the actions to be tried jointly because the "clear focus of the [coordination] petition is on pretrial matters").

<sup>52</sup> Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193 (2007).

<sup>53</sup> 587 U.S. \_\_\_, 2019 WL 2257158 (2019).

<sup>54</sup> *Id.* slip op. at 3-4.

<sup>55</sup> *Id.* slip op. at 5-6, 9-11.

<sup>56</sup> 137 S. Ct. 1773 (2017).

<sup>57</sup> 95 U.S. 714 (1878).

<sup>58</sup> Much of this discussion of the evolution of personal jurisdiction doctrine is drawn from Bradt & Rave, *supra* note 3, at 1268-74.

<sup>59</sup> 326 U.S. 310 (1945).

<sup>60</sup> *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

<sup>61</sup> See, e.g., Cal. Civ. Code Proc. 410.10; Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, 49 AM. J. COMP. L. 203, 210 (2001) ("[T]he greater latitude to assert jurisdiction afforded the states by *International Shoe* and its progeny dramatically enhanced the opportunities for interstate forum shopping . . .").

<sup>62</sup> See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 463 (1985); *Calder v. Jones*, 465 U.S. 783, 784 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980); *Rush v. Savchuk*, 444 U.S. 320, 322 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 189 (1977); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221 (1957).

<sup>63</sup> *Burnham v. Superior Court*, 495 U.S. 604, 607 (1990); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987).

<sup>64</sup> These factors include: "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." 471 U.S. at 477 (quotation marks omitted).

<sup>65</sup> In *Helicopteros Nacionales de Colombia, S.A. v. Hall (Helicol)*, 466 U.S. 408, 414 (1984), the Court adopted Arthur von Mehren and Donald Trautman's framework for interpreting *International Shoe*. Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966). And it is now the centerpiece of the Court's jurisdictional analysis. See, e.g., Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 611 (1988).

<sup>66</sup> See, e.g., *Daimler, A.G. v. Bauman*, 571 U.S. 117, 126 (2014).

<sup>67</sup> 564 U.S. 915, 920 (2011).

<sup>68</sup> 564 U.S. 873, 877 (2011).

<sup>69</sup> *Bristol-Myers*, 137 S. Ct. at 1777; *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1554 (2017); *Walden v. Fiore*, 571 U.S. 277 (2014); *Daimler*, 571 U.S. at 121; *Goodyear*, 564 U.S. at 920; *Nicastro*, 564 U.S. at 877.

<sup>70</sup> See Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 W.M. & MARY L. REV. 1165, 1179 (2018); Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 5 (2010).

<sup>71</sup> See Meir Feder, *Goodyear, "Home," and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012) (noting that "lower courts widely embraced the notion that any corporation 'doing business' in a state was subject to general jurisdiction there").

<sup>72</sup> *Int'l Shoe*, 326 U.S. at 318.

<sup>73</sup> See Allan R. Stein, *The Meaning of "Essentially at Home" in Goodyear Dunlop*, 63 S.C. L. REV. 527, 533 (2012).

<sup>74</sup> 564 U.S. at 919.

<sup>75</sup> See Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 347 (2013); Stein, *supra* note 72, at 532.

<sup>76</sup> 571 U.S. 117, 123 (2014).

<sup>77</sup> 137 S. Ct. 1549, 1559 (2017).

<sup>78</sup> E.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980).

<sup>79</sup> *Volkswagen*, 444 U.S. at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

<sup>80</sup> See Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 629 (2012).

<sup>81</sup> 564 U.S. 873 (2011).

<sup>82</sup> *Id.* at 886.

<sup>83</sup> 571 U.S. 277 (2014).

<sup>84</sup> *Id.* at 288-89.

<sup>85</sup> 137 S. Ct. 1773 (2017).

<sup>86</sup> *Id.* at 1778.

<sup>87</sup> *Bristol-Myers Squibb v. Superior Court*, 377 P.3d 874, 887 (Cal. 2016).

<sup>88</sup> *Id.* at 889.

<sup>89</sup> *Id.*

<sup>90</sup> *Bristol-Myers*, 137 S. Ct. at 1781.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1782.

<sup>93</sup> *Id.* at 1781.

<sup>94</sup> Bradt & Rave, *supra* note 3, at 1282-94.

<sup>95</sup> *Id.* at 1291.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1291-92.

<sup>99</sup> *Bristol-Myers*, 137 S. Ct. at 1789 (Sotomayor, J., dissenting).

<sup>100</sup> *Id.*

<sup>101</sup> See D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192-98 (2013).

<sup>102</sup> See, e.g., Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017) ([T]he anticipated cost of litigating [a plaintiff's] science- or medicine-intensive case may exceed \$250,000. Even a claimant with a strong claim may have trouble finding a contingent fee lawyer eager to gamble that much money and time on the client's case.”).

<sup>103</sup> *Bristol-Myers*, 137 S. Ct. at 1783. The Court was noncommittal on this point.

<sup>104</sup> Bradt & Rave, *supra* note 3, at 1292.

<sup>105</sup> *Id.* at 1293.

<sup>106</sup> See *Bristol-Myers*, 137 S. Ct. at 1781.

<sup>107</sup> Bradt & Rave, *supra* note 3, at 1294-95.

<sup>108</sup> *In re FMC Corp. Patent Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976).

<sup>109</sup> Bradt & Rave, *supra* note 3, at 1296; see also *In re Library Editions of Children's Books*, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969). The defendant is not prejudiced, according to the Federal Judicial Panel on Multidistrict Litigation, because it can still object to the transferor court's personal jurisdiction or venue in the transferee court. *Id.* at 1142. Other federal courts have held that § 1407 functions like a nationwide service of process statute authorizing the MDL transferee court to exercise personal jurisdiction over plaintiffs nationwide. E.g., *Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. 2010); *In re Agent Orange Prods. Liab. Litig.*, 996 F.2d 1425, 1432 (2d Cir. 1993); *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987). The MDL court's exercise of personal jurisdiction is also limited by the Fifth Amendment's Due Process Clause, which the Supreme Court noted in *Bristol-Myers* may operate differently from the Fourteenth Amendment's Due Process Clause. 137 S. Ct. at 1783-84. For further elaboration on these issues see Bradt & Rave, *supra* note 3, at 1296-99 and Bradt, *supra* note 69, at 1213-29.

<sup>110</sup> See, e.g., Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014).

<sup>111</sup> Bradt & Rave, *supra* note 3, at 1294.

<sup>112</sup> *Bristol-Myers*, 137 S. Ct. at 1783.

<sup>113</sup> *Id.* at 1783 (“Alternatively, the plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States.”).

<sup>114</sup> *Id.* at 1781.

<sup>115</sup> See *id.* at 1788 n.3 (Sotomayor, J., dissenting) (“Bristol-Myers urges such a rule upon us . . . but its adoption would have consequences far beyond those that follow from today's factbound opinion. Among other things, it might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries—a result specifically contemplated by [Volkswagen].”). For elaboration on the mischief that a “proximate cause” conception of the relatedness requirement would cause, see Pamela K. Bookman, Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, Brief of Amicus Curiae Civil Procedure Professors in Support of Respondents 14-18, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466), available at <https://ssrn.com/abstract=2955343>.

<sup>116</sup> *Bristol-Myers*, 137 S. Ct. at 1780 (majority op.).

<sup>117</sup> Bradt & Rave, *supra* note 3, at 1280.

<sup>118</sup> *Bristol-Myers*, 137 S. Ct. at 1789 n.4 (Sotomayor, J., dissenting).

<sup>119</sup> *Id.* at 1782-83 (majority op.) (distinguishing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) as addressing the question of personal jurisdiction over absent class members, not over the defendant).

<sup>120</sup> Bradt & Rave, *supra* note 3, at 1282-85.

<sup>121</sup> *Id.* at 1285.

<sup>122</sup> The D.C. Circuit is close to addressing the issue, having certified an appeal in *Molock v. Whole Foods Market, Inc.*, 317 F.3d 1 (D.D.C. 2018). What federal courts say about this issue is relevant to state courts. Even though *Bristol-Myers* suggests that the Fifth Amendment Due Process Clause need not be interpreted in lockstep with the Fourteenth Amendment, so long as Federal Rule of Civil Procedure 4(k) continues to tie the federal district court's personal jurisdiction to the states in which they sit, the federal courts are deciding same question presented to state courts. See Bradt & Rave, *supra* note 3, at 1286-87.

<sup>123</sup> See, e.g., Molock v. Whole Foods Market, Inc., 297 F. Supp. 3d 114, 125 (D.D.C. 2018), motion to certify appeal granted, 317 F. Supp. 3d 1 (D.D.C. 2018); Brotz v. Simm Assoc., Inc., 2018 WL 4963692, at \*2-3 (M.D. Fla. Oct. 15, 2018); cf. In re Chinese-Manufactured Drywall Products Liability Litigation, 2017 WL 5971622, at \*17-19 (E.D. La. 2017) (“[I]t is clear and beyond dispute that Congress has constitutional authority to shape federal court’s jurisdiction beyond state lines to encompass nonresident parties. And Congress has done so repeatedly—with Rule 4, MDLs, and class actions. Under Defendants’ premise, [Bristol-Myers] would require plaintiffs to file fifty separate class actions in fifty or more separate district courts across the United States—in clear violation of congressional efforts at efficiency in the federal courts.”).

<sup>124</sup> See, e.g., Al Haj v. Pfizer, Inc., 338 F. Supp. 3d 815, 819-20 (N.D. Ill. 2018); Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc., 2017 WL 4224723, at \*5 (N.D. Cal. 2017); Feller v. Transamerica Life Insurance Company, 2017 WL 6496803, at \*17 (C.D. Cal. 2017).

<sup>125</sup> 472 U.S. 797, 814 (1985).

<sup>126</sup> Compare Devlin v. Scardelletti, 536 U.S. 1, 4 (2002) (considering absent class members parties for purposes of appeal), and Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 540 (1974) (treating absent class members as parties for statute-of-limitations tolling), with Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 365-67 (1921), overruled on other grounds in part by Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 127 (1941) (not treating absent class members as parties for the complete diversity requirement).

<sup>127</sup> *Ben Hur*, 255 U.S. at 365-67. CAFA modifies these rules for the class actions it covers. See 28 U.S.C. § 1332(d) (2012). On the idea of a class action as an “entity,” see David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998). Judge Diane Wood has argued that personal jurisdictional analysis should vary depending on the type of class action. For pure representational classes, like small-claims class actions and those seeking indivisible injunctive relief, specific jurisdiction over the named plaintiff’s claims against the defendant should usually be sufficient for jurisdiction over the entire class’s claims. For joinder-style classes, like most mass torts, it should not. Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 616-18 (1987).

<sup>128</sup> Bradt & Rave, *supra* note 3 at 1286; see also Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About “Class Action Fairness”*, 58 SMU L. Rev. 1313, 1367-74 (2005); Wood, *supra* note 126, at 614-18.

<sup>129</sup> See, e.g., Mussat v. IQVIA, Inc., 2018 WL 5311903, at \*3-6 (N.D. Ill. Oct. 26, 2018); DeBernardis v. NBTY, Inc., 2018 WL 461228 (N.D. Ill. Jan. 18, 2018); McDonnell v. Nature’s Way Products, LLC, 2017 WL 4864910, at \*4 (N.D. Ill. 2017); Wenokur v. AXA Equitable Life Insurance Company, 2017 WL 4357916, at \*4 n.4 (D. Ariz. 2017); In re Dental Supplies Antitrust Litig., 2017 WL 4217115, at \*9 (E.D.N.Y Sept. 20, 2017).

<sup>130</sup> See *supra* notes 6-30, and accompanying text.

<sup>131</sup> Though the Court is noncommittal on this point. See *Bristol-Myers*, 137 S. Ct. at 1783 (“[T]he plaintiffs who are residents of a particular State—for example, the 92 plaintiffs from Texas and the 71 from Ohio—could probably sue together in their home States.”) (emphasis added); Bradt & Rave, *supra* note 3, at 1288; see also 2 NEWBERG, *supra* note 9 § 6:26.

<sup>132</sup> Bradt & Rave, *supra* note 3, at 1288.

<sup>133</sup> *Id.*; see also 28 U.S.C. §§ 1332(d), 1453.

<sup>134</sup> See, e.g., ARTHUR T. VON MEHREN, *ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY* 176 (2007).

<sup>135</sup> See Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 282-83 (7th Cir. 2002) (Posner, J.) (describing how a reverse auction works); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370-73 (1995); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2040 (2008).

<sup>136</sup> Bradt & Rave, *supra* note 3, at 1289.

<sup>137</sup> See Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 369 (1996); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002).

<sup>138</sup> Coffee, *supra* note 134.

<sup>139</sup> Bradt & Rave, *supra* note 3, at 1289.

<sup>140</sup> *Id.*

<sup>141</sup> 472 U.S. at 813-14.

<sup>142</sup> See *Matsushita*, 516 U.S. at 367.

<sup>143</sup> See Robert H. Klonoff & Mark Hermann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1710 (2006) (noting that Congress considered and rejected including a provision in CAFA allowing any class member to remove class actions.).

<sup>144</sup> See, e.g., Rave, *supra* note 100.

<sup>145</sup> See Oscar G. Chase, *Consent to Judicial Jurisdiction: The Foundation of “Registration” Statutes*, 73 N.Y.U. ANNUAL SURVEY OF AM. LAW 159, 159 (2018).

<sup>146</sup> See Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609, 1647-61 (2015) (listing and summarizing all state registration statutes); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1345, 1363 n.109 (2015) (collecting statutes).

<sup>147</sup> Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

<sup>148</sup> Penn. Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93, 94-96 (1917).

<sup>149</sup> See Monestier, *supra* note 145, at 1366 n.125 (citing cases in Arizona, Delaware, Florida, Georgia, Iowa, Kansas, Mississippi, New Jersey, New Mexico, New York, Pennsylvania, and Vermont holding that corporate registration confers general jurisdiction). But see *Genuine Parts Co. v. Cepec*, 137 A.3d 123, 126 (Del. 2016) (subsequently holding that Delaware’s registration statute does not confer general jurisdiction); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318-1322 (11th Cir. 2018) (subsequently reading Florida Supreme Court case narrowly and holding that Florida’s registration statute does not confer general jurisdiction); *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, 164 A.3d 435, 446 (N.J. Super. Ct. 2017) (“In light of *Daimler*, we reject [an earlier] holding as allowing general jurisdiction solely based on the fiction of implied consent by a foreign corporation’s compliance with New Jersey’s business registration statute.”). The Kansas statute that had been interpreted to confer general jurisdiction has since been repealed. See Monestier, *supra* note 145, at 1368 n.121.

<sup>150</sup> See, e.g., *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 623 (2d Cir. 2016) (reading Connecticut’s registration narrowly); *Waite v. All Acquisition Corp.*, 901 F.3d 1307, 1318-1322 (11th Cir. 2018) (reading Florida’s registration statute narrowly); *Figueroa v. BNSF Rwy. Co.*, 390 P.3d 1019 (Or. 2017) (en banc) (reading Oregon’s statute narrowly); *Delaware Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016) (overruling *Sternberg v. O’Neil*, 550 A.2d 1105 (Del. 1988), and reading Delaware’s statute narrowly).

<sup>151</sup> See, e.g., *Brown*, 814 F.3d at 640-41 (contrasting Connecticut’s statute, which says nothing about general jurisdiction with Pennsylvania’s, which expressly provides for general jurisdiction, and New York’s, which has been authoritatively interpreted by the state courts to require consent to jurisdiction); cf. *id.* (“If mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction—nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*’s ruling would be robbed of meaning by a back-door thief.”).

<sup>152</sup> 42 PA. CONS. STAT. § 5301; see *Monestier, supra* note 145, at 1367-68.

<sup>153</sup> See, e.g., *Steuben Foods, Inc. v. Oystar Grp.*, 2013 WL 2105894, at \*3 (W.D.N.Y. May 14, 2013) (“For more than sixty years, New York courts have determined that general jurisdiction may be asserted over a corporation solely on the basis that it has registered to do business in the forum.”). But see *Amelius v. Grand Imperial LLC*, 64 N.Y.S. 3d 855 (N.Y. Sup. Ct. 2017) (refusing to follow earlier understanding of New York’s registration statute after *Daimler*).

<sup>154</sup> Cf. *Cepec*, 137 A.3d at 147 (“*Daimler*’s reasoning indicates that such a grasping assertion of state authority is inconsistent with principles of due process, and impliedly, with interstate commerce.”).

<sup>155</sup> *In re Asbestos Prods. Liability Litig. (No. VI)*, \_\_\_ F. Supp. 3d \_\_\_, 2019 WL 2399738 (E.D. Pa. June 6, 2019).

<sup>156</sup> See, e.g., *Allstate Ins. Co. v. Electrolux Home Prods.*, 2018 WL 3707377, at \*4 (E.D. Pa. Aug. 3, 2018) (“In the wake of *Daimler*, federal district courts in Pennsylvania have consistently found that the Third Circuit’s decision in *Bane* remains good law and that Pennsylvania’s consent-by-registration statute remains a proper basis for personal jurisdiction.”); *Webb-Benjamin, LLC v. Int’l Rug Grp., LLC*, 192 A.3d 1133, 1139 (Pa. Super. Ct. 2018).

<sup>157</sup> See, e.g., *Rodriguez v. Ford Motor Co.*, \_\_\_ P.3d \_\_\_, 2018 WL 6716038 (N.M. Ct. App. Dec. 20, 2018) (interpreting New Mexico registration statute to confer general jurisdiction and finding that constitutional).

<sup>158</sup> 243 U.S. 93, 94-96 (1917).

<sup>159</sup> See *Rodriguez*, 2018 WL 6716038, at \*5.

<sup>160</sup> See *Chase, supra* note 144, at 188.

<sup>161</sup> See *id.* at 196; *Clopton, supra* note 26, at 442.

<sup>162</sup> See, e.g., *In re Asbestos*, 2019 WL 2399738, at \*8-9; D. Craig Lewis, *Jurisdiction over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1 (1990); T. Griffin Vincent, *Toward A Better Analysis for General Jurisdiction Based on Appointment of Corporate Agents*, 41 BAYLOR L. REV. 461, 482-85 (1989).

<sup>163</sup> See, e.g., *Monestier, supra* note 145, at 1347.

<sup>164</sup> See *Chase, supra* note 144, at 182-83 (discussing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), where the Court enforced a forum selection clause in a contract of adhesion and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), where the Court enforced an arbitration clause with a class action waiver in a contract of adhesion).

<sup>165</sup> Compare *Am. Express Co. v. Italian Colors*, 570 U.S. 228 (2013) (enforcing arbitration clause with class action waiver even when it afforded the plaintiffs no realistic opportunity to vindicate their rights), with *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (“Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”) (quotation marks omitted) and *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549 (2017) (holding that Federal Employee Liability Act does not subject railroad corporations to general jurisdiction in states where they do business).

# Oral Remarks of Professor Rave

Thank you everyone at Pound for inviting me to be here, and thanks to all of you for coming to listen. Us academics usually just talk to each other. We can only hope that judges read our work sometimes. I guess maybe part of that is our fault for only writing about 18<sup>th</sup> century Bulgarian evidentiary law, but it is exciting to get a chance to talk to the people who make the real decisions in the real world.

## Two Trends

Today, I want to talk about two recent trends in federal law that I think profoundly affect aggregate litigation in the state courts. Those trends are, first, an expansion of federal subject matter jurisdiction over aggregate cases, and, second, a simultaneous constriction of state court personal jurisdiction in all cases.

Together, I think these trends make it harder for plaintiffs to maintain many forms of large-scale aggregate litigation in the state courts—*except* in the states that they are least likely to want to litigate in. As a result, I think we are likely to see more aggregate litigation shift to federal courts, particularly to federal multidistrict litigation.

These trends have been going on for some time, but the U.S. Supreme Court's decision two years ago in *Bristol-Myers Squibb v. Superior Court*,<sup>1</sup> I think, was a major development and has the potential to shift the ground under state court aggregate litigation. So I am going to spend some time today talking about the *Bristol-Myers* decision, but the *Bristol-Myers* case leaves lots of questions unanswered, and it tees up some new issues. I am going to talk about some of those questions, too.

Understanding what CAFA did is crucial for understanding the more recent developments in personal jurisdiction law.

Two recent trends in federal law that profoundly affect aggregate litigation in the state courts are an expansion of federal subject matter jurisdiction over aggregate cases, and a simultaneous constriction of state court personal jurisdiction in all cases.

First, the trends. As I said, the first trend is an expansion of federal subject matter jurisdiction, by way of the Class Action Fairness Act of 2005, affectionately known as “CAFA.” I guess it is hard to call a 14-year-old statute a new development, but I think understanding what CAFA did is crucial for understanding the more recent developments in personal jurisdiction law.

## The Class Action Fairness Act<sup>2</sup>

CAFA does two basic things. First, CAFA expands federal diversity jurisdiction over class actions with 100 or more class members. Instead of requiring complete diversity—instead of requiring that every plaintiff be from a different state as every defendant—CAFA requires only minimal diversity: that at least one plaintiff be from a different state from one defendant. And instead of requiring the named plaintiff to have claims that, standing alone, exceed \$75,000, CAFA looks to the aggregate value of the class’s claims and requires them to exceed \$5 million. So CAFA expanded the scope of federal subject matter jurisdiction.

Second, CAFA relaxes some of the procedural rules in a way that makes it easier for defendants to remove class actions to federal court. The idea behind CAFA, at least according to its sponsors, was that cases that are nationwide in scope really belong in the “national” courts—the federal courts. Plaintiffs shouldn’t be able to get some outlier state judge to certify a nationwide class and thus be able to rule on the defendant’s conduct nationwide.

The more cynical view of CAFA, however, is that it sends class actions to federal court to die there. So, while Congress was expanding the federal courts’ jurisdiction over class actions, the federal courts, themselves, were becoming more hostile to class actions, particularly to nationwide class actions that would require them to apply 50 different sets of state law to one litigation.

## “Slice and Dice”

As a result, plaintiffs who wanted to stay in the state courts that they chose to file in began trying to structure their cases to avoid CAFA. In my paper I talk about a couple of different strategies that plaintiffs used. I just want to focus on the most important and most successful one right now: it’s what you might call the mass action slice-and-dice strategy. It works something like this . . .

Plaintiffs who wanted to stay in the state courts that they chose to file in began trying to structure their cases to avoid CAFA.

the plaintiffs propose to jointly try the claims of 100 or more plaintiffs. The plaintiffs’ lawyers got around that by breaking their aggregate cases up into bundles of 99 or fewer plaintiffs in order to avoid the CAFA mass action trigger. Then they file a series of largely identical complaints in state court. If the state courts then consolidate these bundles in a single court, the slice-and-dice strategy can effectively create a CAFA-proof mass action that is stuck in state court.

While defendants often object to this slice-and-dice strategy, the federal courts have been pretty tolerant of it, even when the plaintiffs are quite transparent about what they are doing. As long as it is not the plaintiffs, themselves, who ask that the bundles be consolidated and tried together, CAFA isn’t triggered, and the cases can stay in state court.

That is largely where things stand with federal subject matter jurisdiction over aggregate litigation. Multistate class actions of any significant size are easily removable to federal court, but plaintiffs often try to slice-and-dice their aggregate litigation, particularly in mass torts like product liability, in order to avoid CAFA removal.

## Personal Jurisdiction

So now I want to shift over to some more recent developments in personal jurisdiction. Ever since *Pennoyer v. Neff*,<sup>3</sup> the U.S. Supreme Court has enforced federal constitutional limits on state courts’ exercise of personal jurisdiction. After a period of benign neglect to close out the 20<sup>th</sup> century, the Supreme Court has gotten back into the personal jurisdiction game in a really big way. In fact, it has decided six personal jurisdiction cases since 2011.

The two cases that probably have the biggest impact on aggregate litigation are *Goodyear Dunlop Tire v. Brown*<sup>4</sup> and *Bristol-Myers Squibb v. Superior Court*. *Goodyear* dealt with general jurisdiction; *Bristol-Myers* dealt with specific jurisdiction.

Ever since *Pennoyer v. Neff*, the U.S. Supreme Court has enforced federal constitutional limits on state courts' exercise of personal jurisdiction.

To take everyone back to the first year of law school, if mentioning *Pennoyer* didn't get you there already, if a state court has general jurisdiction over a defendant that means the defendant can be sued in that state on any claim regardless of whether there is a connection between the state and the claim. Specific jurisdiction, on the other hand, is narrower. It requires a link between the facts of the case and the forum state.

Before 2011—before *Goodyear*—general jurisdiction was thought to be quite broad. A defendant was subject to general jurisdiction if it had substantial and continuous operations in the state. For most courts, that roughly corresponded to doing business in the state. If a corporation had a significant footprint in the state in terms of sales, or employees, or stores, or things like that, then it was thought to be subject to general jurisdiction and could be sued in that state on any cause of action.

That understanding changed radically with *Goodyear*, where a unanimous U.S. Supreme Court held that a defendant is only subject to general jurisdiction in a state where it is essentially “at home.” For corporations, that typically means the state where it is incorporated and the state where the corporation has its principle place of business.

This was a pretty surprising shift in the understanding of general jurisdiction. In case there was any lingering doubt about whether the Supreme Court meant what it said, it has twice reaffirmed that doctrine, that general jurisdiction over a corporate defendant will almost always be limited to those two states: the state of incorporation and the state where the corporation has its principle place of business.

The Supreme Court left open a theoretical possibility that, in an exceptional case, a corporation might also be at home in a third state, but the court hasn't found that case yet. In *Daimler v. Bauman*,<sup>5</sup> the Court held that California lacked general jurisdiction over a car manufacturer that had multiple facilities, and sold billions of dollars' worth of cars, in the state. In *BNSF Railway v. Tyrrell*,<sup>6</sup> just two years ago, the Court held that Montana

lacked general jurisdiction over a railroad that had thousands of employees, and thousands of miles of track, in the state.

If plaintiffs from around the country want to join together and sue a corporate defendant for harms that are caused around the country, they can't just sue in any state where the defendant does business—even a lot of business—and then count on that state having general jurisdiction over all of their claims.

So what does this mean for aggregate litigation? Well, if plaintiffs from around the country want to join together and sue a corporate defendant for harms that are caused around the country, they can't just sue in any state where the defendant does business—even a lot of business—and then count on that state having general jurisdiction over all of their claims. They could sue in the state where the defendant is incorporated or has its principle place of business, the two states where the defendant is at home. Or they are going to have to find a state that has specific jurisdiction over all of their claims.

## **Bristol-Myers**

That brings us to *Bristol-Myers*. The *Bristol-Myers* case was a mass tort litigation involving the drug Plavix that was carefully structured to avoid removal under CAFA. About 600 plaintiffs from all around the country joined together with about 80 Californians to sue the pharmaceutical company Bristol-Myers Squibb in California State court. They used the slice-and-dice strategy to split up their case into eight separate—but largely identical—complaints, each with fewer than 100 plaintiffs. All of the actions were assigned to the same court in San Francisco.

Unable to remove the case to federal court, the defendant moved to dismiss the claims of the out-of-state plaintiffs for lack of personal jurisdiction. There was never any question that the California courts had jurisdiction over the California plaintiffs' claims, but the defendant sought to dismiss the out-of-state plaintiffs' claims for lack of jurisdiction.

The California courts recognized that they couldn't rely on general jurisdiction after *Goodyear* and *Daimler*. So even though the pharmaceutical company had a huge footprint in California, it was only "at home" in Delaware, where it was incorporated, and in New York, where it had its principle place of business.

But the California courts said, "No problem. We have specific jurisdiction." In a thoughtful opinion, the California Supreme Court applied a sort of sliding scale approach to specific jurisdiction, essentially saying that the more extensive a defendant's contacts with the forum state, the less directly related the plaintiff's claims had to be to that state.

Now, this wasn't a crazy approach to the jurisdictional inquiry. In many ways, it echoes the U.S. Supreme Court's seminal decision in *International Shoe v. Washington*.<sup>7</sup> But when the *Bristol-Myers* case reached it, the

Supreme Court rejected this sliding scale approach 8 to 1, calling it a "loose and spurious" form of general jurisdiction.

In *Bristol-Myers*, the court held that, for specific jurisdiction to be proper, each plaintiff's claim must have some specific connection to the forum state. So a product liability plaintiff can't sue a national product seller in any state where it sells the product, even if that plaintiff

joins with other plaintiffs who were injured by the exact same product in the forum state. Thus, the Court said, California only had jurisdiction over the Bristol-Myers company with respect to the California plaintiffs' claims. The 600 Plavix plaintiffs from other states were dismissed.

## **Aggregate Litigation in State Courts**

What does this do to aggregate litigation in state court? Well, it narrows the plaintiffs' options for where they can aggregate their claims. They can't just pick a state where the defendant does a lot of business. If the plaintiffs want to aggregate their claims from around the country in a single state court, they will have to do so on the defendant's home turf, where the defendant is subject to general jurisdiction.

Of course, the plaintiffs can still sue alone or in small groups in the states where they live or where they were injured. But if they do so, they have to give up all of the advantages that come with aggregation. Aggregation can be an important way for plaintiffs to level the playing field with defendants in mass harm cases. Indeed, suing

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individually might not be economically viable in cases where recoveries are small (as in many consumer cases), or where litigation costs are very high (as in many mass tort cases).

Faced with this choice, either suing alone in the state where they were injured, or suing together on the defendant's turf, many plaintiffs might abandon the state courts altogether and instead sue in federal court where their cases will most likely be consolidated in a federal multidistrict litigation.

Federal MDL isn't subject to the same personal jurisdiction constraints as state court aggregation, but that is another lecture entirely. The important point is that many plaintiffs who have often fought to *stay* in state court might now find it more attractive to pursue aggregate litigation in a federal MDL than on the defendant's home turf.

## Two Questions from *Bristol-Myers*

So *Bristol-Myers* leaves a lot of questions open. I just want to briefly flag two of them:

First, exactly how related must the plaintiffs' claims be to the forum state for specific jurisdiction to be proper? *Bristol-Myers* tells us there is no specific jurisdiction if the plaintiffs don't reside in the forum state, didn't purchase or use the defendant's product in the forum state, and weren't injured in the forum state. But which of those contacts would be sufficient for specific jurisdiction? The court never tells us. The defendant in *Bristol-Myers* pushed for a very strict interpretation of the "relatedness" requirement, but the court rejected that.

Second, *Bristol-Myers* leaves open the question whether it applies to class actions. The Court assiduously avoided saying anything at all about class actions, but under the logic of the decision, it is difficult to see how many multistate class actions could be maintained outside of the defendant's home state where it is subject to general jurisdiction. So if *Bristol-Myers* requires a connection between each plaintiff's claim and the forum state, it is going to be difficult to find a single state that is going to have that connection with each of the absent class members' claims.

The courts are split on whether *Bristol-Myers* applies to class actions. Some courts say we should treat absent class members as non-parties for the personal jurisdiction analysis. So as long as the class representative's claim has a sufficient connection to the forum state, then there is specific jurisdiction over the class's claims even if the class includes out-of-staters.

The courts are split on whether *Bristol-Myers* applies to class actions.

I think this approach is quite plausible. The U.S. Supreme Court has in the past treated absent class members as parties for some purposes, but not for others. And it could approach the class more like an *entity* than like an *aggregation* of individual claims, and look only to the class representative's claim when assessing personal jurisdiction, much as it ignores the citizenship of absent class members when assessing diversity jurisdiction. But, given recent trends in class action law and personal jurisdiction law, I wouldn't bet on it. I think the writing is probably on the wall for multistate class actions outside of the defendant's home state.

There is lots more to talk about. I am sure we can do that with the rest of the panelists and throughout the day. Thank you.

## Comments by Panelists

### PROFESSOR ADAM ZIMMERMAN

I am thrilled to be before all of you and to comment on this terrific paper. In this paper, which I highly commend, Teddy Rave broadly, lucidly, and comprehensively describes the effect of both CAFA and the evolving law of personal jurisdiction on the increasing federalization of mass torts.

Teddy so comprehensively describes this phenomenon that I wasn't quite sure what I was going to talk about today. But I came up with three things that I think build on what Teddy has said and might have implications for state courts.

The first thing that I am going to do is briefly provide a little academic context about what the scholarship has said about how we deal with these questions of personal jurisdiction to mass torts. Scholars of mass torts, and litigators and judges have been thinking about this stuff for a really long time. Notably, none of that stuff actually

*Bristol-Myers* and cases like it . . . might have real implications for states' substantive law.

appears in the Supreme Court's decision. I think that has interesting and ironic consequences because the Supreme Court's decision was largely driven by a need to vindicate *state* sovereignty and *state* power.

My second point is that *Bristol-Myers* and cases like it might not only have ramifications for procedural questions, like where to sue, but it might have real implications for states' substantive law—the ability of a state and state courts to define the laws that govern their own citizens.

### Who Gets to Decide State Law Questions?

Then I want to turn to one or two exceptions that I think generally prove the rules that Teddy is pointing out. At this time, between the Due Process Clause, CAFA, federal arbitration, and Article III jurisdiction, the Supreme Court now has an array of tools to define who gets to decide some of these state law questions and what the shape of those state laws will be.

First, a little context on a topic that I think we will be returning to throughout the day. The dominant paradigm for dealing with mass torts has always been centralization. In order to promote efficiency, fairness, and consistency, we need a single decisionmaker, a single judge, a single forum, and a single set of state laws, in order to coordinate a large number of claims being brought by the same people, who deserve to be treated in the same way.

In general, up until maybe the last decade, procedural law and substantive law largely accommodated those types of goals. We developed more expansive theories of when class actions could be certified, we developed MDLs, and we made more procedural innovations. On the substantive law side, tort law accommodated more expansive theories of duty, more expansive use of strict liability, as well as relaxed causation requirements in medical monitoring claims and market share liability. All of these different types of substantive law developments also helped bring claims together so that we could bring them to an efficient resolution.

## Personal Jurisdiction

But there was always an issue with all of this. That wrinkle was personal jurisdiction—in particular, a view of personal jurisdiction that tied the question whether or not one violated Due Process under the Fourteenth Amendment to state territory. The claim actually had to arise in a particular territory. When you think about it, once you tie lots of diffuse claims around the country to a particular state's territory, it means you can't centralize—at least not as easily. So there had to be some way to accommodate that flexibly.

People who thought, very extensively, about these questions of personal jurisdiction knew that too. So if you look at the cases that Teddy talked about, that narrowly defined general jurisdiction, *Goodyear* and *Daimler*, Justice Ginsburg very heavily relied on the work of many people who have been writing in the area for years, like Von Mehren and Trautman and Twitchell. Justice Ginsburg cites these procedural scholars in *Goodyear* and *Daimler* almost as much as she cites case law. You can see how much these theorists influenced her in defining general jurisdiction and limiting it to when a defendant was “essentially at home.”

When you think about it, once you tie lots of diffuse claims around the country to a particular state's territory, it means you can't centralize—at least not as easily.

When they were writing, Von Mehren, Trautman, and Twitchell understood well the problems associated with pervasive multistate and multiparty cases. Accordingly, they always tried to provide some type of accommodation for groups of individuals. For example, Von Mehren and Trautman said that, in litigation involving multiple and indeterminate parties, specific jurisdiction has to still “provide an appropriate focus for matters that called for a unified administration.” That principle suggests that in some unusual cases involving lots of people we may need a single forum, even if that forum might not normally be able to adjudicate those claims individually.

The same thing can be seen in Twitchell’s discussion of specific jurisdiction. She read cases like *International Shoe* to say that, under dispute-specific jurisdiction, the state need not determine whether it would permit jurisdiction over *all* claims asserted against the defendant in the forum, like general jurisdiction. Twitchell instead pointed to the broad language used by the Supreme Court in *International Shoe Co. v. Washington*: specific jurisdiction needed only to relate to obligations that “arise out of or are connected with the activities within the state.”

Probably the most expansive definition and attempt to try to accommodate mass torts involving large groups of parties in a single forum was set forth by Judge Jack Weinstein, who had been studying the issue for years. When overseeing the DES cases, which involved New York residents who had sued 300 different manufacturers of DES, Judge Weinstein found the case “presents a classic illustration about why personal jurisdiction had to be modified.” When there are thousands of people all around the country all suing for the same set of issues arising from the same national marketing campaign, a single forum had to be available to consistently hear those claims:

Thousands of persons in hamlets and cities across the country are now claiming to have been adversely affected by exposure to the drug. In short, the technology, marketing, sociology, and possible ill effects of DES knew no state boundaries. The national nature of the resulting toxic tort litigation must be reflected in the law’s treatment of jurisdictional issues.<sup>8</sup>

## **Bristol-Myers**

When you look at the California Supreme Court's decision in *Bristol-Myers*, it largely echoed Judge Weinstein. It never cites him. It doesn't really cite any of the scholarship. But it said essentially the same thing: "because mass tort injuries may involve diverse injuries or harm not amenable to the efficiency and economy of a class action, they present special problems for the proper functioning of the courts and the fair, efficient, and speedy administration of justice."<sup>99</sup> If we were to separate all of these claims, send the Ohio litigants to Ohio and the Utah

The Supreme Court . . . said that specific jurisdiction requires an actual link between the defendant and each litigant.

litigants to Utah, when we have all of these claims here, the end result would delay our own proceedings and our own attempt to achieve justice.

The Supreme Court, as Teddy told us, rejected all of that. They said that specific jurisdiction requires an actual link

between the defendant and each litigant. Just because a number of California litigants could show that link doesn't mean that other people making exactly the same claims can show that link. They needed to actually show that they were somehow injured by taking these pills made by Bristol-Myers in *California*. The fact that all of these plaintiffs were prescribed, obtained, and ingested Plavix in California doesn't really mean anything for all of these out-of-state residents who might have been taking these pills, too.

This procedural analysis, however, creates an interesting problem for state substantive law. Many state substantive laws over time, as I said earlier, have also been designed to further the aggregation of large claims. Going back to the DES case against 300 different manufacturers, the New York Court of Appeals had already modified its substantive law on the understanding that women suing drugmakers for the pills their mothers had taken over 30 years earlier wouldn't be able to precisely identify which manufacturer made the specific dose. Looking at the California court's experience with market share liability, the New York court wasn't all that happy with it. It was chaotic.

*Bristol-Myers* problematizes this substantive area of tort law.

So New York changed its tort law and developed a special rule of "market share liability." It held defendants can be liable up to your market share so long as (1) the mothers ingested the pills during pregnancy; (2) the defendant negligently marketed the pill for pregnancy use somewhere in the country; and this would be the case (3) *even if the defendant could prove it did not produce the drug that caused plaintiff's injury*. That is, even if the defendant could show that you didn't take its pill, you could still recover from them according to their market share so long as you took the pills of someone else who was engaged in the same parallel conduct.

*Bristol-Myers Squibb*, a decision designed to promote state sovereignty, ironically makes it a little bit harder for states to define their own state law.

So here is the question: Under *Bristol-Myers Squibb*, can the New York residents in front of Judge Weinstein continue to bring those claims in front of Judge Weinstein in a New York court when they can't show that factual link for an out-of-state defendant? I am not saying that *Bristol-Myers Squibb* undermines state tort law. In fact, I think it all depends on

whether you interpret *Bristol-Myers* to say that whether or not a claim arises in a particular jurisdiction turns on (1) the state's defined cause of action or (2) whatever individual, factual link exists between the purchaser and the seller. But you can see how *Bristol-Myers* problematizes this substantive area of tort law. *Bristol-Myers Squibb*, a decision designed to promote state sovereignty, ironically makes it a little bit harder for states to define their own state law.

## Generic Drugs

Here's another example. Recently, the highest courts of California and Massachusetts have said that a plaintiff injured by a generic drug can sue the brand-name manufacturer of that drug for failing to warn. This is because the brand-name manufacturer is the one that actually creates the faulty warning. (And, as it happens, as a matter of federal preemption, you can't sue the generic drug manufacturer.) Under FDA rules, the generic has to provide the same warning as the brand name drug. So these courts have said, "We are going to expand the brand-name manufacturer's duty to warn, even when it did not warn a particular plaintiff in a particular state about the harm its products could cause."

Again, think about the fact pattern of *Bristol-Myers Squibb*. Do we have personal jurisdiction here, in the State of California, to sue that out-of-state manufacturer for a similar product? It depends on whether or not we are looking to (a) state substantive law to define the cause of action and the scope of jurisdiction, or (b) strictly looking at where the plaintiff is and where the defendant is. Again, in trying to define the scope of where you can sue, the Supreme Court has arguably raised new questions about when state courts hearing claims from their own residents can define their own state substantive law.

## Exceptions

I also want to mention that there are some exceptions out there to Teddy's general thesis about whether or not we are seeing the complete federalization of all of these state tort claims. First, there is a general trend that has begun to narrow when Article III jurisdiction exists in class actions. The Supreme Court looks ready to narrow when Article III jurisdiction exists in two different areas: (1) cases allowing defendants to "pick off" claims and (2) cases where there may be no case or controversy, particularly in data breach claims. What does that mean for state courts? It might mean that federal courts will have to remand those class actions back to state court. If there is no Article III jurisdiction, even with the expansive removal of class actions under the Class Action Fairness Act of 2005, that case might have to be sent back to the state courts.

The Supreme Court looks ready to narrow when Article III jurisdiction exists.

There still might be a question about whether CAFA strips the state courts of power to hear these cases at all. And, despite the presumption against implied repeals of jurisdiction, federal courts will ultimately have to figure this out. But, this is one way in which the court is shaping and defining, but may not completely be federalizing, state tort law.

The other exception is the state qui tam statutes like PAGA here, in California.<sup>10</sup> A number of state legislatures are adopting new statutes that allow people to sue on behalf of the state and recover not only for the state, but also for individuals. Today, the Supreme Court of California and the Ninth Circuit have said that those actions are not removable under CAFA. Those stay in the state courts. Not only that—double whammy!—they can't be arbitrated! So state courts get to hear them. The question will be whether the U.S. Supreme Court will continue to go along when it finally confronts qui tam suits, PAGA actions, and other similar statutes.

In sum, the Federal Arbitration Act, Article III, Due Process, and CAFA have now given the Supreme Court a wide array of tools to define where these mass cases are brought. But beyond that, it may also allow federal courts to define the shape, substance, and future of state tort law.

## THE HONORABLE BRENT APPEL

I am going to take a somewhat different tack. I am going to give you a whirlwind tour of some case law and some concepts. It is really going to be a bit of an alphabet soup, but I want to highlight specific examples of how some of these class action issues play out.

### State Forum v. Federal Forum

First, I want to just start with the basics. Is there a difference between a state forum and a federal forum? Traditionally, the thought has been “yes.” The reasons are multiple. Some of you probably don’t adopt stringent pleading or summary judgment rules: *Iqbal*,<sup>11</sup> for example, and *Celotex*.<sup>12</sup> Some of you have different rules for experts. In Iowa, for example, we have *Daubert*<sup>13</sup> to some extent. I would characterize it as “*Daubert Lite*.” We don’t have *Iqbal*. *Celotex* has been erased.

Is there a difference between a state forum and a federal forum? Traditionally, the thought has been “yes.”

I would also say, generally, that state courts have a tradition of deciding disputes through courts of general jurisdiction. Federal courts are, of course, historically courts of limited jurisdiction. They tend to look for a way to avoid exercise of judicial power. State courts, oftentimes are not that way.

Indeed, our first case in Iowa—I am fond of Iowa, of course—is an 1839 case involving a African-American man in Dubuque—a sojourner, if you will. They were trying to drag him back into slavery because he defaulted on a contract. Iowa Territorial Supreme Court, in its very first ruling, on July 4<sup>th</sup>, 1839, held in favor of the African-American man.<sup>14</sup>

The only problem was, the court had no jurisdiction. There was no original action filed at the local court. No record was developed. But the court said, “Well, this is not strictly regular.” But they proceeded to decide the case. This is kind of harsh on modern ears. You read that and you think, “Oh boy.” But I think, in general, state courts have been problem-solving courts in a way that federal courts have not.

### Departures from Rule 23

Then I think you need to look at your class action rules. There are some departures from Federal Rule 23. Iowa is one of them. I am going to just describe some features. There are probably eight, nine, ten linguistic differences, but there is no requirement of predominance of common issues. Instead, there is a 13-factor test that is pure Jack Weinstein—common factors, risk of duplicative litigation, practical assessment of non-parties, whether injunctive relief is appropriate, whether the person who is not present in court is represented, conflicts of law, management issues. It is a multi-factor test. There is no requirement of typicality in the rule. Maybe the class action comes in the back door on some of these factors.

Our case law is favorable to class actions. It says that class actions are to be liberally construed. The burden is light on the plaintiff. The plaintiff bears the burden of satisfying class action certification standards, but that burden is characterized as light. Footnote: there is

[Iowa’s] case law is favorable to class actions. It says that class actions are to be liberally construed. The burden is light on the plaintiff.

kind of a trapdoor there, because we have also said, “Yes, you can get decertified later on pretty quickly, too.” My point is the “trap door” under the Iowa rule is at least arguably somewhat more generous.

## Aggregate Litigation in Iowa

What has happened in Iowa since 2006? I don’t have any kind of empirical study of how many cases are filed in federal court and so forth. I am going to describe just a few cases quickly. We did have a big Microsoft case.<sup>15</sup> Many of you are probably familiar with it. It was on the antitrust implications of tying in the operating system. It was a major, major case. Ultimately, there was a \$179 million settlement. Along the way there were the usual challenges to the class, claiming it was not representative. There were some kind of fancy-pants economic experts coming in to try to develop theory to avoid individualized proofs.

Ultimately, the state courts affirmed the class and Microsoft, using the 13-factor test, expressly pointing out that there is not a requirement of predominance—but observing that there are some pretty nice antitrust issues here that are kind of common. Also, lots of discretion in the district court. Standard of review of class certification in Iowa—and, I think, in a lot of places—is abuse of discretion. When you get a 13-factor test on abuse of discretion, if you have a district court that has done its job and put together a 20-25 page ruling on abuse of discretion, it is probably not terribly likely to get reversed, quite frankly, either way.

There was an effort to remove this case under CAFA. The action was filed prior to the effect of CAFA, so it was not removed.

After *Microsoft*, I can tell you there are a number of reported federal cases that were removed to federal court and then were challenged in federal court—appealed, if you will. Some of them are kind of fun, depending on your perspective. (Maybe “fun” is a bad word.) There’s *Bell v. Hershey*,<sup>16</sup> a class action against Hershey Chocolate and Mars, Cadbury – I don’t know who else was in it, but a number of defendants. It is a case against the chocolate manufacturers alleging artificially raised prices. The damages claimed were \$3.75 million, and the attorney fees were \$1.24 million, to get under the \$5 million CAFA threshold. The 8<sup>th</sup> Circuit frowned on that approach, and it didn’t work. Several other cases have tried to evade the \$5 million cap. They have been unsuccessful.

After CAFA, there have been a number of class actions in Iowa. They tend to be somewhat local. One was a substantial environmental case that involved pollution in Muscatine, Iowa.<sup>17</sup> There were 4,000 individual members of the class, with state law issues of nuisance and trespass—that kind of thing. It was ultimately settled for \$50 million, and was handled thoroughly by our state court judges.

When you get a 13-factor test on abuse of discretion, if you have a district court that has done its job and put together a 20-25 page ruling on abuse of discretion, it is probably not terribly likely to get reversed.

## Two Different Court Environments

Observations: First, I think there is something to the notion that the state court legal environment can be somewhat different from the federal court environment.

Second, discretion is going to be key, certainly in the state court system and certainly in the Iowa system. The attitude of the district court judge is going to be extremely important. In some ways, I am not fond of the multifactor approach. I'm in appellate court review. I can't review anything if there is a multifactor test. You put it on high, you mix it up. On the other hand, it is flexible. My bottom-line point is that discretion is going to be very important.

Third, there is also an issue of resources in state court. You are state judges, too, so I bet I'll get some kind of resonance here. These substantial cases can be very demanding on the judicial system. To personalize it a little bit,

There is something to the notion that the state court legal environment can be somewhat different from the federal court environment.

I worry every day about our resources and our ability to deliver. I worry about the quality of our state court judges and their experience and background. We have wonderful applicants who tend to be less experienced and tend to come from the public defender's office or the public prosecutor's office, but they don't have a lot of trial experience. We have a limited number of applications for district court judges.

The cases tended to be tried in the past by special designation by our chief judges. They are very sharp in assigning the cases to those that are ready, willing, and able to take on one of these interesting matters. But one of my overall concerns is that, for complex litigation, the energy that gets drained from the state court system can really be an issue. I think access to justice across our country in state courts is threatened by lack of resources.

## PHILIP L. WILLMAN

I am here as the President Elect of DRI. It is the largest membership defense bar organization nationally and internationally with some 20,000 members. So that is my role here today—to speak to you as a leader and officer, not as someone experienced in mass tort or class action litigation. I am an old-style medical malpractice defense lawyer.

But I contacted a number of our members. I did an informal survey of members that I know who are involved in this type of litigation. I asked, What are the issues out there? What are your concerns? What are you seeing out there that you need to be addressing?

## Issues Raised by the Defense Bar

The majority of comments that came back had to do with both *Daimler* and *Bristol-Myers*. They are seeing some responses to those cases that are limiting both general and specific jurisdiction. Here are some of the issues that they brought up with me. These are more questions than answers for all of you.

The first is **jurisdiction by consent**. Professor Rave discusses this pretty thoroughly in his article. The theory is that if a corporation either hires a registered agent in a state or applies for and receives a certification to do business in the state, does that indicate that they have consented to jurisdiction?

The courts that have taken this up so far have said no, those are regulatory requirements. There is one state that Professor Rave mentions that does have a statutory requirement that if you apply for and receive a registration to do business in the state, then you are expressly consenting to general jurisdiction. Otherwise, the courts have been saying no, that is a regulatory requirement, not a jurisdictional requirement.

The second area of issue or concern is **using third-party contracts to achieve jurisdiction**. That means that a third-party resident defendant contracts with a non-party defendant in that state. For example, if a distributor of a pharmaceutical is a resident of that state, does that allow then jurisdiction over that non-resident corporate defendant?

A third theory that has been put out there and used is **conspiracy**. That is, that there is conspiracy between the non-resident and resident defendant. The liability of the resident defendant is imputed to the non-resident.

The fourth theory is specific to pharmaceutical cases involving **clinical trials**. The argument is that if a pharmaceutical company has conducted clinical trials and they are pivotal clinical trials in that state, you have subjected yourself to jurisdiction. So far, courts have said that these clinical trials are done to get approval of new drugs from the FDA, so it is not the focus of the cause of action for harm. Also, there are many forums that would come into that category. Clinical trials really are conducted in almost every state in the country. Therefore, it is not an exclusive way of obtaining jurisdiction.

Those are the four areas of concern with respect to how the plaintiff's bar deal with *Daimler* and *Bristol-Myers*.

## Jurisdictional Discovery

My contacts also talked about jurisdictional discovery. Where now do we stand in terms of jurisdictional discovery in light of *Daimler* and *Bristol-Myers*? Is there a threshold that a plaintiff must reach to be able to conduct discovery on an otherwise non-resident defendant to show that the non-resident defendant has sufficient relation to that state that there can be jurisdiction? And what is the burden of proof? Those are all open questions right now with jurisdictional discovery.

I do want to respond to Judge Appel's point about lack of resources. This is actually a concern that DRI shares. In fact, we have published a white paper called *The Economics of Justice*.<sup>18</sup> It was a study that was done that showed that not only does lack of funding of courts make it more difficult to follow through on the rule of law, but there is economic cost to the state when the courts aren't able to function the way that they should. Thank you.

Not only does lack of funding of courts make it more difficult to follow through on the rule of law, but there is economic cost to the state when the courts aren't able to function the way that they should.

## ERIC GIBBS

It is not every day you get to address a room full of appellate judges and accomplished law professors, including Professor Rave and Professor Gilles, who so ably wrote on the ever-changing world of aggregate litigation.

I love my practice because we get to help everyday people resolve grievances that are often small in the abstract, but important to those who are enduring them and important to a fair and just marketplace. Without the judicial system's emphasis on efficiency, which I fear is waning, and without the wisdom of extending those efficiencies to everyday people through aggregate litigation, many such issues would never be addressed, and many of the successes that our clients have shared would not have happened.

## Litigation After CAFA

Focusing on Professor Rave's paper, which I have to say remarkably summarized my practice since 2005 when CAFA was enacted, I gave a good deal of thought on what to say here because I don't have a solution to his fundamental conclusion, which I read as "the states have little left when it comes to aggregate litigation." So I thought the best path would be to share my perspective as it relates to my core practice, which is prosecuting cases of consumers that involve unfair and deceptive consumer practices.

When CAFA was enacted, like many of my colleagues at the time, I questioned the purported purpose of the legislation, which Professor Rave captures as moving nationwide class actions into federal court on the theory that the controversies that are national in scope belong in "national" courts. On its face, that doesn't seem controversial. When you step back and think about it, there is not a national consumer protection statute that provides a private right of action. Moving just about every consumer protection case to federal court, when each of those cases arises under a different state's laws, reflecting that state's judgment with respect to the exercise of its police

powers, including providing a private right of action, cedes the enforcement of those laws and the development of underlying state law to the federal courts.

Moving just about every consumer protection case to federal court . . . cedes the enforcement of those laws and the development of underlying state law to the federal courts.

It is pretty fundamental stuff, but as Professor Rave I think correctly points out, at the time support for or opposition to CAFA largely fell on whichever side of the "v" on which you practiced. My personal view is most of those views were grounded in one's perception of the stated overreaching of a handful of venues. As

an aside, what was absent from the discussion was the perception many had that courts were unfairly providing advantages in litigation to the defendants, as opposed to the plaintiffs. But that wasn't part of the calculus.

## Shift From State to Federal Courts

Given all of that, you might be surprised to learn that my view during the CAFA debates was that consumers would benefit from CAFA-like procedural adjustments when it came to parallel state court aggregate litigation. When CAFA was enacted, I would say about 80 percent of my practice was in the state courts—primarily in California, but generally around the country—with 20 percent in the federal courts. Now, *all* of my practice is in federal court. I have one case pending in a California state court that is pled as a state court class action. It is primarily there to deal with a forced arbitration clause.

The interesting thing for me, though, is that the judges in the state courts in which I used to practice and the federal judges before whom I have appeared really aren't much different from one another. Our success rate on certification, whether in state or federal venues, is about the same. The way discovery is handled is about the same. The amount of scrutiny one receives with respect to class action settlements is about the same. Involved judicial case management is the norm, at least in our cases, in both forums.

What has been troubling to me, though, and where I think one can find some truth in the underpinnings of CAFA, is that when a state court consumer protection case presented true risk to a defendant, the defendant had an escape hatch. It could go to a different state court and negotiate a weak, but sweeping, resolution of those

claims. That was basically referred to as a race to the bottom. My view is that race to the bottom was a problem for consumers, was a problem for lawyers, and was a problem for the judicial system in general.

My opinion at the time was that legislation addressing the race to the bottom was what was needed. Without a place for defendants to run—often deemed judicial hellholes by the very litigants who sought their solace—there was no need for sweeping legislation that undermined the balance between the federal and state courts when it comes to aggregate consumer protection litigation. But in fairness, and as a practical matter, CAFA effectively has done away with the race to the bottom at least in consumer fraud cases.

Now, you might be asking, “If the judging is the same and the race to the bottom is solved, then what is your problem?” Setting aside questions of federal intrusion on state matters, the practical problem is that CAFA delays the resolution of consumers’ substantive claims. The fundamental issues, at least with respect to consumer class actions, is that what was once a smaller number of single state law cases is now a multistate action in a single federal court. Not only does that interfere with the state court’s enforcing its own laws, but it also adds significant case management burdens and responsibilities to an already overwhelmed federal court—and that, in turn, can impact consumers’ rights.

## Avoiding CAFA

Professor Rave suggests various approaches to avoid CAFA and, in turn, perhaps avoid these types of situations. Those approaches, whether limiting the amount in controversy or the slice-and-dice approach talked about earlier, often aren’t palatable in consumer class cases and inevitably will raise adequacy questions at the point of class certification.

In our firm, what we now find ourselves doing is filing single state cases in federal court. While doing that alleviates the manageability issues, what you find yourself doing is repeatedly filing largely identical class cases in federal courts sprinkled around the country, which raises its own concerns of duplication and inefficiency and increased costs.

Professor Rave suggests bundling small numbers of cases with similar laws. I think it is the similar laws that is the critical piece of effective bundling. With increased frequency, what we are now seeing is defendants invoking *Bristol-Myers* to essentially Balkanize bundled litigation, which means your case gets delayed while you are fighting over where the case ought to be. That is just the practical reality of the things we are talking about today.

## Undermining MDL

I will close with an observation. One answer to the issues I am talking about is the MDL process. MDL courts are typically armed with additional resources and thus are often better positioned to address and manage thorny multistate issues. If you pay attention, you will see that the very corporate forces that have successfully moved aggregate litigation into the federal courts are now attacking and undermining the MDL process in much the same way they attacked and undermined aggregate litigation in the state courts.

MDL courts are typically armed with additional resources and thus are often better positioned to address and manage thorny multistate issues.

There is a concerted, organized PR campaign underway designed to belittle and minimize the MDL process. One article I read the other day conceded that the number of MDLs has decreased since 2013. Nevertheless, it says that “the MDL magnet is more powerful than ever,” and “the MDL world is still very much alive and well and particularly pronounced in the area of product liability, where the MDL magnet is extremely powerful.”

As is plainly set forth in Section 2 of Professor Rave’s paper, there is no magnet attracting the plaintiff bar to MDLs or to the federal courts in general. The so-called magnet is the end result of corporate-sought changes in subject matter jurisdiction and personal jurisdiction that have driven state court cases into federal court. As I said, those MDL courts and many non-MDL federal courts are now holding wrongdoers accountable and responsible for their conduct, which I think is the real concern of our friends on the other side of the “v.”

## Response by Professor Rave

I think Adam, and to some extent the other panelists as well, raised some important and interesting questions about what the constriction of personal jurisdiction does to state substantive law. I think those are difficult questions and important questions. I also think it is important to stress how little *Bristol-Myers* actually decided.

*Bristol-Myers*, as I said, was an 8-1 decision. I think part of the price of getting eight justices to sign off was that the court actually says very little. It makes it very clear that there is no specific jurisdiction if the plaintiff doesn’t reside in the state, didn’t buy the product in the state, didn’t use the product in the state, and wasn’t injured in the state. If the plaintiff has no relationship to the state, there is no specific jurisdiction.

But the decision never tells us which of those is sufficient. I think that that is going to be the next battleground in specific jurisdiction. Think back to another first-year chestnut (I realize I am reviewing the first year of law school here): *World-Wide Volkswagen v. Woodson*.<sup>19</sup> An aggressive reading of *Bristol-Myers*, like the one Adam was saying could undermine state substantive law, would reverse the understanding in that case.

### *World-Wide Volkswagen v. Woodson*

To take everyone way back, in that case, the Robinson family was injured when their car exploded in a crash in Oklahoma. They sued the dealer and the manufacturer, among other parties, in an Oklahoma state court. The U.S. Supreme Court’s holding there was that the dealer who sold them the car in New York wasn’t subject to specific jurisdiction because it hadn’t purposefully availed itself of the markets of Oklahoma. But nobody ever questioned whether there was specific jurisdiction over Audi, the manufacturer, who sold the same model of car in Oklahoma.

A very aggressive reading of *Bristol-Myers*, I think, would question whether Audi could be sued there by a plaintiff who was injured in that state, because Audi’s purposeful contacts with Oklahoma didn’t give rise to the specific injury. That would go much further than *Bristol-Myers*, itself, went.

Justice Appel mentioned the Microsoft settlement in Iowa. I think Eric Gibbs talked about class action settlements, too, as sort of an escape hatch, and “the race to the bottom.” I think that is actually probably an important caveat that I didn’t mention in my remarks, but talked about it in the paper a little bit. The constriction on personal jurisdiction probably has a lot less bite on settlement classes. I think that escape hatch is actually still there.

You still can have a “reverse auction,” because the defendant can consent to personal jurisdiction in any state. If the defendant and class counsel cut a deal where class counsel is going to get a lot of money and the class is going to get very little in recovery, the defendant and class counsel can run off and both agree to personal jurisdiction in whatever state court they want. Under CAFA, the absent class members don’t have the ability to remove that case to federal court. The only way that is going to get stopped is if there is already pending litigation in federal court and the federal MDL judge enjoins that settlement.

The constriction on personal jurisdiction probably has a lot less bite on settlement classes.

That is something that state judges should watch out for. When you start seeing parties act in ways that are not consistent with their ordinary strategies, that should raise some red flags, and maybe you want to take a close look at those settlements.

## Registration Statutes

Phil Willman brought up the question of jurisdiction by consent. Do these corporate registration statutes give states general jurisdiction over every corporation that registers to do business? As far as I am aware, every state has a corporate registration statute. Corporations have to register everywhere. I don’t think that means that every state has general jurisdiction over every corporation.

Most of the registration statutes don’t purport to require corporations to consent to general jurisdiction. Pennsylvania’s does. It is very explicit about that. Some other states like New York have interpreted their statutes to require consent to general jurisdiction. I think in those states which have been explicit about requiring consent

to general jurisdiction, we are going to see some litigation there. I believe that very recently a federal district court judge in Pennsylvania said that the Pennsylvania requirement of consenting to general jurisdiction is unconstitutional—it violates the Due Process Clause.<sup>20</sup> We will see where the federal courts go with that.

Every state has a corporate registration statute. Corporations have to register everywhere. I don’t think that means that every state has general jurisdiction over every corporation.

I think it would be kind of a strange irony if the federal courts take the position that consent to general jurisdiction as a condition of doing business in the state can’t be a voluntary

form of consent—that it is an *invalid* form of consent—while at the same time taking the position that consent to arbitration in a contract of adhesion is a valid form of consent. I think it would be a strange irony. I don’t think it would be an unexpected irony.

## Questions and Comments from the Floor

**The Honorable Sabrina McKenna, Supreme Court of Hawai’i:** Since different states do have different substantive law, for example, on consumer protection, how are the MDL judges applying the different state laws? I don’t think that our court has ever received a certified question from a federal court in an MDL matter. I am just wondering, are they just applying a general law? How are they handling this, trying to ascertain what the different state laws are?

A lot of our cases now are cases where we are literally filing complaints that have plaintiffs from each of the 50 states, and asking an MDL judge to manage that.

**Eric Gibbs:** In my experience, what is happening today with respect to those questions depends somewhat on the underlying case. A lot of our cases now are cases where we are literally filing complaints that have plaintiffs from each of the 50 states, and asking an MDL judge to manage that.

Addressing the MDL cases triggering the laws of most, if not all, states, is becoming the first management hurdle for MDL courts, and it is an ever-evolving process, but particular states are often selected from the 50-state patchwork. Those states effectively become bellwether states,

getting the case to class certification and getting the discovery done in relation to that. Oftentimes, the states that are selected are states where the law is particularly developed or the courts don't necessarily need to go back to the state courts for those types of questions.

But it is a problem, in my view, because, as I said in my comments, in many instances the federal courts are making state law. The flipside of that is everyone is seeing resolutions in these MDL cases like what we just put on the table earlier this week in the *Equifax* litigation, where the relief exceeds a billion dollars. Part of the reason that is happening is because these cases are cabined and there aren't places for the defendant to run to. There isn't an escape hatch because the court comes in, appoints class counsel, appoints defense counsel, and everyone has an obligation to the court and duties of candor. It is pretty tough to run off and resolve cases in a race to the bottom. As a practical matter, I think that the issues that are being addressed aren't the type of issues that ultimately require being presented to the underlying state courts.

That is a pretty sweeping answer to, I think, a very good, targeted question.

**Patrick A. Malone, Esq., President, Pound Civil Justice Institute:** The other thing I would just add is that, in theory, what is supposed to happen in an MDL, especially in the mass tort situation, is that the cases are consolidated from all over the country in one specific federal court only for purposes of discovery and various procedural issues. Once discovery ends, and the cases are ready for trial, the court is, in theory, supposed to send them back to wherever they came from for trial. But as a practical matter, that hasn't always happened. The MDL court has become its own adjudicator of so-called bellwether trials, and then it winds up running all of the settlement process and, effectively, running the entire case.

The MDL court has become its own adjudicator of so-called bellwether trials, and then it winds up running all of the settlement process and, effectively, running the entire case.

**Prof. Zimmerman:** One more thing. It is true, theoretically, the MDL judges will decide choice of law questions as well as the state law questions from the jurisdictions they are transferred from. They will decide those types of cases. The point that you are making, about what that means for the development of the common law, is a really critical issue.

There is a new law review article in the past year called *The Hollowed-Out Common Law*.<sup>21</sup> It points to how the increased removal of these cases from the states into the federal courts and the transfer to MDL courts means that we now have a very narrow group of judges, usually in the federal courts, that are influencing in a very powerful

way the development of our common law. There hasn't been the same kind of percolation that is supposed to be taking place in our state supreme courts.

**Prof. Rave:** I'd like to jump on that, because I think this is really important. The MDL process is actually really well set up to deal with 50 different sets of state law. These are all individual cases. The judges are supposed to decide the choice of law questions before they decide a summary judgment motion or instruct a jury in a bellwether trial or make other decisions like that.

Even though the system is designed to respect the differences in state law, there are these inevitable pressures, once you put all these cases together in an MDL, towards smoothing out those differences. Most of these cases settle. Less than three percent of the cases actually get remanded for trial. If you look at the settlements, the settlements make almost no distinctions among plaintiffs based on what state law would apply to their claims. We have, in a sense, federal judges making decisions on state law and then parties settling in the shadow of that and not really making much effort to differentiate among the state laws that would apply to their claims.

**Eric Gibbs:** As a practical matter, the states with the strongest consumer protection laws, at least, are the ones whose laws are being enforced in the MDL. It is usually those cases that drive the settlement. Those settlements typically benefit the rest of the country. In many of the states, the laws are not as strong. The recoveries and the outcomes may not be as good.

In a lot of ways, you see California law, Illinois law, sometimes Missouri law, other states' laws, that are driving the settlement of the case. It is just not palatable, I think, to the defendants to treat its customers in one state one way and its customers in another state another way. The more stringent laws are really benefiting the country as a whole—certainly not in every case, but that is something that we are seeing.

Even though the system is designed to respect the differences in state law, there are these inevitable pressures, once you put all these cases together in an MDL, towards smoothing out those differences.

## Notes

<sup>1</sup> 137 S. Ct. 1773 (2017).

<sup>2</sup> 8 U.S.C. § 1332(d).

<sup>3</sup> 95 U.S. 714 (1878).

<sup>4</sup> 564 U.S. 915 (2011).

<sup>5</sup> 571 U.S. 117 (2014).

<sup>6</sup> 137 S. Ct. 1549 (2017).

<sup>7</sup> 326 U.S. 310 (1945).

<sup>8</sup> In re DES Cases, 789 F. Supp. 552, 557 (E.D.N.Y. 1992).

<sup>9</sup> Bristol-Myers Squibb Co. v. Superior Court, 377 P.3d 874, 893 (Cal. 2016).

<sup>10</sup> California Private Attorney General Act of 2004 ("PAGA"), Labor Code § 2699 et seq.,

<sup>11</sup> Ashcroft v. Iqbal, 556 U.S. 662 (2009).

<sup>12</sup> Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

<sup>13</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

<sup>14</sup> In Re Ralph, 1839 WL 2764 (Iowa 1839).

<sup>15</sup> Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002).

<sup>16</sup> Bell v. The Hershey Co., 557 F.3d 953 (8th Cir. 2009).

<sup>17</sup> Freeman v. Grain Processing Corp., 895 N.W.2d 105 (Iowa 2017).

<sup>18</sup> Eric J. Magnuson, Steven M. Pujszis, Lisa M. Agrimonti, and Nicole S. Frank, THE ECONOMICS OF JUSTICE (DRI 2014), available at <http://www.dri.org/docs/default-source/dri-white-papers-and-reports/2014-economics-of-justice.pdf?sfvrsn=10>.

<sup>19</sup> 444 U.S. 286 (1980).

<sup>20</sup> In re Asbestos Prods. Liability Litig. (No. VI), 384 F.Supp.3d 532 (E.D. Pa. June 6, 2019).

<sup>21</sup> Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 18-33, 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3261372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261372) (analyzing how to identify the common law that governs modern commercial, electronic transactions).

# Luncheon Keynote Address

## Serial Objectors: A Challenge for Our Civil Justice System

**Professor Robert Klonoff, Lewis & Clark Law School**

It's really an honor to be here in front of so many distinguished judges. Although the issue that I'm talking about has, thus far, arisen mainly in federal courts, it also has emerged in state courts, as I'll explain. And I'll describe a new federal rule dealing with this problem, and it's an approach that I think the states ought to look into.

The topic today is what I call "serial objectors." We're talking about objectors in class actions who, basically, make it a practice not to provide meritorious objections but to lodge objections so that they can extract payments, mainly from plaintiff counsel, to go away and not pursue their objections—because otherwise, the settlements are going to be held up, potentially for many years.

Objections are critical to the class action process, because you've got so many absent people who really aren't there to evaluate the settlement. And you need some mechanism, so that problems in the settlement can be decided by the court. The serial objectors, however, don't serve that purpose.

Objections are critical to the class action process, because you've got so many absent people who really aren't there to evaluate the settlement.

One court described serial objectors as "remoras," which are small fish with sucker-like organs that attach themselves to larger fish. Think about that image as we go through this process. That was in one of dozens of opinions using that level of language to describe the people that we're talking about today.

### A Hypothetical

I want to give a hypothetical that really will explain what the problem is here. Let's assume that a class action alleging defective Chevrolet engines settles in federal court. It's a massive case, with 10,000 class members. Every class member gets \$20,000, so you have a \$200,000,000 settlement. And General Motors agrees, on top of that, to pay attorneys' fees of \$20,000,000.

At the fairness hearing, there's only one objection, and it's by an individual represented by Attorney Bill Jones. And Jones files a brief that says, in its entirety, "The settlement is unfair." That's all it says. No analysis; no argument. The district court approves the settlement, and Jones appeals to the Sixth Circuit. Jones then calls John Smith, the attorney representing the class, and says he will drop the appeal for a side payment of \$500,000. This is exactly what goes on, all the time.

The backlog in the Sixth Circuit is two years, with another year factored in for the Supreme Court certiorari process. Although the appeal is frivolous, Smith pays the \$500,000 out of the \$20,000,000 in fees.

If he does this repeatedly, Jones is a “serial objector.” A website created by a plaintiff law firm, called [www.serialobjector.com](http://www.serialobjector.com), which keeps track of serial objectors, says that serial objectors “. . . can make a living by simply filing frivolous appeals and, thereby, slowing down the execution of settlements.” The website lists 81 examples of frivolous objections by a single lawyer, and large numbers by many others. Seven objectors on the list have filed 30 or more frivolous objections. The website calls serial objectors “perhaps the least popular parties in the history of civil procedure.”

Basically, what we’re dealing with are people who, as the “remora” analogy says, latch on to capable lawyers who have achieved a very good settlement, and they look at it as an opportunity to cash in, doing very little work and having absolutely nothing to do with making the settlement better. A federal district court in Ohio court said of serial objectors that they

subsist primarily off of the skill and labor of . . . more capable attorneys. These are the opportunistic objectors. Although they contribute nothing to the class, they object to the settlement in the hope that [class counsel] will pay them to go away. Unfortunately, the class-action kingdom has seen a Malthusian explosion of these opportunistic objectors . . . .<sup>1</sup>

One law firm, Edelson PC, has really been aggressive at going after these objectors. They filed a RICO case against a Texas lawyer who was notorious in this game. As I mentioned, *Serialobjector.com* lists 81 examples of frivolous objections filed by one specific serial objector, whom I’ll call “S.O.” The court in that RICO case noted

Basically, what we’re dealing with are people who . . . latch on to capable lawyers who have achieved a very good settlement, and they look at it as an opportunity to cash in, doing very little work and having absolutely nothing to do with making the settlement better.

that the Edelson firm “identified fifteen cases since 2009 in which [S.O. and his cohorts] have repeated this same basic pattern—frivolously object, appeal its denial, settle out of court, withdraw—and suggests that, because the Defendants have hidden their activities in various cases, the true number is much larger.”<sup>2</sup> Although the court didn’t think that case satisfied the elements for RICO, it did enter an order at S.O.’s request to dismiss the case in exchange for S.O.’s agreement to a permanent injunction prohibiting him from practicing law in Illinois or acting in conjunction with other lawyers to practice in Illinois.

I re-read that RICO opinion last night, and it’s heartbreaking. This judge was fuming about what S.O. did, but she writes this lengthy, scholarly opinion about why S.O.’s misconduct didn’t violate the RICO statute. And it’s only one example of courts that have been very conservative about punishing these serial objectors.

## Serial Objectors in the Federal Courts

There are several examples of cases, in a whole variety of contexts, where courts have issued sanctions against serial objectors. In another case, an internet service provider, Clearwire, claimed to have high-speed internet. A class action against the company alleged that its internet speeds were more like dial-up speed. S.O. and some other objectors filed objections, and the court was not pleased. It wrote that

[The objectors] appear to believe that they do not need to follow court orders until they are threatened with sanctions for failing to do so . . . This is not acceptable conduct for attorneys appearing before this court . . . [T]he ruling of this court is that, in regards to the appropriate sanctions, it will revoke [S.O.'s] permission to practice pro hac vice in the Western District of Washington.<sup>3</sup>

In another case, the class alleged that Major League Baseball violated the antitrust laws by controlling televised access to games. The court wrote about the same lawyer,

Throughout this proceeding, [S.O.'s] behavior has been, at best, unprofessional, and at worst, an unseemly effort to extract fees from class counsel in exchange for the withdrawal of a meritless objection to the proposed class settlement . . . Numerous courts throughout the country have publicly excoriated [S.O.] for the frivolous objections that he has penned and injected into class action settlements . . . This court joins the other courts throughout the country in finding that [S.O.] has orchestrated the filing of a frivolous objection in an attempt to throw a monkey wrench into the settlement process and to extort a pay-off.<sup>4</sup>

“[An] unseemly effort to extract fees from class counsel in exchange for the withdrawal of a meritless objection to the proposed class settlement . . .”

And in yet another case, direct and indirect purchasers alleged that polyurethane foam manufacturers engaged in price fixing. The court wrote that S.O.'s conduct

has not only burdened Direct Purchasers and this Court with the task of responding to patently frivolous filings; settlement funds of \$147 million, the product of four years of hard-fought litigation, have hung in limbo for more than eight months because a person who knows he has no right to object to the settlements nonetheless refuses to withdraw his meritless objection.<sup>5</sup>

## State Court Litigation

The problem exists in state courts as well as in federal courts. For example, in *Clark v. Gannett*, a case in Illinois, the class alleged in its complaint that the defendant publisher violated the Telephone Consumer Protection Act by promoting the sale of its newspapers through unsolicited marketing calls. Class counsel (the Edelson firm again) told the court that [S.O.] “got us to a mediation and basically said, ‘I can delay the settlement, which will cost the class and class counsel money. And, in exchange for me not doing that, you can pay me.’”<sup>6</sup> Edelson PC depicted S.O. and his cohort as “hold-up artists deliberately manipulating the legal system to collect an unearned bonanza at Edelson PC’s expense,” and called their actions “a fraud on the court.”<sup>7</sup>

As noted above, Edelson PC filed a civil RICO action against S.O., and the *Clark* court wrote that S.O. and his cohorts

abuse the nation’s courts by filing frivolous, last-minute objections on behalf of purported class members that seek nothing in the way of substantive changes to the terms of the proposed class settlement. Rather, the Defendants exploit the nuisance value of the objection . . . in leveraging demands for hundreds of thousands of dollars from class counsel at secret mediation sessions.<sup>8</sup>

You may get a lot of judges who really get upset at a serial objector. They may sanction the lawyer and say, "You can't come back to my court." But we have 50 states and many federal district courts, and unless and until the most abusive serial objectors are disbarred from every court in the United States, this is going to continue unless the profession comes up with some sort of a remedy.

We have 50 states and many federal district courts, and unless and until the most abusive serial objectors are disbarred from every court in the United States, this is going to continue unless the profession comes up with some sort of a remedy.

The *serialobjector.com* website has lots of examples. In addition to the 81 cases involving S.O., there are listings involving many other attorneys. Moreover, the raw number 81 is only the tip of the iceberg. It's way, way more than 81. The 81 are just the people who complained; the people who filed motions in the court; the people who raised issues. There are probably 10 times that many lawyers who paid off S.O., and nobody's counting it. Nobody knows. It's confidential. It was done on the side.

Numerous courts have slammed these people, but their sanctions really have done very, very little to deter them.

I could go on and on. The reason I'm giving so many examples is just to give you a flavor of how pervasive the courts' condemnation of these people has been over the years.

Until recently, really nothing was being done to deal with the problem. Why does everybody hesitate to really throw the book at serial objectors? Why is this such a difficult problem? The complication is that there are a lot of legitimate objectors. There are people in this room who I have great admiration for, people from Public Citizen and Public Justice, and they file objections that make our process better, that make our process work. We need people like that to object. But Public Justice never calls up the lawyer and says, "I'll drop my objection in exchange for a side payment." They want to litigate their objections. They want to go forward. They want to make the case better.

## Legitimate and Illegitimate Objections and Objectors

Legitimate objectors include, in my mind, people or groups like Public Citizen, Public Justice, or class members addressing their individual compensation, who can really demonstrate that the money that's being paid to the class is deficient. Examples of legitimate objections include assertions that the class needs to be divided into subclasses to ensure adequate representation; or that notice to the class members was deficient (and thus a new notice is required); or precise arguments about why the settlement is deficient and attorney fees are excessive. Obviously, objectors making such arguments make no offer to dismiss the objection for a payoff.

In one of the breakout sessions this morning, one of the judges talked about coupon settlements, and those have now been condemned. That was a result of vigorous and meritorious objections. In most cases, coupon settlements are really not of benefit to the class.

Why does everybody hesitate to really throw the book at serial objectors? Why is this such a difficult problem? The complication is that there are a lot of legitimate objectors.

Challenges to attorney fees can be legitimate. And at the point in the process in which lawyers are arguing for their fees, if you're talking about a pie that's being divided up, there's really a conflict between the lawyers and the clients. So it's very important for objectors to be able to come in and challenge the proposed attorney fees. You have to come up with a solution that's going to protect the legitimate objectors, but put an end to the illegitimate ones.

## What Courts and Lawyers Could Do

Why has this problem gone on for so long? Well, in all of these cases that I've shown you, the courts have been aggressive in writing opinions—but they haven't done anything else. For the most part, they haven't referred lawyers to their bars for disciplinary proceedings. There ought to be something like the website *serialobjector.com*—though not managed by a plaintiff law firm—that courts can look to, so that they can understand what's going on; and the courts can sanction on a much broader level than they are doing now.

I mentioned the concern that courts don't want to get too carried away, because they don't want to deter legitimate objections. The plaintiff lawyers are also part of the problem, and I'm going to discuss the rules committee that I was on and what we finally have come up with in the way of amendments to Federal Rule 23. We had hearings around the country, and at one of the hearings, a plaintiff lawyer got up and was complaining about serial objectors, and I said, "Why do you pay? If you just stop paying, the problem would go away." I'm not sure the lawyer had a very good answer to that. But I think part of the problem is that repeat serial objectors know that plaintiff lawyers will keep writing checks.

At one of the hearings, a plaintiff lawyer got up and was complaining about serial objectors, and I said, "Why do you pay? If you just stop paying, the problem would go away."

## Summary Affirmance

Also, plaintiff lawyers haven't aggressively pursued appellate strategies to deal with serial objectors. I've mentioned appeal bonds, and I don't think that's a very viable option, but summary affirmance is a great option. If you've got one objector, and you're faced with three years of appellate proceedings, you can file a motion for summary affirmance. You attach as an appendix a printout from *serialobjector.com*; you attach as an appendix these opinions that are condemning the serial objectors. But our committee found that very few plaintiff lawyers were utilizing summary affirmance.

## Expedited Appellate Review

The other option is expedited appellate review. I mentioned in my hypothetical a two-year process for appeal in the Sixth Circuit. What should an attorney representing the class do? File a motion for expedited review with the appellate court. Point out that the objection is being filed by one person; that it's a frivolous objection; that it's going to hold up the recovery for many, many years; and tell the court it needs to expedite the appeal. They need to deal with it promptly.

The Third Circuit understood this point in the NFL concussion case.<sup>9</sup> And, in that case, there were valid objections, but we were dealing with a class of people who were very, very sick, and who needed money right away

You need to ask the appellate courts to decide these cases quickly. Because the only leverage these serial objectors have is the timeline.

for medical treatment. And the Third Circuit did a wonderful job of really deciding the appeal very quickly (within about a year from the district court's approval of the settlement). The panel recognized the gravity of the situation. And that was not even a case where a motion for summary affirmance or expedited appeal was filed.

So I would say to the plaintiff lawyers who are dealing with these kinds of cases that you need to be proactive in your appellate courts. You need to ask the appellate courts to decide these cases quickly. Because the only leverage these serial objectors have is the timeline. The lawyers don't want to wait two years to get paid; they don't want to wait two years before the class members get paid. And if you can speed that up, if you can get a summary affirmance, you can deal with that process.

## New Federal Rules Amendments

How do you come up with a rule that's going to target the bad objector and not the good one? For example, Judge Brooks Smith, who is the Chief Judge of the U.S. Court of Appeals for the Third Circuit, wrote an article with Professor John Lopatka<sup>10</sup> in which they argued that an appeal bond should be required for every objector, and that the appeal bonds would deal with costs of counsel and other expenses. The cost would be enormous.

That would put an end to objections from individual citizens who want to object to class actions. But it would also put an end to objections from entities like Public Citizen and Public Justice, so that's really not a viable alternative.

As I mentioned, the Federal Civil Rules Committee started to look at Rule 23 and possible reforms several years ago. We put out the word that we wanted to hear from both the plaintiff bar and the defense bar about what they thought were the most serious issues were in class actions. Overwhelmingly, we heard that the most serious issue was serial objectors. There wasn't another issue that was even close. So we decided early on to take up that issue. We realized that that was an area that we had to address in the rules process. Ultimately, on December 1, 2018, new language to Rule 23 was adopted to address serial objectors.

There's now a new Rule 23(e)(5)<sup>11</sup> that does several things. Part A says that the objection must state whether it applies only to the objector or to a specific subset of the class. Why is that required? Well, as I said at the beginning, most of these objections allege that the settlement is unfair, and the objectors don't even think about what the objection really is. So this is an effort to require the serial objector to actually articulate what the objection is, and whom it affects. Thus, these form objections, saying merely "It's unfair," could be summarily dismissed as a violation of the rule.

The heart of the reform is a new rule that requires court approval of any payment in connection with the dismissal of any objection, either at the trial level or on appeal.

Similarly, the objection must state with specificity the grounds for the objection—it's the same point. So no longer can you just say, "The settlement is unfair." The hope is that, if the serial objectors have to work harder, to state with specificity what the objection is, maybe it'll deter some of them from filing these objections. That's because one of the beauties of serial objections is that they didn't have to do any work. They just file a frivolous one-sentence objection, and they can hold up the process for several years.

But the heart of the reform is a new rule that requires court approval of any payment in connection with the dismissal of any objection, either at the trial level or on appeal. It adopts the process of Rule 62.1,<sup>12</sup> which deals with the problem where you have a case where the appellate court has jurisdiction, and the appellate court can still hear from the trial court to decide what to do.

You may be wondering, if the parties go in and ask the court to approve the dismissal of the appeal, How is the court going to do it? How's that going to solve the problem? The way we envision that it's going to solve the problem is that no one is going to want to stand up in front of a federal judge and explain what's *actually* going on. Imagine the argument: "Your Honor, we're here today jointly to move for the dismissal of Attorney S.O.'s objection. And, in exchange for that, we're disclosing to the court that we're paying Attorney S.O. \$500,000, and we'd like the court's permission to do that." I don't think anybody's going to do that, because the first question from the judge is going to be, "What on earth are you doing? Why are you paying this guy \$500,000?" So I think the idea behind this change to Rule 23 is that sunlight is the best disinfectant. By bringing it out, by requiring that these motions and arguments be public, and that they be approved by the court, people aren't going to do it anymore.

The idea behind this change to Rule 23 is that sunlight is the best disinfectant.

## The Future

Will this problem go away? Only time will tell, but let me mention one very encouraging sign. I was an expert witness in the Chrysler-Dodge-Jeep Ecodiesel Litigation.<sup>13</sup> It was a follow-on to the Volkswagen case, with very similar allegations involving emissions systems that cheated the emissions testing. Why it didn't get the same publicity, I'm not sure, but it's very much a carbon copy of the Volkswagen case. It involved 100,000 vehicles, and there was an April 15, 2019, deadline for objections. I was hired by class counsel to look at the objections, to analyze them, and to respond for the court. Much to the surprise of everyone, there were only three objections, and they were all from lay people. And it was clear that these were legitimate objections, very much like most of the objections in the Volkswagen litigation.

For example, one of my favorite objections from *Volkswagen* (not made by a serial objector) was, "I'm not being compensated for my sheepskin seat covers." The court had to deal with that! And the objections in the Chrysler case were similar—they didn't come from serial objectors. So it's an interesting post-amendment example of a

situation where there were no objections—but it's just an anecdote. We're going to really have to look and see. We're going to have to take the temperature of the plaintiff's bar in a couple of years to see if serial objectors are still a problem. But, hopefully, it's a start.

We're going to have to take the temperature of the plaintiff's bar in a couple of years to see if serial objectors are still a problem.

One great thing about this new rule amendment is that there have been people—Judge Lee Rosenthal from the federal district court in Houston is one example—who have been going around the country educating judges about the new rule. And just by doing that I think they've made the federal judges' antennae go up throughout the country, and see that this is a problem to pay attention to. So with fingers crossed, we're hoping that the serial objection problem will be much, much less serious going forward.

## Questions and Comments from the Floor

**Hon. John Leventhal, New York State Supreme Court, Appellate Division, Second Department:** How about using Rule 38 on appeals, why don't you take this guy to the end of the appeals process and let him be sanctioned, have damages, et cetera?

**Prof. Klonoff:** Well, the problem is you don't want to go through the appeal process.

**Judge Leventhal:** If you're sanctioned one time, you'll be chilled from doing this again.

**Prof. Klonoff:** Well, these are all sanctions. Every example I gave was a sanction situation, and it hasn't worked. That's my point—that the courts have repeatedly sanctioned these serial objections, and it hasn't worked. What the class lawyers have really been focusing on is trying to deter the serial objectors, so that they won't hold up the appellate process at all. I wish that ordinary sanctions had done the job, but, unfortunately, if you get sanctioned in Illinois, you can just file a frivolous objection in Indiana; and that's what was happening.

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## Notes

<sup>1</sup> In re Cardinal Health, Inc. Sec. Litig., 550 F. Supp. 2d 751, 754 (S.D. Ohio, 2008).

<sup>2</sup> Edelson PC v. [S.O.] Law Firm PC, 2018 WL 3496085, \*2 (N.D. Ill. 2018) [hereinafter "Edelson"].

<sup>3</sup> Denning v. Clearwire Corp., Minute Entry, U.S. Dist. Ct., W.D. Wash. 2013.

<sup>4</sup> Garber v. Office of Commissioner of Baseball, 2017 WL 752183, \*4, \*6 (S.D.N.Y. 2017).

<sup>5</sup> In re Polyurethane Foam Antitrust Litigation, 165 F. Supp. 3d 664, 670-71 (N.D. Ohio, 2015).

<sup>6</sup> Clark v. Gannett, 122 N.E.3d 376, 382 (Ill. App. 2018).

<sup>7</sup> *Id.* at 392.

<sup>8</sup> Edelson at \*2.

<sup>9</sup> In re National Football League Players Concussion Injury Litigation, 821 F.3d 410 (3<sup>rd</sup> Cir. 2016).

<sup>10</sup> John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*

<sup>39</sup> Fla. St. U. L. Rev. 865 (2012).

<sup>11</sup> Federal Rule of Civil Procedure 23(e)(5)

...

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or  
(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(For the entire Rule 23, see <https://www.federalrulesofcivilprocedure.org/frcp/title-iv-parties/rule-23-class-actions/>.)

<sup>12</sup> Federal Rule of Civil Procedure 62.1, *Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal,*

(a) *Relief Pending Appeal.* If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;  
(2) deny the motion; or  
(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) *Notice to the Court of Appeals.* The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) *Remand.* The district court may decide the motion if the court of appeals remands for that purpose.

<sup>13</sup> In re Chrysler-Dodge-Jeep Ecodiesel® Marketing, Sales Practices, and Products Liability Litigation, 2019 WL 2554232 (N.D. Cal. May 3, 2019).

# Afternoon Paper, Oral Remarks, and Comments

## Rethinking Multijurisdictional Coordination of Complex Mass Torts

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“Coordination between state and federal judges with parallel cases is hardly a new topic. Indeed, given the thoroughness of the treatment the subject has received . . . one might reasonably ask what new statements could possibly be made on the subject . . .”

—Federal Judicial Center (2011)<sup>2</sup>

### Introduction

We are in the midst of a transformative shift in civil litigation, as the number of factually related cases consolidated by the Joint Panel of Multidistrict Litigation (“JPML”) for transfer to a single, federal judge pursuant to the multidistrict litigation statute (“MDL”) has rapidly risen in recent years.<sup>3</sup> In 1999, MDLs represented only 11% of the federal civil docket; today, these consolidated cases comprise nearly 40% of the federal civil caseload.<sup>4</sup> Not only has the overall number of MDLs risen, but so too have the claims themselves become more concentrated in specific areas—particularly pharmaceutical and other products liability cases, environmental exposure actions, and mass accident and disaster cases.<sup>5</sup> Of the MDLs pending in January 2019, nearly 90% were mass tort cases.<sup>6</sup>

But consolidation of mass tort claims before a single federal district judge<sup>7</sup> is only part of this dramatic shift—because, for each MDL, there are hundreds and sometimes thousands of factually related cases filed in the state courts that are not subject to consolidation.<sup>8</sup> This “[m]ultiplication of cases . . . across the federal and state systems” has become a staple of complex litigation in the modern era.<sup>9</sup> As a result, a typical mass tort case “often has several courts with power over various plaintiffs,” creating risks of duplication, non-uniformity, and strategic manipulation by the parties.<sup>10</sup>

For each MDL, there are hundreds and sometimes thousands of factually related cases filed in the state courts that are not subject to consolidation.

Because there are no formal rules or procedures prescribing the means of coordinating related litigation between state and federal courts,<sup>11</sup> judges have looked beyond rules and doctrine for creative and innovative ways of managing these complex cases.<sup>12</sup> One important source is the vast secondary literature on federal-state coordination. To be sure, the question of how to best facilitate multijurisdictional coordination has been the subject of intense study by numerous scholars,<sup>13</sup> researchers at the Federal Judicial Center and the National Center for State Courts,<sup>14</sup> and judges involved in these complex matters.<sup>15</sup> Yet, the conclusion reached by these knowledgeable observers seems fairly obvious: judges and lawyers in both court systems should communicate and coordinate as

much and as early as possible. These sources also suggest methods for doing so—but again, all fairly obvious: “making arrangements between counsel, communications between judges, joint pretrial conferences and hearings at which all involved judges participate, and parallel orders.”<sup>16</sup> Part I of this essay describes the conventional advice given to state and federal judges faced with the behemoth task of coordinating complex mass torts.

But it should give us pause that the coordination of complex mass tort litigation across federal and state court systems relies upon such vagaries as “making arrangements” or “encouraging communication.” Or that efficient management of claims involving “tens of thousands of plaintiffs with billions of dollars in liability claims” is dependent on the ability or willingness of judges and lawyers across disparate legal systems to work together.<sup>17</sup> Too much rests on too little, and without clear rules governing these interactions, much can go wrong.

Indeed, in recent years, much has gone wrong and multijurisdictional coordination has not worked very smoothly or efficiently. Some argue that jurisdictional conflicts are sowed when state court lawyers take strategic

In recent years, much has gone wrong and multijurisdictional coordination has not worked very smoothly or efficiently.

advantage of coordination efforts by trying individual cases to judgment before the federal MDL can even get underway.<sup>18</sup> In this way, local lawyers avoid the yawning vortex of federal consolidation and retain control over the settlement values of their portfolio of cases. Others argue that the coordination problems lie with lawyers who handle numerous class actions, who are frequently appointed to

lead counsel positions, in blockbuster, mass tort MDLs and who have a major hand in designing settlements. There are a host of procedural and ethical hurdles to effective coordination of mass tort claims across state and federal courts. Part II outlines these problems in an era of rising interjurisdictional litigation complexity.

So, despite the Federal Judicial Center’s observation reprinted in the epigraph of this essay, I think there are “new statements . . . [to] be made on the subject” of coordination. Specifically, building on my prior work in this area,<sup>19</sup> I propose a different approach to multijurisdictional cooperation in the service of complex mass tort litigation—one that makes greater use of “issue” classes as provided in both Federal Rule of Civil Procedure Rule 23(c)(4) and numerous state procedural rules.<sup>20</sup> Issue classes provide a mechanism for collectively resolving core elements of the tort that underlies all claims within an MDL and parallel state litigation, and in this way, can maximize efficiency and avoid jurisdictional conflicts.

On the proposal outlined here, a court with mass tort cases on its docket would certify a (c)(4) class on issues common to all or most of these claims—and hold a trial solely on those issues.<sup>21</sup> The result of this trial would be a set of preclusive findings that plaintiffs, if successful, could use in subsequent litigation over individual issues, such as reliance or damages, without having to re-prove liability. This approach promotes efficiency and cooperation in at least two ways: first, issue classes provide a cost-effective means of pooling resources and amassing expertise in order to litigate the core issues of liability, which are often the most expensive, expert-driven and contentious issues in a mass tort case; and second, once adjudicated through the (c)(4) mechanism, these issues are accorded preclusive effect, enabling individual litigants to quickly resolve personal damages claims in their home court.

On the proposal outlined here, a court with mass tort cases on its docket would certify a (c)(4) class on issues common to all or most of these claims—and hold a trial solely on those issues.

Additionally, the issue class approach puts the state court judge in the driver’s seat because she can make clear to her federal counterpart that—if an issue class is *not* certified in the MDL proceeding—she will proceed to either try the related cases on her docket individually or certify an issue class pursuant to state rules. Either possibility should inspire some trepidation in the MDL court, as outcomes of prior state trials in related actions can have outsized res judicata effects on consolidated federal cases. Witness the many cases in which MDL lawyers have requested that a transferee court stay or enjoin parallel state proceedings for fear that decisional state law could upset global resolution of complex mass torts.<sup>22</sup> Accordingly, the issue class approach offers state courts a way to take charge of intercourt coordination in ways that enable complex mass torts to resolve more quickly and efficiently.<sup>23</sup> Part III provides greater detail on the issue class approach to resolving common questions.

The approach outlined here is very much a judge-created, ad-hoc, and voluntary procedure—but in this way, it differs little from the current and conventional wisdom that judges should simply “find ways” to coordinate complex litigation. The significant difference is that the issue class approach gives meaningful and durable preclusive effect to core issue determinations, which will save downstream courts and parties the time and money of reprobining these essential elements. Still, much lies in the particulars of the issue class model—and this essay hopes to spark discussion and deliberation among judges and lawyers involved in complex mass torts on precisely those details.

## I. Conventional Approaches to Multijurisdictional Coordination

Federal and state judges faced with thousands of mass tort filings understand well that these cases “present an awesome managerial task.”<sup>24</sup> Judges also generally recognize that, by working together, “they can jointly develop strategies to manage the litigation and [] reinforce each other’s strategies.”<sup>25</sup> Those strategies have typically involved active communication between judges and lawyers in both court systems, shared case management, and joint proceedings.

### A. Communication

The most common federal-state coordination approach has been, quite simply, for transferee and state judges to talk with one another about the parallel litigations on their dockets. The Manual for Complex Litigation, for example, recommends that MDL judges “communicate personally with state court judges who have a significant number of cases in order to discuss mutual concerns and suggestions.”<sup>26</sup> The “Pocket Guide for Transferee Judges” urges federal judges to “reach out to your state court colleagues from the outset and forge constructive working relationships with them.”<sup>27</sup> The “Resource Book for State Trial Court Judges” also advises judges to “contact the [transferee] judge to advise him or her that you are handling some of these cases and to learn what coordination is underway and possible.”<sup>28</sup> Other sources similarly stress the importance of early and ongoing judicial communication,<sup>29</sup> and more recent guidance promotes technology—in particular, setting up an MDL website to centralize and make accessible case management orders and other rulings<sup>30</sup>—as a means of facilitating these interactions.<sup>31</sup>

The most common federal-state coordination approach has been, quite simply, for transferee and state judges to talk with one another about the parallel litigations on their dockets.

It appears the majority of MDL judges have followed this conventional advice: the Federal Judicial Center’s 2011 survey of 204 transferee judges reported that 60% communicated “directly or indirectly with state court counterparts,” and in products liability and mass tort MDLs, the number rose to 80%.<sup>32</sup> In these early communications, surveyed judges reported that they raised the issues most likely to generate conflict and duplication, such as “scheduling dispositive motions,” “establishing a common document depository,” creating “a website to communicate orders,” and “scheduling trial dates.”<sup>33</sup> A similar survey of state judges conducted by the National Center for State Courts reported that 52% of respondents had communicated with their federal counterparts on these matters.<sup>34</sup>

The centrality of active communication as the first coordinative step can also be discerned from the transfer determinations made by the JPML.

consolidated cases—such as judicial workload, expertise in managing MDLs, and the first-filed forum—it gives particular weight to the number of cases pending in a particular district.<sup>35</sup> But, in addition, the Panel has also tended to transfer cases to the district located *in the state* where the greatest number of parallel cases have been filed—particularly in cases where it believes that extensive and convenient state-federal coordination may prove critical.<sup>36</sup>

In addition to opening lines of communication between judges, secondary sources also stress the importance of information-sharing efforts by lawyers in both court systems.<sup>37</sup> To facilitate these interactions, transferee judges are urged to appoint state liaison counsel (or a state liaison committee) to serve as a conduit of information between the MDL proceeding and related state cases.<sup>38</sup> In doing so, judges are also urged to “consider appointing attorneys from states with significant numbers of cases . . . to facilitate communication with the state judges and MDL counsel.”<sup>39</sup>

Guidance sources uniformly instruct liaison counsel to immediately “identify all similar cases in other courts, their stage of pretrial preparation, and the assigned judges.”<sup>40</sup> Nearly 30% of surveyed MDL judges report making liaison appointments,<sup>41</sup> and some state judges have also employed liaison counsel to aid in communication.<sup>42</sup> In more complex MDLs, judges have also “created additional committees for specific purposes, such as conducting settlement negotiations,” and, in some cases, have appointed to these committees “attorneys with state court cases who had not previously been involved in the MDL.”<sup>43</sup>

Early and active communication between judges and lawyers, urged by every MDL guidance manual and resource, is clearly the first step in coordinating multijurisdictional mass tort cases. Yet, we know little about what is accomplished in those early discussions—i.e., how often do they result in coordinated case management orders, discovery-sharing arrangements, joint scheduling agreements, etc.? When judges cannot agree on a coordination plan, how do they proceed? Merely picking up the phone or sending an email doesn’t ensure that effective state-federal coordination of mass tort claims will ensue. The real work of managing these sprawling litigations is discussed in greater detail below.

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## B. Shared Case Management

Coordinating expert testimony, arranging joint depositions and common document production, making arrangements for sharing electronic discovery, and appointing a common special master to oversee the multijurisdictional discovery process result from entry of a formal case management order issued by the transferee judge, often in conjunction with her state court counterparts.<sup>44</sup> In the *In re Bextra/Celebrex Prods. Liab. Litig.*, for example, the transferee judge ordered coordinated federal-state discovery, and he and his state court counterpart appointed the same special master to oversee these procedures across both court systems.<sup>45</sup> So too in *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, where the federal and state judge entered joint orders providing for coordinated discovery in the MDL and California state court proceedings.<sup>46</sup> A similar protocol was adopted in *In re Yaz Prods. Liab. Litig.*, where the MDL judge “coordinated with state court judges in California, New Jersey, and Pennsylvania in implementing a detailed deposition protocol covering the use and admissibility of depositions.”<sup>47</sup>

In other cases, it seems apparent that federal and state judges decided that discovery should proceed on separate tracks, but nonetheless issue “coordinated rulings on discovery disputes” applicable across all cases, or provide for the use of common experts in both courts.<sup>48</sup> In the *In re PPA Prods. Liab. Litig.*, for example, the federal judge ordered that lawyers in both the MDL and state cases “cross-notice the deposition of an[y] expert . . . [who] had been designated in both proceedings.”<sup>49</sup> The order specified that this was done in the spirit of encouraging “voluntary state-federal coordination.”<sup>50</sup>

Occasionally, formal coordination appears completely absent.

Occasionally, formal coordination appears completely absent. In these cases, transferee judges may simply invite attorneys with state claims “to share in taking expert depositions,” or allow these attorneys “additional examination time on case-specific issues.”<sup>51</sup> Judges may also maintain websites populated with master pleadings, written decisions, case management orders, discovery depositories, and other resources. While different degrees of coordination may be warranted depending on the nature of the underlying claims, it is hard to imagine a complex mass tort that would not be rendered more efficient by broader agreement on core issues.

## C. Joint Proceedings

Less common coordinative efforts include joint pretrial hearings—with multiple judges physically present on the bench or participating via video-conference.<sup>52</sup> When feasible, joint proceedings “can facilitate prompt and uniform resolution” of disputes, “saving attorney, witness, and judicial time.”<sup>53</sup> In the *In re PPA* litigation, for example, the MDL judge “invited state court judges with PPA cases to preside over the hearings alongside the MDL judge,” and videotaped the proceedings “to allow state judges unable to participate to use them.”<sup>54</sup> Ultimately, eleven judges from the seven states with the greatest number of filed PPA cases participated in numerous joint hearings held in federal court.

Joint hearings appear most useful in working through discovery-related issues and vetting expert testimony, helping parties avoid the duplicative efforts that would inevitably result if these lengthy determinations were conducted separately in each court. For example, in multijurisdictional litigation that broke out after the 1994 crash of U.S. Air Flight 427,<sup>55</sup> federal and state judges held numerous joint hearings to determine the admissibility

of a cockpit voice recorder tape.<sup>56</sup> Similarly, in *In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.*, state and federal judges conducted a “joint Daubert/Frye hearing” to assess the admissibility of expert evidence on causation and reliance.<sup>57</sup> Another example is *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.*, where MDL Judge Norton conducted a joint hearing with numerous state court judges co-presiding over issues of expert proof.<sup>58</sup> And in the *In re Diet Drugs Prod. Liab. Litig.*, MDL Judge Bechtle and a network of eleven state court judges did all of the above: held joint state/federal hearings, coordinated discovery, and hammered out a settlement that included all parties—including those represented in the state cases.<sup>59</sup>

Voluntary communication, case management and joint proceedings comprise the most common coordinative methods used by state and federal judges to organize and manage masses of parallel litigation.

Taken together, voluntary communication, case management and joint proceedings comprise the most common coordinative methods used by state and federal

judges to organize and manage masses of parallel litigation. Yet these conventional approaches have, at times, proven insufficient to the increasingly complex task of managing mass tort claims. The problems and perils of relying on these methods is discussed in the next Part.

## II. Limits on Conventional Forms of Multijurisdictional Coordination

Coordination of sprawling mass tort cases across state and federal systems has remained difficult and uncertain for a number of reasons. This lack of predictability has created numerous problems for the judges who helm these cases, the lawyers who litigate them, and the parties whose rights and obligations are at stake. And given that MDLs currently account for nearly 40% of the entire federal civil caseload—along with thousands or tens of thousands of related state court cases—these multijurisdictional coordination problems are significant. This Part describes various procedural, substantive and structural obstacles to intercourt coordination.

### A. Procedural and Substantive Hurdles at the State Level

Setting aside persistent concerns with the resources available to state courts, there are a host of procedural issues that make coordination more difficult and less effective than it need be. For instance, multijurisdictional coordination is easily thwarted where states lack procedures for consolidating related cases within their own borders—a problem that exponentially increases the difficulty of identifying and coordinating across a multitude of individual state cases in different counties. Indeed, while some states have adopted intrastate consolidation procedures that closely resemble the federal MDL statute<sup>60</sup>—California’s Judicial Counsel Coordination Proceeding and Texas’s Multi-District Litigation Panel are two examples<sup>61</sup>—only New York and New Jersey instruct their courts on how to coordinate with related federal litigation.<sup>62</sup> And the majority of states have no formal rules providing for intrastate coordination.

Setting aside persistent concerns with the resources available to state courts, there are a host of procedural issues that make coordination more difficult and less effective than it need be.

State court judges and administrators are increasingly aware that factually related claims scattered across multiple counties raise both legal and resource-related concerns, and some have tried to “establish[] coordinated litigation proceedings notwithstanding the absence of any coordinating statute.”<sup>63</sup> The Oklahoma Supreme Court, for example, has interpreted the state Constitution to “provide[] judicial authority to consolidate cases for pre-trial matters including discovery.”<sup>64</sup> Kentucky has similarly announced the “inherent authority” of its state courts to manage their dockets as necessary, including by consolidating like cases.<sup>65</sup> Other states rely on informal practices among judges to coordinate factually related claims. But in the absence of predictable intrastate coordination of related cases, it may be too difficult for transferee judges or liaison counsel to communicate effectively with all their state counterparts.<sup>66</sup>

Another potential wrench in the works is state judicial assignment practices.<sup>67</sup> While the majority of states assign cases to a single judge for all purposes, in some states, or in some counties, different judges may be assigned for pretrial and trial purposes. For example, some counties in New York state provide for “the assignment of one judge until trial and a different judge for the trial itself.”<sup>68</sup> This also occurs in small counties in California, where “pretrial matters must often be handled by judges filling in for absent judges,”<sup>69</sup> as well as in Michigan and West Virginia.<sup>70</sup> This practice of rotating judicial assignments can doom efforts at establishing early communication between transferee and state judges with parallel claims.

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Other coordination problems arise when state and federal procedural rules diverge. For example, “[u]nder the federal rules, exchanges of expert reports and expert depositions are routine, while in state court such discovery may not be permitted.”<sup>71</sup> In New York, where “expert disclosure . . . is quite limited, and generally does not include depositions,” this procedural divergence can disrupt efforts to coordinate across systems. Differences in substantive law can also create roadblocks: for example, a number of state courts require expert proof to meet the *Frye* standard, while federal courts follow *Daubert*.<sup>72</sup> Efforts to coordinate expert testimony—which is often the most expensive and time-consuming aspect of a mass tort case—can be intractable in the face of these substantive deviations.<sup>73</sup>

## B. Ethical Constraints

Where state and federal judges manage to communicate about parallel litigation, some worry that these constitute unethical, ex parte communications about active cases.<sup>74</sup> The ethical concern, put simply, is that “when judges work together and influence one another, or mold their rules to conform to those of another system, or decide matters jointly, litigants may lose the advantages of their chosen forum.”<sup>75</sup> Indeed, some observers have opined that even the appearance of “state and federal judges join[ing] forces in deciding issues of substantive law” violates federal and state judicial canons that expressly demand independent and impartial decision-making.<sup>76</sup>

Given these ethical pitfalls, it is unsurprising that nearly forty percent of federal judges surveyed by the FJC “expressed reservations about the propriety of contacting their state counterparts about pending matters.”<sup>77</sup> In a recent case, plaintiffs’ lawyers in the *In re Actos Prods. Liab. Litig.* accused the federal transferee judge of “improper and unethical conduct . . . in . . . reaching out to explore coordination with state courts.”<sup>78</sup> Specifically, counsel allege that MDL Judge Doherty engaged in “impermissible interference” with particular state court proceedings by contacting judges with Actos cases on their dockets to discuss coordinating these

proceedings; and further, that state court judges had “engaged in misconduct by abdicating [their] role as sovereign judges.”<sup>79</sup> In response to these allegations, Judge Doherty wrote a detailed (and, at times, highly defensive) 20-page opinion, attaching all correspondence between the MDL court and various state courts with parallel filings,<sup>80</sup> and citing numerous cases in which similar correspondence has been deemed perfectly acceptable.<sup>81</sup> Predictably, the opinion concludes that allegations of improper judicial conduct were “completely specious”:

Coordination, cooperation, discussion and interaction between and among the federal courts and the state courts is not a novel thing; it is not improper; rather, it is advised, encouraged and welcomed by both the federal and state courts. [...] It is wholly without question this court does not have jurisdiction over state court cases, nor has it, nor will it, attempt to in any way, exercise improper jurisdiction over state courts and the cases within those courts. However, as the federal judge tasked with managing this behemoth litigation, history, guidance, comity and necessity have proven it is desirable for fairness to all parties and in promotion of equitable and efficient resolution, that this court reach out to the other judges who, also, have cases in their courts, in order to discuss possible coordination, mutual concerns, and suggestions, and to offer exchange of relevant orders and information.<sup>82</sup>

While the allegations of judicial misconduct in the *Actos* litigation appeared weak on their face—given the transferee judge had not issued any injunctions nor halted state court proceedings—concerns over the propriety of intercourt coordination efforts may explain why federal judges appear reluctant to make contact with state court colleagues.

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State court judges also express concerns over off-the-record discussions with their federal colleagues about related cases—particularly substantive interactions about admissibility of evidence or the qualifications of an expert.<sup>83</sup> And these judges may be

right to worry, as state judicial codes of ethics vary widely. Some codes allow judges to communicate about active cases, so long as they make “reasonable efforts to avoid information that is not part of the record,” and do not “abrogate the responsibility personally to decide the matter.”<sup>84</sup> Some require judges to give notice to the parties of any off-the-record communication, which can result in litigation over the propriety of the judicial contact.<sup>85</sup> And while the National Center for State Courts (“NCSC”) has worked to dispel these concerns and reassure judges that there are few ethical barriers to judicial cooperation in the management of parallel state-federal cases, these views have proven difficult to change.<sup>86</sup>

## C. Common Benefit Funds and Global Settlements

Intercourt coordination is also critical to making sure that, upon successful resolution or settlement of the case, plaintiffs’ lawyers are paid reasonable fees for common work done on behalf of all claimants—a task made more

complicated in multijurisdictional cases with overlapping proceedings. MDL judges are encouraged to quickly appoint lead and liaison counsel to manage the behemoth litigation, and to then “set up a fund to which designated parties should contribute” to compensate these lawyers for general case work.<sup>87</sup> Typically, courts require parties to pay a fixed percentage of the settlement proceeds into the common fund.<sup>88</sup> And to ensure fee payment and prevent free-riding, some transferee judges have also required that lawyers sign fee transfer agreements at the start of litigation, legally binding them to set aside money from their share of proceeds to pay common benefit fees.<sup>89</sup>

These practices have been used in numerous MDLs to compensate lead and liaison counsel who rendered legal services beneficial to all MDL plaintiffs and the case as a whole.<sup>90</sup> But they have not been without controversy, as numerous critics object to both the creation of a common fund and the forced fee transfer imposed on non-lead lawyers.<sup>91</sup> Especially troubling are MDLs where lead lawyers have negotiated for “provisions in[] global settlement agreements increasing the set-asides,” and requiring nonlead “lawyers and their clients to waive objections to these provisions as a condition for enrolling in the settlements.”<sup>92</sup> Lead counsel in these cases, critics argue, have “used their control of settlement negotiations to make more money available for themselves.”<sup>93</sup>

And if the general use of common benefit funds and fee-transfer agreements *within* the MDL has been widely criticized, things get *really* messy when parallel state cases are roped into these fee-allocation disputes. These issues generally arise when the parties in the MDL negotiate a “global settlement” requiring lawyers in parallel state cases to pay into the common fund “as a condition for enrolling their clients in a global settlement.”<sup>94</sup> And despite the fact that federal MDL courts lack formal jurisdiction over related state court actions,<sup>95</sup> transferee judges have sometimes asserted authority to “tax” lawyers in parallel state cases. The Master Settlement Agreement

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in *In re Vioxx*, for example, provided that attorneys would only be eligible to share in the distribution of common benefit fees once their clients had agreed to the settlement terms and signed a release.<sup>96</sup> Another example, described by Professor Burch, is *In re Genetically Modified Rice Litig.*, where the transferee judge initially recognized “that she lacked jurisdiction to order state-court litigants to withhold and contribute 11% of plaintiffs’ gross settlement recovery to a common fund that would compensate and reimburse lead lawyers.”<sup>97</sup> But the judge nonetheless approved a settlement

agreement that “required all enrolling claimants (whether litigating in state or federal court) to contribute that amount to the common fund.”<sup>98</sup> These settlements raise ethical questions about the nature of consent and the duty of fair representation,<sup>99</sup> but for my purposes here, the point is simply that intercourt coordination is critical to avoiding these contestations over fees.

## D. Federalism and Comity

A tension inherent in efforts to coordinate related mass tort litigation is the “persuasion and influence by MDL judges over their state court colleagues,”<sup>100</sup> in a manner that encroaches upon the independence of state courts to resolve the legal matters of state citizens.<sup>101</sup> Of course, fundamental principles of federalism and comity direct federal courts to be respectful of their state court colleagues. The Supreme Court has instructed that when a federal

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court reaches out to a state court, it must do so with “a proper respect for state functions, recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.”<sup>102</sup>

Despite these admonitions, MDL judges intent on coordination can sometimes act imperiously. One especially contentious issue arises when state court litigation gets underway far sooner than an MDL, which can sometimes take months to get organized.<sup>103</sup> Particularly in states with favorable discovery rules, individual tort suits may go before a state court jury long before dispositive rulings are made in the slow-moving MDL—and the outcomes in those state trials can heavily influence the dynamics within the MDL.<sup>104</sup> In their efforts to slow down or even halt parallel state court proceedings that are racing ahead of their MDLs, transferee judges can seem to flout principles of federalism and comity. For example, MDL judges have simply asked that state courts “chang[e] the speed with which the cases on their docket move forward.”<sup>105</sup> Others have gone further, seeking to enjoin state court proceedings.<sup>106</sup> In *In re Worldcom Securities Litig.*, for example, Alabama state court plaintiffs requested a trial date long before the consolidated proceedings had even completed discovery.<sup>107</sup> The MDL judge in New York tried delaying the state case by issuing an injunction under the All Writs Act, preventing the Alabama judge from moving forward until the MDL had resolved, but was reversed.<sup>108</sup> Ultimately, the Alabama case “proceed[ed] ahead of the federal case,” despite the efforts of the federal judge to slow it down.<sup>109</sup>

MDL judges intent on coordination can sometimes act imperiously.

Similarly, in *In re Baycol Prods. Liab. Litig.*, the transferee judge enjoined his state court counterpart from considering a pending motion for class certification; the circuit court affirmed this application of the re-litigation exception to the Anti-Injunction Act.<sup>110</sup> But the U.S. Supreme Court, in *Bayer v. Smith*, disagreed:

“A federal court and a state court apply different law. That means they decide distinct questions. The federal court’s resolution of one issue does not preclude the state court’s determination of another. It then goes without saying that the federal court may not issue an injunction.”<sup>111</sup>

In other cases, however, similar gambits have succeeded and motions to stay state court litigation pending the outcome of an MDL have been granted.<sup>112</sup> Taken together, these scenarios signal a deep-seated discomfort with the cooperative federalism model that transferee and state judges are encouraged to follow—and imply that coordinative distrust can hamper efforts to manage the hundreds of thousands of mass tort cases that weigh down state and federal dockets.

### III. The Issue Class Solution

Ad hoc, voluntary approaches to federal-state coordination of complex mass torts are uneven and unpredictable: they can result in ethical dust-ups, federalism flashpoints, and attempts, by lawyers who handle numerous class actions, to manipulate courts. But, most critically, in an era of dwindling judicial resources, duplicative litigation

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detracts from the public good that our courts are charged with protecting. Thirty years ago, Professor Richard Freer remarked that “[c]ourts are a public resource, providing publicly financed resolution of private disputes. We pay for them, and we have a right to insist that their services not

be squandered.”<sup>113</sup> He also warned that, because “[t]he duplication of effort is a major cause of the protraction of time needed to resolve cases . . . multiplicity [of litigation] is a harm to society’s legitimate interest in judicial efficiency.”<sup>114</sup> Professor Freer’s words still resonate today, particularly in state courts. Already underfunded, some state courts have been subject to budget cuts that directly interfere with access to justice, disabling judges from “fulfill[ing] their traditional role in maintaining societal order and public safety.”<sup>115</sup> The search for procedural models that maximize efficiency in this era of austerity is essential to keeping state courts operational.

Accordingly, this essay proposes a different and more aggressive method of coordinating cases: using issue classes to achieve scale efficiencies in mass tort cases.<sup>116</sup> Issue classes accomplish this feat by resolving and according preclusive effect to core liability holdings in mass tort cases—issues such as “whether or not the defendant was negligent, or breached warranties, or intentionally concealed known risks, or sold a product that unreasonably elevates the risk of heart attack.”<sup>117</sup> No other procedural device can reliably deliver binding downstream effect to core, common issues across jurisdictional boundaries.<sup>118</sup> And once these issues have been conclusively determined, it becomes possible to organize and streamline the litigation of masses of individual related claims.<sup>119</sup>

In recent years, federal courts have begun to recognize the vast potential of issue classes to resolve knotty legal questions at the heart of complex litigation, without triggering the heightened certification standards of Rule 23(b)(3). This trend started, ironically enough, with the Supreme Court’s decision in *Comcast v. Behrend*—where a slim majority held that a Rule 23(b)(3) consumer class action could not be certified unless the plaintiffs’ damages theory was standard across all class members.<sup>120</sup> But in dissent, four Justices reasoned that district courts could easily avoid these problems by certifying a Rule 23(c)(4) class on “liability” issues only, “leaving individual damages calculations to subsequent proceedings.”<sup>121</sup> Numerous federal courts have followed the *Comcast* dissenters’ reasoning, certifying (c)(4) “liability-only” classes in a range of cases.<sup>122</sup>

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Indeed, Rule 23(c)(4) grants courts a great deal of discretion over whether to certify “particular” issues “[w]hen appropriate,” and in the mass tort arena, the benefits of doing so are clear. At the heart of every mass tort are a set of core questions that are common across all cases, and “those questions are typically answered using common evidence, such as expert testimony and the defendant’s own internal documents.”<sup>123</sup> Gathering this evidence, however, is incredibly costly to any given individual plaintiff. As courts are beginning to recognize,

certifying issue classes on these common questions, and then allowing individuals to pursue their damages claims independently without having to relitigate liability, is a fair and efficient approach to multijurisdictional coordination in complex mass torts.<sup>124</sup>

## A. Using Issue Classes to Coordinate Complex Mass Torts

The basic model I propose still relies on early-stage judicial communication—as urged by all the guidance literature on intercourt coordination—but instead of simply crossing our fingers in hopes that judges will reach out and find ways to work together, the issue class approach increases the stakes of failing to do so. Specifically,

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I propose that judges with related tort cases on their dockets reach out to one another to discuss the feasibility and value of certifying an issue class to resolve common questions. If the judges agree on this procedure, the remaining steps are clear: the judges will determine (with input from and briefing by the parties) the specific issues to be certified, and a court will then certify a (c)(4) class on those issues, and hold a trial solely on those issues. The result will be a judgment that each plaintiff—if successful—can then take into her local trial

court, entitling her to a binding declaration that certain core issues of her claim have been established as a matter of law. She is then free to focus her litigation energy on individual issues, such as reliance or damages, without having to re-litigate common questions.

However, if the judges are not in accord on the issue class approach, the state judge can either try the related cases on her docket individually, or, if she has been assigned a sufficient number of related cases, she can certify an issue class pursuant to state procedural rules and hold a trial on the common issues. Either option is likely to produce some consternation in the federal MDL proceeding, as outcomes of prior state trials in related actions may alter the dynamics within the consolidated federal cases. For example, if a state tort case goes to trial and the jury returns a defense verdict on causation grounds, this may change the defendant’s settlement posture in the MDL. Indeed, in recent years, MDL lawyers have fought aggressively to stay or enjoin parallel state proceedings for fear that decisional state law could upset global resolution of complex mass torts.<sup>125</sup> For this reason, I expect that efforts by state courts to coordinate via the issue class will be met with great solicitude. Moreover, as courts begin to understand that issue classes enable related cases on their dockets to move more quickly and efficiently to resolution, and that uniformity across the state-federal divide on these common issues will protect (rather than detract from) the legitimacy of these immense proceedings, I expect this procedure could easily become the norm for coordinating complex multijurisdictional litigation.

In addition, the issue class approach avoids many of the problems associated with current coordination efforts, as discussed above in Part II. For example, the issue class is unbothered by a lack of intrastate case coordination and is not stymied by varied judicial assignment rules. After all, once common issues are resolved, separate hearings to determine damages owed to individual class members can occur in any county of any state before any judge. Ethical concerns also diminish where the only communication between parallel courts is whether

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to certify an issue class and what issues should be resolved by a jury. And perhaps most importantly, the issue class creates powerful opportunities for state courts to spearhead coordination, rather than playing second fiddle; as such, this approach turns the federalism and comity concerns on their head. Indeed, even where the MDL court takes the lead in certifying and adjudicating the (c)(4) class, this model will not erode local control over individual cases. Rather, by reducing the costs and inefficiencies associated with duplicative litigation, and providing state courts

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some leverage vis-à-vis federal MDL proceedings, (c)(4) treatment of common questions promises to significantly advance thousands of individual cases.<sup>126</sup>

Despite these clear benefits, implementing the issue class approach will require courts to address numerous questions that have not yet been subject to judicial examination.

For example, a (c)(4) class must satisfy the certification

requirements of Rule 23(a) and one of the three prongs of Rule 23(b). But which prong of Rule 23(b) should apply—Rule 23(b)(3) or Rule 23(b)(2)? The former allows class members to opt out of the class, the latter does not.<sup>127</sup> As my co-author and I have written in prior work, our view is that issue classes should be certified under Rule 23(b)(2), which applies whenever “declaratory relief is appropriate.”<sup>128</sup> After all, the (c)(4) class is seeking a declaration: it asks the court to declare that certain facts are true, or that the defendant’s conduct violated some standard or law. On this view, there would be no right to opt out of a (c)(4) issue class, and all plaintiffs will be bound by the outcome in the issue class trial. But courts have yet to address this important question, which is bound to arise if the proposal offered here is implemented.

Another unresolved issue involves compensation of issue class counsel. As discussed above in Part II, common fund approaches to compensation of MDL lead and liaison counsel have proven controversial; query whether a similar approach to compensating counsel who successfully litigate an issue class would raise similar questions. Moreover, should lawyers who achieve a positive ruling on common issues also recover a share of the individual damages cases that rely on their work product?

Finally, there are a host of nuts-and-bolts items. For example, to ensure the issue class functions as intended, state and federal courts may wish to manage the heightened collateral estoppel effect of the (c)(4) trial. Accordingly, judges may want to work together to draft jury interrogatories that set out in detail the specific questions to be answered by the common issue jury, and to ensure that these issues are sufficiently granular and clear to streamline subsequent individual litigation.<sup>129</sup> Further, the certifying judge may wish to draft a clearly-written companion decision explaining the (c)(4) procedure to further bullet-proof the outcome from collateral attack. The specifics of these efforts require judicial thought and planning to achieve the benefits of binding declarations that the issue class offers.

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## B. Potential Objections to Issue Classes

Observers have lodged three primary objections to the use of issue classes in mass tort cases—one grounded in the Constitution, and others in legal strategy. None stand in the way of the state-federal coordination effort proposed here.

The first objection posits that, in the wake of a jury determination in a (c)(4) issue class, any subsequent individual trial to determine a plaintiff's injury could require the re-litigation of factual issues in violation of the Seventh Amendment's Reexamination Clause.<sup>130</sup> Setting aside the historical argument that the Framers never intended that the Seventh Amendment would disable trial courts from using various procedural and managerial tools to organize their dockets,<sup>131</sup> the practical reality is that two-tiered or bifurcated trials are now a widely-accepted practice. The Supreme Court recognized the value of bifurcation in its 1931 *Gasoline Prods. v. Champlin Ref. Co.* decision, where

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it held that separate trials on liability and damages are constitutionally unproblematic unless the issues are "so interwoven" that they "cannot be submitted to the jury independently . . . without confusion and uncertainty."<sup>132</sup> Since the *Gasoline Prods.* decision, numerous courts faced with complex mass torts have easily detached liability from damages, submitting these issues independently to juries with careful instructions aimed at eliminating any "confusion or uncertainty."<sup>133</sup> And all have concurred that jurors are completely "capable of following an instruction to respect—and not reexamine—an earlier holding."<sup>134</sup> Indeed, courts have even held the Reexamination Clause unaffected where the jury in a follow-on individual trial is asked to determine comparative fault as between the plaintiff and defendant—a common occurrence in mass tort cases.<sup>135</sup>

Another objection to broad use of Rule 23(c)(4) to determine core issues across related cases is the so-called "judicial blackmail" argument: that certifying an issue class to determine a defendant's liability and giving that determination binding, preclusive effect in subsequent litigations would exert an extortionate level of settlement pressure on the defendants.<sup>136</sup> On this argument, "even a low probability of a catastrophic judgment will induce a rational defendant to settle unmeritorious cases . . . and therefore courts should not certify mass-tort issues classes."<sup>137</sup> This is a quarrel that critics have long had against *damages* class actions—i.e., cases where companies agree to massive aggregative settlements rather than risk a negative outcome at a trial that would radically multiply the number of claimants to be compensated. But the "blackmail" argument makes little sense in the context of *issue* class actions, where a trial only threatens to establish liability-determinative facts with preclusive effect.<sup>138</sup> Indeed, courts in recent years have been unfazed by the blackmail objection to issues classes.<sup>139</sup>

The third, and final, objection against (c)(4) tort classes asserts that issue-class certification is unwarranted until a tort claim is "mature," in the sense that multiple juries over time have considered the facts and law, and found the defendant liable.<sup>140</sup> The "maturity" objection was an obstacle to class certification in the 1980s and 90s, but in recent years it has been met with powerful criticism that maturity is "simply too vague" to be of any use.<sup>141</sup> The clearest expression of this broadly-held sentiment is the Eleventh Circuit's decision in *Klay v. Humana*, where the court roundly rejected the maturity concept "as a legitimate consideration" under Rule 23:

There is no reason why, even with so-called 'immature torts,' district and circuit courts cannot make the necessary determinations under Rule 23 based on the pleadings and whatever evidence has been gathered through discovery. Moreover, there is no basis in Rule 23 for arbitrarily foreclosing plaintiffs from pursuing innovative theories through the vehicle of a class action lawsuit.<sup>142</sup>

The path is clear to certifying issue classes to determine core liability issues, and then using those determinations in subsequent proceedings to determine individual damages.

Taken together, none of the objections discussed above hold much merit, and nearly all have been methodically dismantled over the years by thoughtful scholars and jurists. Accordingly, the path is clear to certifying issue classes to determine core liability issues, and then using those determinations in subsequent proceedings to determine individual damages.

## Conclusion

Courts and scholars are just beginning to recognize the vast potential of issue classes to resolve common elements across a multitude of related cases in federal courts.<sup>143</sup> In recent years, a handful of courts have certified issue classes in consumer cases,<sup>144</sup> and we are beginning to see issue classes in mass tort cases as well.<sup>145</sup> This essay goes one step further, proposing that issue classes can serve as powerful expedients for coordinating multijurisdictional mass tort litigation—i.e., the hundreds and sometimes thousands of factually related cases filed in both federal and state courts. As Professor Burch has noted, “[b]ecause issue classes preclude subsequent cases from relitigating the same issues, they also have the potential to bridge jurisdictional boundaries.”<sup>146</sup> Indeed, by adjudicating common conduct issues collectively, an issue class allows courts to effectively work together to conserve resources by generating binding resolutions and applying preclusion principles in subsequent litigation. This approach is sorely needed in this era of rising interjurisdictional litigation complexity and limited judicial resources.

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## Notes

<sup>1</sup> Paul R. Verkuil Research Chair and Professor of Law, Cardozo Law School.

<sup>2</sup> Emery G. Lee, Federal Judicial Center Survey of Federal Transferee Judges in MDL Proceedings Regarding Coordination with Parallel State Proceedings Report to the Judicial Panel on Multidistrict Litigation and the Judicial Conference Committee on Federal-State Jurisdiction (2011) [hereinafter, Lee, *Survey of MDL Judges*].

<sup>3</sup> 42 U.S.C. §1407 (providing for the transfer of civil actions that are pending in different districts to “a single district for coordinated or consolidated pretrial proceedings” if the cases involve one or more common questions of fact). See also Amanda Bronstad, *Products Liability Cases Driving Growth in MDLs*, LAW.COM, Oct. 4, 2018 (reporting that the number of claims consolidated through the federal multidistrict litigation statute more than tripled between 1992 and 2017).

<sup>4</sup> MDL STATISTICS REPORT, Jan. 15, 2019, available at [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Type-January-15-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Type-January-15-2019.pdf).

<sup>5</sup> MDL STANDARDS & BEST PRACTICES, DUKE LAW CENTER FOR JUDICIAL STUDIES (2014), available at [https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/mdl2015/P4-B1-Chapter\\_4.pdf](https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/mdl2015/P4-B1-Chapter_4.pdf) at xi [hereinafter, DUKE MDL STANDARDS].

<sup>6</sup> *Id.*

<sup>7</sup> Also known as a “transferee” judge.

<sup>8</sup> See JAY TIDMARSH & ROGER H. TRANSRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 41 (2002) (“At present, the transfer power is available only at the federal level, not at the state . . . level.”); DAVID F. HERR, ANN. MANUAL COMPLEX LIT. § 20.32 (4th ed.) (“The inability to coordinate federal cases and state cases in multiple states is recognized as a singular weakness in the [JPML’s] authority.”).

<sup>9</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20 (2004) [hereinafter, MANUAL]. Parallel state-federal litigation is more prevalent in mass tort personal injury cases, which are generally not suitable for class certification either because individual issues of causation and damages predominate and/or state law may vary widely.

<sup>10</sup> Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L. J. 1339, 1347 (2014).

<sup>11</sup> See, e.g., Dunlavy v. Takeda, 2012 WL 3715456 (W.D. La. 2012) (“Because there is no comprehensive statutory scheme defining the handling of a mass tort or MDL . . . judges often rely on . . . creative and innovative efforts in managing cases”).

<sup>12</sup> See, e.g., MANUAL, *supra* note 9 at §20.36 (“State and federal judges, faced with the lack of a comprehensive statutory scheme, have undertaken innovative efforts to coordinate parallel or related litigation so as to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation.”).

<sup>13</sup> See, e.g., William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1700-31 (1992) (discussing early federal-state coordination efforts); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

<sup>14</sup> See, e.g., George E Mize & James Fletcher, *Judicial Ethical Considerations When Managing Multi-District Litigation*, National Center for State Courts (2012), available at <https://www.ncsc.org/Services-and-Experts/-/media/Files/PDF/Services%20and%20Experts/Government%20Relations/Judicial-Ethics-Comparative-Analyses-1.ashx>.

<sup>15</sup> See, e.g., Schwarzer, *supra* note 13 (case studies of complex MDLs by member of the JPML working in conjunction with FJC); Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1569, 1571 (1995) (discussing state judges taking primary responsibility for portions of common discovery and other aspects of the silicone gel breast implant MDL process); Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 TEX. L. REV. 1573, 1573 (1995).

<sup>16</sup> Barbara J. Rothstein & Catherine R. Borden, Fed. Judicial Ctr. & Judicial Panel on Multidistrict Litigation, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* (2011) [hereinafter, Rothstein & Borden, *Pocket Guide*], available at [http://www.jpml.uscourts.gov/managing\\_MDL\\_PL\\_Pocket\\_Guide.pdf](http://www.jpml.uscourts.gov/managing_MDL_PL_Pocket_Guide.pdf).

<sup>17</sup> Geoffrey Miller & Charles Silver, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

<sup>18</sup> Rothstein & Borden, *Pocket Guide*, *supra* note 16 at 24 (warning judges to “[w]atch out for strategic maneuvering by both parties,” but to be especially wary of that “plaintiffs [] seek[ing] early trial dates in jurisdictions with favorable discovery rules”). See also Lee, *supra* note 2, at 2 (reporting that federal judges surveyed suspect that parties may try to use state proceedings to strategic advantage).

<sup>19</sup> Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs* (forthcoming in U. GA. L. REV. 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3348129](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348129).

<sup>20</sup> F.R.C.P. RULE 23(c)(4) (“when appropriate, an action may be brought or maintained as a class action with respect to particular issues”). The vast majority of states have adopted procedural rules providing for class actions, including issue classes. Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes*, 35 W. ST. U. L. REV. 147, 148 (2007) (observing that most states’ procedural rules track FRCP 23, and other states (such as California) explicitly draw on “Rule 23 case law even when state language does not closely parallel the federal text”).

<sup>21</sup> While an issue class may be certified in either the federal or state court for the coordination procedure proposed here to be effective, for ease of reference, this essay assumes that the issue class will be certified pursuant to Federal Rules of Civil Procedure 23(c)(4). See generally *infra* Part III.

<sup>22</sup> See, e.g., In re GM Pickup Truck Fuel Tank Prods. Liab. Litig., No. MDL 961, 1996 WL 683785 (E.D. Pa., Nov. 25, 1996) (observing that exceptions to the Anti-Injunction Act been developed in MDL cases where “pending state action threatens to frustrate the federal court’s ability to finalize and craft a settlement, or jeopardizes an existing provisional settlement”); In re Diet Drugs Products Liability Litigation, 282 F.3d 220 (3rd Cir. 2002) (affirming issuance of an injunction by the federal trial court against the commencement of parallel state court actions); In re Vioxx Prods. Liab. Litig., 869 F. Supp. 2d 719 (E.D. La. 2012) (finding that, upon the conclusion of MDL or complex class litigation, the “settlement-in-progress” demands that the court exercise exclusive jurisdiction); In re MI Windows and Doors, Inc., Prod. Liab. Litig., 860 F.3d 218 (4th Cir. 2017) (Anti-Injunction Act does not prohibit a federal court from enjoining state court litigation).

<sup>23</sup> In an important article, Professor Burch recognized the capacity of the issue class to streamline aggregate litigation. Elizabeth Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1857 (2015) (observing that “issue classes are now experiencing a renaissance”).

<sup>24</sup> Schwarzer, *supra* note 13, at 1706. See also Vincent v. Hughes Air W., Inc., 557 F.2d 759, 773-75 (9th Cir. 1977) (“With this advent of complex multiparty litigation have come serious administrative problems, and the federal courts have found it necessary to develop innovative procedures to meet the problems.”).

<sup>25</sup> *Id.*

<sup>26</sup> MANUAL, *supra* note 9, at §20.312. See also In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75 (D. Mass. 2005).

<sup>27</sup> Rothstein & Borden, *supra* note 16.

<sup>28</sup> MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES, § 3.4 at 30 (1995) [hereinafter, RESOURCE BOOK FOR STATE TRIAL COURT JUDGES]; see also *id.* at 31 (advising state judges that “[i]f the federal cases already have been assigned to a coordinating judge, whether or not he or she is in your jurisdiction, you should contact the judge to advise him or her that you are handling some of these cases and to learn what coordination is underway and possible”)

<sup>29</sup> DUKE MDL STANDARDS, *supra* note 5, at 93 (“If state court actions are pending in many districts or states, communication among judges is a concrete way to demonstrate the reality of federal-state coordination and inter-judicial collegiality.”); *id.* (observing that “some transferee judges have set up periodic teleconferences in which all the parallel court judges participate”); Schwarzer, *supra* note 13, at 1734 (“As a general rule, contact at the earliest possible time is desirable,” keeping in mind that “the most extensive cooperation has been achieved primarily during discovery and other early stages of litigation”).

<sup>30</sup> Rothstein & Borden, *Pocket Guide*, *supra* note 16 (urging transferee judges “to establish an MDL-specific website so that your orders and rulings are readily available”).

<sup>31</sup> *Id.* (observing that “most MDL judges have found that having a website updated with new orders within hours is a helpful way to communicate with state judges and state parties”).

<sup>32</sup> Lee, *Survey of MDL Judges*, *supra* note 2.

<sup>33</sup> *Id.*

<sup>34</sup> Catherine R. Borden & Emery G. Lee III, Beyond Transfer: Coordination of Complex Litigation In State and Federal Courts in the Twenty-First Century, 31 Rev. Litig. 997, 1016 (2012) (citing Nat'l Ctr. for State Courts, MDL Survey (state) (Sept. 2, 2011)).

<sup>35</sup> See, e.g., John G. Heyburn II, *The Problem of Multidistrict Litigation: A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2228 & 2238 (2008).

<sup>36</sup> See, e.g., In re Century 21-Re/Max Real Estate Adver. Claims Litig., No. 1008, 1994 WL 171221 (J.P.M.L. 1994); In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 128 F.R.D. 131 (J.P.M.L. 1989). See also David F. Herr, Ann. Manual Complex Lit. § 20.32 (4th ed.) (“If state court litigation is concentrated in a single state, the opportunity to coordinate state and federal proceedings should be a powerful force favoring that forum as a transferee district.”).

<sup>37</sup> The Manual recommends that courts “consider the feasibility of coordination among counsel in the various cases. Consultation with other judges may bring about the designation of common committees or of counsel and joint or parallel orders governing their function and compensation.” MANUAL, *supra* note 9, at §10.255.

<sup>38</sup> *Id.* (suggesting that transferee judges “designat[e] a liaison attorney . . . to communicate” across cases and “exchange pretrial orders and proposed schedules that help avoid potential conflicts”); *see also* DUKE MDL STANDARDS, *supra* note 5, at 95 (observing that “transferee judges have found that the appointment of appointed liaison counsel is essential in most MDLs” and that “state court judges may also decide to appoint liaisons . . . who have cases before the state court and are actively involved in the federal MDL as well”); Rothstein & Borden, *Pocket Guide*, *supra* note 16 (“If you appoint a state liaison committee as part of the attorney organizational structure, seek state judges’ input on its membership. This early opportunity to work with state judges can set a tone of cooperation for the duration of the litigation.”).

<sup>39</sup> Rothstein & Borden, *Pocket Guide*, *supra* note 16.

<sup>40</sup> *Id.*; *see also* Responsibilities of Plaintiffs’ State Liaison Committee (2012), available at <https://multijurisdictionlitigation.files.wordpress.com/2012/11/responsibilities-of-plaintiffs-state-liaison.pdf>.

<sup>41</sup> *See, e.g.*, In re Avandia Mktg., Sales, Practices & Prods. Liab. Litig., MDL No. 07-1871, Pretrial Order No. 59 (E.D. Pa. May 21, 2009) (appointing state liaison counsel), available at <http://www.paed.uscourts.gov/documents/MDL/MDL1871/PTO59.pdf>; In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708 (DWF/AJB), 2008 WL 5382338 at \*28 (D. Minn. 2008), vacated in part on other grounds, 2010 WL 145278 (D. Minn. 2010) (describing work of state liaison counsel).

<sup>42</sup> *See, e.g.*, In re N.Y. ReNu with MoistureLoc Prod. Liab. Litig., No. 07/766,000, CMO No. 2, at 8-9 (N.Y. Sup. Ct. 2007), available at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2007MAR/3007660002007801SCIV.pdf](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2007MAR/3007660002007801SCIV.pdf).

<sup>43</sup> Miller & Silver, *supra* note 17, at 118.

<sup>44</sup> *See, e.g.*, Solis v. Lincoln Elec. Co., No. 1:04-CV-17363, 2006 WL 266530, at \*1 (N.D. Ohio Feb. 1, 2006) (“After substantial discussion with the parties, the Court entered an initial Case Management Order . . . which addressed issues such as attorney organization, pleading and filing issues, discovery, and so on.”); *see also* Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 625–27 (2006) (discussing strategies MDL courts use to coordinate and manage discovery).

<sup>45</sup> Both the state and federal court appointed an ex-judge, Fern Smith, to serve as Special Master. *See* In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 1699 (N.D. Ca. 2006); In re N.Y. Bextra & Celebrex Prod. Liab. Litig., No. 05-560001, CMO No. 5 (N.Y. Sup. Ct. Apr. 21, 2006), available at <https://www.nycourts.gov/courts/1jd/supctmanh/Mass%20Tort%20PDFs/Bextra%20CMO%205.pdf>; *see also id.*, n.32 (reporting that in the Yaz MDL, Judge Herndon “coordinated with state-court judges in California, New Jersey and Pennsylvania in implementing a detailed deposition protocol covering the use and admissibility of depositions” (internal citations omitted)).

<sup>46</sup> In re: Phenylpropanolamine (PPA) Prods. Liab. Litig., MDL No. 1407, C02-423R, 2002 WL 34418423 (W.D. Wash. Nov. 27, 2002).

<sup>47</sup> Rothstein & Borden, *Pocket Guide*, *supra* note 16, at 25.

<sup>48</sup> *Id.* (these rulings might, for example, resolve “the assertion of privilege” or concern “the preservation of evidence or the examination of evidence by experts”).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (*citing* Case Management Order #12 Regarding Expert Deposition Discovery).

<sup>51</sup> *Id.*

<sup>52</sup> *See* Lee, *Survey of MDL Judges*, *supra* note 2, at 2 (reporting that, of the 53 federal MDL transferee judges who had communicated with the judges presiding over parallel state proceedings, only 13% reported holding joint hearings”).

<sup>53</sup> Jane Roth, *Coordination of Litigation in State and Federal Courts*, 2 BUS. & COM. LITIG. FED. CTS. § 15:28 (4th ed. 2018).

<sup>54</sup> Rothstein & Borden, *Pocket Guide*, *supra* note 16.

<sup>55</sup> In re Air Crash Near Pittsburgh on Sept. 8, 1994, MDL No. 1040 (W.D. Pa. 1994). Numerous wrongful death actions were also filed in state court. *See, e.g.*, McCoy v. USAir, Inc., No. 94L11726 (Ill. Cook Cnty. Dec. 23, 1997).

<sup>56</sup> *See* Laura E. Ellsworth et al., *Federal and State Court Coordination*, 2 BUS. & COM. LITIG. FED. CTS. § 14:40 (4th ed. 2018); *see also* In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig., 816 F. Supp. 2d 442 (W.D. Ky. 2009) (joint state-federal proceedings to determine scope of expert evidence).

<sup>57</sup> *See* In re Neurontin Mktg., Sales Practices, & Prods. Liab. Litig., 612 F. Supp. 2d 116, 124 (D. Mass. 2009) (assessing a *Daubert* challenge to expert testimony on general causation); In re Neurontin Prod. Liab. Litig., 24 Misc. 3d 1215 (2009) (joint *Daubert-Frye* hearing for 288 cases in state litigation and 244 cases in a federal products liability MDL). For a discussion of coordination issues that arise when jurisdictions have adopted different standards for admissibility of evidence, *see infra* text accompanying notes 71-73.

<sup>58</sup> *Id.*

<sup>59</sup> In re Diet Drugs, No. 1203, 1999 WL 124414, at \*1 (E.D. Pa. Feb. 10, 1999). *See* Elizabeth Cabraser, *The Diet Drugs Litigation: 1997-2002*, 1 Litigating Tort Cases § 9:63 (describing the “thousands of fen-phen suits filed in state courts . . . notably in Pennsylvania, New York, New Jersey, and California,” which resulted in “a network of coordinated proceedings” taking place “concurrently in the federal and state courts, [t]hrough formal sharing agreements” and joint efforts).

<sup>60</sup> At least 15 states have adopted rules providing for some form of consolidation. *See* COLO. R. CIV. P. 42.1(g); CONN. GEN. STAT. § 51-347b(a); ILL. SUP. CT. R. 384(a); MD. R. 2-327(d)(1); MASS. TRIAL CT. R. XII; N.H. SUPER. CT. R. 113; N.J. SUPER. TAX SURROGATE CT. CIV. R. 4:38-1; N.Y. C.P.L.R. §202.69; OR. R. CIV. P. 32(L)(1)(b); PA. R. C. P. 213.1; TEX. R. JUD. ADMIN. 13.10; VA. CODE ANN. § 8.01-267-267.9; W. VA. TRIAL CT. R. 26.01(c).

<sup>61</sup> *See generally* Amanda Bronstad, *The States Are Getting in on the MDL Action*, NAT’L L.J., Sept. 19, 2011, at 12 (describing the Multidistrict Litigation Panel in Texas and the Judicial Council in California, both of which coordinate and oversee MDLs in their respective states). California rules for intrastate coordination of complex litigation are available at <https://www.courts.ca.gov/27922.htm>. Rule 13 of the Texas Rules of Judicial Assignment are available at <https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/>.

<sup>62</sup> N.Y. C.P.L.R. §202.69; New Jersey Courts, Multicounty Litigant (Non-Asbestos) Resource Book at 14-15 (available at <https://www.njcourts.gov/attorneys/assets/mcl/nonasbestosmanual.pdf?c=mdk>).

<sup>63</sup> Joseph J. Ortego et al., *Coordination of Mass Tort Proceedings*, 19 NO. 2 PRAC. LITIGATOR 9, 12 (2008).

<sup>64</sup> *Id.* (*citing* In re Okla. Breast Implant Cases, 847 P.2d 772 (Okla. 1993)).

<sup>65</sup> See, e.g., Ky. Farm Bureau Mut. Ins. Co. v. Wright, 136 S.W.3d 455, 458-59 (Ky. 2004) (acknowledging “that courts (even without express authority given by the constitution, statute, or rule of a supreme court of a state) have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice”) (internal citations omitted).

<sup>66</sup> Note, coordination of counsel *within* the MDL can itself be a challenge. See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at \*2 (D.P.R. 1988) (“It is not yet known how many lawyers will eventually join this litigation, but we can assume it will be pretty close to legion.”). Dispersed intrastate claims—as well as claims scattered across states—add layers of coordinative complexity. See Rothstein & Borden, *Pocket Guide*, *supra* note 16, at 24 (“Coordination becomes much more complex when cases are dispersed across many states.”).

<sup>67</sup> DUKE MDL STANDARDS, *supra* note 5, at 91; *see also id.* at 96, n.219 (observing that at least 15 states “have enacted analogues to the MDL statute”).

<sup>68</sup> Joseph L. Marino, 3 WEST’S MCKINNEY’S FORMS CIVIL PRACTICE LAW AND RULES § 7:2 (2019) (*citing* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3(c)(6)).

<sup>69</sup> Housing Auth. of Monterey Cnty. v. Jones, 130 Cal. App. 4th 1029, 1035 (2005).

<sup>70</sup> See, e.g., Totzkay v. DuBois, 140 Mich. App. 374, 380 (Mich. Ct. of App. 1985) (citing WAYNE CIR. CT. R. 6.1(b): “The judge to whom a civil case is assigned shall handle all preliminary matters until trial of the case begins. Following pretrial, if a matter comes before the judge which he believes should be decided by the trial judge, he shall refer the matter to the chief judge for disposition.”).

<sup>71</sup> Ortego, *supra* note 63, at 13.

<sup>72</sup> *Id.* (Note that most state rules of evidence mirror the federal rules concerning the scope of admissible evidence, so that in many MDL/state cases, there is no divergence.). See, e.g., In re Bausch & Lomb Contact Lens Solution Prod. Liab. Litig., MDL No. 1785, 2007 WL 3046682 (D.S.C. Oct. 11, 2007) (describing the convergence of state and federal rules of evidence).

<sup>73</sup> See Roth, *supra* note 53 (observing that “joint Daubert/Frye hearings are common in coordinated state and federal mass tort litigation, as courts and parties recognize that it produces significant efficiencies and few, if any, conflicts”).

<sup>74</sup> See also Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 856-58 (1989) (observing that federal judges may formally certify questions to state courts when necessary to decide an unclear point of state law, but that *ex parte* communications are barred by judicial ethics).

<sup>75</sup> Schwarzer, *supra* note 13, at 1744; *see also* Borden & Lee, *id.* at 1019 (“It is worth pondering whether inter-jurisdictional communications can be limited to scheduling and administrative matters – or, perhaps more precisely, whether administrative and substantive matters are so distinct.”); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. Rev. 1851, 1869 (1997) (“In most cases, the administrative role of the judge is well defined and predictable. In mass torts, however, . . . the role of the judge has been expanding—from umpire to manager to player.”).

<sup>76</sup> Borden & Lee, *supra* note 34, at 1020.

<sup>77</sup> *Id.* at 1016 (citing FJC Transferee Judge Survey Results).

<sup>78</sup> Dunlavey v. Takeda Pharm. Am., Inc., Nos. 6:12-CV-1162, 6:12-CV-1165, 2012 WL 3715456 (W.D. La. Aug. 23, 2012).

<sup>79</sup> *Id.* at \*5 (discussing specific allegations of impropriety made against Judge Sarah M. Singleton, a state court judge in New Mexico).

<sup>80</sup> *Id.* at \*2 (“[T]his Court has sent correspondence to judges once known to this Court as having ‘Actos’ cases in his or her court, asking if he or she ‘might wish to explore whether it might be of benefit to talk about the status of our respective cases and the possibility or desirability of coordinating some of our efforts in hopes of avoiding duplication of effort, costs and, perhaps, inconsistent rulings by the different courts.’”).

<sup>81</sup> *Id.* at n.13 (*citing* In re Aircrash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1009 (5th Cir. 1977); In re Oh. Asbestos Litig., No. 83-OAL (N.D. Ohio June 1, 1983); In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913, 917 (D. Nev. 1983); In re L’Ambiance Plaza Litig., (D. Conn. & Conn. Super. Ct. Dec. 1, 1988) (Special Settlement Proceedings)).

<sup>82</sup> *Id.*

<sup>83</sup> RESOURCE BOOK FOR STATE TRIAL COURT JUDGES, *supra* note 28.

<sup>84</sup> Mize & Fletcher, *supra* note 14, at iv, n.15 (citing 2007 ABA MODEL CODE OF JUD. CONDUCT R 2.9(A)(3); HAW. REV'D CODE OF JUD. CONDUCT R 2.9(A)(3); MINN. CODE OF JUD. CONDUCT R 2.9 (A)(3)).

<sup>85</sup> *Id.* (*citing* MASS. CODE OF JUD. CONDUCT Canon 3B(7)(c)(i) (“[A] judge shall take all reasonable steps to avoid receiving from court personnel or other judges factual information that is not part of the case record. If court personnel or another judge nevertheless bring non-record information about a case to the judge’s attention, the judge may not base a decision on it without giving the parties notice of that information and a reasonable opportunity to respond.”)).

<sup>86</sup> See generally Mize & Fletcher, *supra* note 14; RESOURCE BOOK FOR STATE TRIAL COURT JUDGES, *supra* note 28 (“discussion and interaction between and among the federal courts and the state courts is not . . . improper”).

<sup>87</sup> MANUAL, *supra* note 9, at § 20.312 at 202; see also Air Crash Disaster, 549 F.2d at 1011 (finding that lead lawyers who performed “duties beyond their responsibilities to their own clients” should be paid out of funds contributed by all lawyers in specified amounts).

<sup>88</sup> For examples of MDLs establishing a common benefit fund, *see* In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig., MDL No. 2197 (N.D. Oh. 2011); In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prods. Liab. Litig., MDL No. 2100 (S.D. Ill. 2010); In re Vioxx Prods. Liab. Litig., MDL No. 1657, (E.D. La. 2005); In re Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La. 2001); In re Chinese-Mfd. Drywall Prods. Liab. Litig., MDL No. 2047 (E.D. La. 2009); In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179 (E.D. La. 2010).

<sup>89</sup> See generally Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 376 (2014) (“[I]n MDLs, the claimant does not pay the common benefit fee; the primary attorney who is the beneficiary of the common benefit work pays it.”); *See also* In re Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. 2005); In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. MDL 1699 (N.D. Cal. 2006).

<sup>90</sup> See Fallon, *supra* note 89, at 379 (“Regardless of the legal basis given to explain its use, the common benefit doctrine has been consistently used and is well established as the justification for the payment of common benefit fees in MDLs.”); *See also* In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 647 (E.D. La. 2010) (“Since the nineteenth century, however, the Supreme Court has recognized an equitable exception to this rule, known as the common fund or common benefit doctrine, that permits the creation of a common fund in order to pay reasonable attorneys’ fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries.”); In re Zyprexa Prods. Liab. Litig., 594 F.3d 113, 115-17 (2d Cir. 2010) (discussing district court order requiring 3% of all settlement and judgment proceeds to be deposited into a common benefit fund to compensate a committee of attorneys for its work on behalf of all MDL plaintiffs); In re Diet Drugs, 582 F.3d 524, 546-47 (3d Cir. 2009) (discussing common benefit doctrine).

<sup>91</sup> See generally Miller & Silver, *supra* note 17.

<sup>92</sup> Miller & Silver, *supra* note 17, at 132.

<sup>93</sup> *Id.* (discussing examples, such as *In re Guidant* and *In re Vioxx*).

<sup>94</sup> *Id.* at 141, n.122.

<sup>95</sup> See, e.g., *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 165-66 (4th Cir. 1992) (stating that “a transferee court’s jurisdiction in multi-district litigation is limited to cases and controversies between persons who are properly parties to the cases transferred,” and that “plaintiffs in state and un-transferred federal cases” are not subject to the court’s authority).

<sup>96</sup> *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. 2007), available at <https://www.merckvioxxsecuritieslitigation.com/Content/Documents/Judgment.pdf>.

<sup>97</sup> Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 81 (2015) (*citing In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at \*1-3 (E.D. Mo. 2010)).

<sup>98</sup> *Id.*

<sup>99</sup> See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 65, 279-92 (2011).

<sup>100</sup> Thomas, *supra* n. 10 at 1358. See also Schwarzer, *supra* note 13 at 1743-4 (discussing the risk of federal judges exerting too much influence over state colleagues).

<sup>101</sup> *Id.* at 1744 (“In light of federal courts’ greater resources, this tendency [to control the litigation] is understandable, but judges should take care that dominance be avoided if possible.”).

<sup>102</sup> Fair Assessment in Real Estate Ass’n, Inc. v. McNary, 454 U.S. 100 (1981) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

<sup>103</sup> Elizabeth Cosenza, *The Persistent Problem of Multi-forum Shareholder Litigation*, 10 VA. LAW & BUS. REV. 413, 434 (2012) (“Four or five months may elapse between the time a motion to transfer is made and when the MDL Panel issues a decision.”); see also Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIG. 43, 43 (1998) (noting that it can takes months for a transferee judge to schedule the first status conference).

<sup>104</sup> This occurred in the *In re Guidant* MDL where a Texas state court set an individual case Guidant case for trial before the MDL was even organized. See also McGovern, *supra* note 75, at 858 (“[P]laintiffs’ attorneys rush to their favorite judges and demand draconian procedures to pressure defendants to make block settlements . . . Defendants seek the opposite – delay is their nirvana.”).

<sup>105</sup> *Id.*

<sup>106</sup> In the early 2000’s, the Advisory Committee on the Federal Rules considered an amendment that would make it easier for federal judges to enjoin parallel state litigation. Georgine Vairo, *Trends in Federalism and What They Mean for the State Courts*, in STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE? 15, n.62 (POUND FORUM REPORT, 2002); see also Martin Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000) (proposing a “zero tolerance” policy requiring that “in every instance the assertion of federal jurisdiction automatically precludes the continued conduct of the parallel state litigation”).

<sup>107</sup> Ret. Sys. of Ala. v. J.P. Morgan Chase & Co., 386 F.3d 419, 421-22 (2d Cir. 2004).

<sup>108</sup> *Id.*; see also Vairo, *supra* note 106, at 11 (“Generally, the federal Anti-Injunction Act embodies Congress’s intent that federal courts should not interfere with ongoing state litigation. Over the years, however, federal courts have crafted an exception, based loosely on the express exceptions of the Anti-Injunction Act and the federal All Writs Act, that is designed to help them achieve global settlements of complex litigation.”).

<sup>109</sup> Cosenza, *supra* note 103, at 441.

<sup>110</sup> *In re Baycol Prods. Litig.*, 593 F.3d 716 (8<sup>th</sup> Cir. 2010).

<sup>111</sup> Smith v. Bayer, 131 S. Ct. 2368, 2379 (2011).

<sup>112</sup> See, e.g., *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985); *In re Diet Drugs*, 282 F.3d 220 (3d Cir. 2002); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 838 (7th Cir. 1999); *Caravetta v. McKesson HBOC, Inc.*, 846 A.2d 240, 246-47 (Del. Super. Ct. 2000); *La. Seafood Mgmt. v. Foster*, 46 F. Supp. 2d 533, 546 (E.D. La. 1999); *Polaris Public Income Funds v. Einhorn*, 625 So. 2d 128, 129-30 (Fla. Dist. Ct. App. 1993).

<sup>113</sup> Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITTS. L. REV. 809 (1989).

<sup>114</sup> *Id.* at 832.

<sup>115</sup> CRISIS IN THE COURTS, ABA TASK FORCE ON PRESERVATION OF THE JUSTICE SYSTEM (2012).

<sup>116</sup> Professor Burch has made a similar point in an important article, *Constructing Issue Classes*, *supra* note 23, at 1860 (arguing that issue classes “offer a means for transferee judges to resolve common conduct questions in multidistrict litigation when plenary classes are unavailable”).

<sup>117</sup> Gilles & Friedman, *supra* note 19.

<sup>118</sup> *Id.* (arguing that “[o]rdinary principles of issue preclusion, the now-common practice of bellwether trials, and the more ambitious judicial experiment with ‘binding bellwethers’” all fail to reliably deliver preclusive effect).

<sup>119</sup> See, e.g., *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, n.69 (3d Cir. 1982) (“A disappointed litigant should not be given a second opportunity to litigate a matter that has been fully considered by a court of coordinate jurisdiction, absent unusual circumstances. Adherence to law of the case principles is even more important in this context.”).

<sup>120</sup> See, e.g., *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

<sup>121</sup> *Id.* at 1437.

<sup>122</sup> See, e.g., *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013) (observing that “[t]his case is different from *Comcast*” because the Whirlpool district court used Rule 23(c)(4) to certify a liability-only class); *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (observing that “the rule of *Comcast* is largely irrelevant [w]here determinations on liability and damages have been bifurcated” in accordance with Rule 23(c)(4)); *Brown v. City of Detroit*, No. 10-cv-12162, 2014 WL 7074259, at \*3 (E.D. Mich. 2014); *Fort Worth Emps.’ Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 142 (S.D.N.Y. 2014); *Wallace v. Powell*, 2013 WL 2042369, at \*19 (M.D. Pa. 2013).

<sup>123</sup> Burch, *supra* note 23, at 1861.

<sup>124</sup> See *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405 (6th Cir. 2018), *cert. denied*, 2019 WL 1231762 (U.S. Mar. 18, 2019) (district court certified seven issues pursuant to Rule 23(c)(4), leaving only injury, causation, and damages to be resolved individually; and stating its concern that without issue certification, the class members “might not otherwise be able to pursue their claims”).

<sup>125</sup> See, e.g., *In re GM Pickup Truck Fuel Tank Prods. Liab. Litig.*, No. MDL 961, 1996 WL 683785 (E.D. Pa. 1996) (observing that exceptions to the Anti-Injunction Act been developed in MDL cases where “pending state action threatens to frustrate the federal court’s ability to finalize and craft a settlement, or jeopardizes an existing provisional settlement”); *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3d Cir. 2002) (affirming issuance of an injunction by the federal trial court against the commencement of parallel state court actions); *In re Vioxx Prods. Liab. Litig.*, 869 F. Supp. 2d 719 (E.D. La. 2012) (finding that, upon the conclusion of MDL or complex class litigation, the “settlement-in-progress” demands that the court exercise exclusive jurisdiction); *In re MI Windows & Doors, Inc., Prod. Liab. Litig.*, 860 F.3d 218 (4th Cir. 2017) (finding that the Anti-Injunction Act did not prohibit a federal court from enjoining parallel state court litigation).

<sup>126</sup> To be clear, the issue class does not solve all intercourt coordination problems—in particular, concerns over compensation of plaintiffs’ counsel in both state and federal cases may prove difficult in some cases. See Myriam Gilles & Gary Friedman, *The Issue Class Revolution* (forthcoming) (proposing various solutions to selection and compensation of issue class counsel).

<sup>127</sup> Gilles & Friedman, *supra* note 19 (“The opt-out right exists to ensure the class action does not extinguish an absent class member’s claim, a protected property interest, without due process. But there is no protected right to place oneself beyond the collateral estoppel effects of a judgment—just as a party’s rights are not abridged when an unrelated court decides an issue that effectively forecloses her claim by operation of stare decisis or as a matter of binding precedent.”).

<sup>128</sup> *Id.* (asserting that the (c)(4) class “is not seeking damages,” but instead, “it asks the court to declare that certain facts are true, or that the defendant’s conduct violated some standard or law”).

<sup>129</sup> Burch, *Issue Classes*, *supra* note 23, at 1901-2 (advising that “courts certifying issue classes should take great care to . . . craft special verdict forms to minimize preclusion challenges”).

<sup>130</sup> U.S. CONST. amend. VII (“no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law”); see also *In the Matter of Rhone-Poulenc Rorer*, 51 F.3d 1293, 1303 (7th Cir. 1995) (observing that, after a finding by the first jury as to “whether one or more defendants was negligent,” a second jury “will have to decide . . . issues [that] overlap the issue of the defendants’ negligence”).

<sup>131</sup> See, e.g., *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 33 (E.D.N.Y. 2001) (Weinstein, J.) (“the historical record demonstrates that the Framers’ main objective in drafting the Seventh Amendment was to limit the ability of an *appellate* court, specifically the Supreme Court, to review de novo and overturn a civil jury’s findings of fact”) (internal citations omitted).

<sup>132</sup> *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497-98 (1931).

<sup>133</sup> See, e.g., *Martin v. Behr Dayton Thermal Prods. LLC*, 896 F.3d 405, 417 (6th Cir. 2018) (“if done properly, bifurcation will not raise any constitutional issues”); *In re Bendectin Litig.*, 857 F.2d 290, 307 (6th Cir. 1988) (the Seventh Amendment is not violated where the bifurcated issue is adaptable to a separate trial without creating jury confusion and uncertainty amounting to the denial of a fair trial); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986) (affirming class action plan providing for trial of common factual issues involving the health hazards of asbestos, to be followed by individual damages cases); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986), cert. denied, 479 U.S. 915 (same).

<sup>134</sup> Gilles & Friedman, *supra* note 19.

<sup>135</sup> Simon, 200 F.R.D. at 49 (observing that the Reexamination Clause requires only that courts avoid the “risk that in apportioning fault, the second jury could reevaluate the defendant’s fault,” by going “so far as to reapportion 100% of the fault to the plaintiff”). See generally, Burch, *supra* note 23, at 1926 (“Reexamining much of the same *evidence* in subsequent proceedings bears on whether an issue class materially advances the litigation, but it does not mean that a second jury will decide the same legal *element*.”) (emphasis in original).

<sup>136</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

<sup>137</sup> Gilles & Friedman, *supra* note 19.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Castano, 84 F.3d at 747-50 (“[A] mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.”).

<sup>141</sup> David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 707 (1989) (observing that the maturity requirement is “simply too vague to provide courts with useful guidance in determining when to use class actions and other collective procedures”); see also *In re Dow Corning Corp.*, 211 B.R. 545, 576 (E.D. Mich. 1997) (“Unfortunately, the number of jury verdicts needed . . . [to] make a mass tort mature . . . is hard to pinpoint.”).

<sup>142</sup> 382 F.3d 1241 (11th Cir. 2004).

<sup>143</sup> See, e.g. Elizabeth Chamblee Burch, *On Regulatory Discord and Procedure*, 11 N.Y.U. J. L. & Bus. 819, 825 (2015) (predicting that courts will “begin to use issue classes to target defendant’s uniform, non-individuated conduct such that subsequent cases could use issue preclusion to prevent these conduct-related questions from re-litigation”).

<sup>144</sup> *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (“a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed”); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013) (same).

<sup>145</sup> See, e.g., *In re Deepwater Horizon*, 739 F.3d 790, 806-07 (5th Cir. 2014) (upholding ruling that “issues relating to damages” could and would be ‘severed and tried separately’ from other issues relating to liability, in accordance with this court’s previous case law and Rule 23(c)(4)); *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 33 (E.D.N.Y. 2001) (Weinstein, J.).

<sup>146</sup> Burch, *supra* note 23, at 830.

# Oral Remarks of Professor Gilles

My paper is about state-federal coordination of related tort cases. I am talking here about a scenario in which tort claims against a common defendant are filed all around the country in state and federal courts. Some of those state cases are removed to federal courts for the reasons Professor Rave described this morning. Then all of the federal cases are, of course, consolidated—or may be consolidated. They are typically consolidated and transferred by the Joint Panel on Multidistrict Litigation to one district court for pretrial purposes only. Cases consolidated via the MDL statute now comprise maybe 40 percent of the federal docket.

What is relevant for the state judiciary is that, for every federal MDL there are dozens, and sometimes hundreds, of related state cases that are not removable and, therefore, remain in state courts on your dockets. These are cases that have many of the common facts, similar injury allegations, identical or overlapping liability theories, and equivalent discovery needs, but they are in different fora, overseen by different judges, and litigated by different lawyers.

For every federal MDL there are dozens, and sometimes hundreds, of related state cases.

This scenario might raise some concerns about nonuniformity and duplicative adjudication costs, among other things. So, while some might argue that our system of cooperative federalism is designed to promote diversity in law, I think many others would worry about a scenario where federal and state courts are essentially replicating the same work.

## Three Problems with Non-Coordinated Cases

We worry about non-coordinated cases for at least three reasons.

First, I think Judge Appel's point this morning was very important, and it resonated throughout the room. There are resource concerns. Every state court, I think, faces serious resource concerns. I think a lot of you worry about the capacity of your courts to handle complex cases. That concern is surely magnified where litigation is duplicative, where you are managing a multitude of cases at the same time the federal MDL is going on. After all, if costs can be avoided, we should try to do that.

Second, if one measure of justice is that “like cases are treated alike,” then uniformity is a good thing and it shouldn't matter whether a case is brought in federal or state court because in either event, we should treat these tort cases the same.

Third, we may encounter problems and gamesmanship where similar cases are tried in different fora. For example, controversies have erupted when MDL judges in cases like Vioxx and Guidant have ordered state court lawyers to contribute to the common benefit fund that's set up to pay the Plaintiff's Steering Committee. Their theory is that state court litigants might be benefiting to some degree from the work done in the MDL, but of course, individually-retained counsel may disagree. From the other direction, problems may arise when individual, related state trials move too quickly ahead of the consolidated cases. In that scenario, the MDL court worries about a state court lawyer losing the trial and the impact of that loss on the settlement dynamics within the MDL.

So—bottom line—we expect (need!) state and federal courts to coordinate. To work together. I started this project thinking that coordination would be a good thing. I read a lot of material about coordination from the *Manual for Complex Litigation*, the *Pocket Guide for Transferee Judges*, and the *Managing Mass Torts Resource*

*Book for State Court Judges*—which, if you haven’t read it, I think is a quite good read. Looking at all of the guidance literature, it is really fascinating that everybody says “coordinate, communicate, work together,” but there is actually not a lot of specific guidance on how to do that, what the goals of communication or coordination really ought to be.

There is actually not a lot of specific guidance on how to do that, what the goals of communication or coordination really ought to be.

The first thing that every manual tells you is to reach out and talk to judges who have parallel litigation on their dockets. It seems that many, many judges do. A study by the Federal Judicial Center<sup>1</sup> reports that 60 percent of federal MDL judges self-report that they have reached out to all of you. A very similar study done by the National Center for State Courts says that 52 percent of state court judges report the same.

So you *are* talking, but what are you talking about? What is it that these early conversations are meant to do? It is not really clear from the literature, and frankly, I think these early conversations are less about coordination and more about identification. You are sort of saying, “Hello.” And that’s a good thing.

Of course, sometimes early communication does result in real action. Sometimes we see federal and state judges agree to plans to actually coordinate expert discovery, electronic discovery, some of the more expensive parts of complex litigation, and maybe appoint a common Special Master.

In a handful of cases, usually mega cases like Vioxx, judges have even held joint proceedings. There are some great pictures of judges from state and federal court sitting together, hearing discussions about expert evidence, *Daubert* hearings, et cetera.

I think that happens, but it is rare. That is not the most common thing that we see when we think about coordination. I think formal coordination is relatively rare. We can hypothesize, of course, why that might be. Administrative feasibility and cost are probably big reasons why we don’t see more of that. In my paper, I dig deeper into ethical problems, as well as concerns about divergence in federal and state procedural rules, which Judge Appel discussed this morning. Some states follow *Daubert*, some states follow *Frye*. We might have different rules. I am happy to talk about that more in the Q&A.

Formal coordination is relatively rare.

## Issue Classes

Now I want to focus on my proposed solution to what I view as these weak versions of coordination—if we assume that coordination is an overall good, for the reasons I described earlier. My solution is to have issue classes under Rule 23(c)(4) or analogous state procedures.

First, what is an issue class? An issue class is a vehicle for resolving particular issues that are identical across class members in both the state and federal tort cases.

Generally, the issue that will be identical will be a question about liability or an element of a claim. For example, “Did the defendant intentionally misrepresent the risk of their fungicide?” “Does the defendant’s pharmaceutical drug cause a heightened risk of heart attack?” These are the sorts of questions that can be very difficult and expensive to prove on an individual basis, but every single plaintiff who is bringing a claim against this defendant is going to have to prove this same issue.

So my argument is that these issues lend themselves to class-wide resolution. Invariably, they are going to relate to the defendant's conduct and liability. That is what the plaintiff has to prove. Every plaintiff in every case against this defendant will have to prove that claim, and the issue class provides the way of doing that. And I believe that the outcome of the issue class trial should be binding on all plaintiffs and all defendants.

Let me be clear about what that means. This is a very risky proposition, which means nobody should love this idea. None of us likes high risk. If you did, you wouldn't have gone to law school. We are not high-risk people, and this is a very risky proposition. This is for all the marbles here. If the defendant wins a (c)(4) issue class trial, the defendant is done—no further litigation. If the plaintiffs win, they get

a declaration that they can then take to their home court. They no longer have to re-prove or re-litigate liability. The defendant is essentially enjoined from challenging that finding from the (c)(4) issue jury.

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Of course, plaintiffs are going to have to fan out after the (c)(4) trial, because there are going to be other issues regarding individualized relief, damages, reliance, other plaintiff-focused issues that are going to be determined outside the issue class in these follow-on suits, but they will have that issue significantly completed for them.

So that's what an issue class is.

The second point is why I think issue classes could be useful for facilitating inter-court coordination. Again, if the purpose of coordination is to find sound, fair, constitutionally valid means of achieving scale efficiencies in sprawling litigations, I think that issue classes give us a very good way of doing that, because they give meaningful, durable, preclusive effect on these core common issues. Issue classes generate rulings on issues that are basically identical across class members so that litigants can try their individual claims and follow-on actions.

Other procedural devices can't do this for us. Bellwethers, of course, are not binding. Neither are the ordinary preclusion principles from *Parklane*.<sup>2</sup> We don't get binding effect from any of these other methods of trying to adjudicate common issues. Nor can we simply rely on courts in the typical case, without an issue class finding, to protect the preclusive effect of a jury's determination on liability in the ordinary bifurcated case scenario.

I hope I have convinced you that issue classes and complex mass torts can serve the ends of judicial efficiency and fairness. I am not only concerned about efficiency, though. I think efficiency is important when we have so many mass cases flooding the courts. But I am also concerned about fairness, because I also think we have tons of litigants who can't actually get access to justice.

Let me end with a more controversial assertion—that issue classing can also give some content and meaning to the coordination that the literature asks all of you to engage in.

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## Carrot and Stick

My idea is to use issue classes as both a carrot and a stick. We already know the carrot. Coordination can help make things easier. It can avoid duplicative litigation and avoid wasting valuable resources. It can make things more uniform.

Now for the stick. I propose that judges who have related cases on their dockets should reach out to one another, as the Manual recommends, to determine the feasibility, value, and scope of the certified issue that they want to examine. If they agree, then I think the procedure is relatively straightforward: certify an issue class and hold a trial on the common issue. I am not assuming all of these cases will settle. I am assuming that at least some of the time, an issue class will go to trial—the question of the defendant's liability will be tried.

If courts can't coordinate on the issue class, then we have few options, and I don't think any of them are good. Perhaps a state court could take it upon itself to certify an issue class under its procedural rules. That is essentially what the Florida Supreme Court did in the *Engle* case.<sup>3</sup> It didn't work out so well for lots of reasons.

Or, if a state lacks an issue class procedure, or just doesn't want to expend those resources, it can allow an individual tort case to go forward—a kind of state court bellwether. That is not a great option either. Nobody is going to like that option because it is not going to do much good in the larger scope of things to have an individual claim go forward.

Neither of those are good options. I think, in general, federal courts with MDLs, and especially the lawyers practicing before them, don't like it when state cases get ahead of federal cases—because, again, those cases could

change the settlement dynamics of the MDL. So my proposal is to let the federal MDL court certify an issue class and try the claim to completion; individual claims in state court would then benefit from the preclusive effect of a win. I don't see why (though I would love to hear from all of you) you would object as state court judges, or why your trial court judges would object to a federal court certifying a (c)(4) issue class if that could help you with the individual cases that are on your dockets. Again, I understand the risks of it, but from the perspective of trying to actually make sure that some of these people get justice, that their claims are heard, I would love to know whether you think that that is a problem—having the federal court do this in addition to all the other work that the federal court is doing.

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So I am presuming that there are incentives on both the state and federal side to motivate judges to work together to determine and adjudicate an issue class. I also think it gives some content to the conversation that we think ought to happen early on. The manual tells you, "Pick up the phone and call the federal judge who has the MDL." Now, you have something to talk about that is not the weather or how the local teams are doing. You can talk about whether or not you think an issue class might be the right way to try to resolve a very knotty issue that is going to affect all of the cases before you.

I would be happy to discuss more, including, for example, my view that issue classes should be certified as mandatory non-optout classes under rule 23(b)(2), not (b)(3)—no notice or optout, or minimal notice, no optout. I don't see how you opt out of a declaration.

Finally, I will just point out I am very aware of the risks involved in this proposal. I am suggesting, after all, a trial for all the marbles. In my view, the most consequential civil cases are not best of seven. That is for the NBA playoffs. I am okay with one shot. The question is whether I can convince not just you, but lawyers on both sides that it is worth taking just one shot to determine these issues.

## Comments by Panelists

### PROFESSOR NORA ENGSTROM

Myriam begins by drawing attention to the tremendous growth of federal MDLs over the past quarter-century. As recently as 1991, MDLs accounted for only about 1 percent of pending civil cases. Now, that figure has swelled to some 37 percent—more than one-third of the federal civil docket—sweeping together some 158,589 individual actions.<sup>4</sup>

These MDLs span the waterfront, consolidating cases in areas as diverse as contract, antitrust, and securities. By far the biggest MDLs, however, involve mass torts. Indeed, when one looks beyond the number of MDLs formed to consider the number of individual actions consolidated, the dominance of mass tort MDLs becomes plain: Of the actions swept into MDLs, a staggering 95 percent involve mass torts, almost invariably allegedly defective products.

But those statistics tell only part of the story because, as Myriam notes, MDLs and state court cases coexist. MDLs, authorized and governed by 28 U.S.C. § 1407, can consolidate all of the relevant *federal* court cases, but there are simultaneous state court cases galore that are beyond the reach of the federal MDL system. If litigation is an iceberg, the federal MDL may be merely the tip.

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We see that now playing out vividly in the opioid litigation, where Judge Dan Polster of the Northern District of Ohio is the transferee judge overseeing the federal opioid MDL. That MDL consolidates some 2,500 cases mostly filed by cities, counties, tribes, and municipalities. But independently, nearly every state has its own *equivalent* state court case filed by its own state attorney general. These AG-initiated cases are litigated on the state's home turf, and they will not be—indeed, by most accounts, they *cannot* be—swept into the MDL system.

Vioxx offers another prominent example. In the early 2000s, Vioxx litigation spawned an MDL that consolidated 5,700 cases in Louisiana in front of Judge Eldon E. Fallon. But, alongside that federal MDL, there were a whopping 16,800 state cases in New Jersey and another 2,500 in California.

Myriam notes all of this and highlights the difficulties and inefficiencies that can arise when independent—but interrelated—cases, filed by different plaintiffs and handled by different lawyers, move along in different places at different speeds under the supervision of different judges pursuant to different rules.

## What to Do with Fractured Litigation?

The upshot is: Complex litigation generates fractured litigation. The question is: What to do about it?

Many answer: “Coordination!” Many believe that state and federal judges overseeing this complex litigation should coordinate and cooperate to limit duplication, conserve scarce resources, and promote the consistent and speedy resolution of both the state and federal claims. And, in her piece, Myriam helpfully discusses several tried-and-true coordination strategies.

Considering coordination, Vioxx again provides an instructive example. The Vioxx litigation ended with a \$4.85 billion settlement that was announced in federal court on November 9, 2007. What’s interesting is that

In the Vioxx litigation, the judges chose to sit together, work with one another, and even preside together.

Judge Fallon convened the hearing—but, in so doing, he wasn’t alone. He was, in fact, physically joined in the federal courthouse by state judges from New Jersey, California, and Texas. These state and federal judges had coordinated so closely they were, in fact, sitting shoulder-to-shoulder. So, in the Vioxx litigation, the judges chose to sit together, work with one another, and even preside together.

Myriam takes this principle of coordination one step further in advocating a new mechanism, the “issue class action.” Issue class actions, she argues, will give meaningful and durable preclusive effect to core issue determinations—taking certain issues off the table early and decisively.

In her paper, Myriam flags potential objections to her proposal. These include, first, the possibility that issue classes may violate the Seventh Amendment’s Reexamination Clause. Second, issue classes might promote what she calls “judicial blackmail,” in which the threat of a negative determination might induce defendants to settle even dubious claims. Finally, she notes that some commentators take the position that, while issue classes are fine in theory, they should only be used when the case becomes “mature.” But it is unclear when, exactly, a case would meet that somewhat obscure and subjectively-defined threshold.

Rather than elaborating on those concerns—which I take as serious—I will flag four further objections. The first two are “means” critiques; they ask if issue class actions really are a sensible way of promoting judicial efficiency. The latter two are “ends” critiques. More fundamental in scope, they interrogate our commitment to judicial efficiency and ask whether muscular federal-state coordination is actually such a good idea.

### The “Means” Critiques: Reality Check and the Risk of Bias

My first “means” critique is quite simple: Myriam’s analysis tends to assume that, today, cases are fully litigated—and she suggests that issue classes will promote the more efficient litigation of these otherwise-litigated claims. Yet, I’m not sure that’s the right comparison. In reality, as almost everyone knows, the vast majority of cases aren’t *fully* litigated.<sup>5</sup> Indeed, in the MDL system, less than 3 percent of cases are sent back to their home “transferor” courts to be tried; the rest are extinguished by summary judgment, settlement, or otherwise, in the transferee court in the course of pretrial maneuvering.

This reality check is important because when we think about efficiency—and when we try to assess the gains that might accrue from Myriam’s proposed procedural innovation—we need to think about what would be gained

from that new system relative to our current system, as the latter actually exists. And, critically, the relevant comparator is not a world with thousands of far-flung, independent, time-consuming, and resource-intensive transferor trials. It is, instead, for better or worse, a world of consolidation, summary judgment, and settlement. When that reality comes into focus, the efficiency gains of issue classes may not be as large as they initially appear.

My second “means” concern is that issue classes may bias the system. This concern runs both ways.

The obvious fear for defendants, as Myriam notes, is a threat of blackmail settlements—the conventional worry that the threat of a negative determination might be so large that it will induce defendants to settle even dubious claims. I worry about that, too. But I also worry about something different but maybe less obvious: I predict that, to the extent there *are* issue class actions tried to verdict, the issue most often tried will be general causation, at least in the mass tort context. General causation, of course, refers to the all-important determination of whether the defendant’s allegedly toxic agent has the capacity to cause a particular disease. So, “Does X product cause Y form of cancer?,” for example—distinct from the specific causation question of “did X product actually cause *his* cancer?”

Isolating causation questions is not necessarily a bad thing, of course. But such an issue class action trial would closely resemble a bifurcated trial, where the general causation question is excised from the rest of the case and decided first. And, there is some evidence that this style of bifurcation—which forces a jury to zero in on the arguably dry and lifeless content of the case, apart from the case’s broader context—systematically disadvantages plaintiffs.<sup>6</sup> It seems possible, then, that issue class actions might, similarly, tilt the playing field.

## The “Ends” Critiques: Experimentation and Efficiency

In this final section, rather than considering Myriam’s proposal to encourage coordination to promote efficiency, I step back to raise a couple of tentative questions about the wisdom of the entire enterprise. Here, I want to start by asking: Is more coordination *necessarily* better than less? Or, put slightly differently: Is it true that we *always* want state and federal courts to march in lockstep? Or is it preferable, at least some of the time, if state and federal courts each march to the beat of their own drummers?

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Again, the opioid litigation offers a relevant example, as, at least so far, I think it’s been beneficial to have the federal MDL, with its set of procedures, and, alongside that federal MDL, lots of states, each doing things differently.

The Massachusetts litigation, for example, has been much more *transparent* than the federal MDL. In *Massachusetts v. Purdue*, the Suffolk County Superior Court has been slower to seal filings and less keen to place documents under protective orders. As a consequence, the Massachusetts state court litigation has been critical in revealing previously-hidden information about Purdue’s apparent misconduct. When it comes to secrecy, I, for one, am glad that Massachusetts Superior Court Judge Janet L. Sanders hasn’t simply followed Judge Polster’s script.

The Oklahoma litigation, for its part, has proceeded much *faster* than the federal MDL. Last summer in Norman, Oklahoma, Cleveland County District Judge Thad Balkman oversaw a seven-week trial focused on Johnson & Johnson’s opioid-related activities—and that trial was, itself, revelatory.

In the opioid litigation, would we be better off if Judge Polster were calling all the shots? I'm not at all sure. It could be that at least some state court experimentation is desirable. And it could be that coordination is a lot like wine, coffee, and chocolate—healthy only in moderation.

Finally and relatedly, I agree that heavy-handed coordination is efficient. Litigating an issue once is faster and cheaper than litigating it twice. I also agree that efficiency is an important aim. As Federal Rule of Civil Procedure

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1 says, we want to promote the “speedy and inexpensive determination of every action and proceeding.”

But there are other critical values besides efficiency. The word “efficiency” or some variant appears fourteen times in Myriam’s paper. But what isn’t mentioned as often (or at all) are other values we also want to promote in civil litigation: transparency, procedural justice, litigant autonomy, fundamental fairness, and accuracy. In our commendable quest for efficiency, I worry we sometimes leave these other values on the cutting-room floor.

## THE HONORABLE JOSEPH J. MALTESE

We are here to talk about state aggregation of cases. I am an appellate judge in New York. Since 2002, I have been on the Litigation Coordinating Panel, which euphemistically is called the “mass torts” panel. We have handled state mass torts for several years. I was involved with the panel and was a mass torts judge, myself, at the trial-court level, and handled some of those cases. So I am going to go through our procedures and rules, which basically we borrowed from the federal MDL statute and rules and adapted them to our state rules.<sup>7</sup>

Only a few states have judicial structures that are set up to deal with these issues ahead of time, with judges who are selected who have some experience with these matters. They deal with it in an ad hoc manner. But if you have numerous cases that are against a particular manufacturer for a product defect, that are starting to pop up in your state in various different counties, you can’t be trying all of those cases separately. Let’s consolidate (or, as we call it, *coordinate*) these cases under one judge, under one roof.

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Class actions are not necessarily “mass” actions. They are not mass torts. What we have found is that when they are defeated, it’s usually on the issue of typicality. When you go through the factors in order to have a class action, the third factor being typicality, most mass tort actions do not meet the threshold of typicality and so cannot be handled as class actions.

Why? Because people are dealing with a particular product in a different way. If you are dealing with a pharmaceutical product, people are prescribed different dosages by different physicians for different causes. The malady may be different that you suffer from. However, they are typical enough to go forward to be coordinated and to be helpful and efficient as we move through the court system.

One such case I was involved with, where we denied typicality and sent it to the Litigation Coordinating Panel, was an OxyContin case, *Hurtado v. Purdue Pharma*,<sup>8</sup> in 2005. The trial court denied class certification, holding

that the plaintiffs did not satisfy the typicality requirement because of (a) the different prescribed dosage amounts ordered by their doctors (the “learned intermediaries”), (b) their different times of exposure, and (c) their different injuries. So the individual differences in the plaintiffs’ claims did not predominate over common issues of fact and law. Therefore, the trial judge, *sua sponte*, referred the cases to the New York State Litigation Coordinating Panel, which ordered coordination of all OxyContin cases before one Coordinating Judge.

We started out with five cases. The plaintiffs eventually filed over 1,000 cases, just in my county alone, and paid individual fees for each one—a quarter of a million dollars on one single day, to bring all of these cases under one roof.

## Dilantin Litigation

Now, what is going on? I just handled another case on the Dilantin issue. Dilantin is an old drug. There are mass tort cases that are springing up around the country—one in New York, one in California that I know of also. The cases allege that Dilantin, which is an antiseizure drug that has been around since the beginning of the past century, has been causing maladies that the prescribing physicians—the “learned intermediaries”—were not warned about.

The plaintiffs filed several cases in different counties, with multiple plaintiffs. They were doing what we heard about this morning, the issue of how to get around the Class Action Fairness Act. That is what these plaintiffs are trying to do. Unfortunately, they only filed on behalf of one individual from the particular county and the state—the others are from out of state. So we coordinated these cases.

What happens next? We are waiting for the other shoe to drop: the question whether this is a convenient forum for all. They sued in the home state of the defendants, who are Pfizer and its subsidiaries. So they are in the right state, in the home state of the defendant. We will see how these succeed.

Here is what goes on in trying to coordinate cases: either the attorney, *sua sponte*, will come forward and say, “Hey Judge, we can’t do this in multiple counties,” or the judges will do it *sua sponte* and say, “Panel, can you issue an order to coordinate these cases?”

We look at our rules. We ask, “Is this something that is worthy of being coordinated? Is there a federal MDL action? Can you go to federal court?” Sometimes there is an MDL, sometimes there isn’t.

Today, more and more cases are coming under the federal MDL ambit. Cases that are exclusively within one state you can adjudicate, assuming (pursuant to *Bristol-Myers*<sup>9</sup>) that it is the home state of that particular manufacturer or other defendant. If you have one or more common issues of fact and/or law, and it is a convenient forum for the parties, and if it promotes just and efficient litigation.

We have one judge from each of our four departments who sit on these panels. These are folks who generally are experienced in handling mass torts or complex litigation. We can say no to coordination and turn it around. Sometimes the plaintiffs’ lawyers will say, “Hey judge, we are on the verge. We have our case all ready for trial. Discovery is done. I don’t want to start with another group of lawyers in other different counties. I want to be excised from any coordination that takes place. We have already done it. I don’t want to slow down the parade. Let’s go to trial.” We may say, “Yes, you can go forward” on those types of cases.

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## Coordination Standards

So, on the coordination panel, what are we looking at? We're looking at:

- The complexity of the actions
- Common questions of law and fact
- The importance of these questions in determining these issues
- The risks of delay
- Will coordination increase the expenses of the suit?
- Will it complicate the process?
- Will it duplicate rulings?
- Will it be convenient for the parties and witnesses?
- Would coordinated discovery be advantageous?
- The efficiency of judicial resources (we would have one judge instead of 12 judges in 12 different counties handling the same case)
- The manageability of coordination
- Can coordinated proceedings address
  - Issues of insurance?
  - Limits on assets?
  - Potential bankruptcy?
- Are there related matters in federal courts or other state courts?

We have coordinated with federal judges. In one of my mass tort cases, I actually sat with the federal judge in his court. This was euphemistically called the “Body Parts Case.”<sup>10</sup> It was the selling of body parts to physicians. It was a disgrace. A made-for-TV movie has come about as a result of that. So the advantages are as follows:

- Uniform discovery requests, with: joint bills of particulars; joint interrogatories; joint depositions (EBTs) of defendants; plaintiffs may be deposed individually, without other plaintiffs present at deposition
- Joint orders apply to all parties
- One special master for discovery

The advantages apply to all parties.

## Is the Forum Convenient?

Here is the big arrow in the quiver: The defense is going to try to divide and conquer on many of these issues. One of the issues that comes up (and it will probably come up in this Dilantin case that we have pending), is “Is the forum convenient?” That is a discretionary call by the state trial court judge. If they meet the *forum non*

*conveniens* standards of the U.S. Supreme Court and you are in the home state, can the defendant say, “Well, this is inconvenient for those plaintiffs from out of state. They came into my home state to litigate these things and now we have to depose doctors in other states. That is inconvenient”? How considerate that is of the defendants to look out for the interests of the plaintiffs. “The plaintiffs chose your home state. They have decided to come out of state!” We have seen that argument, and we will probably see it again.

The reality is that, if you aggregate, the case will settle unless it gets dismissed for failure to prove general causation or some comparable issue.

When the coordinating judge terminates the coordination, that means the pretrial discovery is finished. Then the cases can go back home if they are not resolved, either through settlement or summary judgment or dismissal. They go back to the vicinage in which they were commenced—they go back to their home county, just as with the federal MDL. They will go back to the home state that they were originally filed in. Or the lawyers could consent to a trial before the coordinating judge. They could say, “Hey Judge, you have been handling this thing for years, why don’t you handle all of these things?” Typically, those judges will assign a bellwether case that will go to trial to try and ascertain the value of these cases. We do the same thing in the state system.

The reality is that, if you aggregate, the case will settle unless it gets dismissed for failure to prove general causation or some comparable issue.

## JAMES A. BRUEN

Bearing the burden of being defense counsel today, I want to talk to you about two things, which fit into the flow of the topics you have heard today, but are a little different. I want to talk to you first about how what you do fits into product design. Then I want to talk to you about a defense lawyer’s perspective about how to achieve acceptance of trial and appellate results so that what you do actually ends the litigation or dispute rather than simply sets us in another stage in the litigation.

My background is a little different from most defense backgrounds. For 46 years, after starting out as an assistant U.S. attorney, I have tried mass tort cases in various jurisdictions all over the country. I have tried all kinds—medical device, pharmaceuticals, product defects, a lot of different things.

## Product Stewardship

For the last 25 of those years, I have been a “product steward.” That means that, in the apparel industry, in the consumer products industry, for some companies, and for some manufacturers, I sit on teams with chemists, engineers, and physicians, to talk about how to design, manufacture, and distribute products which will not cause injuries in the first place. It is “claims avoidance” work.

What you do as judges impacts both of my functions—the trial function and the product stewardship function. So I thought I would start with product stewardship and just talk to you about where you fit in.

I sit on teams with chemists, engineers, and physicians, to talk about how to design, manufacture, and distribute products which will not cause injuries in the first place.

Both in this country and in Europe, products are designed following a very simple concept called a “continuous improvement loop.” Products are designed. They

are then advertised and distributed. They are then tested, both before, and sometimes after, distribution. The testing results are then analyzed. The products are redesigned. The redesigned products are marketed and distributed.

They are tested again. The test results are analyzed, and so forth. For good products made worldwide, that loop never ends. It is continuous.

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good product stewards I think, as well) consider litigation results—both trial and appellate results—if they regard them as well-reasoned and well-supported, as a different kind of testing input. So what you do makes a difference in how pharmaceutical and medical devices and automobiles and other things are designed.

Therefore, it is extremely important that, when you find a flaw in the way something is designed, no matter how tersely it may otherwise deserve judicial comment, you take some time to lay out, legally and factually, what is wrong with the design. If you do so, you will be speaking to me and other product stewards about how to change the product. That, frankly, is one of the most beneficial things judges can do.

## The Causation Question

The second thing I want to talk to you about is acceptance of litigation results from a defense perspective. In some respects, I think that perhaps defense lawyers haven't explained this often enough, either to their own clients or to the courts.

That is that there are many different ways to look at dividing up issues at trial and many different ways to think of them on appeal. You all know that from case management conferences, themselves, to bellwether trials, to issue classes (which is a very useful idea), and other mechanisms. There are many ways to divide up the issues at trial to try to make trial more efficient. But when I sit in private meetings with major manufacturers and distributors in my practice, I will tell you the one thing they are most interested in seeing: a trial on general causation.

In private defense meetings, the main focus is on causation.

Over the thousands of cases that I have handled in 46 years, I can't tell you how many times in private defense meetings the main focus is on causation (although in litigation there is often a dispute over every single issue before the court). And the main focus in causation is on general causation. Many manufacturers and distributors simply don't believe that the product they have designed and distributed can cause the array of injuries alleged by mass tort plaintiffs. They need to have that issue resolved.

Now, let me tell you why that is complicated. In all of the large cases (and over the years I have handled very large cases, some reaching into the billions of dollars), we do significant jury research. The jury research we have done across the country over the last 46 years continues to tell us the same thing on the issues. Think of a simple negligence cause of action—you know, duty, breach, proximate causation, damages. In any case where duty and breach of duty are an issue, if the evidence is inflammatory, most jurors will ignore lack of proof of causation. We see that in jury research. We tell our clients that. Most large and sophisticated clients know that before we arrive in court.

If they have a highly inflammatory case (and we can all think of examples from around the country), and the issues are separated for trial (as explained, for example, in Professor Gilles's paper, there have been historic divisions of issues so that liability is tried before damages. Liability includes duty, breach, and causation. If they are lumped together, you face a lack of acceptance by defendants of an adverse result. If that occurs, you may be surprised, no matter how bad the result is, that the litigation continues through additional trials, through a lengthy battle on appeal. In many cases I can tell you from being in these private meetings that the reason for the continuance of the litigation is lack of acceptance by the defendant of the verdict, insofar as it deals with causation because it has been mixed with the evidence of breach of duty.

It is not that you can't try all of the issues (and of course, you *should* try all of them). But it is important that you show the case on causation to a jury or to a court before the court deals with breach of duty. Once you do that, I think you will be surprised in the trial court, and you, as appellate judges, will be surprised at how quickly many of the cases are resolved, because the defendant will believe that it has had its day in court.

I wanted to convey those two points to you. Otherwise, you might not hear them during this Forum. I think it is important that you realize that most defendants today are dealing with legacy flaws in their products—not all, but many of the people who are being sued now, many of the people running the entities being sued, have inherited their problems from some prior manager.

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That doesn't make them saints, but it does make them more willing to resolve the issues, because no one likes protracted litigation. It hurts reputations, which is the most important asset a company has, and it is very expensive. Believe it or not, as charming as we are, no one likes paying their defense lawyers endlessly to defend a long string of litigation.

## ELLEN RELKIN

I very much enjoyed Professor Gilles's paper, and I agree with some of her comments. It was very comprehensive, addressing many of the challenges we face in mass torts.

I am a plaintiff mass-tort litigator. I have handled cases in both state court and in the federal MDL system, and sometimes in both venues in the same litigation—pharmaceutical cases such as Vioxx, medical devices such as hip implants, and it goes on and on.

I think Professor Gilles addresses many of these issues in a very thorough fashion that I agree with. I think the most apt comment may be (for those of you from Pennsylvania, and perhaps other states) where she talks about how the state judicial assignments can make efficient case management difficult. Our firm encountered that just last year while trying a case in Philadelphia in the Xarelto litigation. The managing judge in our case was Judge Arnold New—a terrific judge. He does all the management, holds all of the case management conferences, and handles the summary judgment motions. But then you get sent to a new judge for trial who knows nothing about the litigation. That is not an efficient way to do it.

## It Ain't Broke

In terms of the overall thesis suggested by Professor Gilles, that we need to adopt issue classes with preclusive effect, I disagree. I think, essentially, that "It ain't broke." Can things be perfected? Do things vary? Are there hiccups, and do some litigations work better than others? Of course. That is just how life is. But I would say

generally the systems of state court and federal mass tort litigation are working. It is improved.

Can things be perfected? Do things vary? Are there hiccups, and do some litigations work better than others? Of course.

has evolved that right now there is a fairly efficient system where you have good coordination among the litigants, and also among the courts.

I have been practicing for about 35 years. When I started doing kind of this type of work about 25 years ago, there were the state-court lawyers, and then there were the federal-court lawyers. There was a kind of schism. Now, there is a lot of overlap. Which system we are working in may depend on the cases. I think when the lawyers are working in both court systems you get optimal coordination.

We also see the judges coordinating better. If I go to the state court judge where I am practicing and say, "Oh, in that MDL, the lawyers are not handling it the way we think is appropriate," the judges who know me might be more inclined to not want to follow the MDL. If we are all working together, you get better cooperation among the judges. I have seen that.

If we are all working together, you get better cooperation among the judges. I have seen that.

We have had litigations in the past two years, where in a Stryker hip replacement litigation, before an MDL in Boston, and with concurrent state court litigation in New Jersey, our New Jersey judge appeared in the MDL "Science Day" hearing.<sup>11</sup> Science Day is what they do in MDLs now to "educate" the judges about the underlying

science and the technical issues. We have had joint hearings like that. We have had in-tandem case management orders where you ask the same interrogatory-like questions, which in mass torts are called factsheets. We had the same schedule. We shared depositions.

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makes perfect sense that the lawyers share the cost between the MDL litigants and the state court litigants. That is happening more and more. Does it make sense for independent lawyers to be reviewing the same millions of documents? No. We divide up the work between the state and the federal. Often, it is some of the same lawyers.

That also addresses the common benefit issue. If there is going to be an assessment, which there likely will be at the end if the case is resolved, then the lawyers who put in the time, whether they are from the MDL or the state litigation, all can get compensated for their work.

So I really think things have evolved, and that it is much better. There are certainly problems occasionally. Often, it is personality-dependent. Once in a while you can run into a bull. You want to avoid that person. I think that is the exception, not the rule.

## Resource Concerns

Those comments are about whether preclusive issue classes are actually needed. On the different subject of resource concerns, I would suggest that mass torts can be a cash cow for some states. In California, the filing fees are about \$500 per case. It's similar in Pennsylvania. These cases are not handled individually. It is electronic filing nowadays, so there is less paperwork for the clerk's office. A case management conference is held monthly with the same team of two or three or four lawyers, even if there are 10,000 cases. You can do the math. It can be a revenue source for some jurisdictions. You can use up more judicial resources even in a very small individual case.

As to state courts going ahead of the federal courts, I think sometimes that is a terrific thing. The Vioxx litigation began in state court in New Jersey more than a year before the federal MDL proceedings began. Much of the Vioxx discovery was done in the state court litigation. There were five or six trials in the MDL. Only one was a win for plaintiffs, but, in New Jersey, in the second trial, the plaintiffs won. It was my firm's case, and we won on appeal. I think the state court litigation largely drove the bus. There were some lawyers working in both the state litigation and the federal litigation. It works.

In a different litigation I was involved in, the DePuy "ASR" hip implants (a recalled hip implant that caused all sorts of terrible, destructive damage to the tissues and muscle), I would call the litigation a tandem bike. The MDL judge worked very well with the state court judges. They talked regularly. We had an MDL trial scheduled, but a state trial came first. That was a defense win. Shortly thereafter, there was another state trial that ended with an \$8 million verdict for the plaintiffs. That was the perfect setting for settlement, and that is what happened.

We had done all of the discovery, including about a hundred depositions, with many in England. The bottom line was that, after two state court trials with differing results, the company knew they had a problem. It was a \$2.5 billion settlement that was generally regarded by most as very successful.

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The system ain't broke. It works right now in the state court system. We shouldn't put all of our eggs in one basket, in one court system. If we do, I'd better put my insurance carrier on notice. There is not enough insurance available for me to ever agree to a system where there's just one trial, and you are dead if you lose.

In the asbestos litigation, which we all know has been going on for many years, the first 10 trials apparently were all defense verdicts. It took a long time to learn. Litigation does mature. Science changes. Nowadays, with electronic medical records, there are new epidemiology studies coming out on drugs every month. The science absolutely changes.

## Risks of Preclusive Determinations

From the plaintiff's standpoint, I think to ever stipulate and agree that the first trial would be win or lose for all related litigation would be malpractice. It's very, very dangerous.

In federal court, unanimous verdicts are required. Not so in many states. Because of one naysayer in a federal court, you don't win? Why would state court litigants want to agree to a federal court verdict binding them? It is just much too dangerous.

In terms of identifying the issues, you cannot always easily categorize the issues. We have heard about the causation issue. But in causation, liability issues also come in. You want to see the memo from the company from 30 years ago that they knew that talc had asbestos in it, and that there were problems. Is that a liability issue, or is that just about causation? Identifying the issues for the issue trial can be very murky.

Why would state court litigants want to agree to a federal court verdict binding them? It is just much too dangerous.

In pharmaceutical cases, the warning label changes over time. In the Vioxx case I was involved in, there were two plaintiffs. My firm won the case for one of the plaintiffs. Another firm lost the other case. There were differences between the two cases. In the Vioxx trial that came after us, the judge—a terrific judge in New Jersey—decided to conduct a joint trial on only one issue: the adequacy of the label. The plaintiffs were prescribed the drug before Merck changed the label and warned about heart attacks. The second plaintiff began taking the drug with the original label, but had his fatal heart attack several months later, after the new label was introduced, with the heart attack warning included in it. The jury didn't get to hear that that plaintiff was prescribed the drug by a doctor who didn't know about the cardiac risk, even though his fatal event happened afterwards. Guess what happened? His case was lost.

That is just an example of how there are so many nuances in terms of how you look at a particular issue. It is very, very hard to do that. Different labels, different injuries, different doses, it goes on and on in terms of the nuances. I just don't think the idea of an issue class with preclusive effect is feasible, practical or just, given the many factors that can cause a case to win or lose. To have preclusive effect after one trial would deny injured victims access to justice based on potentially the flukiness of the first trial.

## Response by Professor Gilles

There is so much to say. Thank you all for the careful read. I think when the defense guy agrees with me and the plaintiffs' lawyer doesn't, something may be deeply wrong. I am not sure how to feel about that. My world is a little topsy-turvy. I come from an access-to-justice perspective. I think it's terrible to see a lot of cases die on the vine. I want to get these litigants what they need. To my mind, an issue class is the right way (or *a* way). There are other ways, as well. But I do hear Ellen's point.

### Issue-Class Trials

I am going to start with Nora. I think Nora makes a lot of good points. A couple that really stuck with me are her concern that an issue-class trial may be the most mind-numbingly dry thing we could ever possibly force jurors to sit through. Let's assume I can really isolate an issue. I will just go back to the original one—"Did the defendant intentionally conceal or misrepresent the risks of their fungicide?" Let's say that is the issue because there are going to be all of these claimants who are bringing claims against the defendant RoundUp, for example. I think Nora

An issue-class trial may be the most mind-numbingly dry thing we could ever possibly force jurors to sit through.

might be right that that is just going to be a ton of scientific evidence that could be really hard for jurors to sit through.

I am not really sure how we handle that. Maybe you all have thoughts about how we can handle boring jury cases more generally—to the extent we even have trials anymore!—how we can do that effectively. I haven't thought about that. I think that is a really good point.

Nora also brings up the disadvantages to plaintiffs. At least some of the literature indicates that plaintiffs are typically disadvantaged in bifurcated or even trifurcated cases, where judges will hear liability first and then damages, sometimes vice versa. Without a blood-and-guts plaintiff in front of them, without the person they can empathize with, jurors can often dehumanize the plaintiff. So some studies have shown that bifurcation hurts plaintiffs, but there are also studies that show that it doesn't.

## What Happens to Substantive Law?

On the coordination point, one of the things I took away from this morning's session is something I hadn't thought about. It was Teddy and Adam talking about substantive law and the real concern that all of these cases ending up in federal MDLs that would otherwise be heard by your state trial courts. That is changing the substantive law of your states. You are no longer in charge of determining what your law says.

I think that is a real concern. I wonder whether coordination might be a partial response to that problem as well. So if state and federal judges work together to try to figure out what the issue is that will be (c)(4)-certified, I imagine that the state judges will also have some input into what the law of their state is so that that issue can be resolved according to their state law.

[There is a] real concern that all of these cases ending up in federal MDLs that would otherwise be heard by your state trial courts.

I haven't really worked that out yet because I hadn't thought about the sort of hollowing-out of the common law that Adam brought up earlier. I think that might be yet another reason for coordination, though it might not answer all of Nora's questions about whether we really should.

## Product Stewardship

As to Jim Bruen's points, I had never heard of a product steward before. I teach products liability law, so I think I should have heard of such a thing. It is good to know that such teams exist and that the process is cooperative. Jim says you all are part of that process, and I think that is probably true. Defense lawyers, in whatever setting, whether acting as product stewards or just sitting in their offices, are always paying attention to judicial rulings, and to jury outcomes in product cases.

I am not imagining here (c)(4) issue classes will focus on broad general causation issues because these are often not common across all litigants.

They might even tell us some of these jury determinations really change the way that the products are designed. I have even heard defense lawyers say jurors don't know what they are talking about—"These jury determinations are totally crazy and we have to redesign because of one single juror"—and that is a problem. But it is nice to hear that Jim at least is interested in what judges and juries have to say about that.

When somebody who is doing it tells you, “It ain’t broke,” you have to pay attention.

I am not imagining here (c)(4) issue classes will focus on broad general causation issues because these are often not common across all litigants. I view it as actually much narrower than that. I have tried to give you a bunch of examples that are narrower. Causation might come in, but because causation can be very linked up and intertwined with individual plaintiff issues that I imagine should be handled, and would

be handled, better in individual follow-on litigation that is not appropriate for class resolution, I don’t take the broad view about general causation. So I don’t view this as ordinary bifurcation or trifurcation, just to be clear about that.

What to say about Ellen? I should have known that Ellen just hates this idea. I think Ellen is a fantastic lawyer. So it scares me that Ellen hates this idea, because she is on the frontlines doing this stuff. When somebody who is doing it tells you, “It ain’t broke,” you have to pay attention. Yet, here I am being a law professor not paying attention.

I will tell you why I disagree with at least some of the things Ellen says. First of all, I think Ellen might be lucky in her practice. She talks about all of the coordination that she has seen. Ellen has done some very high-level cases. She gave you a couple of the names. She is at the high end of a bar that has a lot of really amazing people litigating. She is a go-to person. She is really amazing.

## Do Judges Talk to Each Other?

When I went to the annual MDL judges’ conference last year in Florida, I talked to them about issue classes. I asked them about how many of them reach out to their state counterparts, or have liaison counsel that they appoint reach out to the state lawyers. Many of the federal judges said they don’t really reach out. The lawyers reach out, but it is really just to kind of make sure nothing is going crazy over there in the state courts. I am not sure that it always works out as well for everybody else, as Ellen describes.

Now, if Ellen is right that it always works, and everything is perfect, then I have nothing to add. I just think that there are lots of cases where that is not the case. We have at least some examples where federal MDL courts have tried to enjoin state litigation. That is not cooperative federalism. That is not everybody getting along.

Many of the federal judges said they don’t really reach out. The lawyers reach out, but it is really just to kind of make sure nothing is going crazy over there in the state courts.

Maybe we can meet in the middle and agree that it is not *totally* broken. I am not alleging that it is, but it is not totally *not* broken, either. There is room for improvement. At least in some cases, (c)(4) might be a nice or a good way of fixing the problems that need to be fixed.

## Not Encouraging Settlement

I think there has been a real misunderstanding here. I don’t want to encourage settlement. I know you all do, or your trial judges do. I think that is the impulse of judges. I don’t want to encourage settlement. I worry about some of the trapdoors that were talked about this morning. I want to get a great (c)(4) declaration out there. If individual

litigants want to settle their individual cases, fine. But I don't want en masse settlements. I want individual litigation. I want us to start trying cases again. I would like to try a case before a jury again. That would be fun, but in the current system I don't think I'm ever going to do that again.

So I am not really proposing (c)(4) for purposes of encouraging or generating better settlement grids. We can do settlement grids right now. Bellwethers help us with settlement grids. I want to just solve the problem—I want a key to the state courthouse. I think that, because these cases, as Professor Rave said earlier, are often too expensive to litigate individually, we need there to be a way to give plaintiffs that key. I think the key might be resolving a common issue with durable, meaningful downstream preclusive effects.

I don't want to encourage settlement. I want to get a great (c)(4) declaration out there.

## Notes

<sup>1</sup> Emery G. Lee, *Federal Judicial Center Survey of Federal Transferee Judges in MDL Proceedings Regarding Coordination with Parallel State Proceedings* (Report to the Judicial Panel on Multidistrict Litigation and the Judicial Conference Committee on Federal-State Jurisdiction, 2011).

<sup>2</sup> Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

<sup>3</sup> Engle v. Liggett Group, Inc., 945 So.2d 1246 (Fla. 2006). For more discussion of this protracted litigation, see *What is the “Engle Progeny” Litigation?* (Public Health Law Center, Mitchell Hamline School of Law, 2015), available at <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf>.

<sup>4</sup> For the 1 percent and 37 percent figures, see Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 6 (2019). For the 158,589 figure, see the JPML Statistics Report, available at [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-September-17-2018.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-September-17-2018.pdf).

<sup>5</sup> For civil trial statistics, see Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

<sup>6</sup> For discussion, see Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial Splitting Devices Defeat the Jury’s Role*, 26 U. TOLEDO L. REV. 505, 513-14 (1995).

<sup>7</sup> NY Uniform Rules for the Trial Courts §202.69.

<sup>8</sup> Hurtado vs. Purdue Pharma, 6 Misc. 3d 1015(A) (N.Y. Sup. Ct., Richmond Cty., (2005)).

<sup>9</sup> Bristol-Myers Squibb v. Superior Court, 137 S. Ct. 1773 (2017).

<sup>10</sup> In the Matter of Human Tissue Litigation, 38 Misc.3d 184; 955 N.Y.S. 2d 721 (2012).

<sup>11</sup> “Massachusetts District Court Outlines Process for Stryker LFIT Bellwether Trials,” NEW YORK LEGAL EXAMINER, Dec. 20, 2017, <https://newyorklegalexaminer.com/health/medical-devices-implants/massachusetts-district-court-outlines-process-for-stryker-lfit-bellwether-trials/>.



# Closing Plenary

**Professor Gilles:** Thank you all for thoroughly engaging with my project, even if you hate it. My colleagues just said to me, and I think this is a good way to think about it, if they don't disagree with you then you're not saying something interesting. So, I feel like I win the "most interesting person of the year" award.

There are a couple of things that I take away from being with you today. First of all, thank you to the judges for all the work you do. I think you're on the front lines of lots of really important cases, and you really care. You care about the cases; you care about getting the appeal decisions right; you care about your lower-court judges; you care about the resources that your state can bring to bear to provide access to justice in your states for your citizens. Thank you.

And thank you for sharing with us all your wisdom because, as you well know, we spend far too much time in law school looking at federal decisions, thinking about federal judges, and not enough time reading state cases (outside of the first year in torts or contracts, where all the cases are state cases). Once you get to the upper level, it's a real concentration and focus on federal courts and what's happening in the federal bench. So it's really wonderful to be with you and to hear about some of the things that you are concerned about on an everyday basis.

**Professor Rave:** It's a real challenge to try to wrap up an event like this and figure out what ties it together. The most valuable thing, for me, was being able to sit in on the discussion groups and hear the things that the judges are talking about and thinking about and finding interesting. I found that truly fascinating and rewarding, and thank you for allowing me to be part of that.

The things that, in my impression, resonate with you concern the role of state appellate judges—no surprise!

If I'm right about my claim this morning that more of these complex aggregate cases are making their way into federal court over the past several years—and if that's a trend that's going to continue—then what does that do to state substantive law, as Adam brought up this morning? What does it do to state substantive law when federal judges are deciding questions of state law without the benefit of state precedent? The state judges aren't getting those cases, and so they're not making their way up through the appellate system in state court.

And what does that do for the development of the law when we see federal judges with incentives towards uniformity—and maybe a reluctance to strike out on their own without some guidance from the state courts, who are really the institutions that are supposed to be deciding these questions of common law? And if we've arrived at a system where lots of important decisions of state law are being made by federal judges based on precedents set by federal judges, I don't think we've undone *Erie*, but it sounds pretty close to federal common law.

And the other concern that I heard, or theme that I heard today a lot, was resource constraints. And I want to suggest that maybe these two things are not unrelated. So, if we're seeing the biggest, most complicated aggregate cases moving out of the state courts and into federal courts, then we're also seeing some of the best lawyers moving into federal courts, and the best-resourced defendants moving into federal courts.

If the high-stakes litigation is not going to be in state court, then I think we're at a real risk of the state courts losing some of their constituency with the state legislatures in terms of obtaining resources. And I find that rather

alarming in a system where you state judges are the ones who are supposed to develop the common law. And if you can't get the resources that you need to do that, I find that a bit alarming.

I hate to end on such a dour note, but this has been a real privilege, and I learned a tremendous amount today. Thank you all.

## Comments from the Floor

**The Honorable Eileen Moore, Associate Justice, California 4th District Court of Appeal:** Thank you very much for everything today. I'd first like just to react to a little bit of what Professor Gilles said regarding paying attention to federal courts versus state courts, just a little aside. I think it was in 2008 that I had to give a speech, and I don't remember what the speech was about, but I wanted to know the number of original filings in federal courts and state courts. I called the Administrative Office of the U.S. Courts, and I called the National Center for State Courts. And for all the federal courts, all over the U.S. and all of its territories, the total number was 360,000 that year. Just for California, it was somewhere between nine and 10 million! So, the number of cases that are filed in state court is so far beyond what is going on in federal courts. Consequently, the number of state court appellate opinions is much higher than federal court appellate opinions. It is easier for law school professors to read fewer opinions by concentrating on federal opinions.

Professor Rave, I wanted to respond to a little bit of what you said. Regarding the lack of advancement of state substantive law, it appears to me that the Ninth Circuit is certifying more and more questions for the California Supreme Court, so I think probably that may be what's going on. And, in my observation, rather than federal courts deciding questions of state law without the benefit of state precedent keeping state substantive law from advancing, what is keeping substantive law from advancing is arbitrations.

Regarding the money courts get through aggregate litigation, and the notion that courts are profit centers, what is actually happening is that more and more people are filing *in forma pauperis* fee waiver requests. It's \$435 for an original filing in California. But if you get a fee waiver for it, not only do the courts have the administrative work of going through that fee waiver and figuring out if the request is worthy, but the courts receive no money, despite all that extra work, and it's not necessarily a profit center.

**The Honorable Judy Cates, Fifth District Appellate Court, Illinois:** First of all, I want to thank you for addressing the topics you do. I think they're exceptionally relevant. It was an exceptional idea for the Pound Institute to put on this topic at the Judges Forum. Illinois is one of those states where we are seeing these issues. They're very relevant right now for us, although, I learned from my colleagues today that a lot of states don't see any of this.

Thank you very much for both of your presentations. I believe that Professor Gilles's insightful suggestion, which I call "one-and-done," was very, very important for us to consider. In our group, once we got past the questions, and we started all really discussing how this would even occur, we mostly realized that there aren't any procedures for this to happen; that a lot of us lack any kind of process for this to occur.

So, at least in our group, we had a very resourceful discussion about the topic.

# The Judges' Comments

In the discussion groups, the judges were invited to consider prepared questions relating to the Forum papers and presentations. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below and arranged according to the discussion questions. These remarks have been edited for clarity only. Conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of convergence that arose out of the discussion groups, please see page 121 of this report. We have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

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## Have you noticed a trend in the types of aggregate cases being litigated in your state's courts in recent years?

The feds have taken over so much. In my years as a judge, I have seen tremendous takeover through federal legislation and U.S. Supreme Court decisions—not just in aggregate litigation.

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We used to be a very heavy plaintiff's area, but our legislature changed our venue law to prohibit some types of joinder that are used for the purpose of getting a favorable venue. So there are a lot of big cases that we do not have jurisdiction to handle because of venue issues now.

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In our southeastern state we see cases where there is a jurisdictional dispute, whether it should be in our state as opposed to some other state, and we have cases where it is a question of whether it should be in one of our counties as opposed to another. But I can't remember any in my 10 years where the issue was whether it should go to the federal court or not. I am not sure if our state is different in that respect. There doesn't seem to be a big push of cases that are filed in state courts and that they are trying to get to federal courts.

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—In our state we have a fair number of class action cases, but they never reach the court of appeals for some reason. They all go away. We have to certify them. By state law, the cases come up to us. We say yes to certify or not. But they never come back up. I have never seen one actually make it on appeal. The trial court actually certifies it, but either side can appeal that certification decision. I have never seen one actually make it back up on appeal.

—We are seeing certification issues, too. They do not end up being litigated beyond that—they get settled, primarily.

—In our Southeastern state we have interlocutory appeals on class certification. We are not allowed to look at any of the merits at all, even if you know they are going to lose. You just look at the class certification issue and keep hands off the merits.

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We have some odd situations occasionally, where after there has been a settled aggregate case, individual plaintiffs are trying hard to come up with new theories of recovery to come in alone and not to be members of a class that are relegated to the corner and get whatever percentage is left. So there is a lot of exploration into state tort law to see where there might be some openings. At the intermediate appellate level, it will just come up every year or year and a half. It trends more now where we have long-established funds on things like asbestos. There is some wrangling going on between the two sides.

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—In our western state we have a mass tort litigation possibility developing around this issue of climate change. There are actions that are starting to be brought against the fossil fuel industry, carbon producers, and it's going to be, I think, a nationwide issue.

—I don't think there is an MDL on that, but there have been environmental MDLs for sure, like MTBE, the ground water contamination cases. There have been some cases involving farms in the Midwest, chicken farms in particular, where rivers and other areas being polluted. I haven't heard any yet on this bigger legal area.

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In our western state our asbestos cases have been reduced. We also had mass tort litigation before CAFA that involved Benlate cases, fungicide cases, that were against DuPont. But at that time I don't think DuPont was as focused strategically on getting into the federal courts so that litigation stayed in state court. That's where it was resolved.

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At the appellate level we are seeing a lot of mass litigation, mostly on issues related to attorney fees or people filing objections. We just got one from the federal court in New York. They came to our county, the trial judge just signed off on the class, didn't ask a question, and there were two MDLs pending in other states.

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How open should the courts of one state be to resolving disputes that primarily arise in a different state? Does it matter whether one or more of the parties are residents of the forum state?

In our mid-Atlantic state, we don't want lots of out-of-state filings because it makes more work for us. But as a practical matter, certainly we get numerous cases where we have out-of-state plaintiffs. But if the alleged bad acts emanated from our state, that could change the equation for sure.

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There's always the question of the competency of the judge who would preside over those cases, as a practical matter.

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I think it should be open to the extent of if it falls within their jurisdictional principles. And I thought of a case that our court resolved where the plaintiff worked in a mine in State X, and 30 years later developed mesothelioma, but now lives in our State Y. And the issue was not only can he bring a suit against the State X mine owners 30 years later in State Y, but then also, whose law will apply? And it made a difference, because State X has a statute of repose; State Y does not. So your case would go away in State X and it would be viable in State Y. We ended up ruling in favor of the plaintiff, and a lot of it was because he

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had been there in State Y for many years, and that's where the disease manifested itself. So I think yes, it makes a big difference if there are residents versus just newcomers forum shopping, which I think every judge looks to. I do think you're open in those kinds of situations to resolving that within your state.

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I'm from a large urban jurisdiction, and quite often I'll look at a new appeal when it comes in with the briefs and briefs and think, "Why the heck is this case here?" I've got an insurance company from Europe on one side and a corporation from another state on the other side. There's some kind of local hook for it, but it's a very thin hook. But I think a lot of it is because the lawyers who do these big cases are in big cities. In my state, there's just one gigantic metropolitan area and no other big cities. And they want to litigate in my city because it's geographically convenient, they know the judges, they know the courts, they're used to dealing with these large business disputes. So we get a disproportionate amount of work vis-à-vis our population because of all of those factors.

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In Florida, with the *Engle* cases, you had judges that did nothing but try tobacco cases. And I think on the federal side they did something similar, but in state court, I don't know if it was a volunteer effort or what, but those state court judges became very sophisticated at trying the tobacco cases and all the issues stated having very consistent evidentiary rulings. It worked, but it certainly was a huge undertaking for the Florida state courts, and all of those cases get appealed, and I thought the appellate courts did a great job with consistency and timing and the system worked.

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In one case, though, it was interesting. We applied the "closely-related" doctrine, which is a theory of consent for jurisdiction. A typical situation is where a company enters into agreement with another company and they have a forum selection clause. It says, "All of our lawsuits will be brought in Maryland state court." The holding company decides to form another LLC. That LLC that actually produces all of the widgets and then says, "We are not bound to that forum selection clause." Under the Closely Related doctrine, a party that is closely related can be held to have consented to jurisdiction. There is a test that has been developed.

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Look at the states where a corporation is incorporated, but a plaintiff is injured somewhere else. You are going to litigate the case where the incorporation is. Just how fair does that seem? How comfortable are you doing that and applying the law from somewhere else? I think a lot of the discussion this morning seemed inherently unfair to the injured parties. It appears to weigh more favorably towards corporations.

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I think besides the law, the question is where is the evidence? And do you have the ability to bring the witnesses that are required in a multistate dispute. I think the federal option is favorable in those cases where you are going to have to bring in witnesses from sea to shining sea.

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Usually the large corporations have so much more in the way of resources. It just often seems geared towards the defense rather than towards the plaintiffs. I look at a lot of this and I think of the little person who has gotten hurt and having to litigate a claim. It does help if you have others around you to litigate the claim.

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It is pretty well settled now in our central state that, yes, you have to have at least somebody related to the state, who was injured in the state.

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Sometimes in federal court, cases seem to take a long time; whereas, if you are in state court, you get a trial much sooner. Plaintiffs in our mid-Atlantic state prefer to be in state court rather than in federal court. So that is one of the things about state court *versus* federal court—there is a belief by plaintiffs that they can get their matter resolved much sooner than in federal court.

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In our midwestern state we have always been a heavy litigation state. But civil trials are down something like 40 percent in the last few years. It's amazing. I do read about the federal courts just going through the roof with their volume. We are in a real sea change, I think.

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We're such a small state, we would never try to take claims from other states. We also think that it's important for the common law to develop in each state. And we tend to be a very consumer-protective state. I kind of like the idea of our courts being able to keep our cases. For people who are injured, or consumers who are injured in our state, we would prefer to be able to develop our law ourselves, rather than have the federal courts or other states decide.

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I prefer that we get to decide our own cases. But by the same token, I don't think we should be deciding California law or Utah law, or how those plaintiffs should be treated.

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Our midwestern state is home to two real industrial giants. It would seem likely that people would be forced to come to our state to litigate against them, even if they don't want to. I don't think our courts would have any problem with citizens from other states suing in our jurisdiction. I think choice of law would be an issue, depending on where the injury occurred.

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Our supreme court completely removed the class action rule from our rules of civil procedures. So now we don't have a rule for it. And our legislature, at the same time, enacted a very restrictive venue statute. So we're not going to have a plaintiff in our state courts who doesn't have a connection there. And our joinder laws are pretty restrictive as well. Our supreme court does have authority to make procedural rules, but ours are more restrictive.

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In our southern state, the supreme court is very hostile to any plaintiff's cases so generally they don't get filed there. And our federal circuit court has no problem with taking those cases out of state court and putting them into federal court. That's why we flat don't see them.

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I think it is desirable to have a case resolved in the state whose substantive law would apply.

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How should state courts handle legal controversies that stem from a defendant's uniform nationwide course of conduct that affects plaintiffs in many states in similar ways? Are the federal courts better situated to handle such disputes? Are courts in the defendant's home state better situated to handle such disputes?

It feels to me like the federal courts are taking cases, like tort claims and consumer protection cases, that are historically the purview of the state. When we're talking about principles of federalism, it feels to me like that should be a state concern.

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It depends on what you mean by better situated. In my view, "better situated" means which jurisdiction is more likely going to be more favorable to your position. Maybe I'm being a little negative, but that's what it boils down to—"Where am I going to have the greatest advantage or the least disadvantage?"

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Just from the management perspective, I think it is hard to argue against putting it in federal court. If it's a personal injury or a medical case, we have veteran trial judges in our northwestern state who I think have much better feel for that law than a new federal district court judge would. Just in terms of the skillset in the area of law, you might have some great state court judges. But it would be very difficult to manage.

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If it's a uniform, nationwide course of conduct, there's so much greater potential for inconsistent judgments when it's not in the federal system. So, I think the federal system is better equipped to handle anything that's considered uniform. Now if it's not uniform, that's different. But if it's one policy that seems to be affecting everybody, I think that's not something for state courts.

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We have a case in front of us right now where the trial judge is presented with a question of payment of MDL fees because the MDL court was trying to require one of the lawyers in his case to pay a fee for the common discovery that was used. The court had no jurisdiction over the lawyer, but had jurisdiction of course over the defendant. Now, on appeal, we're trying to decide whether the MDL court has jurisdiction over our trial court—reaching into our trial court. And believe it or not, the circuits are split on this issue.

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—I had an experience very early in my practice with a case that, under state law, we would win, but in the federal court of appeals we would lose. The defendants removed us to federal court and we lost, and had to litigate that all the way to the U.S. Supreme Court to vindicate a state common law cause of action. So that's kind of baked into my DNA.

—Mine too. It's politicized, and now of course we get all these new federal judges for seats that were open for so long, who all have the same mindset so it's almost like a politicized, ideological decision. You know what they're going to decide because they were chosen for a reason. There's no regard for the law. And when your state doesn't even get to weigh in on it, it's done.

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—Some more conservative judges and jurists and scholars believe that the courts in the defendant's home state are better situated to handle such disputes.

—Not necessarily. That state might not afford a plaintiff any relief whereas my state might. So it really depends on where you're talking about, whose law.

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—It's the plaintiff's cause of action and that choice should belong to the plaintiff.

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In our state we tend to try to protect our consumers and people who are injured. So in this day and age, with the increased conservatism of the federal courts, I'm not a huge fan of cases going to federal courts.

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How do you treat corporate registration statutes? Are they viewed as requiring consent to general jurisdiction, consent to specific jurisdiction, or not consent to jurisdiction at all?

From the point of view of the regulators in the state, the legislators, or the governors, when we have foreign corporations register, they are not actually registering with the idea that a claim can be brought against them. Maybe we are going to have a more robust type of requirement now that requires actual consent: "In State X, you are consenting to the jurisdiction of our courts."

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Our supreme court hasn't ruled on this yet, but we've had one or two court of appeals decisions that have said that the statute itself requires registration, but doesn't give any kind of notice that you'll be submitting yourself to the jurisdiction of the court. So there's no fair notice. Registration can be considered in the mix of factors, most notably for specific jurisdiction, but it's not consent.

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In my experience, the fact of registration and incorporation is just a strong factor in determining that they've consented to general jurisdiction. That's the way we've always done it. In our southern state we don't go much beyond *International Shoe*. We look at all the factors to determine whether or not there's jurisdiction. Registration in the state, incorporation in the state, is a strong factor. They intended to do business there, and one of the consequences of doing business there is that the company might be haled into court.

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In our midwestern state registration is a factor for jurisdiction, but it's not dispositive.

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We just had a case in our mid-Atlantic state that involved a gun. It started in my court. It went up to our court of appeals. A person was shot in our state, but the gun was purchased and bought in another state. The manufacturer did no business in that state, but they were registered to do business in our state. It was registration for service purposes. It didn't mean that you were consenting to jurisdiction. Our highest state court said no jurisdiction. *Daimler* has affected all of that.

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—I have difficulty with the notion that if AT&T, who does business in 50 states, has to register to do business in State X, they should be subjected to jurisdiction for an injury that they cause in State Y just because they appointed a registered agent.

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What is the purpose of the registration? It is not to say, "I am here to be sued." It is to identify an individual to accept a piece of paper.

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In our midwestern state we were pretty open to jurisdiction. Now, the *forum non conveniens* doctrine actually weeds out a lot of cases that would have otherwise stayed in our state.

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I recognize the concern that caused Congress to pass CAFA to prevent forum shopping. That is a legitimate concern. I am just struck by the fact that you can so easily consent to being forced to go to arbitration. I guess you “consented,” so you are not being forced. Yet the corporation that makes a conscious decision to have lawyers register it to do business in a particular state is *not* consenting to jurisdiction.

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Our statute just says, “If you do business here, you must register with the Secretary of State.” Period.

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In our midwestern state it wasn’t just the registration. You could subject yourself to jurisdiction based upon the substantial contacts that you had, how much business you did within the state, how much you had publicity in the state to get people to buy your product. There were a lot of different factors.

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I was really struck by the irony that when you sign up for a cell phone service, you have consented to arbitration. Yet, a corporation that makes an affirmative decision to register in a state and appointed an agent for service of process hasn’t consented.

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Should personal jurisdiction analysis change because of the aggregate nature of a dispute? Should personal jurisdiction doctrine facilitate aggregation, prevent aggregation, or be indifferent to aggregation?

I think jurisdiction requirements facilitate aggregation, but not necessarily for the better. But it certainly facilitates consolidation and promoting an MDL process in state court, and almost forcing that.

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It doesn’t make sense to try a case in 50 different places, so maybe we require a redefinition of personal jurisdiction. However, it’s a Constitutional doctrine, so it’s a little hard to change.

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—The jurisdictional rules are always in my mind. The driving force behind them has been fairness to litigants, and that remains the driving force in my mind. And in light of that, I would say jurisdiction should be indifferent to aggregation. I don’t think practicality overrides fairness.

—The question of fairness is in the eye of the beholder. We would be naïve to think there isn’t gamesmanship. Everyone wants to win, and so they want to file the case where they think they’ve got the best chance to prevail, whether it’s in a particular city or a particular part of the state, and the other side is going to resist that and say, “It is not in my best interest to have this case venued here, let’s fight about whether it should be there to begin with.” So I think that that plays a role in the analysis as well. As a judge, how you perceive those arguments, the weight you give to each of those, is part of the process.

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I think it’s better to have a big group of litigants to promote settlement, because that creates the precedent. When one of these cases gets tried, people think, “Oh, these cases are going to go this way or that way.” That’s going to promote settlement. If you have all these people, all these different locations trying the same issue, and you have different results, I think that leads to inefficiency—not just in court, but also in the settlement processes.

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Doesn't fairness still come into play with respect to due process? Whether it's a corporation or an individual, the same factors that you take into consideration with respect to personal jurisdiction still need to be applicable.

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One of the primary motivations behind aggregate or class litigation is to promote fairness. If plaintiffs are bringing a claim against a giant behemoth corporation to right a \$10 wrong, that just won't happen unless we allow aggregate or class certification. I do think that is and should be one of the driving motivations behind aggregating cases. That is something that really needs to be balanced. I really think there is a need to have aggregate and class cases to make sure that the litigant can get the small wrong righted. Especially if you have a wrong against a huge corporation, it is not going to be righted unless you have resources that can be shared among hundreds (or maybe thousands) of people.

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I think jurisdiction should be indifferent to aggregation. For it to facilitate or prevent aggregation puts the proverbial cart before the horse. If it can be indifferent, I think it should be.

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I wouldn't want to set a number. I wouldn't want to say that if you have 2,000 plaintiffs, 1,000 have to be residents of the state, or 10 percent have to be residents, or 50 percent. That's my fear. I would just say the main plaintiff should be a resident.

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Does your state have procedures for coordinating related intra-state cases? Have you used this system and how does it work?

In our state, I am not aware of any coordination procedures at all. I am on the intermediate court. The question might get certified up to the supreme court and just bypass the appellate court.

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No.

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I not aware of any procedures for coordinating in our state.

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You can petition the supreme court if you have multiple litigations and various different circuits in the state. They have the supreme court assign them all to the same circuit. That can be done. It has to be a petition to the supreme court.

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We have procedures. It depends on which case is filed first and some of the other things that were spoken of during the lecture—how far the case has progressed, what are the issues of commonality, the parties and where they are located. There is also motion practice, where you can sometimes have the case moved by consent, but sometimes not. The plaintiffs pick where they want to start the case, but it doesn't mean that there couldn't have been another place to start it.

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We have criteria that are applied. It is a more efficient use of our resources than to have a bunch of cases from different locales with widespread witnesses and different issues. As we know, in civil litigation, often times cases don't ultimately go to trial. If the common issues can be resolved, that results in the ultimate settlement of the case.

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In our state we have a kind of MDL panel with five members and any additional members that the chief justice of the supreme court appoints. We're on the coast, where we have a lot of wind damage and flood damage and questions about which insurer should pay for it. That has been a big source of litigation from all of our hurricanes for the past 10 years.

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—California does, and you apply to the judicial council, which is the governing body for the courts and the chief justice appoints, decides what court where all the cases will be heard in the state.

—Illinois has a rarely-used rule. I think it's becoming more fashionable as of late, in light of the opioid cases.

—I'm not aware of a rule in our state. I would think if we needed to, we could go to the supreme court and ask the to transfer cases to one certain court, but there's no formal procedure.

—Hawaii doesn't have a system. I was a civil trial judge for over 10 years, and there were colleagues and I had similar cases and we had different rules for the cases.

—Mississippi does not.

—In Connecticut, we have a procedure in our rules where parties can apply for what's called a complex litigation docket, and now there's three, it's increased over time.

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—In our southwestern state, at the trial court level, they have an MDL panel that they can transfer cases into.

—In our midwestern state nobody ever really looked at it until the opioid cases came along. I think that was the real first useful use of it. I did class actions, and I didn't know about it until, you know, somebody filed a case in a tiny rural county. There was no way that judge was ever going to be able to handle it. So once all of the cases started coming, then everybody agreed to send them to an urban county where the judges have law clerks.

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In our western state we use the word "consolidation" if there are cases that are somehow connected within a county. Those cases are consolidated. The word "coordination" is used for separate cases that are filed in different counties throughout the state, but the issues are very much the same, and the chief justice will order that they be heard in one particular county, and then the cases from the other counties come to that one particular county, and all their cases are heard together. There will be a status conference among all of them, and one order will be made regarding discovery motions, summary judgment motions, etc.

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—In our southern state, to my knowledge we don't have any coordination of intrastate cases. But how does that work? Is there someone in the administrative office of your courts who somehow finds out about cases around the state that seem to be related?

—It's kind of up to any individual judge to pick up the phone and call and say, "Hey, are there any other cases like this?"

—Or a defense attorney who says, "We're having problem. I'm in Manhattan, I'm in New York County and we're having a problem in terms of discovery where we have a similar case in Kings County, so shouldn't you guys get together and coordinate this?"

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Our southwestern state does. The supreme court will assign the judge, and then he or she will hear all the related cases. For instance, right now there are a lot of hail damage cases. The judge who was assigned them is hearing them from all over the state, and she is also trying the initial cases. But then what she did is she'd have the plaintiffs pick a case and the defendants pick a case, and they try it. They kind of go back and forth like that until it creates a pool of settlement parameters. So we do have a system—not a specialty court, but just by assignment when there is a lot of litigation in a certain area.

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In our western state, the parties themselves can petition the court for a declaration of complex designation, and then one judge gets it all. We get no additional resources. And we sometimes do tell them they have to go to mediation. If they're uncooperative on discovery we force them to pay for a discovery master.

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Our procedure is, whichever court had the first case gets all the cases, so they can't go forum shopping.

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The opioid lawyers in Chicago are on the MDL steering committee for opioids in Cleveland. So this whole concept of people working together, it's already happening. It's just the way it's usually done—hopefully without a fight.

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Have you ever had occasion to coordinate state tort claims with related claims consolidated in a federal MDL? What coordinate steps did you take? Were these efforts worthwhile?

Yes.

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Nope.

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No.

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There were several times when there was a state case pending and a federal case pending, and we discussed and we coordinated, and we did joint settlement conferences. The state and federal court judges together would settle the cases. But it wasn't these mass cases or class action cases. It's just big court cases.

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That would never happen. We'd never get that call. If we did, we'd just laugh.

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Informal coordination could happen easily.

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Most members of our court like control. We want us to be interpreting our state law, not them.

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—If, in the briefs lawyers send us, they exclusively quote federal law, then we don't articulate it, but the basic thought is "Who cares?"

—We do the same thing.

—We're the same way in our midwestern state. You can cite federal sources all you want. Maybe we like the concepts, but we're not going to quote them.

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—They cite us to other states too. If we have an issue where we haven't dealt with it yet, and we had two sides, we just picked the one we want, and the side that loses is going to go to the supreme court and say what they want. That's just the way it works.

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In my midwestern state there is an asbestos judge. That is all that judge does. Most of the asbestos cases in our area do not seem to go to the federal MDL. Coordination doesn't come up.

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—No.

—As a trial judge, no.

—I was a trial judge for almost 12 years, and I never had anything to do with it.

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We're still waiting for that phone call.

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Have you ever been subject to efforts by federal MDL judges to enjoin or stay state proceedings pending the resolution of federal proceedings? How have you responded to those efforts?

I was surprised, in reading the Forum materials, to learn that MDL judges can stop state proceedings. That might make sense if the MDL judge has most of the cases in front of him and is trying to settle them, but what happens if most of the cases are not before the MDL judge?

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—I have.

—Some of those stays can be lengthy. You could have an appellate court case that goes in bankruptcy. There is a stay. A year goes by. There is a stay. They are trying to do a reorganization. There is a stay. They holding the case as "pending." There is not a damn thing you can do about it.

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The state-federal competition is overblown.

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A stay can affect our reputations for handling cases quickly. We have to file reports on our case-management. It's public knowledge.

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The newspapers often will publish court statistics. A stay can create a huge embarrassment, because people just see the numbers. The article does not explain the reasons behind the numbers. We may be short on some judges. Those things are not printed.

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—In our intermediate appellate courts, at the end of the term, if we fall below a 95 percent disposition rate, our chief justice has to write an explanation to the chief justice explaining why.

—In our western state, if judges do not produce a certain amount, they do not get paid.

—Same in our northwestern state.

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Before tort reform we would see mass litigation cases come through our southern state, but since then we just don't see a whole lot.

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Yes, in the big cases, BP litigation for instance, and in the water cases, the opioid cases, those really big ones. The mesh cases have both federal and state cases going. And it does appear that some judges in state courts are saying, “We’re not going to stop this. We’re not going to wait for the federal court system. You have to go another way.”

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That would be so much fun. No, I won’t stay my proceeding.

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In coordinating with federal judges, have you ever confronted ethical arguments about ex parte discussions on active litigation? How have you managed those arguments?

I haven’t heard that argument made before.

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I like that idea—talk with the federal judges and work a plan out to resolve timely issues. That is our job.

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No.

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They do not coordinate with us and we do not coordinate with them.

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It is not unethical to talk to other judges as long as you make the decision yourself. There is no problem with that.

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That does not happen in our midwestern state. There is no coordination. There is no reason to. They each have their own case cases and jurisdictions.

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We know what our jurisdictional limitations are and we work with them.

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In our southern state it wouldn’t be an ex parte communication, because judges can talk to each other.

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I can’t or don’t know what our code of judicial conduct says on this question, at least I’ve never seen it arise. I do, at least in the abstract, have concerns with our state judges chatting with federal judges, even in connection with related cases.

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—It would be no different than me calling up an expert witness and asking them some sort of very scientific question without telling the parties, which I think is totally inappropriate. So, unless the parties requested that these two judges coordinate, I would stay away from it. I really would. And I would caution all judges to stay away from it.

—I would rather the lawyers request it, and coordinate and know about it.

—I think the ethical rules make a distinction between administrative matters and matters of merit.

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Under judicial ethics in our mid-Atlantic state, one judge cannot consult another judge concerning the outcome of the case, or solicit advice as to how they can rule on issues. But this is totally procedural. It’s

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coordinating the discovery, coordinating the hearings. And you're not bound by a determination by the federal judge as to, for example, whether they are to accept this individual as an expert or not, or accept their determinations. It's purely procedural, trying to do the scheduling. That's all you're doing. You're not soliciting their advice or their opinion as to any particular rulings, and you're making your own ruling.

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You can have your court attorney call. It's kind of the same thing if your court attorney does it but if you feel uncomfortable as a judge doing it, you can certainly have the court attorney call.

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—Under our rules, the parties would not necessarily have to be informed. Maybe it would not be in violation of judicial ethics if the parties were not aware. The best practice is to alert the parties to it, but there are rules where you wouldn't have to tell the parties.

—The next time I saw the parties, I would probably let them know, just as a matter of course, but I don't necessarily think I would have to do it in advance.

—Instead of making a phone call, sometimes I've looked at the docket of the other court. It's easier now that everybody's electronic.

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—Has anybody here ever had a federal judge call you up and say, "Hey, can we chat so that we can coordinate about these proceedings?"

—No.

—No.

—No.

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That is a process that has already been set up before, and it doesn't seem to me that it is *ex parte*, because it's a process that's designed for the two courts to communicate.

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I'm from a small state, and the state court judges are very close to the federal court judges. We're friends. We hang out. But I don't think I've ever had them ask me a question of state law. They don't ask, "How would you guys see this?" I think they kind of draw the line there. I think it makes a lot of sense to ask about the procedure.

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I can't imagine having a discussion with another judge with regard to substance of the case, other than just trying to figure out administratively where they are, if we have similar cases poised for disposition.

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I'm very close to several federal court judges. We get together regularly for cocktails, first Monday of every month, and we never talk about cases.

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I think even in informal settings, we do everything we can to avoid talking about courtroom, the cases, anything like that. It would be an unusual circumstance if we were somewhere socially and the subject matter came up.

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I wouldn't talk to a federal court judge about the substance of a case.

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Do you believe a preclusive determination of a core issue in a prior federal litigation would be a help or a hinderance in managing individual tort cases on your dockets?

I do like the idea of preclusive determination of the core issues.

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If the determination hinged on an issue of state law, the federal court's interpretation of my state's law is not binding on me, so it cannot be conclusive. At least in my court, the only two courts that I must follow in terms of precedent are our state supreme court and the U.S. Supreme Court. I don't have to follow the federal circuit court, I don't have to follow any other state appellate court. So if it's about interpretation of state law we still have free rein to do what we need to do.

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I look at the federal cases. They may be persuasive, but we don't have to follow them.

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There are certain judges on both our state court of appeals and our state supreme court who would want to be tethered to the federal opinion, whatever it is, and there are other judges who believe that it may be persuasive but we don't have to follow whatever the federal court says, that we can do whatever we want as long as we don't go below what their rights are.

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Especially if it's a case of first impression, if there's no local state law, I want to see what other states are doing.

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In the last year, we have had several cases on our court in which the whole argument was over whether it was preclusive. That becomes the issue: whether it is actually preclusive. It doesn't necessarily simplify things.

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—Having had a past as a trial attorney, I just can't imagine turning it over to someone else. Who knows where the venue would be, or the jurisdiction. Every case is so unique with juries and trial attorneys. I would not be in favor of it.

—It seems to me it is the personality of plaintiff lawyers in large cases that they wouldn't be particularly happy about saying, "Sure, she can handle that."

—Every jury is so different.

—I also think that it wouldn't in reality tend to streamline anything, because there is no purse at the end of the issue, litigation or settlement, like there is if you are the aggregated case counsel. I would want to be compensated, not just for my group that I am going to take forward on that issue, but for all the others at the same time.

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To do this you would have to convert an opt-out class into a non-opt-out class. And preclusion would take away a property right. My own opinion is that this would be unconstitutional.

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The bellwether trials seem like a better idea. I would think more people that are involved would be willing to sit by and let those go forward and let them add the information to the settlement calculus and not feel threatened by it.

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—How could it be fair? I think it's very complicated. Very complicated. I don't like the idea. I'm a state court advocate. Especially in this day and age, I think the state courts are very, very important. I think the work that we do is extremely important, and I think we need to assert our position and our importance in this.

—I don't personally have any problem with the idea that there could be different results even in different counties in my state. If you think about a jury as the conscience of the community, one of our urban counties is going to adjudicate the same case differently than a jury in a rural area. I don't have any problem with that.

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I think that there should be room for those differences in a system. I also think that if you think of tort law as a way of ultimately improving safety, it doesn't hurt the defendants to go through two different trials with two different sets of lawyers, that could perhaps inform how products are designed and marketed. I think it's a good process.

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I don't know how you could actually create a system that would bind a plaintiff to the result of a case they weren't actually involved in, absent their agreement to be bound by it. I can't imagine anybody ever agreeing to be bound by it. I don't know how you implement that.

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—How do you pick the plaintiff?

—Well, of course in the opioid case in Oklahoma, they not only picked the plaintiff and the defendant, they even picked *the judge*, because they want a bench trial!

—That would be illegal in my state.

—None of this could happen in our southern state. We have random allotment, and you can't just say, "We're going to send all these cases to a particular court. So it's like a totally foreign concept to me.

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I think everybody has their day in court, and if we asked for this job, that's what we have to do. If it settles, great. But that can't be our goal. Our goal is to act as the judge. It's like they knock on your door, and you have to do what the law provides that you can do.

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—I think that the premise behind this idea was that somehow having more trials would be beneficial to the plaintiff. And I think that's a false premise, given the fact that not only in these instances but in civil cases in general in our mid-Atlantic state, 85 to 90 percent of our cases are settled. Your settlement is either prior to trial or during trial after the plaintiff's case. So I don't think that there is really a denial of access to justice.

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If one case can dictate if there's going to be liability based upon whether there's duty and causation, what role does the individual plaintiff have in all this? What say does that person have? I would think a lot of clients pick a lawyer because they have trust in that lawyer. And if somehow an issue that's determined in federal court by lawyers who they don't know, I wonder how that impacts the private client. Lawyers have different abilities, some individual plaintiff's cases are more sympathetic than others, that all comes in to play. Some plaintiffs are more likeable than others. And if you divorce that from the trial of the issues of duty, breach, causation, etc., I can see some persuasiveness to the argument that a finding for the defendant in one particular test case or issue case may do it an injustice to a lot of other cases.

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- How about if it were an elective process? “There’s an opportunity to move forward and adjudicate this issue, and we want to join in that.”
- I think that could make a big difference.
- It’s like an opt-in and opt-out.
- We’re still putting all our eggs in one basket with something like that. I’m going with no.
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- It seems unfair. Your case is supposed to be heard. To be precluded by some place that you have no connection to? I don’t know. No one wants to give up control. Plaintiffs get to file in the appropriate venue. They take certain factors into consideration. All of the planning that you normally do with respect to litigation, it goes out the window if you are precluded because of something that happened somewhere else.
- If you want every plaintiff to get their day in court, to have access, it seems counterintuitive. It seems like it would almost be more defense-oriented.
- Affirmative collateral estoppel is generally part of the plaintiff’s armament, as opposed to a defendant’s. It is interposed against defendants. I am trying to conceive of where you would interpose it against the plaintiff.

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## Other Topics Discussed by the Judges

### Attorney General Litigation

The only recent trend I’ve seen in aggregate litigation are attorney general cases. I think there’s one going on in Oklahoma now against Purdue Pharmaceuticals. I think that’s an entirely different creature, when the attorney generals are all joined together in a case.

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- A lot of these cases have been brought by the attorney general in our state, and the attorney general doesn’t have some of these issues that a class action attorney would.
- That’s very true, especially with respect to tobacco. Our attorney general was very active in the tobacco litigation.
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Attorneys general, as I understand it, really coordinate with each other.

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### “Bellwether” Trials

We call them “bellwethers,” which is the word for the sheep with the bell that we all follow. And the idea here is we do not have to follow the sheep—but we are going to follow the sheep! In the Vioxx litigation, for example, there were 17 bellwethers. There were six in the federal court system, and 11 in the states. You basically toss the coin and see who wins. And that is important not because it is going to bind, but because it is going to *influence* the settlement—it sets the bar.

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In our state we've done advisory juries, and one of the advantages is you get insurance carriers involved and have them agree that whatever the advisory jury does, which is nonbinding, will not affect coverage, and that's a real advantage to everyone.

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—Bellwethers are real trials with a real plaintiff and a real defendant and the judgment that comes out is going to really affect that plaintiff and that defendant in that case. They are trial balloons that we keep sending up. So we do use them—they're just with real juries and real judges and real appeals, and real money will change hands.

—You need wins and losses to balance them out. If it's all wins for the plaintiff, they're going to think this is going to go on forever. So you need a couple losses.

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Bellwethers are supposed to be representative, and there's no perfect case that's representative. Some plaintiffs are lovable, some are not lovable. Every case has its individual issues, but when you get verdicts from several bellwether cases, it begins to give you a picture.

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There's now a rich literature on bellwethers—including from judges, who are contributing to this—to say what makes a good bellwether, how should they be done. How many bellwethers will there be in opioids? It just depends on when the settlement happens. We're going to start having them. There's been one in Oklahoma, we're going to have some coming up this fall, and my strong guess is they're going to just keep happening until finally the curtain will come down, and it will come down with something like a global settlement.

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—We all want settlement, right? The lawyers want settlements, right? The reality is if the law firm had to prosecute 2,000 products cases and go to trial, those claims would never be brought, and they couldn't afford to bring them. So I think having the bellwether process, whether it's in federal court or state court, is brilliant. It does work.

—But it's informative, not preclusive.

—It's preclusive only on the parties to those specific cases.

—You could hammer out a process where the parties develop 12 or 16, 18 cases and they would go through the regular discovery process, and then each side picks a death case and each side picks a nondeath case, and then those are the ones that are tried and you get great information. I agree that usually plaintiffs get better results later on in the bellwether process. That's what happened in our state.

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## Certified Questions from Other Courts

It is not unusual for a federal court to ask our highest state court for an interpretation of state law that they are going to apply, and then ask advice from the court. I think that that happens across the board. I do not think that that necessarily happens just with our state's courts.

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—In our court, we currently only accept certified questions from the federal courts. I have started talking about how we need to accept them from state courts. Some states allow certified questions from other states also, right?

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—Yes. Some states will allow that. I think it's really important that different states allow certified questions from other state courts. Because you don't want me ruling on your state's law, right? I don't think I should be doing that. I was a civil trial judge for 10 years before I came to our appellate court, and as a civil trial judge I don't think I should be trying to decide on other states' laws.

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In our midwestern state our rules only allow our federal circuit court to do that. It goes from the circuit court to the state supreme court. The federal district courts can't certify questions to any of us.

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—The federal district court judges certify questions of state law to us directly. We don't have to take them, but we almost always do. In my first 10 years or so on the court, we had maybe one a year. But lately we've been getting more than that, like four or five a year. In fact we just got one from our circuit court, where they've already heard argument on the case, and they referred it to us to say what state law is, even though they've heard the case. It's very unusual. So they put the work on us. We've said to one another, "Why do you think it's not clear to them? It's very clear." Maybe they're tired of it, I don't know. It eventually goes back to them. We don't decide the facts at all, we just base our answer on what they give us. We are permitted to rephrase the question.

—So maybe the increase is due to the fact that you're doing such a good job on the answers?

—Maybe.

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## Comparison to Coordination in Family Law Procedure

There is an area of law where they have some sophisticated methods for intra-state and inter-state approaches and that is in the area of custody law. In family law, most states have statutes, and there is a model statute. There are all kinds of statutes that a lot of states have passed directing trial judges who have a custody case in one jurisdiction where the parallel custody case is in another jurisdiction, encouraging them to pick up the phone, have some conference with the other judge, trying to coordinate the custody cases. There is a body of law for it that is not unfamiliar to trial judges and to appellate court judges. The trial court has jurisdiction over both people. If you have jurisdiction over the people in the family law case, there are attempts to enjoin the person from proceeding further in the other case. With that jurisdiction and power over those individuals, it is not uncommon for a judge to enjoin further action.

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## Court Rules on Aggregation

There are almost no state court rules for aggregate litigation. Does anybody have rules on mass actions in your state courts? Anybody? We don't either. And you have to admit that the federal court, in some respects, is much better able, in terms of resources, to handle it.

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—When I think of the opioid litigation, I think of how primitive our state law is as compared to federal law about getting things consolidated. We're kind of bogged down with questions about whether there is a proper venue in this county or another other county. It makes good sense to consolidate the cases, at least for purposes of case management and discovery. And several of the county attorneys have

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gone along with it, but others resist it. And our western state doesn't have an equivalent of either CAFA or MDL litigation. We have to improvise as we go, as I think the feds were doing in the 1940s and the 1950s. Maybe we ought to think some about a logical way to get these taken care of, because everybody knows it would make sense to consolidate, at least for some purpose. But the mechanisms really aren't there for doing it comfortably, and we're bogged down even on such a basic question as venue in one county or another.

—Could you do that by judicial rulemaking, or would that require legislative action?

—A very good question. We could do it, because our supreme court has the prerogative to do most anything procedurally by rule, subject to a two-thirds legislative override. But now that you mention it, I think our rules for civil procedure are completely silent on that subject. So, it probably could be done by rule.

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In our midwestern state we have a very broadly-worded rule governing the complex litigation docket that gives a lot of discretion to do that kind of thing. So, we didn't run afoul with anything. And also because we have a complex litigation docket, you don't have the venue problems because, by rule, it's taken care of.

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—A lot of states will simply adopt federal rules for their procedural rules.

—We do that.

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Our state has had several opioid cases filed in different counties and districts, and a number of judges have said, "Well, at least for purposes of pretrial discovery, I'm going to transfer this, we're going to consolidate, and this one judge can handle all the cases." Most people seemed to think that was a good idea. But one county said, "No, that violates our venue statute. We don't want to have a judge from a different district—not only different county but different judicial district—managing our case." I think they wanted to drive 10 miles, not 80. So they resisted it. The judge in one county said, "It's part of my inherent authority to manage the case before me, to do something as logical as consolidate with the others. So I think it's a function of inherent authority." The county attorney, however, said "It's a violation of the venue statute." It came up to us on a question of whether or not we should take it on an interlocutory appeal basis, and we certified it to our supreme court. So they're thinking about it now. You have to wonder, if the statute is in conflict with the notion of inherent authority, who wins that one? You could make a good argument either way. I don't want to bet on how it will come out.

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—The common law has been administered by the courts forever without rules, and with courts adapting and judges facing new situations and adapting to them. Do you think that's the better process, or do you think having court rules about it would be better?

—That's one of the ways the courts adapt, by passing the rules as they see different issues.

—If you have rules on how you're going to handle it, then litigants from both sides are going to have a better idea of what to expect. But once the rules are there, there's not as much give.

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## En Banc Proceedings

Our state does not have en banc.

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En banc means different things in different places.

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In our midwestern state, “en banc” means the entire court votes on whether or not we are going to hear the case. I agree with the en banc approach, because it is a check and a balance. It makes sure the lawyers are doing their job. It is a beautiful thing, really.

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Twenty years ago, we did not have en banc in our state. We started it because there were so many conflicts within 12 judges. We are the biggest court in our midwestern state. We want to have continuity. The younger generation came in and said, “Let’s start doing en banc.” I am not for en banc. I’m in office because the people wanted somebody who thinks like me, not like 11 other people. We are all different. We are all different people. We all come from different everything. It does work, but I do not like it.

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## Forced Arbitration

Mandatory arbitration has severely cut down on aggregate cases.

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One of the issues that we’re facing is the mandatory arbitration clauses. So I think that may be one reason why we’re not seeing as many of the consumer protection cases and the data breach cases as well. I think we don’t see those cases because of those arbitration clauses.

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We are starting to see these arbitration clauses in attorney-client retention agreements. That is a place—I think there is a very strong argument that the same ethics rules should apply that say a lawyer can’t have the client waive the right to sue for malpractice. There is a very clear extension there to say it is legal misconduct for a lawyer to include an arbitration clause in a retention agreement. Whether it is enforceable or not, the lawyers should be sanctioned for trying to strip those rights from the prospective client.

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## Judicial Resources

If a class action is filed in a small county court in your state for hundreds or thousands of potential plaintiffs, don’t you have to look at whether they have the resources to handle it? Most of our states do not have unlimited resources. We once turned down a class action because there were not adequate resources.

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Federal courts have more resources to handle those cases. In our state court, when we did have all those class action cases in our state, our trial judges were overwhelmed. We just don’t have the resources, and it’s hard to get the legislature to appropriate more moneys timely enough to handle litigation that’s already pending. The judiciary doesn’t have money that hadn’t already been appropriated to meet that immediate

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need, so I doubt that the legislature would appropriate money to handle class action cases, even if they knew it was coming next year.

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As a general rule most of the circuits don't have a specific judge or a specific court to handle these cases. The bigger jurisdictions do because they have enough judges to do that. In some of the smaller counties, there are maybe one or two judges. If an aggregate case is filed in one of those counties it's going to take months, and you basically devastate that county's court system.

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None of our trial judges have law clerks. And I've heard that you get the same results as in federal court, even without law clerks. But I am not sure I can get that from a rural judge with no clerks. You do not get the same analysis or insight into the issues.

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## Opioid Litigation

Maybe the opioid litigation shows some of the limits of aggregation.

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I have the general sense that maybe the opioid litigation is going to be like the tobacco and asbestos free-for-all of a prior era. A bunch of separate proceedings have been filed in our western state against manufacturers of opioids, mostly on false advertising, failure-to-warn theories. There's been talk of trying to consolidate them for discovery in this county or that, and I've been wondering how these are staying in state court for so long.

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One example, there's a case still going on in Oklahoma that was filed by the state's attorney general, and the claim is based on public nuisance. There's a bench trial going on right now. Some of the major defendants have settled, but they're still pursuing Johnson & Johnson. So, that's how they got that state court action there. There's at least three different branches of major opioid litigation. Two branches are in the state courts and one's in the federal courts. All the state AGs are able to stay in state court as long as they allege questions of state law, because they can't be removed to coordinate in the state courts. So, we have 48 state AGs that have cases pending in state courts, including Oklahoma. There are counties that are able to stay in their state courts by naming non-diverse defendants.

But by naming non-diverse defendants, they might also be able to stay in state court and proceed under state law. And then, all the other municipalities and tribes are suing under both federal and state law, including legal statute, and that's why they have all then brought up and consolidated. So, there are some ways to stay in state court and there are some advantages. There are state cases involving counties in Pennsylvania, and Texas, and a few others. But right now, for most of the municipalities, close to 2,000 of those are currently pending in federal court. And it's these rivalries between all of these that are creating all these problems and headaches, both for plaintiffs and defendants. It'll be interesting to see where the center of gravity ultimately comes. It can be the state AGs acting from their national associations. Remember with tobacco, there was no MDL. Or is it going to be in the MDL with the municipalities, given that there's overlapping authority between the state AGs and the municipalities for some of the causes of action? What does that mean for who settles first?

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In the opioid cases, the federal MDL is in Ohio, and many states have coordinated through their attorneys general to recover the money their cities and towns and villages that are spending on this through their Medicaid programs. That is their rationale: “We had to spend all this extra money on medical care and the ancillary problems with the opioid addiction crisis.” They brought these cases in their own states. They do not want to be removed, but nonetheless there is a federal MDL.

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## Political Issues

I think the federal v. state court question is more of a political question, to tell you the truth. When you’re a state judge who’s elected every four years, you’re going to be facing tremendous pressures. Your own voters are going to say, “You’re not taking care of our state’s citizens. You’re letting the big corporate interests take over.” There will be tremendous pressure on you to maintain jurisdiction so that your local citizens have access to court. By the same token, the big money boys on the defense side are implicitly going to threaten the hell out of you at the next election, threatening to raise large amounts of money, and you’re not going to be a judge any longer. The federal judges don’t face that, and they shouldn’t. And the state judges shouldn’t, either, but the truth is, they do. So many times, if a state judge can get out of that unscathed, they will look to any escape hatch they can—maybe arbitration. Some of this discussion may not even be important anymore, depending on how arbitration clauses continue to forestall any litigation at all. So my view is that it’s more of a political than a legal question. Do you think judges are not aware of the political ramifications of these things?

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A straightforward example of that would be the analysis that the federal court in San Francisco provided on the issue of climate change litigation. The judge who entertained the cause of action that was brought by the City of San Francisco and the City of Oakland against five oil companies for causing climate change determined that climate change is a political question, and is nonjusticiable. That would remove it, of course, from consideration by the states where the agriculture industry is going to be devastated, and major cities are going to be flooded. For some reason that is such a political question that it would take on, I guess, even more importance than matters like abortion or gun control, which apparently are subject to the rule of law. Somehow this becomes a nonjusticiable question. This is an analysis that of course could blanket the entire country, and to a certain extent foreclose the opportunity for states to participate in whether the rule of law even applies to climate change—because the judge said the rule of law doesn’t.

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—It is amazing how many of these supposedly legal decisions are actually politically driven.

—Absolutely.

—In our state, the legislature is very conservative now.

—Often times the legislature will create these knee-jerk statutes, without thinking about the impact. Then we, in the courts, are stuck with trying to give them practicality when, probably, in many instances, they’ve made matters worse.

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## States' Rights

It is interesting that politicians argue for states' rights, except now the U.S. Supreme Court cherry picks, it appears. When they don't want states' rights to apply, they find a way around it. It looks like the states' ability to control is being diminished by the Supreme Court. That is disheartening.

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I think states' rights is an important issue here. Where I am from, we elect our judges. The people are saying, "This is the court where I want to be." And then a 'higher power,' so to speak, says, "No, over there is where you are going to go." It seems a slap in the face of states' rights.

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## Unfavorable State Law in Aggregate Litigation

Our midwestern state is terrible for hosting any sort of aggregate litigation, because we have some of the worst product liability laws in the country. So, nobody wants to come to our courts.

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Our jurisdiction has been called a "judicial hellhole." The defendants are saying it is too plaintiff-friendly, in other words "unjust." It is only a defined term because it has been propagandized. It is picked up in newspapers. We are sensitized to it. We, and the people in our state, know what it is all about.

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In our mid-Atlantic state, we had groundwater contamination cases, and there was an attempt to consolidate them. The cases eventually went to the highest state court and were crushed. I think the high court sent a message on attempts to create a class of that type. So aggregate cases are reduced in our state, but I think it's not necessarily because of what's happening with this particular federal law. We just aren't friendly to aggregate litigation.

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Some states appear to have good procedures but bad substantive law. When I was practicing, we saw a lot of Texas lawyers bringing their cases to the state courts in our midwestern state.

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In our mountain state, I think there were a lot more class actions in the late 80s, early 90s before CAFA, but we also ended up having a whole bunch of tort reform legislation, so I don't know how much of it is the effect of tort reform or the effect of CAFA. I would guess that it's more tort reform. Because of our tort reform, we've never been like a hotbed where people flock to file lawsuits.

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# POINTS OF CONVERGENCE

In the discussion groups, the moderators were asked to note areas in which the judges' thinking on issues raised in the Forum appeared to converge. These observations were summarized and announced during the Forum's Closing Plenary.

## Trends in the Types of Aggregate Cases Being Litigated in State Courts

- With the exception of jurisdictions where many asbestos cases are filed, most state courts have seen little increase in civil filings. Judges attributed this primarily to the prevalence of mandatory arbitration and increased rates of settlement.
- Attorneys general have been bringing aggregate litigations, for example cases related to opioids and water pollution.
- Class actions are not often reaching the highest state courts after the certification stage.

## Competence of the State Courts

- State courts are competent to handle legal controversies stemming from a defendant's uniform, nationwide course of conduct that affects plaintiffs in many states in similar ways.
- Most judges believe the state courts have no problem adjudicating nationwide class litigation. Not all thought the federal courts are better able to do the job.
- State courts have veteran trial judges who know the substantive law and have broad experience conducting trials.
- State courts are authorized to declare their states' law, and are as competent to apply it as are the federal courts.
- Some judges felt that federal courts can offer more consistency for a national issue.

## State and Federal Court Resources

- Aggregate litigation entails an enormous amount of work by support staff—courtroom clerks, staff lawyers, and researchers.
- State court judges need far more resources in order to take on cases from other dockets in their own states or other states.
- Federal district court judges are better resourced than are state court judges. If state trial court judges are to handle these cases, they need more research and clerical support.

## **State Court Rules and Procedures for Coordinating Related Intrastate Cases**

- Some states have specific rules; some don't. Some courts that do have rules rarely employ them.
- Some jurisdictions have complex litigation dockets for trial courts that are similar to the federal Judicial Panel on Multi-District Litigation. Others rely on the broad discretion of trial court judges to fashion procedures as the need arises.

## **Coordination or Conflict with Federal Courts**

- The judges said they had had few occasions to coordinate state tort claims with related claims consolidated in a federal MDL case.
- The judges had not seen efforts by federal MDL judges to enjoin or stay state proceedings pending the resolution of federal proceedings. A few said they would not respond favorably to such efforts.

## **Ethical Considerations in Coordinating with Federal Judges**

- Most judicial ethical rules distinguish between discussion of administrative issues versus substantive issues. Discussions of substantive issues between benches without consent of parties would be unethical.
- Generally, when state judges talk to each other about related litigation, whether it's with a federal judge or with a judge in another state, they are careful to observe ethical standards and not discuss substance. They get the consent of the litigants and make a record of what they are doing.

## **Jurisdictional Considerations**

- The jurisdictional analysis should not vary with the type of litigation.
- It should be the plaintiff's choice of court, because it's the plaintiff's cause of action. It is inherently unfair to an injured party to force them into a different forum.
- It is desirable to have the case resolved in the state whose law applies.
- Federal jurisdiction is more acceptable in handling "mature torts" where state law is settled.
- The forum non conveniens doctrine is the companion to a broad grant of general jurisdiction.

## **Adjudicating Disputes that Primarily Arise from Different States**

- State courts should be as open to such disputes as possible, depending on court resources, jurisdictional principles, legislative constraints, concerns for access to justice, and constitutional issues.
- Judges voiced concerns about forum shopping, judge shopping, and geographical convenience.

## **Corporate Registration Statutes**

- Corporate registration gives consent to service of process, not consent to jurisdiction.
- Registration is a strong factor in the jurisdictional calculus, but is not dispositive.

## **Efficiency and Fairness Considerations**

- Aggregation can promote settlement.
- Efficiency and practicality should not outweigh fairness.
- Fairness is always a consideration. Some wrongs won't be righted unless small claims can be aggregated.

## **Choice of Law and Certified Questions from Other Courts**

- There is a concern about federal courts deciding unsettled questions of state law.
- Certified questions are a useful mechanism for resolving issues between state and federal courts. Some state courts accept certified questions from other state courts.
- A federal judge's decision on a state law question would not bind a state court.

## **Preclusive Determination of Core Issues and its Effect on State Courts**

- The judges generally opposed preclusive issue determination.
- Preclusion's potential benefit to plaintiffs is questionable, unless liability is clear.
- The issue preclusion approach could undermine state courts, which need to play a central role in litigation.
- Some judges believe the use of bellwether cases promotes settlement. They were not sure issue preclusion would provide the same benefit.
- Some judges said of the current system, "If it's not broke, don't fix it."



# Appendices

## Faculty Biographies

### Paper Writers and Speakers

**Professor Myriam Gilles (AFTERNOON PAPER PRESENTER)** is Professor of Law and Paul R. Verkuil Chair in Public Law at Cardozo Law School of Yeshiva University. She specializes in class actions and aggregate litigation, and has written extensively on class action waivers in arbitration clauses. She also writes on structural reform litigation and tort law. She is one of the most frequently cited civil procedure professors in the country. Her articles have appeared in numerous law reviews, including Chicago, Columbia, Michigan, and Penn. Professor Gilles teaches Torts, Products Liability, and Class Actions and Aggregate Litigation. She has testified before Congress on consumer protection. Professor Gilles served as Cardozo's vice dean from 2016-2018. She has been a visiting professor at the University of Virginia Law School and, in 2005-06, was a fellow in Princeton University's Program of Law and Public Affairs.

**The Honorable Patricia Guerrero (JUDICIAL WELCOME)** was appointed to the California Court of Appeal, Fourth Appellate District, Division One, on November 2, 2017, and took office following her confirmation on December 14, 2017. Prior to her appointment to the Court of Appeal, Justice Guerrero served as a judge of the San Diego Superior Court, where she was appointed in June 2013 and where she served as the supervising judge for the family law division. Justice Guerrero was a partner at Latham and Watkins LLP from 2007 to 2013, where she was an associate from 2003 to 2006 and from 1997 to 2002. Justice Guerrero also served as an Assistant United States Attorney for the Southern District of California from 2002 to 2003. Justice Guerrero was born in the Imperial Valley and graduated from Imperial High School in 1990. She received a Bachelor of Arts degree from the University of California, Berkeley in 1994, graduating magna cum laude, and a Juris Doctor degree from Stanford Law School in 1997.

**Professor Robert Klonoff (LUNCHEON SPEAKER)** is the Jordan D. Schnitzer Professor of Law, Lewis & Clark Law School. He served as Dean of the Lewis & Clark Law School from 2007-2014. His areas of expertise include class action litigation, civil procedure, and appellate litigation. He is the author of a leading casebook on class actions, published by West, and the author of the West Nutshell on class actions, as well as the author of numerous law review articles. He is co-author of a leading text on trial advocacy and co-author of a West Nutshell on federal appellate practice. He has taught and lectured throughout the United States and in several foreign countries on class actions and appellate litigation. He is a member of the American Law Institute (ALI) and served as an Associate Reporter for the ALI's class action project, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION. In 2011, U.S. Supreme Court Chief Justice John G. Roberts, Jr. appointed Professor Klonoff to serve as the academic member of the United States Judicial Conference Advisory Committee on Civil Rules. He was reappointed by Chief Justice Roberts in May 2014 for a second three-year term. Professor Klonoff has argued eight cases before the United States Supreme Court, including *Gentile v. Nevada Bar* and *Kungys v. United States*, and has argued dozens of cases in other federal and state appellate courts throughout the country. He has also tried dozens of cases (primarily jury trials). In addition, he has served as an expert witness on class action issues in numerous federal and state court cases. He has personally represented clients on both the plaintiff and defense side in more than 100 class actions.

**Patrick Malone (FORUM MODERATOR)** is the President of the Pound Civil Justice Institute. He practices law in Washington, DC, representing seriously injured people in professional liability and pharmaceutical products

liability litigation. He is co-author of *RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY* and the author of *WINNING MEDICAL MALPRACTICE CASES WITH THE RULES OF THE ROAD TECHNIQUE*. He has also published a book for consumers: *THE LIFE YOU SAVE: NINE STEPS TO FINDING THE BEST MEDICAL CARE—AND AVOIDING THE WORST*. His recent articles include “Paying It Forward by Pressing for Safety Changes” (*TRIAL*, June 2014), and “Unethical Secret Settlements: Just Say No” (*TRIAL*, Sept. 2010, co-author with Jon Bauer). Mr. Malone is a graduate of Yale Law School, an elected member of the American Law Institute, and a fellow of the International Academy of Trial Lawyers.

**Professor Theodore Rave (Morning Paper Presenter)** is George A. Butler Research Professor and Associate Professor of Law at the University of Houston Law Center. He writes and teaches in the areas of civil procedure, complex litigation, constitutional law, and election law. His scholarship focuses on problems of governance across a range of institutions, and his articles have appeared in leading journals, including the *Harvard Law Review*, the *California Law Review*, the *Duke Law Journal*, and the *Vanderbilt Law Review*, among others. His recent article, “When Peace Is Not the Goal of a Class Action Settlement,” was selected for the 2015 Yale/Stanford/Harvard Junior Faculty Forum. A noted expert on class actions, multidistrict litigation, and public fiduciary law, Professor Rave is regularly interviewed in national and local media outlets, including *The Wall Street Journal*, *Financial Times*, *Houston Chronicle*, and NPR. He is a sought-after speaker and has presented papers at Yale, Harvard, NYU, Duke, UCLA, Vanderbilt, and many other schools. In 2018, Professor Rave received the university-wide Teaching Excellence Award, and he was elected a member of the American Law Institute. Professor Rave earned his J.D. from NYU School of Law and his B.A. from Dartmouth College. He served as a law clerk for Judge Leonard B. Sand on U.S. District Court for the Southern District of New York and for Judge Robert A. Katzmann on the U.S. Court of Appeals for the Second Circuit.

**Elise Sanguinetti (Luncheon Welcome)** is a founding partner at Arias Sanguinetti Wang & Torrijos in Oakland, Los Angeles, Las Vegas, and Montreal. Elise’s main focus is serious injury, wrongful death cases, civil appeals and legal malpractice. She is the President of the American Association for Justice (AAJ), a past-president of the Consumer Attorneys of California (CAOC), and a past-president of the Alameda-Contra Costa Trial Lawyers Association. Ms. Sanguinetti earned her bachelor’s degree from San Diego State University in 1993 and her J.D. from the University of San Francisco in 1997.

## Panelists

**The Honorable Brent Appel** was appointed to the Iowa Supreme Court in 2006. A Dubuque native, he received his bachelor’s and master’s degree from Stanford University in California in 1973 and his J.D. degree from the University of California, Berkeley, in 1977. Following graduation from law school, Justice Appel served as a law clerk for the United States Court of Appeals for the District of Columbia Circuit. In 1979, he was appointed Iowa First Assistant Attorney General, and in 1983 became Iowa Deputy Attorney General. While serving in the Iowa Attorney General’s office, Justice Appel argued and briefed four cases before the United States Supreme Court, including the second “Christian burial” case, *Nix v. Williams*. In 1987-2006, he was engaged in private practice in central Iowa. Justice Appel has served as chair of the Iowa State Children’s Justice Council since 2010. He has also chaired the Iowa Supreme Court’s Task Force on the Rules of Evidence since 2015. In the summer of 2016, Justice Appel was named by the Iowa Supreme Court to chair the newly formed Access to Justice Commission. Between 2010 and 2016, he was appointed by United States Chief Justice John Roberts to serve as a member of the Federal Advisory Committee on the Rules of Evidence.

**James A. Bruen** has more than five decades of criminal and civil litigation and business counseling experience, centered around environmental matters. His practice includes representation of industry, universities, and governmental institutions in complex domestic and international products and environmental counseling and

litigation. He has headed well over 7,500 environmental and products cases, matters and disputes, spanning virtually every issue and topic. His work has included a number of complex, high-profile cases, some with tens of billions of dollars at stake, and teams of attorneys from several law firms working together on exceptionally intricate litigation. He is a past President of the American College of Environmental Lawyers. Mr. Bruen has served as lead trial counsel in mass tort litigation, natural resource damage litigation, environmental enforcement litigation, environmental cost recovery/contribution litigation, and white-collar environmental crimes defense. Before entering private practice, Bruen served for seven years as a Criminal Division Assistant United States Attorney, a Civil Division Assistant United States Attorney, and Chief of the Civil Division for the United States Attorney for the Northern District of California.

**Professor Nora Engstrom** is a nationally recognized expert in both tort law and legal ethics. Her work explores the day-to-day operation of the tort system and particularly the tort system's interaction with alternative compensation mechanisms, such as no-fault automobile insurance, the Vaccine Injury Compensation Program, and workers' compensation. Professor Engstrom has also written extensively on trial practice, complex litigation (including MDLs), attorney advertising, contingency fees, and tort reform. Professor Engstrom currently serves as a Reporter for the American Law Institute's *RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS*. She is the co-author of a leading professional responsibility casebook, *LEGAL ETHICS* (with Deborah Rhode, David Luban, and Scott Cummings), and, in its next edition, she will be joining the classic torts casebook, *TORT LAW AND ALTERNATIVES* (with Marc Franklin, Robert Rabin, Michael Green, and Mark Geistfeld). Her scholarly work has appeared in a wide array of law journals, including the *Stanford Law Review*, the *NYU Law Review*, the *University of Pennsylvania Law Review*, the *Georgetown Law Journal*, and the *Michigan Law Review*, among many others. Before joining Stanford's faculty in 2009, Professor Engstrom was a Research Dean's Scholar at Georgetown University Law Center and an associate at Wilmer Cutler Pickering Hale and Dorr LLP. She was also a law clerk to Judges Merrick B. Garland of the U.S. Court of Appeals for the District of Columbia Circuit and Henry H. Kennedy Jr., of the U.S. District Court for the District of Columbia. Before that, she worked at the U.S. Department of Justice, focusing on terrorism and national security issues. She graduated from Dartmouth College in 1997, summa cum laude, and from Stanford Law School in 2002, with Distinction and as a member of Order of the Coif. Professor Engstrom is an elected member of the American Law Institute, a Fellow of the American Bar Foundation, and a member of the Executive Committee of the Section on Torts and Compensation Systems of the American Association of Law Schools.

**Eric Gibbs** is the founding partner of the Gibbs Law Group in Oakland, California. He prosecutes consumer protection, antitrust, whistleblower, financial fraud and mass tort matters. Eric has been appointed to leadership positions in dozens of contested, high profile class actions and coordinated proceedings. He has negotiated groundbreaking settlements that resulted in meaningful reforms to business practices and have favorably shaped the laws impacting plaintiffs' legal rights. In 2019, Eric was selected by Law360 to "Titans of the Plaintiffs Bar," one of only 10 attorneys nationwide to receive the recognition. He also received the 2019 California Lawyer Attorney of the Year (CLAY) Award for his work in the Anthem Data Breach Litigation.

**The Honorable Joseph J. Maltese** is the Presiding Justice of the New York State Supreme Court's Litigation Coordinating Panel. He has been on the Panel since its inception in 2002. Since January 2014, he also presides as an Associate Justice of the Appellate Division, Second Department of the Supreme Court of New York. From 1996 until January 2014 he presided in the New York Supreme Court in Richmond and Kings Counties as a trial judge handling medical malpractice, product liability and mass tort cases, as well as general civil, commercial and criminal matters. Prior to his service on the New York Supreme Court, he sat on both the New York City Criminal Court in Kings and Richmond Counties and the New York City Civil Court from 1992 to 1996. Before coming to the bench, he was in private practice of law for 15 years, concentrating in civil and criminal litigation. Justice Maltese is a member of the bars of New York, New Jersey, and Florida, as well as the federal courts. He

is a Fellow of The American Academy of Forensic Sciences and an ASTAR Fellow of Science and Technology. Justice Maltese has a Doctor of Philosophy degree and a Master of Judicial Studies (Master of Laws for Judges) from the University of Nevada at Reno. He also earned Master's degrees from New York University and Touro College. His Juris Doctor degree is from New York Law School and he has a Bachelor of Arts degree from the John Jay College of Criminal Justice of the City University of New York. Justice Maltese is an Adjunct Professor of Law at New York Law School, where he teaches an interdisciplinary course on mass torts covering complex litigation, products liability, and scientific evidence. He also teaches courses on scientific evidence to judges at the National Judicial College and at the New York State Judicial Institute.

**Ellen Relkin** is the Immediate Past President of the Pound Civil Justice Institute. She is of counsel to Weitz & Luxenberg, P.C. in New York City and Cherry Hill, New Jersey. She is licensed to practice in New York, New Jersey, Pennsylvania, and the District of Columbia, and is certified by the New Jersey Supreme Court as a Certified Civil Trial Attorney. Ms. Relkin is an elected member of the American Law Institute and an invited Fellow of the American Bar Foundation. She co-chairs the MDL Roundtable of the Emory Law School Institute for Complex Litigation. She is a former chair of the Toxic, Environmental and Pharmaceutical Torts Section of the American Association of Justice and serves on the Board of Governors of the NJ Association of Justice. She serves on the Executive Committee of the *Prescription Opiate* MDL, the *In Re: Invokana* MDL, as co-lead counsel in the *In Re: Depuy Orthopaedics ASR Hip Implant* MDL, as co-lead counsel in the *In Re: Farxiga Products Liability* MDL and she is the State Liaison Counsel to the Plaintiffs' Executive Committee (PEC) in the *In Re: Stryker LFIT V 40 Femoral Head Products Liability* MDL and in the parallel New Jersey state court Multi-County Litigation as both Lead and Liaison counsel, among other appointments.

**Philip L. Willman** is president-elect of DRI-The Voice of the Defense Bar, and will become president in 2019. His trial practice is devoted to defending physicians, medical schools, nurses, hospitals, nursing homes, psychologists and other healthcare providers in medical negligence and healthcare lawsuits and medical device manufacturers in medical device litigation. He also provides representation to defendants in environmental litigation. Mr. Willman obtained his Bachelor's degree, magna cum laude, from Duke University in 1975 and his Juris Doctor degree from Vanderbilt University in 1978. From 1978 to 1979, he was a Research Fellow in Environmental Law at the University of Illinois College of Law. From 1979 to 1984, he served as an Assistant Attorney General in the Environmental Control Division for the Illinois Attorney General, handling numerous trials and administrative proceedings involving civil and criminal environmental prosecution to conclusion. Willman has tried more than 100 cases to conclusion as lead counsel in jury trials in state and federal court, in both Missouri and Illinois. He has also provided representation in environmental lawsuits. He has written and lectured on various topics related to risk management and medical professional liability. Mr. Willman has been active in professional organizations, dedicated to the support and improvement of the civil justice system. He has been a director for the Missouri Organization of Defense Lawyers and Missouri State Representative for DRI. He has also been active in the education of the defense bar and its clients. He has been program co-chair for the DRI Complex Medicine Seminar and program chair for the DRI Medical Liability Seminar. He also served as the chair and vice-chair of the Medical Liability & Health Care Law Committee from 2007-2011, and as the DRI mid-region director from 2013-2016.

**Professor Adam Zimmerman**, of Loyola Law School Los Angeles, teaches Tort Law, Administrative Law, Mass Tort Law, and Complex Litigation. His scholarship explores the way class action attorneys, regulatory agencies and criminal prosecutors provide justice to large groups of people through overlapping systems of tort law, administrative law, and criminal law. His recent articles have been published in the *Columbia Law Review*, *Duke Law Journal*, *New York University Law Review*, *University of Pennsylvania Law Review*, *Virginia Law Review*, and the *Yale Law Journal*. In 2016, the federal government adopted Zimmerman's recommendations to permit class actions in administrative hearings based on findings that appear in his Yale Law Journal article, "*Inside the Agency Class Action*." Professor Zimmerman graduated magna cum laude from Georgetown University Law,

where he served as Associate Editor of the Georgetown Law Journal and co-founded the first student chapter of the American Constitution Society in the country. After graduation, he clerked for Judge Jack B. Weinstein in the Eastern District of New York. He then served as counsel to Special Master Kenneth R. Feinberg in the design and administration of the September 11th Victim Compensation Fund. He was later associated with Orrick, Herrington & Sutcliffe LLP, where he represented clients in complex commercial litigation and mass tort cases, as well as domestic and international arbitration. As a practitioner, Professor Zimmerman has also worked on global class actions involving the tobacco industry, gun manufacturers, and Agent Orange.

## Discussion Group Moderators

**David M. Arbogast** practices throughout California, concentrating his practice on appellate, complex, and class action litigation. He has been involved with complex litigation matters involving a number of disciplines, including consumer lending, defective products, and technology-related matters. He received his B.A. degree from Western State College, and his J.D. degree from Thomas Jefferson School of Law. He is an active member of the American Association for Justice (“AAJ”) sitting on both AAJ’s Legal Affairs and Amicus Committees. He also sits on Consumer Attorneys of California’s Amicus Committee and has authored dozens of amicus briefs in State and Federal Courts including the United States Supreme Court.

**Linda Miller Atkinson** is of counsel to the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Michigan, and is an emeritus member of the Wisconsin and Georgia bars. A 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in Detroit, Michigan, she is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, and of *LAWYERS DESK REFERENCE* (8<sup>th</sup> edition, Thomson-West), and is author of the “Depositions” chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She is a past president of the Michigan Association for Justice, a member of the American Association for Justice President’s Club and a Fellow and trustee of the Pound Civil Justice Institute. In her life outside the courtroom she teaches firearm and hunter safety for the Michigan Department of Natural Resources and is in her 25th year with the National Ski Patrol.

**Lauren Barnes** is a partner at Hagens Berman Sobol Shapiro LLP in Boston, Massachusetts. Her practice focuses on antitrust, consumer protection and RICO litigation against drug and medical device manufacturers in complex class actions and personal injury cases for consumers, large and small health plans, direct purchasers and state governments. She is a Governor of the American Association for Justice and of the Massachusetts Academy of Trial Attorneys. She is admitted to practice before the U.S. District Court for the District of Massachusetts, the Second Circuit Court of Appeals, the Seventh Circuit Court of Appeals and the Supreme Court of the United States.

**Leslie A. Brueckner** is a Senior Attorney at Public Justice, a national public interest law firm, where she specializes in appellate litigation in the state and federal courts. A 1987 magna cum laude graduate of Harvard Law School, Brueckner’s current areas of practice include class actions, constitutional law, federal preemption, consumer rights, personal jurisdiction, food safety, and combating court secrecy. She just celebrated her 25th anniversary with Public Justice. Among other victories, Ms. Brueckner recently won a landmark ruling from the California Supreme Court in *T.H. v. Novartis*, holding that brand-name prescription drug manufacturers can be sued for failing to warn of the dangers of mislabeled, generic versions of their drugs. She and her co-counsel Ben Siminou were awarded the Pound Institute’s 2018 Appellate Advocacy Award for their work on the case. In addition to her litigation work, Ms. Brueckner has taught appellate advocacy at American University Law School and Georgetown University School of Law.

**Kathryn H. Clarke** is a sole practitioner in Portland, Oregon, who specializes in appellate practice and consultation on legal issues in complex tort litigation. She served as President of the Pound Civil Justice Institute from 2011 to 2013. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for over 25 years, served as President from 1995 to 1996, and received that organization's Distinguished Trial Lawyer award in 2006. She is also a member of the Board of Governors of the American Association for Justice. She was a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. In 2008 she served as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission, which resulted in a bill passed by the 2009 legislature. She has served as member and Chair of Oregon's Council on Court Procedures, and has been a member of the Oregon State Bar's Uniform Civil Jury Instructions Committee. In 2016 she was honored by the Pound Institute for her lifetime achievement as an appellate advocate.

**Andre M. Mura** is a partner at the Gibbs Law Group, LLP in Oakland, California, representing plaintiffs in class action and complex litigation concerning consumers' and workers' rights, products liability, drug and medical devices, federal jurisdiction, and constitutional law. Previously, he was senior litigation counsel at the Center for Constitutional Litigation PC, in Washington, DC, where he represented plaintiffs in state and federal appellate courts, including the United States Supreme Court. In *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012), Mura successfully argued that a state law limiting compensatory damages in medical malpractice cases violated his client's constitutional right to trial by jury. He contributes to Consumer Law Watch, a blog analyzing developments in the law of consumer class actions and is a member of the Lawyers Committee of the National Center for State Courts, a member of the American Association for Justice, and a Trustee of the Pound Civil Justice Institute.

**Florence J. Murray** is a partner with the firm of Murray and Murray in Sandusky, Ohio. Her practice centers on civil rights, traumatic brain injury, trucking collisions, class actions, insurance law, admiralty and maritime law, litigation, and railroad law. She holds a BA degree from Saint Ignatius of Loyola University, Baltimore, Maryland, an M.Ed. degree from Ashland University, Ashland, Ohio, an MBA from Case Western Reserve University, and a JD degree from The Ohio State University. She is a member of the Ohio Association for Justice, the Leadership Academy of the American Association for Justice (AAJ), and a Fellow of the Pound Civil Justice Institute. In her non-legal life she assists with Habitat for Humanity projects and is a board member of the Erie County Court Appointed Special Advocates (CASA) for children.

**Rebecca Phillips** practices with The Lanier Law Firm in Houston, TX, and is experienced in mass torts, class actions, and complex commercial cases. Her most recent work has been on opioid addiction cases and on litigation concerning injuries caused by the diabetes drug Onglyza. She has also represented corporations in commercial and class action litigation. Ms. Phillips is a member of the Texas and Houston Trial Lawyers Associations and of the American Association for Justice's Leadership Academy. She has a bachelor's degree from Arkansas State University and a J.D. degree from Yale Law School, where she served as an editor of the *Yale Law and Policy Review*. When not working, she enjoys running, rock climbing, and hiking. She is also an active member of the Houston Blues Dance Community.

**Benjamin Siminou** is the founder and principal of Siminou Appeals, Inc. in San Diego, specializing in appeals of civil cases. Prior to establishing Siminou Appeals, Ben worked nearly a decade as a trial lawyer with the San Diego-based plaintiffs' firm, Thorsnes Bartolotta McGuire LLP, where he handled virtually every aspect of civil litigation. Ben has handled numerous civil and criminal appeals in the California Supreme Court, the California Court of Appeal, and the Ninth Circuit. After graduating law school, he clerked for Chief Justice Michael Heavican of the Nebraska Supreme Court.

**Gerson Smoger** has represented a wide range of clients in consumer and personal injury litigation. His special emphasis in personal injury has been in birth and early childhood injuries, injuries related to the brain and neurological system, and injuries caused by errant pharmaceuticals or environmental exposure, including their carcinogenic and adverse immunological properties. Smoger has served as lead counsel in a number of other significant cases, such as the representation of the people of Times Beach, MO, groundwater contamination by Teledyne, Fairchild, and IBM in Silicon Valley, chlorine gas exposure in Alberton, MT, childhood lead contamination in Herculaneum, MO, and numerous consumer class actions. Always on a pro bono basis, he has represented many amici before the U.S. Supreme Court, including the editors of the NEW ENGLAND JOURNAL OF MEDICINE, the AMA, the Center for Auto Safety, the American Legion, the Campaign for Tobacco Free Kids, and Public Citizen. Dr. Smoger earned his Bachelor's Degree from Lycoming College (Summa Cum Laude), a PhD from the University of Pennsylvania, and his J.D. from the U. of California, Berkeley. He is a member of the bars of California, Texas, and the U.S. Supreme Court.

**Alinor Sterling** practices law as a member of Koskoff, Koskoff & Bieder, PC in Bridgeport, Connecticut. She handles complex civil cases at trial and on appeal. Alinor received her undergraduate degree from Princeton University, where she took her major in the Woodrow Wilson School of Public and International Affairs and her minor in Russian Studies. After a year-long graduate fellowship in Moscow, Alinor attended the UCLA School of Law, where she was elected to the Order of the Coif and was an editor of the *UCLA Law Review*. Alinor is a Fellow of the Pound Civil Justice Institute and Parliamentarian-Elect of the Connecticut Trial Lawyers Association. She is also Chair of the Connecticut Trial Lawyers Association's Rules Committee. Alinor teaches Connecticut practice and procedure at CLE programs.

**John Vail** is the proprietor of John Vail Law PLLC, "An appellate voice for the trial bar." Since 1997, Mr. Vail has focused his work solely on access to justice issues, representing clients in numerous state supreme courts and in the Supreme Court of the United States. He has received the Public Justice Achievement Award from Trial Lawyers for Public Justice for his "outstanding work and success challenging the constitutionality of legislation limiting injury victims' access to justice." Mr. Vail spent seventeen years doing legal aid work, concentrating on major litigation to advance individual rights. He was an original member of the Center for Constitutional Litigation, where he was Vice President and Senior Litigation Counsel. Mr. Vail has served as Professorial Lecturer in Law at the George Washington University School of Law. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

**Peggy Wedgworth** is a partner with Milberg Phillips Grossman, LLP, in New York City. She is a managing partner and Chair of the Antitrust Practice Group. She began her career in the Kings County District Attorney's office, and after moving into private practice has litigated for over 28 years numerous securities, commodities, antitrust and whistleblower matters, representing defrauded investors and consumers. She is currently lead counsel in a nationwide MDL antitrust case where she represents a car dealership class pursuing antitrust claims against software providers. She also currently represents contact lens consumers in a nationwide antitrust case, as well as governmental entities in Fair Housing Act litigation in several jurisdictions throughout the country. Ms. Wedgworth has also tried numerous cases including obtaining a jury verdict against R.J. Reynolds in a wrongful death tobacco case in Florida state court. She is a member of the New York State Bar Association's Antitrust Committee, the Pound Civil Justice Institute, and the American Association for Justice, has served on the Competition Law360 editorial board, and has been designated as a Super Lawyer since 2016. She holds a B.A. degree from Auburn University and a J.D. degree from the University of Alabama School of Law.

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Division One  
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# About the Pound Civil Justice Institute

The Pound Institute is a legal think tank, supported by member Fellows, dedicated to the cause of promoting access to the civil justice system through its programs and publications. Since 1956, the Institute has promoted open, ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. In an effort to bring positive changes to American jurisprudence, Pound promotes and organizes:

**Annual Forum for State Appellate Court Judges**—Since 1992, Pound’s annual Judges Forum has brought together state appellate judges, legal scholars, attorneys, and policymakers to discuss major issues affecting the U.S. civil justice system. Praised by attending judges as “one of the best seminars available to jurists in the country,” the Forum is unique in its mission to educate state judiciaries on the role of the U.S. civil justice system in protecting citizens’ rights. Our 2019 Forum, “Aggregate Litigation in State Courts: Preserving Vital Mechanisms,” took place on July 28, 2019 in San Diego.

**Academic Symposia**—The Institute holds periodic Academic Symposia in conjunction with law schools in an effort to produce new empirical research supportive of the civil justice system. The academic papers prepared for the symposia are published in the co-sponsoring law schools’ Law Reviews. Recent symposia include The “War” on the Civil Justice System (Emory Law 2015); The Demise of the Grand Bargain (Rutgers and Northeastern 2016); The Jury Trial And Remedy Guarantees (Oregon Law Review, Oregon Jury Project 2017); Class Actions, Mass Torts and MDLs: The Next 50 Years (Lewis & Clark 2019).

**Appellate Advocacy Award**—This award recognizes excellence in appellate advocacy in America, and is given to legal practitioners who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, and access to civil justice.

**Civil Justice Scholarship Award**— This award for legal academics recognizes current scholarly research and writing focused on the U.S. civil justice system, including access to and the benefits of the civil justice system, and the right to trial by jury in civil cases.

**Howard Twiggs Memorial Lecture on Legal Professionalism**—Founded in 2010 to honor former Pound President Howard Twiggs, this annual lecture series, held during the AAJ Annual Convention, educates attorneys on ethics and professionalism. These lectures are delivered by prominent attorneys, law professors and jurists, and qualify for ethics and professionalism CLE credit.

**Papers of the Pound Institute**—Pound has an expansive library of research resulting from its Judges Forums, research grants, Academic Symposia, Warren Conferences, Roundtable discussions, and other sources. This research, Papers of the Pound Civil Justice Institute, is available via Pound’s website. Pound Fellows receive complimentary copies of Pound’s publications.

**Alliance with Academics**—The Institute has developed strong relationships within the legal academic community. Currently, 59 **Academic Fellows** keep Pound abreast of emerging legal trends.

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# Papers of the Pound Civil Justice Institute

## Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for download at [www.poundinstitute.org](http://www.poundinstitute.org).)

### 2019 • AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

D. Theodore Rave, University of Houston Law Center, *Federal Trends Affecting Aggregate Litigation in the State Courts*  
Myriam Gilles, Cardozo Law School, Yeshiva University, *Rethinking Multijurisdictional Coordination of Complex Mass Torts*

### 2018 • STATE COURT PROTECTION OF INDIVIDUAL CONSTITUTIONAL RIGHTS

Robert F. Williams, Rutgers Law School, *State Constitutional Protection of Civil Litigation*  
Justin L. Long, Wayne State University School of Law, *State Constitutional Structures Affect Access to Civil Justice*

### 2017 • JURISDICTION: DEFINING STATE COURTS' AUTHORITY

Simona Grossi, Loyola Law School, Los Angeles, *Personal Jurisdiction: Origins, Principles, and Practice*  
Adam Steinman, The University of Alabama School of Law, *State Court Jurisdiction in the 21st Century*

### 2016 • WHO WILL WRITE YOUR RULES—YOUR STATE COURT OR THE FEDERAL JUDICIARY?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulermaking and the Counterrevolution Against Federal Litigation: Discovery*  
Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulermaking and Procedural Practice?*

### 2015 • JUDICIAL TRANSPARENCY AND THE RULE OF LAW

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*  
Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*.

### 2014 • FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*  
Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

### 2013 • THE WAR ON THE JUDICIARY: CAN INDEPENDENT JUDGING SURVIVE?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*  
Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

### 2012 • JUSTICE ISN'T FREE: THE COURT FUNDING CRISIS AND ITS REMEDIES

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*  
J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

### 2011 • THE JURY TRIAL IMPLOSION: THE DECLINE OF TRIAL BY JURY AND ITS SIGNIFICANCE FOR APPELLATE COURTS

Marc Galanter, University of Wisconsin Law School, and Angela Frozana, *The Continuing Decline of Civil Trials in American Courts*  
Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*  
Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

### 2010 • BACK TO THE FUTURE: PLEADING AGAIN IN THE AGE OF DICKENS?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*  
Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

### 2009 • PREEMPTION: WILL TRADITIONAL STATE AUTHORITY SURVIVE?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*  
Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

### 2008 • SUMMARY JUDGMENT ON THE RISE: IS JUSTICE FALLING?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*  
Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

## **2007 • THE LEAST DANGEROUS BUT MOST VULNERABLE BRANCH: JUDICIAL INDEPENDENCE AND THE RIGHTS OF CITIZENS**

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

## **2006 • THE WHOLE TRUTH? EXPERTS, EVIDENCE, AND THE BLINDFOLDING OF THE JURY**

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*  
Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

## **2005 • THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS**

Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

## **2004 • STILL COEQUAL? STATE COURTS, LEGISLATURES, AND THE SEPARATION OF POWERS**

Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

## **2003 • THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS**

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

## **2002 • STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE?**

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

## **2001 • THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE**

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

## **2000 • OPEN COURTS WITH SEALED FILES: SECRECY'S IMPACT ON AMERICAN JUSTICE**

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

## **1999 • CONTROVERSIES SURROUNDING DISCOVERY AND ITS EFFECT ON THE COURTS**

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

## **1998 • ASSAULTS ON THE JUDICIARY: ATTACKING THE "GREAT BULWARK OF PUBLIC LIBERTY"**

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

## **1997 • SCIENTIFIC EVIDENCE IN THE COURTS: CONCEPTS AND CONTROVERSIES**

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

## **1996 • POSSIBLE STATE COURT RESPONSES TO AMERICAN LAW INSTITUTE'S PROPOSED RESTATEMENT OF PRODUCTS LIABILITY**

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

## **1995 • PRESERVING ACCESS TO JUSTICE: EFFECTS ON STATE COURTS OF THE PROPOSED LONG RANGE PLAN FOR FEDERAL COURTS**

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

## **1993 • PRESERVING THE INDEPENDENCE OF THE JUDICIARY**

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

## **1992 • PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM**

Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

### **Law Reviews from Academic Symposia**

#### **2019 • CLASS ACTIONS, MASS TORTS, AND MDLs: THE NEXT 50 YEARS**

Lewis & Clark Law Review (forthcoming)

#### **2017 • THE JURY TRIAL AND REMEDY GUARANTEES: FUNDAMENTAL RIGHTS OR PAPER TIGERS?**

Oregon Law Review, Vol. 96, No. 2

#### **2016 • THE DEMISE OF THE GRAND BARGAIN: COMPENSATION FOR INJURED WORKERS IN THE 21ST CENTURY**

Rutgers University Law Review, Vol. 69, No. 3

#### **2015 • THE “WAR” ON THE U.S. CIVIL JUSTICE SYSTEM**

Emory Law Journal, Vol. 65, No. 6

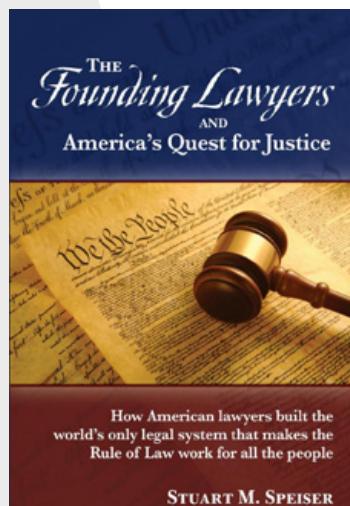
#### **2005 • MEDICAL MALPRACTICE**

Vanderbilt Law Review, Vol. 59, No. 4

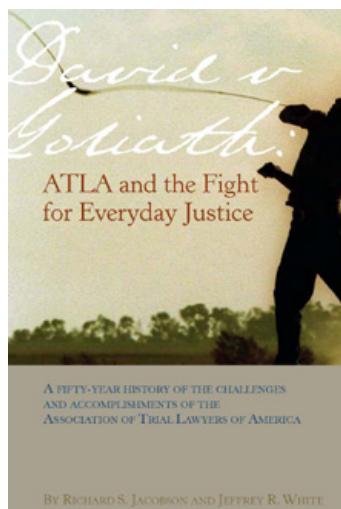
#### **2002 • MANDATORY ARBITRATION**

Law and Contemporary Problems, Vol. 67, No. 1 & 2, Duke University School of Law

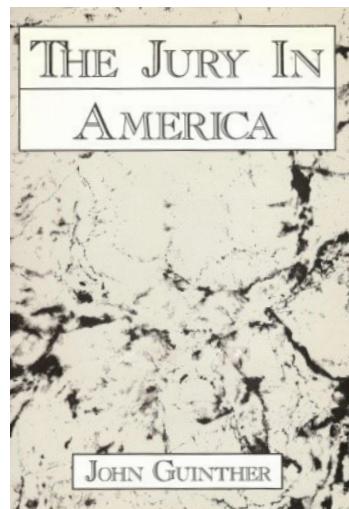
### **Books distributed by the Pound Civil Justice Institute**



*The Founding Lawyers and America's Quest for Justice*  
by Stuart M. Speiser (2010)



*David v. Goliath: ATLA and the Fight for Everyday Justice*  
by Richard S. Jacobson &  
Jeffrey R. White (2004)  
(Free viewing and downloading at  
[www.poundinstitute.org.](http://www.poundinstitute.org/))



*The Jury In America*  
by John Guinther (1988)

## **Reports of the Chief Justice Earl Warren Conferences on Advocacy**

**1989 • MEDICAL QUALITY AND THE LAW**

**1986 • THE AMERICAN CIVIL JURY**

**1985 • DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY**

**1984 • PRODUCT SAFETY IN AMERICA**

**1983 • THE COURTS: SEPARATION OF POWERS**

**1982 • ETHICS AND GOVERNMENT**

**1981 • CHURCH, STATE, AND POLITICS**

**1980 • THE PENALTY OF DEATH**

**1979 • THE COURTS: THE PENDULUM OF FEDERALISM**

**1978 • ETHICS AND ADVOCACY**

**1977 • THE AMERICAN JURY SYSTEM**

**1976 • TRIAL ADVOCACY AS A SPECIALTY**

**1975 • THE POWERS OF THE PRESIDENCY**

**1974 • PRIVACY IN A FREE SOCIETY**

**1973 • THE FIRST AMENDMENT AND THE NEWS MEDIA**

**1972 • A PROGRAM FOR PRISON REFORM**

## **Reports of Roundtable Discussions**

### **1993 • JUSTICE DENIED: UNDERFUNDING OF THE COURTS**

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

### **1991 • SAFETY OF THE BLOOD SUPPLY**

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, DC, attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

### **1990 • INJURY PREVENTION IN AMERICA**

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

### **1988-89 • HEALTH CARE AND THE LAW III**

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

### **1988 • HEALTH CARE AND THE LAW**

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

### **1988 • HEALTH CARE AND THE LAW II—POUND FELLOWS FORUM**

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

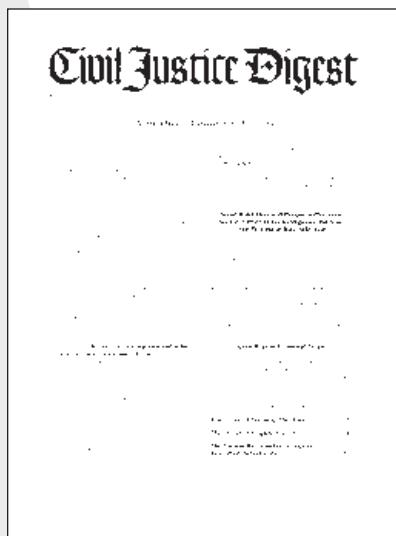
## **Research Monographs**

**Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts.** This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

**The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D.** Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

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## **Pound's Civil Justice Digest**



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