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REPORT

CLASS ACTION SYMPOSIUM

20th Anniversary of *Shutts*: Class Actions in the New Millennium

What do you get when you mix a large group of law professors noted for their class action knowledge with some of the leading defense and plaintiffs' practitioners, and add a couple of prominent federal judges? Radical ideas.

At the April 7 Class Action Symposium sponsored by the University of Missouri-Kansas City School of Law, some of the ideas tossed around included:

- *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), may have outlived its usefulness.
- It might also be time to rethink the holding in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).
- It's a myth that, absent class actions, mass torts are treated in an individualized fashion.
- Trials and settlements should be handled differently, and mass settlements are a good idea.
- Piecemeal litigation could be a practical way of handling complex cases.
- Use of sampling methods might be the best type of notice for a negative value consumer class.

In addition to airing provocative ideas, the symposium, put together by Robert H. Klonoff, Douglas Stripp-Missouri professor of law at UMKC Law School, provided both historical context and up-to-the-minute discussions of the latest court rulings. But—befitting a program put on by a law school for an audience that included a number of law professors—a basic familiarity with class action practice was necessary to keep pace with the speakers.

***Shutts* Sets the Stage.** The symposium commemorated the 20th anniversary of the U.S. Supreme Court's ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which set out the core rules still in effect for both personal jurisdiction over class members and choice of law analysis. Harvard Law School Professor Arthur R. Miller, who argued for Phillips at the Supreme Court, began the day with some reflections on the case.

The *Shutts* case was a class action brought in state court in Kansas by 28,000 natural gas royalty owners—most from other states—seeking interest on delayed payments from Phillips, a Delaware corporation headquartered in Oklahoma. The Kansas Supreme Court upheld a trial court decision that certified the class and applied Kansas law to all claims. On certiorari to the Supreme Court, Phillips challenged both the Kansas court's personal jurisdiction over non-resident class members and the application of Kansas substantive law.

According to Miller, both he and the others involved in the litigation considered the personal jurisdiction issue to be key and they concentrated on that point. But the Supreme Court ruled 9–0 that personal jurisdiction was not required so long as the trial court provided due process protection—opt outs, adequate notice, and adequate representation.

The choice of law issue, however, was resolved in favor of Phillips, with the high court concluding that the Kansas court's application of state law was ''arbitrary and unfair''—a ruling that has led to the significant

choice of law analyses common in multistate litigation today.

Miller observed that, at the time of argument, he had ''no conception of the legs that case would have.'' As an example, he pointed out that the March 31 decision by the New Jersey Superior Court, Appellate Division, in *International Union of Operating Engineers Local #68 Welfare Fund v. Merck & Co.*, No. A-0450-05T1, upholding certification of a nationwide class of third-party payors suing over the drug Vioxx (see related story this issue), included an ''incredible discussion of choice of law'' citing *Shutts*.

''I remain committed . . . that this procedural device has enormous, enormous capacity for doing good, for doing right, for doing fairness.''

HARVARD LAW SCHOOL PROFESSOR ARTHUR R. MILLER

Miller was also part of the advisory committee that developed Federal Rule of Civil Procedure 23 in the 1960s—he noted that ''Rule 23(b) was actually put together in fairly final form in the bowels of the Martha's Vineyard ferry'' on the way to a key meeting on the rules. He still believes in the value of class actions, observing, ''I remain committed . . . that this procedural device has enormous, enormous capacity for doing good, for doing right, for doing fairness.''

A Whole Day on Rule 19? Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit pointed out the unique aspect of debates over Rule 23 in opening her remarks on the future of class actions: ''When did you last consider spending a whole day on Rule 19?'' She suggested that several aspects of class actions were ripe for change, starting with the idea that *Eisen*, which requires actual notice where possible, and *Erie*, which requires federal courts sitting in diversity cases to apply state law, might both have outlived their usefulness.

Modern communications and statistical methods might be more appropriate for notice these days and it might be time for general federal common law in the tort arena, Wood suggested. She also observed that piecemeal litigation—resolving discrete issues separately, and allowing more interlocutory review—might be of value, especially since technology can keep the transaction costs down at this point.

And not all issues belong in the courts, she said: Some issues may be handled better by administrative agencies.

Judge Diane P. Wood suggested that it may be time to develop general federal common law in the tort arena

Rule 23(b). At a morning panel discussing the *Shutts* jurisdiction component, Professor William B. Rubenstein of UCLA School of Law pointed out two problems with class actions. First, he said, class actions aren't collective actions, but rather representative actions, despite the nod given in *Shutts* and other decisions to the idea that the parties have pooled together their claims.

Second, he confessed that, despite having Arthur Miller as his civil procedure professor, ''I never really understood Rule 23(b).'' He went on to make the point that most people understand the rule by its categories, but he found no unifying principle.

During the question period, Miller took the opportunity to explain and defend 23(b), pointing out the historical context of earlier class actions that led to the division of the rule into three subsections. However, Miller's presence did not stop other speakers—most notably Public Citizen Legal Director Brian Wolfman—from proposing changes to Rule 23(b).

Other speakers discussing the jurisdiction side of *Shutts* and its affect on adequacy of representation had different suggestions. Geoffrey P. Miller, the Stuyvesant P. Comfort professor at New York University School of Law, suggested that we should move away from early certification and notice—both assumed in *Shutts*—because certification is risky and important for both parties.

Patrick Woolley, the Beck, Redden & Secrest professor at the University of Texas School of Law, discussed the real meaning of adequate representation; as a practical matter, he said, the system is ''only going to be able to approximately represent individual parties.'' Mass torts, where the individual claims are often significant, present a real challenge on this point.

Discussing the adequacy issues at more length, both Rubenstein and Geoffrey Miller suggested some novel alternatives. Why not make the parties show what would happen to the litigation if there were no class action, Rubenstein suggested, while Miller brought up the idea of disallowing opt outs in small claim cases.

Unintended Consequences: 'Gridlaw.' In an afternoon discussion on the jurisdiction issue in *Shutts*, Professor Linda S. Mullenix, who holds the Morris & Rita Atlas Chair in Advocacy at the University of Texas law school, observed that ''gridlaw is a monumental unintended consequence of *Shutts*.'' ''Gridlaw'' is her term for volumes of charts constructed primarily by defense lawyers to show the distinctions among state laws and defeat predominance and superiority under Rule 23(b)(3).

Saying that this process puts an uneven burden on the parties, Mullenix suggested that, at least in settlement classes, there should be no need for a conflict of laws analysis. More provocatively, she echoed Wood in suggesting that it might be time to throw out *Erie*.

Samuel Issacharoff, the Bonnie & Richard Reiss professor of constitutional law at New York University School of Law, expanded on this idea. Applying the Class Action Fairness Act idea of moving nationwide harm cases into federal court, he suggested developing a body of federal common law for handling those cases that are deemed jurisdictionally different under CAFA.

Professor Richard A. Nagareda of Vanderbilt University Law School noted that *Shutts* provided ''very little guidance'' on handling conflicts, although the court criticized ''bootstrapping''—using the fact that the case is a class action to give extra weight to use of a particular forum law. He suggested that there are situations where bootstrapping might be appropriate and not

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arbitrary—as in the situation where a court in Oklahoma certifies a case under Michigan law because the defendant is located there.

And he observed that, in a case removed to federal court under CAFA, the practical justification for mimicking the state court in handling a conflicts question is removed. Mullenix noted that Congress did not intend such a result with CAFA.

There are "real feasibility limits to any work to change Rule 23."

JUDGE LEE H. ROSENTHAL, CHAIR, ADVISORY COMMITTEE ON CIVIL RULES

Getting 'Real' About Mass Torts. Mass torts, Deborah R. Hensler, the Judge John W. Ford professor of dispute resolution at Stanford Law School, emphasized, are always highly aggregated, regardless of whether they are handled as class actions. Mass torts frequently settle while under the aegis of multidistrict litigation and are also resolved as part of bankruptcy hearings in settlements that might not meet the due process standards in *Amchem Products v. Windsor*, 521 U.S. 591 (1997), or *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

''We should all get real about mass torts,'' Hensler said. ''Until we come to grips with the fact that in a global economy there are going to be products that produce mass harms and in modern society there is a demand to resolve those mass harms,'' the civil justice system is going to fail.

Professor Francis E. McGovern of the Duke University School of Law made a similar point. ''Mass settlements are a good idea,'' he observed, pointing out that once a tort is mature, settlements save money. ''*Amchem* had some process failures,'' he said, but if the court had felt the process had truly been arms length it might have looked at it somewhat differently.

Global settlements are a possible solution, McGovern suggested, so long as everything is done in the ''sunshine.'' We need to look at cases with settlement in mind and figure out what defines a fair global settlement process.

"We should all get real about mass torts."

PROFESSOR DEBORAH R. HENSLER, STANFORD LAW SCHOOL

His points echoed an introduction to the mass torts discussion by Issacharoff, who is the reporter for the American Law Institute's Aggregate Litigation Project (Klonoff and Nagareda are assistant reporters). The primary objective of this project is to facilitate resolutions—settlements, restructuring, workouts. The old tort model of one client and one defendant is no longer the norm, Issacharoff pointed out.

Plaintiffs' attorney Elizabeth Cabraser of San Francisco's Lieff Cabraser Heimann & Bernstein observed that, in mass torts, we are seeing a shift away from classic liability cases to corporate misconduct cases. She cited the boom in drug and medical device cases, which she attributed in part to the direct-to-consumer advertising, the view of drugs as consumer products, the profit tied to these products, and the growth in the use of drugs. ''The law can move much more quickly than science can,'' she said, which is one reason the suits are focusing on corporate actions rather than the science underlying the products.

She, too, pointed out that mass torts are handled in the aggregate, regardless of the procedure used. Air crash cases, for example, are handled as a group despite the number of conflicts present. And though courts often refuse to engage in choice-of-law analyses—preferring just to reject a class on superiority grounds hoping it will go away—the mass torts don't disappear like the small value consumer cases do. They're worth too much money.

Defense attorney Mark Hermann of the Cleveland office of Jones Day set out his own theory on the growth of mass torts: Zero suits were filed in 1977 when the Food & Drug Administration banned saccharin, which stands in stark contrast to the mass litigation over silicone gel breast implants in the 1990s. He attributed the increase to the proliferation of television coverage, lawyer advertising, a perceived need for haste, the increased organization and wealth of the plaintiffs' bar, ''no injury'' cases, ''junk'' science, and *Shutts*.

Dukes v. Wal-Mart. The certified class at issue in the pending sex discrimination case of *Dukes v. Wal-Mart Stores Inc.*, 9th Cir., Nos. 04-16688, 04-16720, includes about 2 million people, Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas observed. ''A class of that size and scope could not occur without *Shutts*.''

Nancy Levit, the Curators' and Edward D. Ellison professor at UMKC law school, noted that few employment discrimination cases are certified, but the effect they have on corporate behavior is powerful. Most settle, she said, pointing to the cases against Coca-Cola and Texaco. Further, if the plaintiffs lose the certification ruling, they have very few options to sue. Many lawyers won't take individual discrimination cases and only 22 percent of those that are pursued end in victory for the plaintiffs.

But certification is a complicated issue, particularly when the case involves both injunctive relief and money damages. The federal courts of appeal are split on how to handle this issue. The Fifth Circuit, in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), rejected certification of a class under either (b)(2) or (b)(3) when money damages predominate. Both the Seventh and Second circuits have rejected *Allison* and have formulated different approaches, including hybrid certification and a balance test. Most recently, the Sixth Circuit, in *Reeb v. Ohio Dep. of Rehabilitation,* 7 CLASS 80, 02/10/06, rejected certification of emotional harm damages under Rule 23(b)(2).

''These issues are very much unsettled,'' Rosenthal noted, adding later that it is ''hard to overstate'' their importance. She pointed out that Sixth Circuit Judge Damon Keith ''passionately'' dissented in *Reeb*, saying the opinion ''turns the clock back on civil rights.''

Joseph Sellers of Cohen, Millstein, Hausfeld & Toll in Washington, who represents the plaintiffs in *Dukes*, said the issues being debated before the Ninth Circuit in that case ''swirl around as the heir to *Shutts*.''

Defense attorney Matthew Lampe of Jones Day in Columbus, looking at the circuit split on handling injunctive relief and money damages, observed that the Second Circuit's standard for Rule (b)(2) ''looks an awful lot like (b)(3).''

More Unintended Consequences: PSLRA. The Private Securities Litigation Reform Act was supposed to rein in plaintiffs' attorneys bringing securities class actions, but William Lerach of San Diego's Lerach Couglin Stoia Geller Rudman & Robbins—one of those plaintiffs' attorneys—told the symposium that while the number of cases filed has remained relatively constant, ''the recoveries have skyrocketed.''

He also said that the PSLRA rules on lead plaintiffs have led to the rise of the sophisticated institutional investor—pension funds, charities, and union funds. In the past, institutional investors were reluctant to sue, Lerach said, but now they've become strong advocates of class suits. And they're not just bringing class actions—some of them are opting out of class litigation and bringing private suits under state law.

Defense attorney Patricia J. Villareal of the Dallas office of Jones Day said far too many securities cases are being brought as fraud class actions when a more appropriate approach would be the shareholders derivative action. She also suggested that the recovered amount in most cases is very low—between 2.3 and 2.9 percent of alleged losses—and that many large investors are not bothering to submit claims because of the low recovery. Lerach disputed that large investors were not collecting their money.

Villareal also noted that since nine out of 10 cases settle, there is little opportunity to develop securities class action law. But she did suggest that courts should move away from using a *Daubert* hearing to examine the probative value of evidence: *Daubert* is only about admissibility, she said.

John C. Coffee, the Adolf A. Berle professor at Columbia Law School, began his remarks with the observation, ''I come to reform the securities class action, not to kill it.'' Securities class actions, he noted, are the ''600-pound gorillas'' of class litigation, outnumbering all other types of cases. They're also the key element in regulating corporate behavior, since our system relies on private enforcement: The Securities and Exchange Commission issued $750 million in penalties against WorldCom, but the class actions settled for over $6 billion.

The threat of securities class actions is substantial, Coffee said: Companies stand a 10 percent chance of being sued. But auditors, who are the most critical factor in deterrence, are rarely affected. And, since no one is monitoring who actually pays damages, much of the money is coming out of the corporation itself, instead of coming from directors and other corporate insiders. In fact, Coffee noted, since many investors who sue are often still shareholders, one can argue that the payments are going out of their left pocket to their right pocket.

Noting that the same insurance company often provides both directors and officers coverage and overall corporate coverage—so that the insurer is not concerned over which pot the recovery comes from—he suggested requiring different insurers for the policies.

Coffee's suggestions focused on methods that might discourage use of corporate funds for damages and increase the risk for directors and auditors, thereby ensuring improved corporate governance. He suggested that requiring a report to the court from the corporate directors demonstrating that the settlement is fair, might be useful; it could, at least, bring in objectors. He also suggested tying plaintiffs' attorneys' fees to the source of damages—with less being paid for damages from the corporation's resources—so that the plaintiffs would have an incentive to monitor the source of funds.

Some Optimism on Ethical Issues

Edward K.M. Bilich of Jones Day's Washington office suggested that the vast expansion in communications technology may really improve the ethical landscape for attorneys representing large classes. The Internet allows lawyers to keep the class members notified and sets up the possibility of holding a ''virtual town hall'' on key topics. However, if plaintiffs' attorneys ask for and give information, they may also have to respond to it effectively.

He also noted that CAFA has increased the centralization of the plaintiffs' bar. Elite plaintiffs' firms will prosper and will have the resources to use high tech. He did observe that neither side may truly want the class members more involved.

Professor Geoffrey Miller, in introducing the topic, cautioned that the ethics rules as currently written can't be straightforwardly applied, since ''all class action settlements are aggregate settlements.'' Debra L. Bassett, the Loula Fuller and Dan Myers professor at Florida State University College of Law looked at adequacy issues, pointing out that they are almost always related to a conflict of interest. And Edward Sherman, the Moise F. Steeg Jr. professor at Tulane Law School, pointed out that class actions are an entrepreneurial activity—money is required. That leads to solicitation of clients and other forms of advertising, and the rules are still the same as in other forms of litigation.

The program also featured a summary of the effective settlement of one of Kansas City's largest class actions—the litigation over the collapse of the Hyatt hotel skywalk due to design, engineering, and structural defects. The collapse killed over a hundred people and injured many more. Attorney James Sullivan of Shughart Thomson & Kilroy in Kansas City called the litigation a ''case study'' in how to use procedural rules to pay real claims and preserve due process.

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Brian Wolfman of Public Citizen suggested that in hybrid cases seeking both significant injunctive relief and money damages, Rule 23(b) be amended to allow certification under each section "with respect to a claim or defense" so that the court could select a different section for claims that warranted different treatment.

Can We Really Change Rule 23? A late afternoon panel looked at some ideas for reforming Rule 23, but also found real difficulties in making those changes. Edward H. Cooper, the Thomas M. Cooley professor at the University of Michigan Law School, pointed out that the rulemaking process is an ''intensely scrupulous enterprise'' that takes at least three years and by its very nature limits the number of topics that can be taken on.

One of the concerns often raised in the process is the possibility of ''strategic misuse,'' he said: ''Lawyers know exactly what we meant to do; they don't care'' and will find a way to misuse any new rule. This objection often vitiates new rules.

And the Rules Enabling Act—which permits procedural, but not substantive change through the rules process—imposes other constraints. A change in Rule 23 that set out one section for securities, another for torts, and so on, might be seen as treading on substantive rights, even if setting up separate rules might make these actions easier to handle than the ''one rule fits all'' current standard.

Judge Rosenthal, who chairs the Advisory Committee on Civil Rules, acknowledged that the rules change ''waters are pretty troubled.'' And a lot of the changes are being made by case law, not by the rules process.

A movement to allow a settlement class even if a case couldn't be tried was put aside first because of the *Amchem* litigation and then because of the adoption of CAFA. The recently approved rule changing the time of certification from ''as soon as practicable'' to ''when practicable'' was once rejected and eventually passed only because it reflected the reality of court practice.

A cynic might decide that ''only the inconsequential amendments can succeed,'' Rosenthal said, though she said that, in the modern world of instant communication, public reaction will play a more important role. Still, she said, there are ''real feasibility limits to any work to change Rule 23.''

Despite the concerns raised by Cooper and Rosenthal, Wolfman presented some proposed changes to the rule. He specifically addressed the hybrid cases that seek both significant injunctive relief and money damages, suggesting that Rule 23(b) be amended to allow certification under each section ''with respect to a claim or defense'' so that the court could select a different section for claims that warranted different treatment.

He also defended the importance of opt outs. Even when logic dictates that there is no value to an individual declining to go along with the class, it is a basic proposition in our society that individuals get to control their own destiny. Individual rights—even impractical ones—are an ''irreducible moral judgment.'' He also suggested that the number of opt outs provides valuable information to the judge about the value of a settlement.

Stephen Yeazell, the David G. Price & Dallas P. Price professor at UCLA law school, said he had committed heresy: He, like Judge Wood, had come to the idea that there might some virtue in developing federal law to apply to nationwide cases. He blamed his reaction on rereading *Shutts* while trying to understand CAFA, noting that today *Shutts* would be removed to federal court and stay there. And if a federal court certified the class, what law would they apply? They might not like the Kansas law, he said, but they might assume they should follow what a Kansas court would do. Federal common law for national litigation addresses that problem.

Articles by the speakers at the symposium will appear in Volume 74 of the University of Missouri-Kansas City Law Review, which is due out shortly.

BY NANCY J. MOORE