Class Actions and Aggregate Litigation

Recent Watershed Supreme Court Term Forms Basis for Eighth Annual NJFE Symposium

By Michelle Parrini

On July 13–14, 2012, 113 state court judges from 32 states and the District of Columbia attended the eighth annual National Foundation for Judicial Excellence (NFJE) Symposium in Chicago, which once again focused on a timely topic: "Class Actions and Aggregate Litigation: Lessons Learned, Challenges Ahead." The substantive presentations, panels, and debates built on recent important federal court rulings to anticipate the unique, challenging, and growing class action and aggregate litigation issues that state courts will confront in the future, and it also anticipated the decisions yet to come. Topics ranged from how much state attorneys general should delegate their powers to private attorneys, to the significance of U.S. Supreme Court class action developments to state court class action practices, to the role that state courts should assume in monitoring and overseeing the ethical and fiduciary duties of class counsel, among others. One participant commented, "I thoroughly learned much throughout."

The symposium opened on Friday, July 13, 2012, with one program moderated by David A. Logan, dean of the Roger Williams University Law School, Bristol, Rhode Island, "State Attorneys General: Champions of Consumer Protection." Dean Logan pointed out that historically the state attorney general position was a "sleepy backwater way station to someplace else" but that has changed: today's attorneys general become involved in multistate, multiparty, multitheory litigation in the public interest, and they frequently hire private attorneys to help. But "is it a good idea for attorneys general to become champions of consumers in their states?" he asked before introducing the panelists: former Georgia Attorney General Thurber Baker, now a partner of McKenna Long & Aldridge LLP in Atlanta, and Victor E. Schwartz, a partner of Shook Hardy & Bacon LLP in Washington, D.C. As Mr. Baker put it, today the job is "at the confluence of law and public policy." Now "when attorneys general speak," he said, "people listen." Musing on how the job has changed over the years, Mr. Baker identified two characteristics that "shaped" how it evolved: the attorney general role as the chief state law enforcer and the role as an independent, often elected voice. These characteristics account for the position as one that conducts business "on a duty basis." In Mr. Baker's view, the 1990s tobacco litigation—the first time that attorneys general thought that they could influence and "sway the national pendulum"—was the "single most important factor in attorneys general becoming a force around the country." It changed attitudes about banding together across party lines on regional and national issues. Explaining the thinking in that litigation, he noted that attorneys general "didn't have the resources or expertise to take on an industry considered invincible," so working together across state lines, and then hiring private lawyers, seemed to make sense. The strategy built on previous cooperative efforts among different states' attorneys general that undertook enforcement, regulatory, and policy functions. Victor E. Schwartz, *Can Governments Impose a New Tort Duty to Prevent External Risks?* (NFJE 2012), http://nfje.net/Programs.aspx (select "2012 Annual Judicial Symposium" and follow course materials hyperlink) (originally published 44 Wake Forrest L. Rev. 923 (2009)). Foreshadowing contemporary concerns, Mr. Baker explained that when those attorneys general debated hiring private attorneys on contingency fee bases they didn't necessarily believe that the litigation would succeed, but then the settlement amount increased exponentially and the fees became a huge political concern. Attorneys general do debate hiring private, contingency fee-based attorneys and often begin working on cases without that structure, he explained, "but when litigation becomes protracted, it becomes difficult, and then they have to ask the governor or the legislature for money." Mr. Baker predicted that attorneys general will continue with multistate litigations and sometimes use contingency fees, adding that "they have become smarter" about them. *See generally* Thurbert Baker & Andrea Geddes, Acting Together: State Attorneys General and the Rise of Multi-State Litigation (NFJE 2012) (URL above) (discussing past and present multistate litigation types, cooperation methods, and potential future actions).

While acknowledging that contingency fees greatly serve the law by providing access to justice to the poor, Mr. Schwartz questioned the argument that contingency fee contracts with private attorneys saved states money. He remarked that private attorneys have goals that conflict with the oath that attorneys general take to uphold the federal and state constitutions in the public interest. Referring to Executive Order 13433, issued by President George W. Bush to prohibit federal attorneys from hiring contingency fee lawyers for federal agency work, a policy continued by the President Barack Obama administration, Mr. Schwartz explained that the Supreme Court of Rhode Island wrote in *Rhode Island v. Lead Indust. Ass'n*, 951 A.2d 428 (R.I. 2008), that the attorney general could contract on fee bases with private attorneys as long as the agreements met stringent criteria for overseeing the work, and the Supreme Court of California agreed in *County of Santa Clara v. Atlantic Richfield Co.*, 235 P.3d 21 (Cal. 2010). "Delegation does not equal abdication," he said, suggesting that the symposium participants would find the two opinions "instructive." If car dealers issued drivers' licenses, states could save money, Mr. Schwartz noted, "but is that a good idea? Does saving money make something a good idea?" Mr. Schwartz advocated implementing legislative checks on public sector contingency fee contracts with private lawyers, specifically transparency, through open competitive bidding; some fee limits; and oversight. He expressed that the cases handled by attorneys general today can use those controls, characterizing contemporary cases as different from the tobacco litigation as "more evolutionary than revolutionary." This raised concerns for Mr.

Baker. Mr. Baker mentioned that attorneys general worry about maintaining their independence and believe that they should not act responsively toward a governor or a legislature along party lines. In concluding, to the justices attending the symposium Mr. Schwartz said, "You do have a role to make sure that the process is handled well." *See generally* Victor E. Schwartz, The Role of State Attorneys General in Brining Collective Actions—When Is Delegation of Power in the Public Interest? (NFJE 2012) (URL above) (discussing whether legislatures should limit state attorneys' general power to pursue collective actions by statute, ethics involved in permitting them to delegate their powers to contingency fee lawyers, and whether the federal government should allow them to hire contingency fee lawyers when the federal government empowers them to enforce federal law).

The symposium reconvened on Saturday, July 14, 2012, with the session, "Overview of Class Action Developments in the U.S. Supreme Court and the Independence of State Procedural Law." Jessica Davidson Miller, a partner of Skadden Arps Slate Meagher & Flom LLP in Washington, D.C., explained why this topic was relevant to state court judges. CAFA has many exceptions, and litigation's slow pace means that she, for instance, still litigates cases in states courts that predated CAFA in inception. She explained recent rulings in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which have tightened class certification requirements and have obliged federal courts to scrutinize class certification requests more than in the past, and how state courts, which don't always interpret the state equivalents to Federal Rule of Civil Procedure 23 the same as the federal courts, have applied the rulings in key cases. *See generally* Jessica D. Miller & Jordan M. Schwartz, Recent Appellate Federal and State Developments in Class Actions (NFJE 2012) (URL above) (discussing developments in detail). Among others, Ms. Miller also explained *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), which in her view "threatens to open the door to parallel state class litigation when federal class certification has failed" because it recognized that state courts' class certification standards can legitimately differ from the federal certification class action standard, state courts have extensive discretion to apply state standards to statewide class certification, and a failed class certification by a federal court didn't preclude a new named plaintiff from achieving certification in a parallel state court action. Ms. Miller remarked that the most important unresolved state class action practice

Jessica Davidson Miller (left) and Samuel Issacharoff

questions involve due process principles, such as whether state courts have a due process obligation to deny certification in state class actions if class members do not prove individual reliance, or whether courts must ensure that a defendant has a chance to raise individualized defenses. *See generally* Miller, *supra*, at 106–07 (discussing cases on point).

Following Ms. Miller, Samuel Issacharoff, Reiss Professor of Constitutional Law at New York University School of Law in New York City, prefaced his commentary by mentioning that he had just spoken to 500 people interested in developing class action mechanisms in Latin and Central America during a conference in Buenos Aires. Why the interest, he asked? "Because we live in a mass society, which puts pressure on courts to achieve goals," Mr. Issacharoff answered. Among other goals, courts face pressure to resolve disputes efficiently and to achieve "horizontal equity in resolution" by treating "similarly situated people similarly." He then analyzed five Supreme Court cases, after identifying the questions that they raised. First, who is in charge, and who has the right to speak on behalf of others. Second, what justifies deciding to certify a class and altering the playing field? "This is a question that no one wants to address head on, but this changes the balance of power," he said. Third, what is the role of individual class members? According to Mr. Issacharoff, although "we discuss these questions in terms of Rule 23, the underlying issue is always due process." Referring to Italian film director Sergio Leone, he also grouped the cases into three categories: "the good, the unfortunate, and the superlative." First Mr. Issacharoff described *Bayer v. Smith* as adopting the American Law Institute (ALI) approach and as a "superlative case" that evolved from the ALI principles and through which the Court intended to preserve "representational integrity" because without it litigation may not bind absent class members. Next he characterized *Wal-Mart v. Dukes* as "good" and simply as "reaffirming previously articulated principles" about when a judge has the right to certify a class, or in this case, not to certify a class. Mr. Issacharoff also viewed *Erica P. John Fund Inc. v. Halliburton*, 131 S. Ct. 21 (2011), as "good." *See generally* Samuel Issacharoff, Class Action Growing Pains 80 (NFJE 2012) (URL above) (discussing the "efficient capital market hypothesis" as it applied to the case). As for the "unfortunate" cases, he mentioned cases dealing with the role of individual class members, the class action waiver arbitration cases involving mass-marketed goods and services: *AT&T Mobility LLS v. Concepcion*, 131 S. Ct. 1740 (2011), and *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012). With cell phones "the market is organized as a mass market, which means that individuals cannot litigate these cases individually," Mr. Issacharoff said. Consumers received standard form contracts that buried the class action waivers in the arbitration provisions, which essentially denied consumers the ability to enforce their rights. *See generally* Issacharoff, *supra*, at 82–83 (elaborating these arguments). He viewed these as "unfortunate" partly because they take cases away from the state courts, noting that most state cases have rejected mandatory arbitration on an individual basis. About the *CompuCredit* decision Mr. Issacharoff said, "This is a deeply troubling opinion if you buy the *In re American Express* [667 F.3d 204 (2d Cir. 2012)] reasoning of trying to fit something into a regulatory scheme." *See generally* Issacharoff, *supra*, at 82–83 (elaborating these points). In *In re American Express* the Second Circuit, evaluating how the arbitration requirement affected "the statutory rights underlying the antitrust laws" and seek-

ing to prevent encroachment, "refused to order arbitration of claims of merchants claiming that the terms of use of American Express cards constitute[d] an illegal arrangement under" those laws. *Id.* When asked by a participant if state legislatures could do anything "to change the game substantially," Mr. Issacharoff answered that states don't need to follow the federal policy of taking small cases out of courts and resolving them elsewhere, unless they involve cross-border activity.

Next a debate ensued between Mark A. Perry, a partner of Gibson Dunn & Crutcher LLP in Washington, D.C., and Karen Barth Menzies, a partner of Robinson Calcagnie Robinson Shapiro Davis Inc. in Los Angeles. Resolved: The Due Process Clause of the United States Constitution prohibits all courts from consolidating cases into aggregate litigation when doing so would require eliminating or bifurcating claim elements or defenses. Mr. Perry argued for the affirmative, and Ms. Menzies argued for the negative. Mr. Perry posited that "the Due Process Clause does constrain state court procedures, but it doesn't impose uniform civil procedures on the states, as confirmed by *Bayer*." *Taylor v. Sturgell*, 128 S. Ct. 2161, 2276, explicitly states that Federal Rule of Civil Procedure 23 implements the Due Process Clause, so complying with the rule complies with due process, he argued. Since most state courts have "analogs" to the federal rule, those rules ought to satisfy due process, according to Mr. Perry. While acknowledging that bifurcating and severing can have a place in certain trials, he argued that "innovation isn't always good." If innovation would eliminate a claim element or a defense completely, that "would violate the Due Process Clause" because it would deprive someone of a right—a defendant or a plaintiff—as the Court wrote in *Dukes* regarding defenses. Referring to the *Scott* case, he noted that Justice Scalia wrote that not requiring the plaintiffs to prove a claim element "created a due process problem." *See generally* Mark A. Perry, Due Process Limitations on Aggregating Claims Under State Procedural Law 116 (NFJE 2012) (URL above) (discussing *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, Circuit J. on granting stay). In innovating, a judge couldn't entirely take something off the table: "a class must prove the requisite element before anyone could recover," he said. Referring to the Rules Enabling Act, Mr. Perry remarked, "Procedure is the handmaid of due process; you can't use procedure to modify substance, removing a claim element entirely is unconstitutional." When a judge permits a plaintiff class to prove an element at "some point, but down the road," courts enter "a gray area," he elaborated, "because if the plaintiff never reaches that point [due to settlement], in reality then it is similar to taking it off the table." *See generally* Perry, *supra* (discussing due process limits on aggregating actions under state procedural law).

Mark A. Perry (left) and Karen Barth Menzies

Ms. Menzies argued that eliminating claims or bifurcating defenses in a mass market involving mass production, mass marketing, and mass consumption "is necessary to ensure due process." "Consider mass tort plaintiffs," she said. Individually, if they had resources, "they'd flood the courts without aggregation." The federal rules traditionally have accommodated severing issues—they have permitted separating claims or issues, she argued. And trial courts traditionally have discretion to manage cases. According to Ms. Menzies, trial courts use the rules "creatively to meet the needs of cases." The Due Process Clause doesn't prevent bifurcation of general causation from specific causation, she posited. And aggregation and bifurcation have cost benefits. In addition to conserving the costs associated with litigating general causation, aggregation and bifurcation can also benefit defendants by disposing of causation and liability. "A sophisticated judge can create a trial plan for specific uses in mass torts," she said. Ms. Menzies acknowledged that plaintiffs' conduct might differ, and if so, a litigation format needs to take it into account: "Defendants do need to have a chance to raise alternative causation," she said. But Ms. Menzies argued that mass actions could decide general causation "across the board and then move to the next stage for specific plaintiffs." And Ms. Menzies reminded the symposium participants, for years courts have held bellwether trials for efficiency's sake, then have grouped plaintiffs, as in the hormone replacement therapy cases. She reiterated that a mass tort action cannot eliminate claim elements or defenses, "but can certain elements be set aside for later, through bifurcation? Yes." And Ms. Menzies disputed Mr. Perry's "in reality" position on settlements: "Global settlements entail proving certain things before someone gets paid," she said. She "has to do due diligence, which involves gates as precursors to payment" and deals with allocation, proof by an individual plaintiff, or alternative causes, to name a few, and "ethics opinions guide this," she said, stating that courts often appoint special masters to oversee this. *See generally* Karen Barth Menzies, Balancing Fairness and Efficiency Under the Due Process Clause in Mass Tort Actions (NFJE 2012) (URL above) (discussing mass tort action due process, issue bifurcation, grouped trials, and global settlements). In closing Mr. Perry suggested that judges require litigating mass tort parties to present a joint trial plan during the certification stage—as suggested by the advisory committee notes to Federal Rule Civil Procedure 23. He thought this should happen early in litigation "when a trial will depart from the norm." Ms. Menzies agreed with the suggestion as long as the plan could adapt and change as needed as the litigation proceeded.

After lunch, Francis E. McGovern, a professor of law of Duke University School of Law in Durham, North Carolina, delivered a program titled, "The Ethical and Fiduciary Duties of Courts and Counsel to State Mass Tort and Quasi-Class Actions." First Mr. McGovern remarked that we "mostly talk about problems on the plaintiffs' side, but defendants have ethical issues," too. For example, he reminded the judges that responding to ethics complaints, Judge Carl J. Barbier of the U.S. District Court for the Eastern District of Louisiana, overseeing the BP Deepwater Horizon oil spill litigation, ordered Kenneth Feinberg, appointed to administer the related claims fund, to stop declaring complete neutrality because,

while neutral on case values, Mr. Feinberg answered to BP, so he could not say that plaintiffs did not need lawyers. During the session, Mr. McGovern outlined areas raising ethical concerns in class actions, quasi-class actions, and aggregated cases; sources of ethical problems; and how judges could navigate the problems. The question, "How much do you want to monitor attorney ethics?" would inform a judge's approach, Mr. McGovern said.

Discussing areas that raise ethical problems, he expressed that judges need to know if "lawyers run the show" in a case and adequately communicate with clients. Multidistrict litigation cases routinely use 1-800 phone numbers and websites to keep clients informed. Joint defense agreements create confidentiality dilemmas. On attorney conduct, according to Mr. McGovern, complex litigation "implicated" every item in the ABA Model Rules of Professional Conduct, and he explained the potential ethical pitfalls in complex litigation trial stages and trial structures, plaintiff business models, and plaintiff funding options. He particularly wanted to alert the judges to "the new world of financing," suggesting that judges "may have an obligation to find out who is financing what to find out what drives the decision-making process" in representation. Mr. McGovern highlighted three particular ethical problem sources: plaintiff business models; plaintiff attorney financing; and aggregate settlements, particularly settlement distribution and attorneys' fees. *See generally* Francis E. McGovern, Toward an Understanding of the Mass Tort Litigation Environment

Francis E. McGovern

(NFJE 2012) (URL above) (discussing plaintiff business models, plaintiff attorney financing, and procedural variables leading to ethics problems).

Mr. McGovern advised that the Federal Judicial Center Manual for Complex Litigation (4th ed. 2004) and accompanying forms offered judges "the best guidance" on how to comply with ethical rules to ensure that "the lawyers meet ethical obligations." "When deciding how to deal with ethics, look to the forms," he advised. He also recommended that judges handling aggregate settlements review the ALI Principles of the Law of Aggregate Litigation, section 3.16, "Definition of a Non-Class Aggregate Settlement," and section 3.17, "Circumstances Required for Aggregate Settlements to Be Binding." Looking ahead, he forecasted that judges would have to deal increasingly with challenges to settlements, which the ALI Principles of the Law of Aggregate Litigation discusses in section 3.18, "Limited Judicial Review for Non-Class Aggregate Settlements."

Near the end of the day, the Honorable Lorna E. Propes of the Circuit Court of Cook County, Illinois, and Adam L. Hoeflich, a partner of Bartlit Beck Herman Palenchar & Scott LLP in Chicago, spoke on "how, when, and if" state judges should deal with experts testifying on certification issues during the session, "Experts at the Head of the 'Class'." Should judges, for example, test these experts by fully applying *Daubert* before certifying classes? Noting that parties frequently use experts to support or fight class certification, the speakers explained the different approaches taken by various federal circuits on analyzing testimony during the class certification stage, which *Dukes* brought into focus, and the extent to which state courts should do it. Judge Propes and Mr. Hoeflich specifically compared the spit between the Seventh Circuit and Eighth Circuit. The Seventh Circuit requires a full *Daubert* analysis, having established this in *Am. Honda Motor Co. v. Allen*, 600 F.3.d 813, 815–16 (7th Cir. 2010). And the Eighth Circuit conducts a "focused *Daubert* analysis," having concluded that courts needed to wait until the parties had completed merits discovery before conducting *Daubert* analyses. *In re Zurn Pex Plumbing Prods. Liabl. Litig.*, 664 F.3d 604, 614 (8th Cir. 2011). *See generally* Adam L. Hoeflich & Lorna E. Propes, Experts at the Head of the "Class" (NFJE 2012) (URL above) (discussing recent federal developments, state expert evidence admissibility standards, and state court expert evidence-testing class certification practices). They pointed out that the Supreme Court will resolve "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to award damages on a class-wide basis," during the 2012

Adam L. Hoeflich (left) and the Honorable Lorna E. Propes

term in *Comcast v. Behrend* (No. 11-864).

Mr. Hoeflich didn't think that it was clear how different standards would affect different parties, or which parties they would benefit, but he advocated providing tools to courts "with some teeth," to make sure that plaintiffs had proper proof to justify classes. Judge Propes termed the Seventh Circuit approach "draconian." She remarked, "The class actions left in state courts are the most righteous," and undertaking *Daubert* analyses during certification would complicate litigation, "increasing discovery and making it difficult for the plaintiffs' bar."

The day concluded with a panel in which all speakers participated. Before adjourning to attend a closing reception, the symposium participants posed questions ranging from, "Are class actions good for certain cases and bad for others?" to "Have we reached a point where alternative dispute resolution is not so much friend of courts as anathema to jury trials?" to "What experience have you had with professional objectors?" and "What do you most want attendees to take away from the seminar to think about?" In the words of one symposium participant, "The final panel did an excellent job of pulling strands of the topic together." Another participant commented, "This is the best program that the NFJE has presented. Interesting and excellent presenters." All in all, the NFJE once again offered a beneficial program.