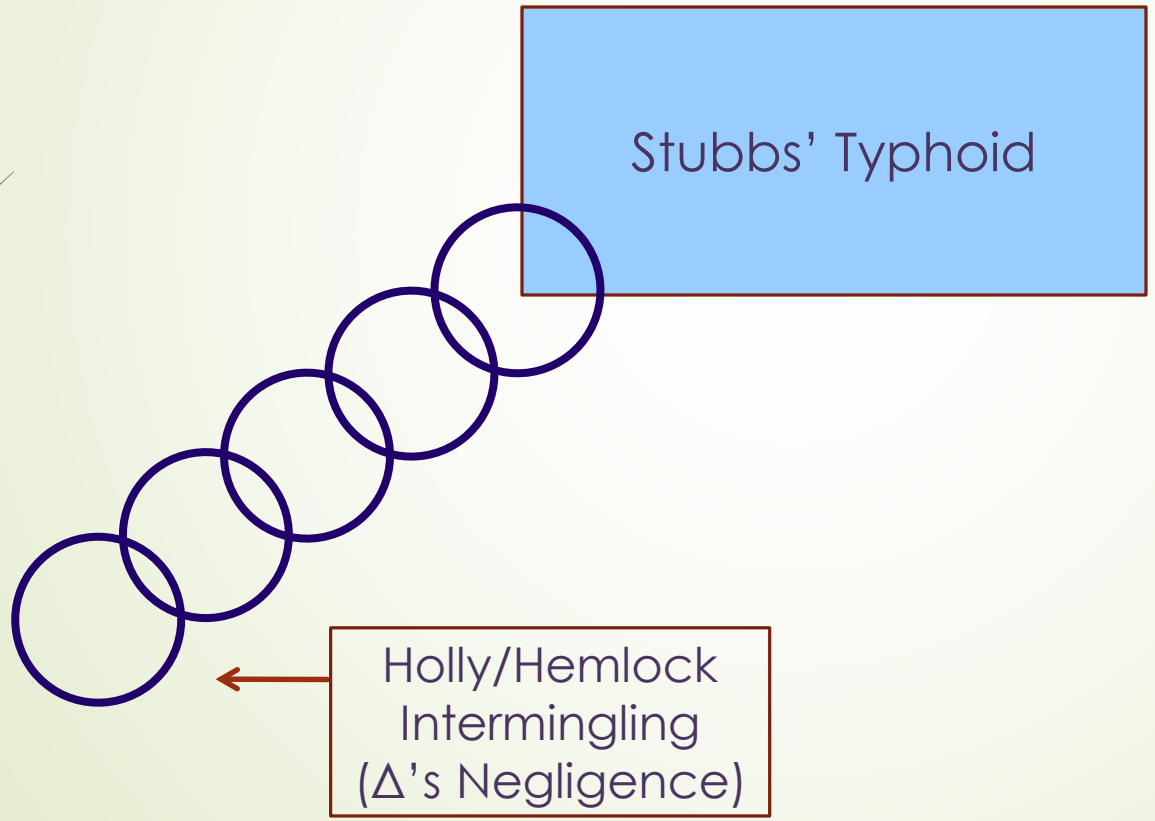
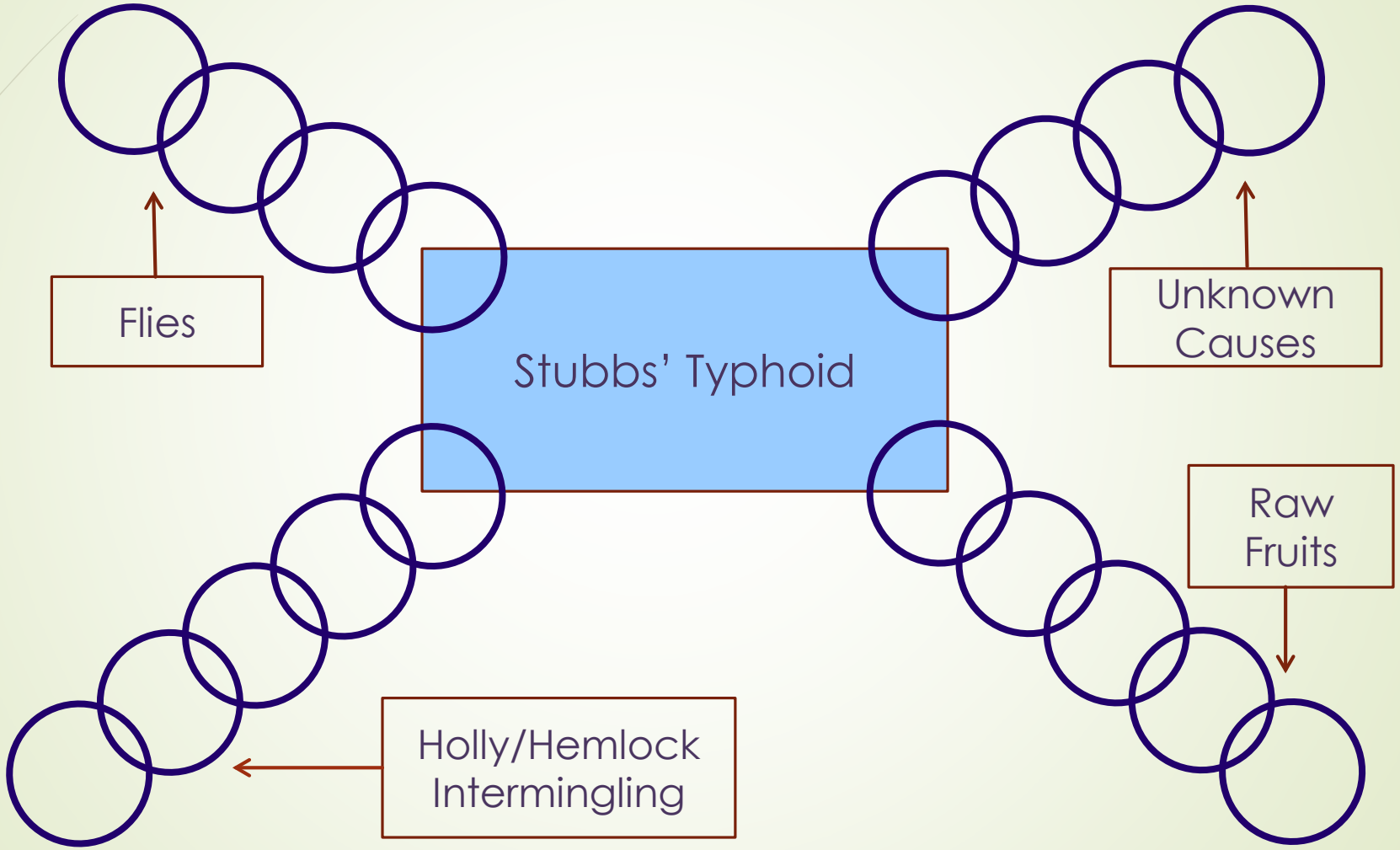
MCLE MATERIALS

PANEL 1
New Technologies and Science in Tort Practice

A MODEL FOR CAUSATION



Multiple Competing Causes



STUBBS' STATISTICS

1) 223 Typhoid cases in 1910; excess of 58 over prior years
2) 180 of those cases occurred in the 3 months (Aug., Sept & Oct.) following intermingling
3) 58 others drank intermingled water and contracted typhoid
4) One-third of typhoid cases were in Stubbs' water district

1) What else happened in Rochester that year?
2) What was the chronological distribution of disease in other years?
3) A Numerator without a denominator
4) What proportion of the population lived in Stubbs's water district?

The Development of Epidemiology (Statistical Investigation of the Cause of Disease)

- Forerunners in 19th century; most famously john Snow's study of Cholera in London
- Development of principles guiding study design and interpretation of data not until post-World War II.
- "Framingham Study" of heart disease begun in 1949
- Salk polio vaccine largest study ever involving over one million school children
- Salk study makes an appearance in an early case that employed epidemiology,

Samuel D. Estep, *Radiation Injuries and Statistics*, 59 Mich. L. Rev. 259 (1960)

- An article well ahead of its time, recognizing
  - The difficulties of competing causes
  - The consequences of long latency periods
  - The problematics of using statistical evidence for particular cases
  - Distinguishing agents that merely accelerate the occurrent of a disease
- How many courts have cited this article since it was published?

0

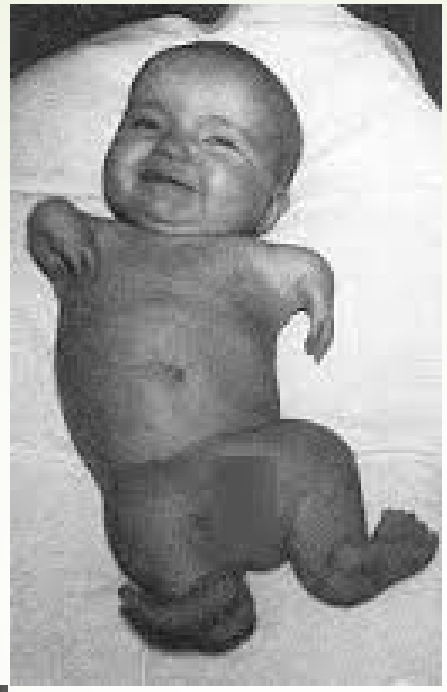
BURSTING THE *FRYE MYTH*

Before *Daubert*, courts in civil cases did almost no screening of the substance of experts' opinions deferring to any expert who presented with appropriate credentials.

Not until the Agent Orange and Bendectin litigations of the late 1970s and 1980s did *Frye* make an appearance in civil cases.

The Laissez Faire Approach to Expert Testimony

- *Cigarettes:* [P]laintiff's expert stated that causation existed in his opinion and that is not only sufficient, it also requires no further examination.
- *MER/29*: P's expert, a doctor, testified: "with a reasonable amount of medical certainty that [P's cataracts and other adverse events] were caused by the taking of MER/29; he relied on 'medical literature' and 'conversations' that many persons who developed skin and hair changes like Roginsky's after taking MER/29 also developed cataracts."That, declared, Judge Friendly was sufficient for leaving the issue to the jury
- *Salk Vaccine:* "it was impossible to prove that any individual case was caused by vaccine" Nevertheless, this evidence "does not preclude a finding by the jury that the polio contracted by plaintiffs was vaccine induced"




AGENT
ORANGE
HISTORY

Agent Orange

- Embracing epidemiology for addressing causation
- Carefully analyzing those studies as to their implications for dioxin as a cause of veterans' and their families' maladies
- Appreciation for the necessity of attending to specific causation when epidemiologic (statistical) evidence of causation is employed to prove causation
- Most importantly, expressing skepticism about expert testimony: Calling for "careful scrutiny" in toxic tort cases where "speculative scientific hypotheses" "create a need for robust screening of experts."
- Reviving *Frye*, Judge Weinstein used it as the tool to rule out plaintiff's experts because they were "insufficiently grounded grounded in any reliable evidence."

The Two Roads Taken in Bendectin

1) Judge Thomas Penfield Jackson: The scientific (epidemiologic) evidence "fails to demonstrate Bendectin's teratogency" and thus JMOL for defendant was proper.

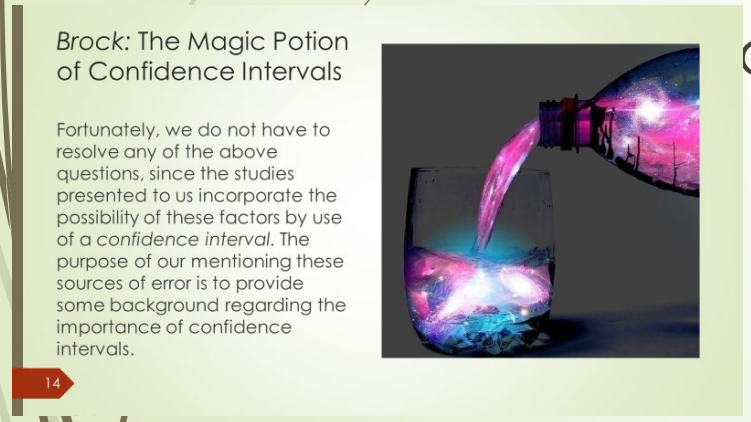
2) In a number of other cases, the courts focused on plaintiff's expert witnesses's opinion on causation and employed f *Frye to* rule them inadmissible.

The Nadir of Judicial Confrontation with Scientific Evidence: *Brock v. Merrell Dow Pharmaceuticals, Inc.*

1)"Courts have not always been so willing to analyze the reasoning employed by experts to reach their conclusions."

2) The three sources of error in epidemiology studies: 1) random error; 2) bias and 3) confounding

on of confidence intervals to cure these sources



Brock: The Magic Potion of Confidence Intervals

Fortunately, we do not have to resolve any of the above questions, since the studies presented to us incorporate the possibility of these factors by use of a *confidence interval*. The purpose of our mentioning these sources of error is to provide some background regarding the importance of confidence intervals.

The Irony of *Brock*, 874 F.2d at 309:

Ultimately, the "correctness" of our decision that there was insufficient evidence presented by plaintiff on the issue of whether Bendectin caused Rachel Brock's limb reduction defect to enable a jury to draw a reasonable inference may be just a matter of opinion, but hopefully the reasoning below will persuade others of the insights of our perspective.

Daubert

- The trial court relied on the state of epidemiologic record and prior cases, including *Brock* to conclude that plaintiff could not meet her burden of production on causation
- The court of appeals, relying on *Frye*, dismissed the methodology of the plaintiffs' experts, ruling they could not testify on causation
- By relying on *Frye*, the Ninth Circuit teed up the case for Supreme Court consideration on whether the FRE displaced *Frye* as the standard for determining the admissibility of expert testimony

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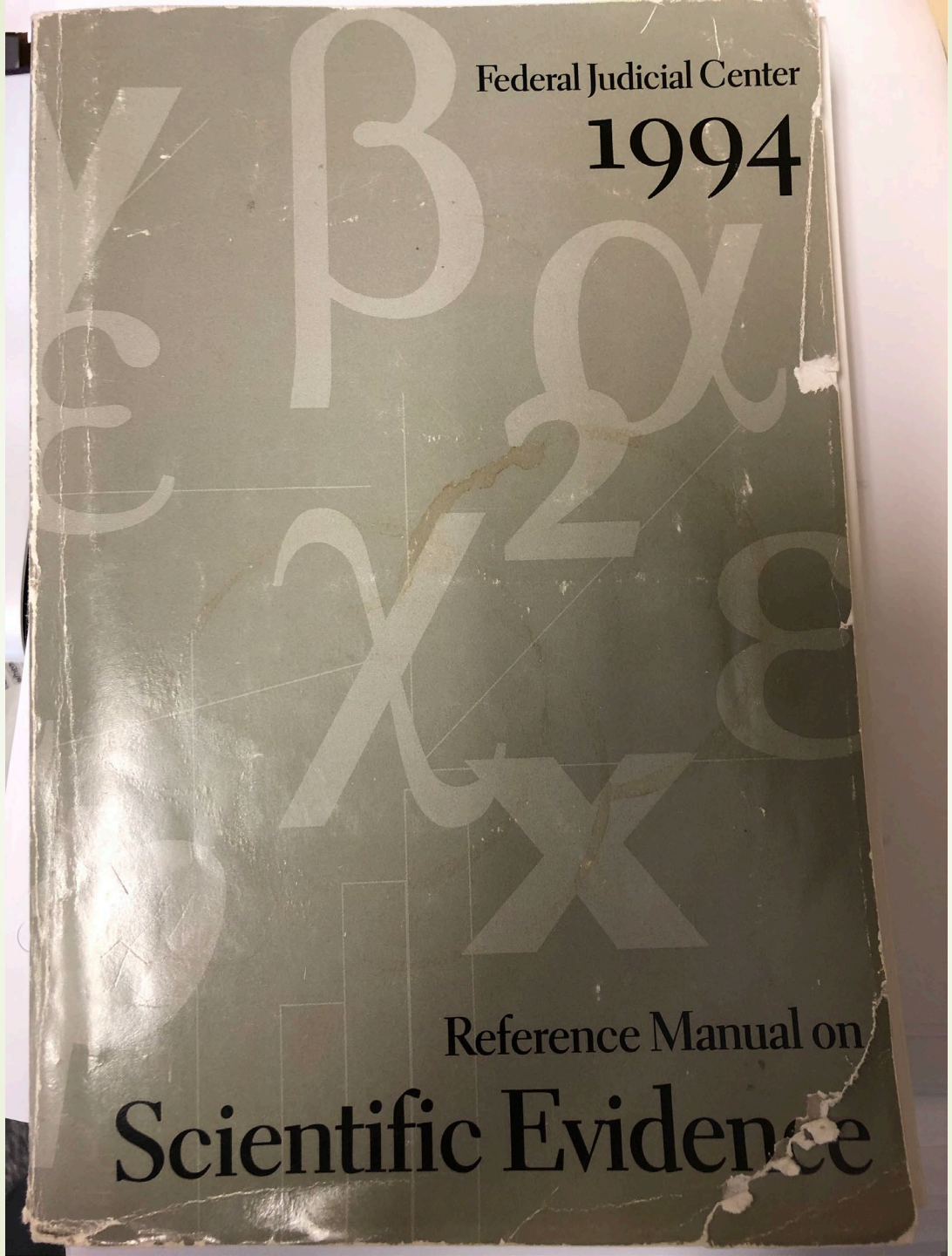
The Two Roads Taken in Bendectin


Federal Judicial Center
1994
Reference Manual on
Scientific Evidence

The Reference Manual on Scientific Evidence (NAS & FJC 3d ed. 2011)

The Common Law of Epidemiology

- However, failure to control for every conceivable potential confounder does not necessarily render the results of an epidemiological study unreliable. *See id.; see also* Bazemore, 478 U.S. at 400, 106 S.Ct. 3000
- [T]he [Bradford Hill] factors are guidelines. See Wagoner, 813 F. Supp. 2d at 803–04; Testosterone Replacement Therapy, 2017 WL 1833173, at *11.
- The "ruling in" step of a differential diagnosis involves creating a list of causes that are *generally* capable of causing the disease. (*Clausen v. M/V NEW CARISSA, supra*, 339 F.3d at pp. 1057-1058.)
- The "best evidence of causation in toxic tort actions" is grounded in epidemiology, *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194, 1199 (11th Cir. 2002),

General Electric v. Joiner: "too great an analytical gap between the data and opinion"

Too great an analytical gap = Insufficiency of the evidence

Sufficiency Analysis?	
Yes	53
Ambiguous	23
No	11
Other	1

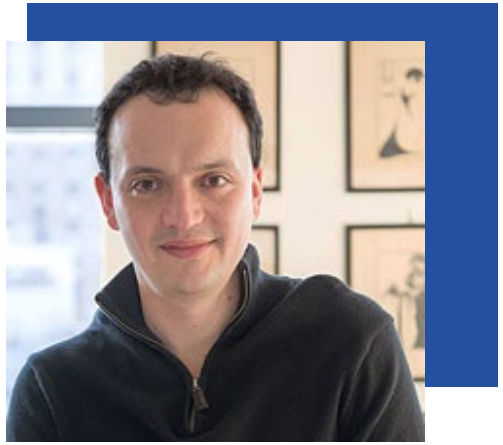
I.e., Sixty percent of courts' ruling on a *Daubert motion examined the scientific evidence to determine if it would permit a reasonable jury to find causation.*

The Two Roads Taken in Bendectin


You've come a long way, baby.
Virginia Slims.

Feb. 2020

About



Michael E. Sander
Founder / Managing Director

- Software engineer
- IP Litigator
- Docket Alarm Founder

Fastcase
Parent Company

- Acquired Docket Alarm Jan. 2018
- Leading legal research engine
- 800,000 Attorney Users

DOCKET ALARM

Track

Search

Analytics

API

Track

Searc
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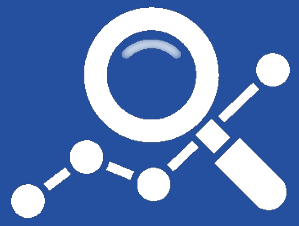


Analytics

API

Legal Analytics

Legal Analytics

Mining court decisions and dockets to extract statistical answers to complex legal questions

Legal Analytics

what are my chances of winning?

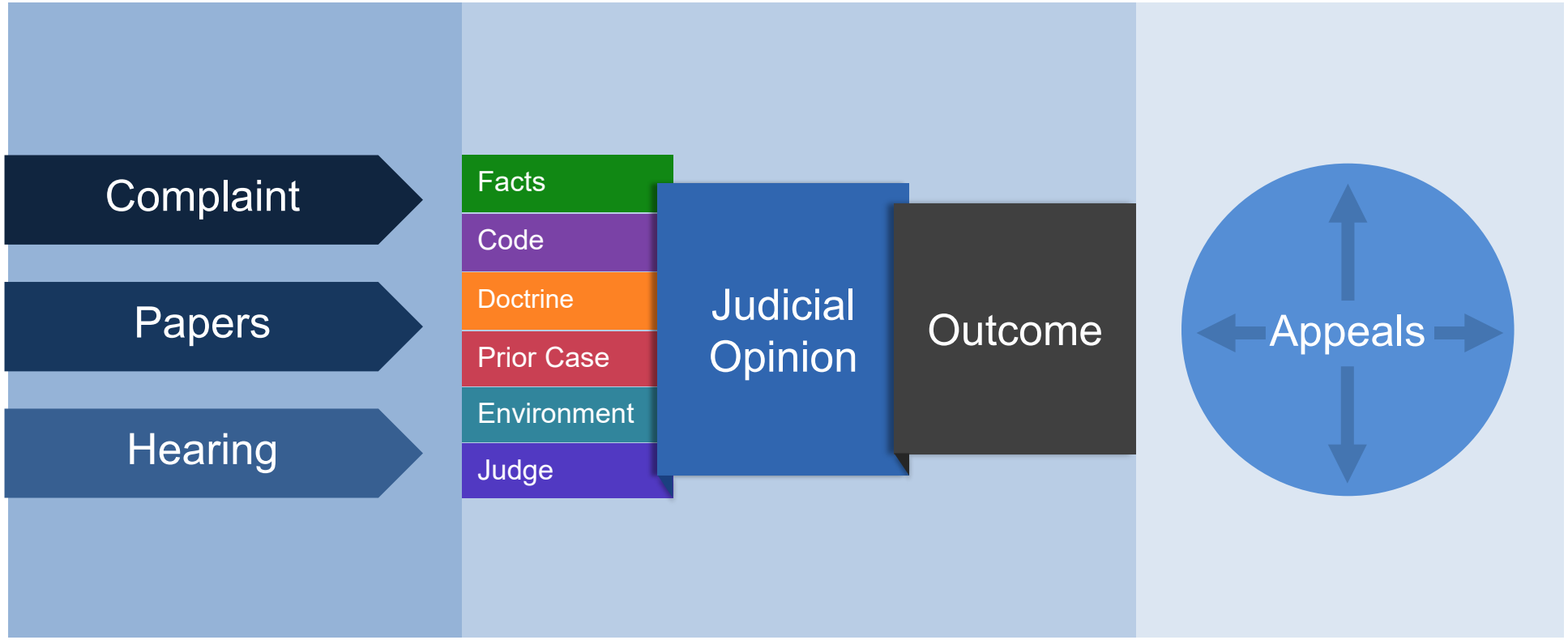
which judges are the most favorable?

how often does a party settle?

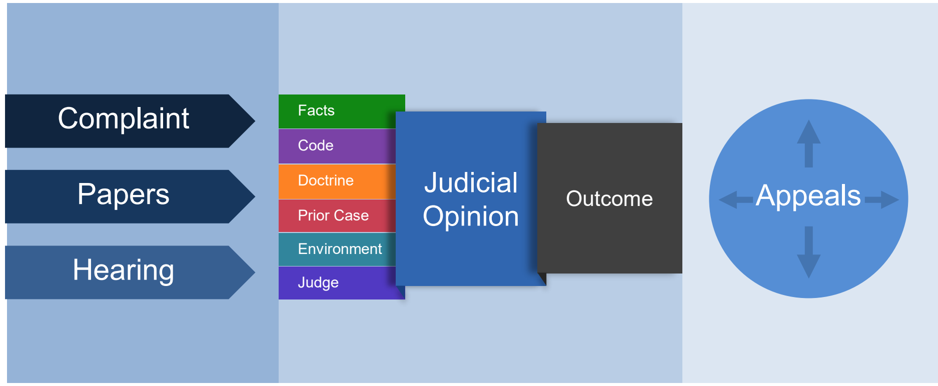
when do cases settle?

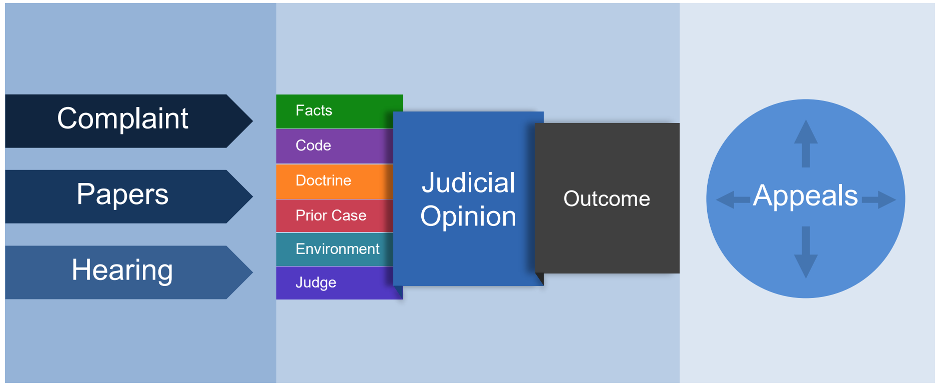
…

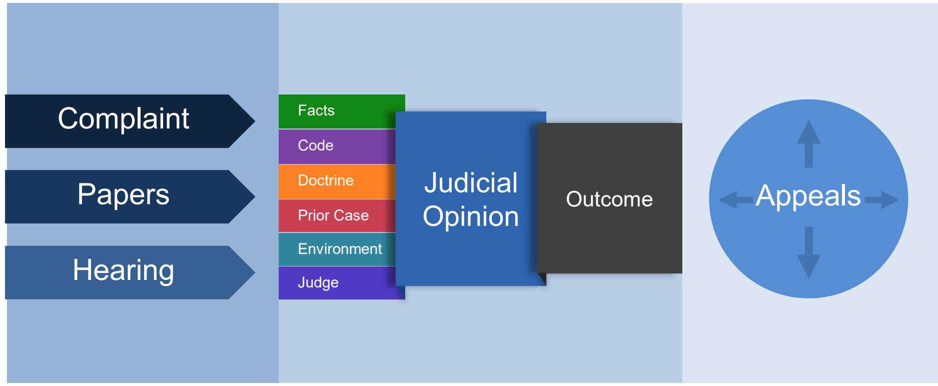
Analyzing a Case

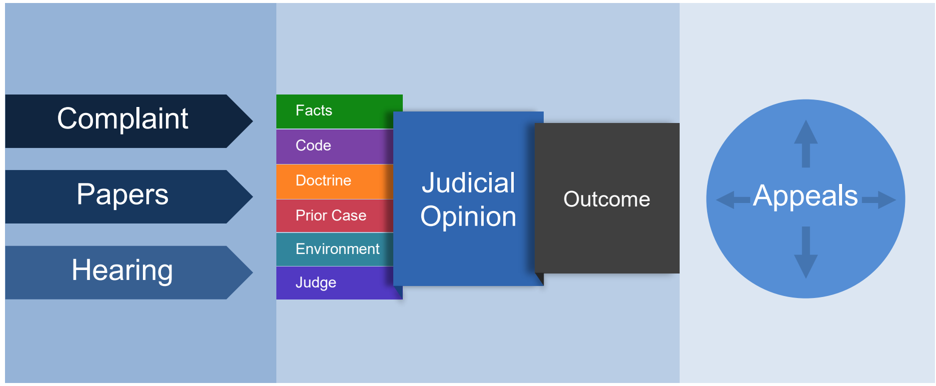


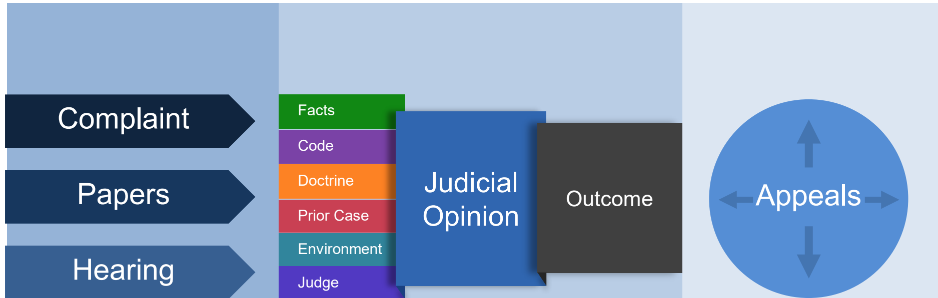
Data Aggregation

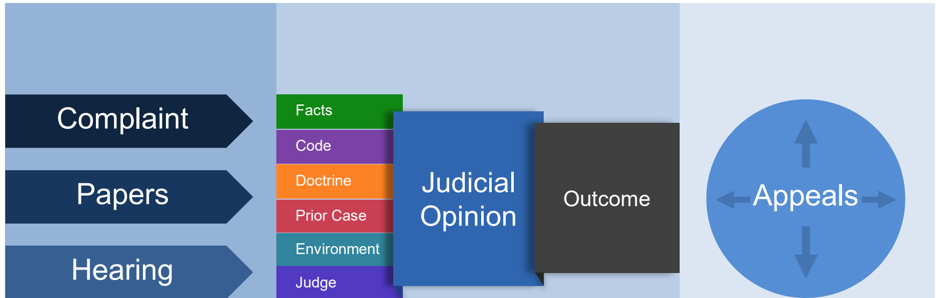


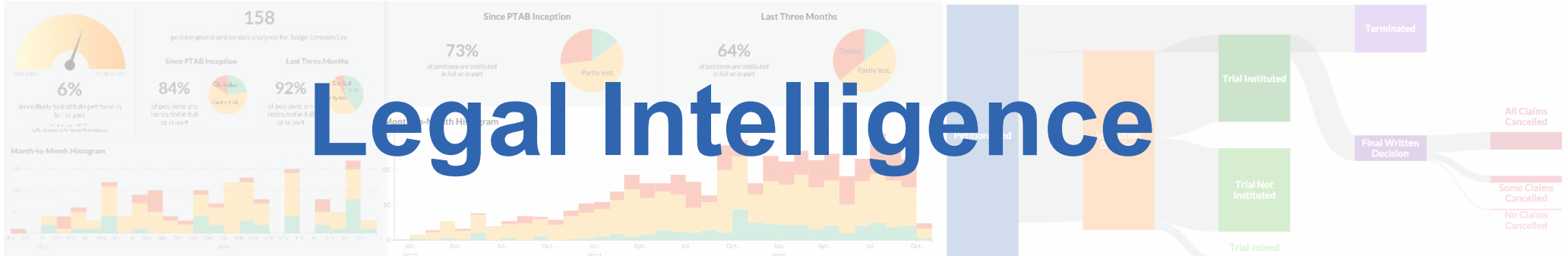








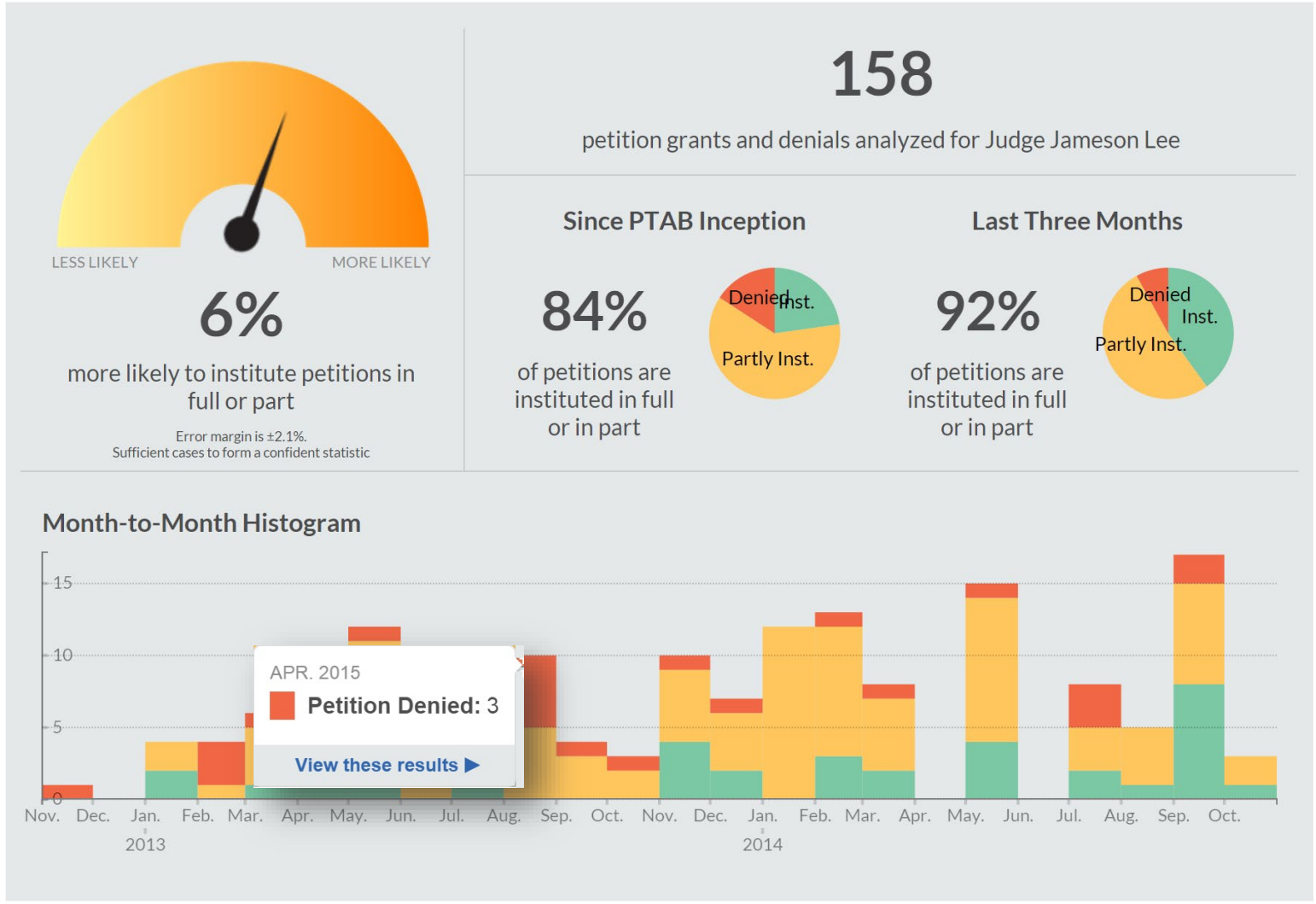




Legal Intelligence

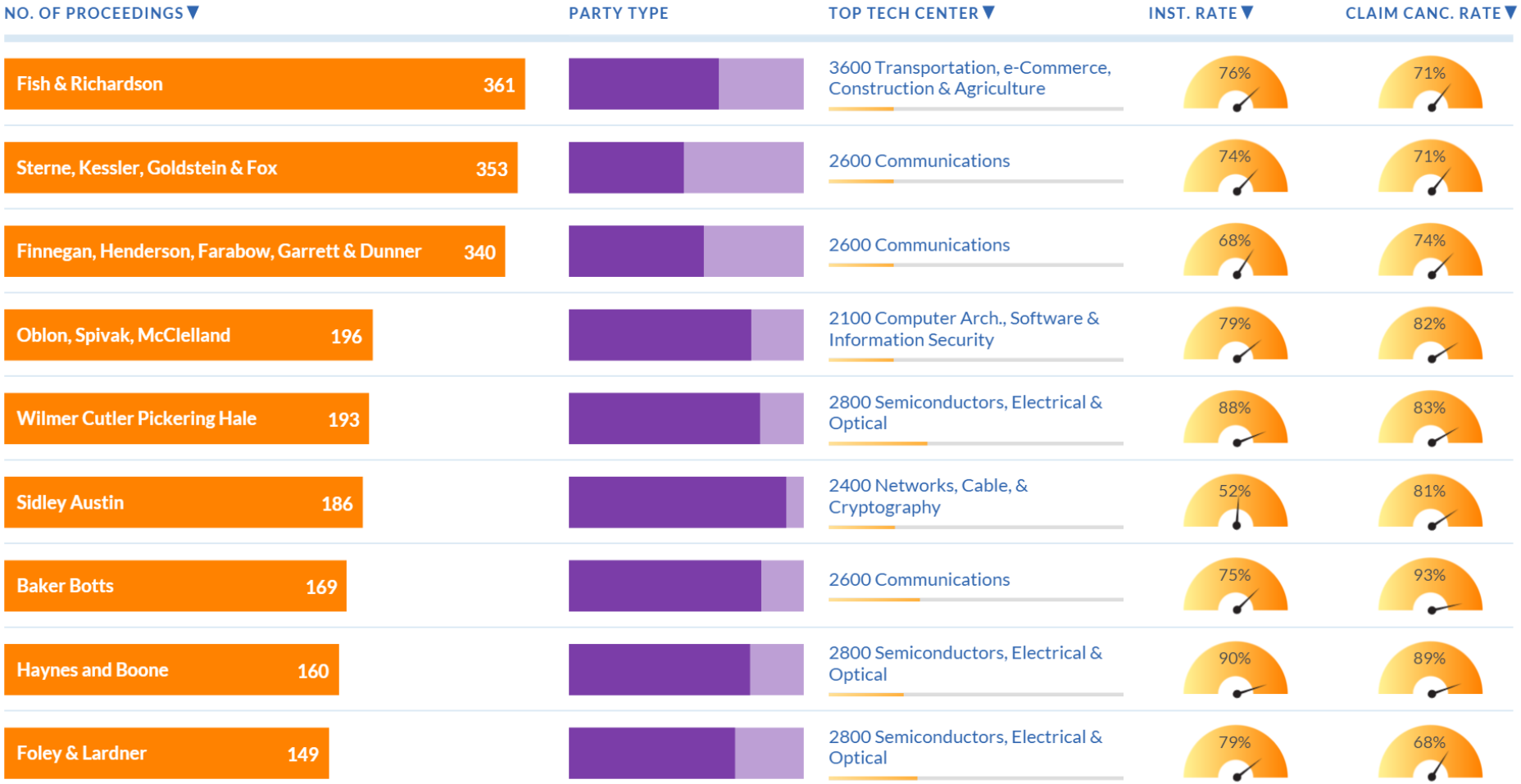
Analyzing Judicial Behavior

Judicial Profile for a Judge



Data Backed Decisions Choosing Effective Counsel

Law Firm Ranking



Tort Analysis

Connecticut State Superior Court

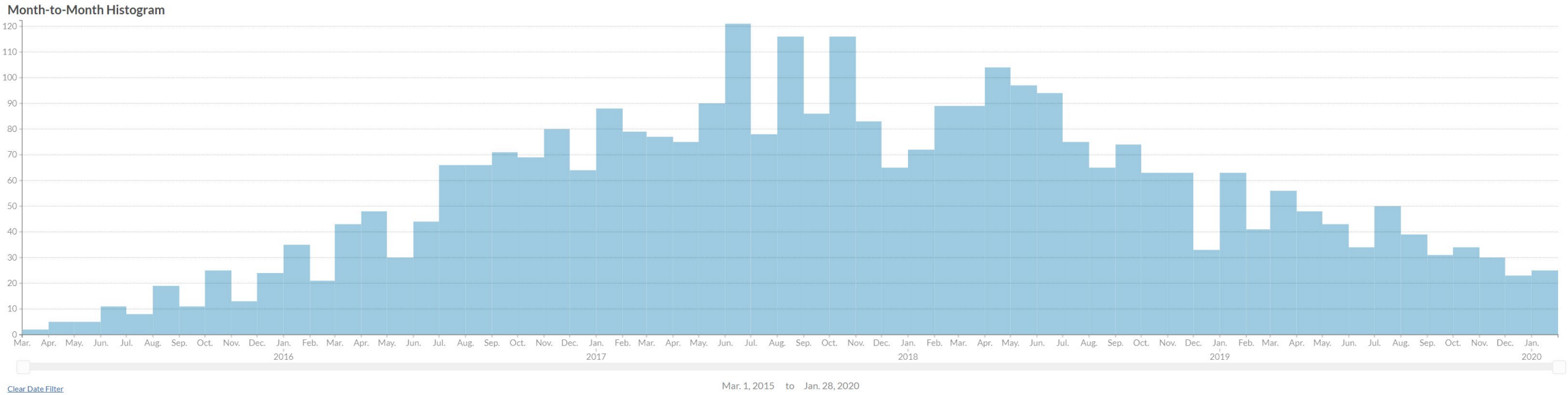
Motion for Summary Judgment + Trial

The Data Set

- Connecticut State, Superior Court
- Cases Filed 2015 or Later
- Tort Cases
- With a Summary Judgment Motion ("MSJ")

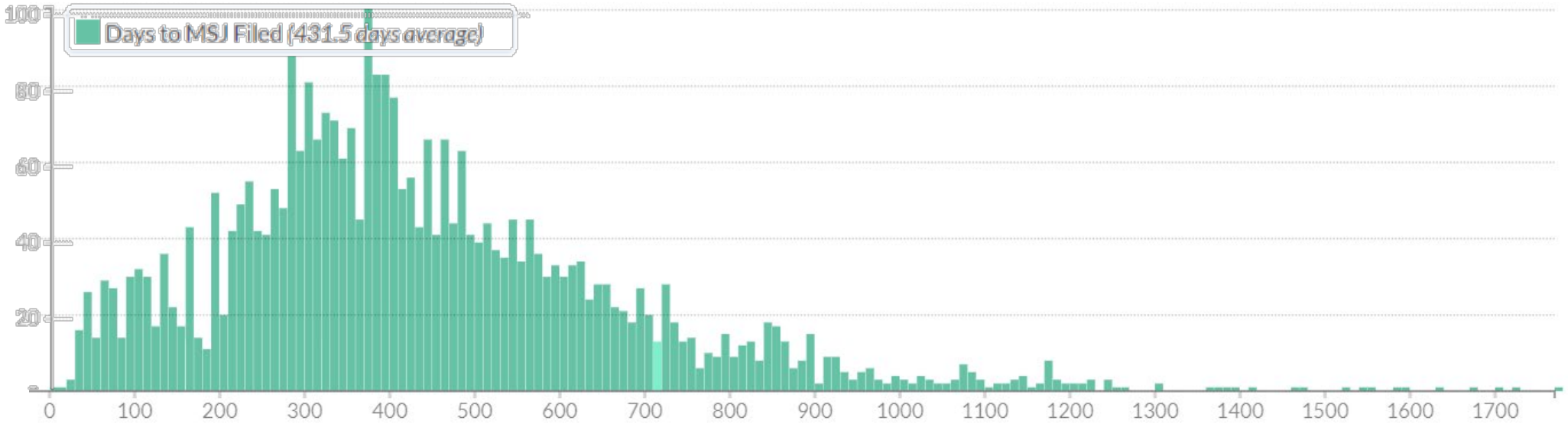
What Questions Can We Answer

Over 3200 Motions for Summary Judgment



Motion for Summary Judgment: Filed

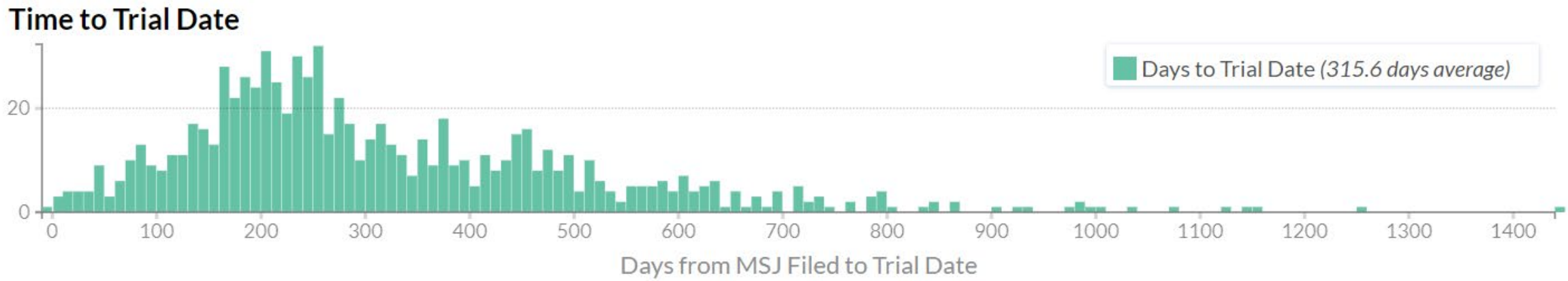
~15 Months to File MSJ



Motion for Summary Judgment: Filed – Histogram of When Filed

DOCKET ALARM

~10 Months from MSJ Filed to Trial



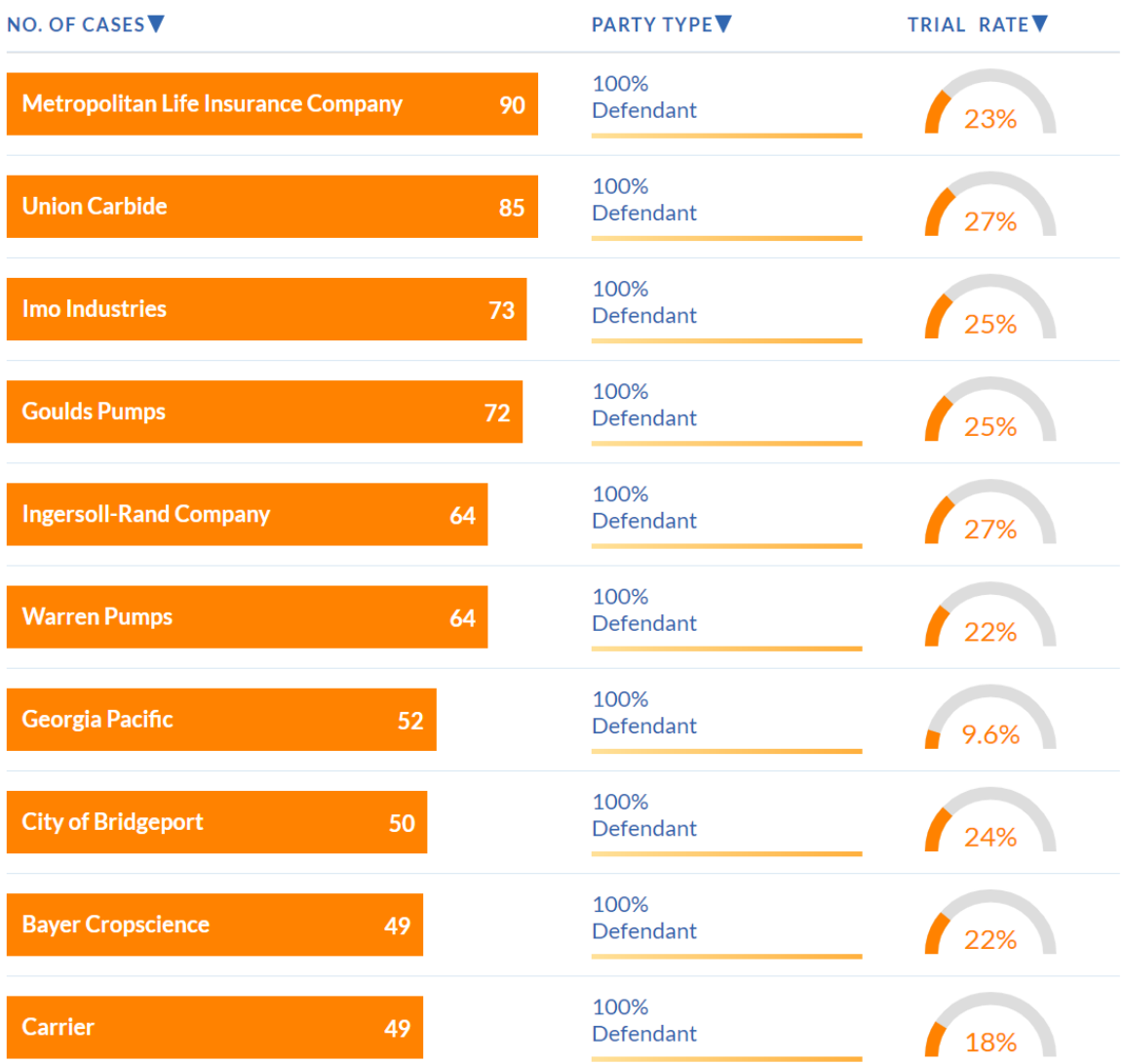
Days from Motion for Summary Judgment Filed to Trial

DOCKET ALARM

Party Analytics

- Who files MSJs the most?
- When do they file?
- Delay?
- Do they go to trial?

Top MSJ Filers



Top Parties in Tort Cases in CT since 2015 where a MSJ was filed, with percentage that go to trial

DOCKET ALARM

Average Time to File of top MSJ Parties

Name	Average Days to File
Metropolitan Life Insurance Company	650.9
Union Carbide	598.0
Imo Industries	695.2
Goulds Pumps	686.0
Ingersoll-Rand Company	725.8
Warren Pumps	704.0
Georgia Pacific	573.1
City of Bridgeport	**321.4**
Bayer Cropscience	**735.9**
Carrier	670.6

Other Answers in this data

which judges go to trial most often?

how long until trial?

what are the top plaintiff/defendant firms?

when do cases settle?

…

Trials by Case Type

Case Type	No. Cases w/ MSJ	No. w/ Trials	Rate
Torts - Assault and Battery	59	8	13.56%
Torts - Motor Vehicle (Small Claims)	7	1	14.29%
Torts - Malpractice - Legal	**106**	**17**	**16.04%**
Torts - False Arrest	5	1	20.00%
Torts - All other	932	214	22.96%
Torts - Fire Damage	26	6	23.08%
Torts - Defective Premises - Public - Snow or Ice	179	43	24.02%
Torts - Defective Premises - Private - Snow or Ice	537	135	25.14%
Torts - Defective Premises - Public - Other	420	108	25.71%
Torts - Defamation	33	9	27.27%
Torts - Defective Premises - Private - Other	696	195	28.02%
Torts - Animals - Dog	138	39	28.26%
Torts - Malpractice - All other	20	6	30.00%
Torts - Products Liability - Other than Vehicular	202	66	32.67%
Torts - Animals - Other	3	1	33.33%
Torts - Malpractice - Medical	**130**	**45**	**34.62%**

Med-Mal Cases go to trial at 2X the rate of Legal Mal

Masthead Logo

DePaul Law Review

Volume 58
Issue 2 *Winter 2009: Symposium - The Challenge of 2020: Preparing a Civil Justice Reform Agenda for the Coming Decade*

Article 3

The Electronic Lawyer

Richard L. Marcus

THE ELECTRONIC LAWYER

*Richard L. Marcus**

I. INTRODUCTION

The organizers of this conference have asked us to reflect on future challenges for the legal profession.[1] I begin with an image from popular culture. Anyone who has seen the movie *Michael Clayton* has seen one vision of the future (or possibly contemporary) American lawyer.[2] In the movie, George Clooney plays the title role as a lawyer who works for a 600-lawyer New York law firm that is acting as the "fixer" for a large agricultural products company sued for allegedly causing the deaths of small farmers in the Midwest. The head of the litigation department, who is in charge of the case, "gets religion" when he discovers incriminating documents in the client's files, and declares that he will bring down the company. Michael Clayton is the law firm's fixer, and his job is to rein in the wayward litigation chief. But that proves difficult, and the client resorts to illegal means to contain things.

As one surveys the possibilities and challenges of the organized American bar during the coming decades, *Michael Clayton* might be one vision (or nightmare) to contemplate.[3] In a way, the film illustrates the dilemma that Dean Kronman addressed sixteen years ago in his book *The Lost Lawyer*.[4] He contrasted the contemporary role of American lawyers with the image of the sage advisor of old, a professional who truly gave direction to the client and acted on some level as a moral compass. Dean Kronman's lawyer was anything but a fixer.

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* Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of Law. I am indebted to Jesse Basbaum, Hastings class of 2010, for research assistance in connection with this Article, and to Hastings for a Summer Research Grant partly used for this Article.

1. This Article builds on my comments during the Fourteenth Annual Clifford Symposium on Tort Law and Social Policy at the DePaul University College of Law on April 4, 2008. The Symposium was entitled *The Challenge of 2020: Preparing a Civil Justice Reform Agenda for the Coming Decade.*

2. MICHAEL CLAYTON (Warner Brothers Pictures 2007).

3. I note that I am not the first to latch onto the movie as fodder for law review analysis. *See* Thomas L. Shaffer, *Business Lawyers, Baseball Players, and the Hebrew Prophets*, 42 VAL. U. L. REV. 1063, 1063 n.1 (2008) (invoking *Michael Clayton*).

4. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

Kronman mourned that the modern lawyer, in contrast, has become "an accomplished technician" without "a wisdom that lies beyond technique."[5] Lawyers are now one-dimensional rather than serving as broad-based guides for their clients.[6]

My focus is narrower than Dean Kronman's; I focus on the role of products depending on electricity in this supposed transformation. In *Michael Clayton*, electronic technology is pervasive. In the modern lawyer's life, it is also pervasive. It is certainly tempting to say that electronic technology is a prime cause—or at least a critical facilitator—of the role of the lawyer today. To the extent that one focuses on big law firms (like the fictional one in *Michael Clayton*), the role of technology has been a longstanding feature of legal practice. Thus, Professors Galanter and Palay recognized in 1991 that "[t]he emergence of the big firm is associated with the introduction of new office technologies,"[7] and they quoted a lawyer who wrote in 1914 that the introduction of the telephone "completely revolutionized" methods of transacting legal business.[8]

Surely the variety of electronic gadgets the Electronic Lawyer now possesses far outstrips those available to the 1914 attorney. Lawyers now employ, rely upon, and to some extent are captives of cellphones, BlackBerries (also known to some as "CrackBerries"), instant messaging, instantaneous electronic research, word processing, electronic filing, and a myriad of other gadget-facilitated activities. Dean Kronman recognized that the introduction of the computer placed pressure on his sage lawyers by reducing turn-around time and curtailing time for introspection.[9] The introduction of additional gadgets in the fifteen years since Kronman wrote has surely accelerated the trend.

Against this background, I intend to offer some thoughts about where these technological developments may lead and their possible effect on the legal profession.[10] Of necessity, this sketch will be impressionistic, speculative, and general. I begin with a comparison to the medical profession, which may be undergoing transformative

5. *Id.* at 2.

6. *See id.* at 307–09.

7. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 7 (1991).

8. *Id.* (quoting THERON G. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 396 (1914)).

9. *See* KRONMAN, *supra* note 4, at 302–06.

10. This work builds on earlier work. *See* Richard Marcus, *The Impact of Computers on the Legal Profession: Evolution or Revolution?*, 102 NW. U. L. REV. 1827 (2007) (examining the extent to which the introduction of computers has altered what lawyers do).

changes due in part to electronic technology.[11] I then turn to a variety of aspects of legal practice and consider the ways in which the Electronic Lawyer may differ from her predecessors. One possibility is that computers might themselves replace lawyers as providers of legal services, but this does not seem imminent.[12] At the same time, the electronic law office has evolved far beyond the law office of the mid-twentieth century, with attendant implications for law practice.[13] Moreover, the profession itself may be moving towards a two-tier reality, although the impact of electronic devices in furthering that trend is doubtful.[14] But the extensive reach of electronic communications in legal representation of clients may place greater stresses on our balkanized system of lawyer regulation.[15] Electronic communications present new challenges on a number of other fronts: the attorney-client privilege, the growing scope of citizen surveillance, and the manner in which law schools train new lawyers.[16] Despite all these potential impacts, however, I believe we must be cautious about a sentimentalized attitude toward the various golden ages of legal practice in the past, and skeptical about the extent to which technology has threatened them or made them disappear.[17] Accordingly, it seems to me that the Electronic Lawyer actually has more in common with her non-electronic predecessor than she may appreciate.

II. THE ELECTRONIC DOCTOR

> Medicine . . . would have been seen only a century ago to have been largely outside the realm of technology, whereas today it is one of the most thoroughly technological fields any of us will encounter.[18]

One way of approaching the Electronic Lawyer is to consider a comparable vision of another profession—the electronic doctor. It is often said that doctors and lawyers are the best established professions,[19] so there is the possibility of parallelism.[20]

There are at least some parallels. For example, a study of "physician discontent" suggested that "lawyers are no more satisfied, and

11. *See infra* notes 18–63 and accompanying text.
12. *See infra* notes 64–107 and accompanying text.
13. *See infra* notes 108–135 and accompanying text.
14. *See infra* notes 136–148 and accompanying text.
15. *See infra* notes 149–175 and accompanying text.
16. *See infra* notes 176–238 and accompanying text.
17. *See infra* notes 239–270 and accompanying text.
18. ROBERT FRIEDEL, A CULTURE OF IMPROVEMENT: TECHNOLOGY AND THE WESTERN MILLENNIUM 1 (2007).
19. *See, e.g.*, C. WRIGHT MILLS, WHITE COLLAR: THE AMERICAN MIDDLE CLASSES 113 (1951) (referring to "the old professions, such as medicine and law").
20. For further discussion of this possible parallelism, see Marcus, *supra* note 10.

perhaps are more dissatisfied, than physicians."[21] For lawyers, the dynamics of competition and law firms' pursuit of ever-increasing profits—along with declining loyalty from corporate clients—seem to contribute to attorney anomie,[22] while for doctors the advent of managed care may loom large. At least some in the legal world have begun to focus on the "new medical marketplace" and the difficulties presented when patients are approached solely as consumers;[23] other similar forces may be at work in the medical profession, as well.

Other parallels seem to exist. Those who teach in law schools are familiar with the phenomenon of rising student debt, with its attendant constraints on the career choices of graduates who express a preference for public interest law but nonetheless flock to higher paying law firm jobs. For similar reasons, medical students are reportedly flocking to higher paying specialties and forsaking family medicine.[24] Another similarity is the growing concern with life-work balance in the medical profession. In law firms, such concerns have also grown in importance.[25] Similarly, we are told that "U.S. medicine is in the middle of a cultural revolution, as young physicians intent on balancing work and family challenge the assumption that a doctor should be available to treat patients around the clock."[26] This shift is contribut-

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21. David Mechanic, *Physician Discontent: Challenges and Opportunities*, 290 J. AM. MED. ASS'N 941, 941 (2003).

22. *See* Marcus, *supra* note 10, at 1851–52.

23. *See, e.g.*, Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Markctplace*, 106 MICH. L. REV. 643 (2008) (analyzing the courts' reaction to the advent of managed care and the overcharging of patients who do not have insurance).

24. *See* Natasha Singer, *For Top Medical Students, Appearance Offers an Attractive Field*, N.Y. TIMES, Mar. 19, 2008, at A1 (reporting on the growing popularity of dermatology and plastic surgery, which are the most competitive fields to enter). While the dermatology and plastic surgery fields are becoming increasingly competitive, family and internal medicine enjoy much less popularity among top medical students:

> Until recently, saving skin did not have the cachet of saving lives. Doctors in other fields jokingly dismissed dermatology as a province of red-spot diseases that could not really be cured, but weren't going to kill patients. Twenty-five years ago, the fiercest competition among medical students was for internal medicine and general surgery.

Id.

25. *See, e.g.*, Ross Todd, *Eyeing the Door*, AM. LAW., Aug. 2008, at 113 (reporting that, in light of the workload of junior partners, today's associates "think that they *could* make partner, [but] they're not sure they *want* to"); Emmett Berg, *Stop the Partnership Track, I Want to Get Off*, CAL. LAW., Aug. 2008, at 12 (reporting that "the younger generation's desire for better work/life balance" has taken the shine off the partnership track); Marisa McQuicken, *Rebels with a Cause: Students Seek a More Reasonable Law Firm Life—Before They Even Start*, LEGAL TIMES, Sept. 3, 2007, at 26 (describing resistance among law students to a "law firm culture bereft of work-life balance").

26. Jacob Goldstein, *As Doctors Get a Life, Strains Show*, WALL ST. J., Apr. 29, 2008, at A1.

ing to the appeal of some higher paying positions such as dermotology, which also offer more predictable work hours.[27]

But one must be careful not to emphasize the parallels between medicine and law too forcefully. For example, we are also told that problems of life-work balance are deterring medical students from pursing careers in academic medicine.[28] Although law schools may sometimes have difficulty persuading promising candidates to work for lower salaries than law firms offer, it is hard to believe that many candidates who are in law practice are put off by the long hours required of law professors; indeed, one lure of a law faculty job is the desirable work-life balance it makes possible. Much as law schools may try to ease the tuition burden on graduates who take public interest jobs, law schools are not likely to do the same for those who pursue professor positions. But at least some medical schools are pursuing tuition breaks for students in hopes of prompting them to pursue academic jobs.[29] Even more remarkable from the law school perspective is the seeming suggestion that the medical profession needs more academics to conduct research on topics such as new treatments.[30] One need not agree with Judge Edwards that law professors and practicing lawyers are on divergent paths[31] to recognize that nobody would pretend that the American bar would be hamstrung in providing legal representation if deprived of the research output of the American legal professoriate.

So any parallels must be examined carefully. For purposes of our focus, one might think at first that the electronic doctor would be less different from predecessors than the Electronic Lawyer. For one thing, lawyers frequently provide advice to a client who is an inani-

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27. *Id.* Goldstein reports:

> Many [new doctors] are eschewing fields such as internal medicine, pediatrics, and family medicine, choosing instead specialties that offer both higher pay and more predictable work hours. In family medicine, for example, hundreds of medical residency positions go unfilled every year. But competition for slots in dermatology residencies is fierce.

Id.

28. *See* Shirley S. Wang, *Cleveland Clinic's Medical School to Offer Tuition-Free Education*, WALL ST. J., May 15, 2008, at D3 (quoting an expert who described the demands of academic careers in medicine and said that "[s]ome students feel that those kinds of demands would be difficult for them to meet while also trying to obtain some sense of work-life balance").

29. *See id.* (reporting on plan of Cleveland Clinic to offer tuition-free medical education to encourage top students to enter academic medicine).

30. *See id.* (quoting medical school dean who says that "there is a need for more [academics] in the profession").

31. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (decrying the extent to which legal scholarship and legal education have lost interest in what actual lawyers and judges do).

mate entity like a corporation or a governmental body. Doctors, on the other hand, only provide professional services to human patients. Lawyers' advice often depends on documentary materials (or electronically stored information), and they may have no need to "examine" a human being to provide advice. In many instances, lawyers seek both "diagnostic" and "treatment" information in a law library, not from the client. Doctors' advice is *about* a human patient, and although much diagnostic and treatment information can come from medical literature, human input from the actual patient seems crucial to making that information pertinent to this case.

Despite all this, it may be that the transformation wrought by the electronic doctor looms larger than that produced by the advent of the Electronic Lawyer. In facilitating a medical diagnosis, electronic devices have long been important, and they now have an even more prominent role. Perhaps the X-ray machine was the first electronic device widely used for diagnosis, but it has been joined by a wide variety of others, particularly as the computer age has become more pervasive. Indeed, if one asked whether a doctor would be more likely justified in reaching a diagnosis by relying solely on electronic devices or solely on personal interaction with the patient, it might well be that the electronic route would be the more reliable one.

One illustration is the possibility of online interaction to replace the face-to-face doctor-patient relationship of the past. Increasingly, doctors may offer treatment to patients in remote locations through online interaction rather than face-to-face examination.[32] This possibility may be enhanced if cellphones could cheaply be turned into a digital microscope that would help with remote diagnosis.[33] This development raises the possibility that "[t]he mobile phone may join the stethoscope and the thermometer as an indispensable piece of medical kit."[34] When one considers that an estimated 3.3 billion peo-

32. *See, e.g.*, Erin Allday, *Online Visits a Boon for Far-Off Patients*, S.F. CHRON., May 27, 2007, at B1. This article describes doctors treating "'virtual' patients—real people who will never meet face-to-face with their physician" at the University of California San Francisco, adding that the UCSF program "is modeled on an online consultation program at the Cleveland Clinic in Ohio, which was one of the first medical centers in the world to offer interactive medical services on the Internet." *Id.*

33. *See Doctor on Call*, ECONOMIST, May 17, 2008, at 100 (describing the development of CellScope, a device that can be attached to a mobile phone to turn the phone into a microscope, permitting transmittal of an image showing individual white and red blood cells that can be used to identify such parasites as the one that causes malaria); *see also Sticky Fingers*, ECONOMIST, Aug. 9, 2008, at 77 (reporting that desorption electrospray ionization may enable doctors to diagnose patients by using this method to scan a portion of their skin).

34. *See Doctors on Call*, *supra* note 33, at 100.

ple—half the world population—now possess cellular phones,[35] the changes that the electronic doctor confronts begin to become apparent. Moreover, there are efforts afoot to use implanted sensors to monitor people with certain medical conditions and identify problems before the patient is aware of them.[36] And the electronic doctor can use the Internet to obtain input from other electronic doctors on tough cases.[37] Indeed, the electronic doctor may be too enamored of such devices; the *New York Times* reports on what it calls a "trend in American medicine" that "faith in innovation, often driven by financial incentives, encourages American doctors and hospitals to adopt new technologies even without proof that they work better than older techniques."[38]

Once the data on the patient are in, however, even the electronic doctor might revert to the role of the doctor of old in reaching a diagnosis, albeit with more information. But the electronic data increase may have changed the nature of the doctor's diagnostic role also. Twenty years ago, informed observers reported that "increased biomedical knowledge and technological capability have increased rather than reduced the complexity and difficulty of the clinician's task."[39] Surely the explosion of medical knowledge since then has magnified this task. Perhaps the computer is necessary also to evaluate all this information. More than sixty years ago, a psychologist suggested that a computer would be better in making treatment decisions for a patient than a doctor.[40] Two decades ago, it was said that "medicine is almost certainly the largest, non-military area of application for both traditional and knowledge-based decision technologies."[41] More than thirty years ago, efforts to use artificial intelligence for diagnosis were

35. *See Halfway There*, ECONOMIST, May 31, 2008, at 68 ("Sometime in the next few months, the number of mobile phones in use will exceed 3.3 billion, or half the world's population.").

36. *Telemedicine Comes Home*, ECONOMIST TECH. Q., June 7, 2008, at 28, 28–30 (describing use of sensors).

37. *See* Jessica E. Vascellaro, *Social Networking Goes Professional*, WALL ST. J., Aug. 28, 2007, at D1 (describing a networking site for doctors that some 25,000 doctors visit regularly to consult with colleagues about diagnoses and treatments).

38. Alex Berenson & Reed Abelson, *Weighing the Costs of a Look Inside the Heart*, N.Y. TIMES, June 29, 2008, at 1 (focusing on the possible overuse of CT scanners for detailed scans of the heart).

39. PROFESSIONAL JUDGMENT: A READER IN CLINICAL DECISION MAKING 2 (Jack Dowie & Arthur Elstein eds., 1988) [hereinafter PROFESSIONAL JUDGMENT].

40. *See Logical Endings*, ECONOMIST, Mar. 17, 2007, at 85 (describing Theodore Sarbin's suggestion in 1947 that "a doctor is really just a machine whose purpose is to make actuarial judgments about the best treatment for a patient," and urging that consideration be given to replacing the doctor with a computer).

41. John Fox, *Formal and Knowledge-Based Methods in Decision Technology*, *in* PROFESSIONAL JUDGMENT, *supra* note 39, at 226.

beginning.[42] One study found that by the 1980s computerized diagnoses were more accurate than those of doctors,[43] and more than a decade ago it was asserted that "[t]he physician became a purveyor of technology."[44] Perhaps it will soon be true that a cellphone in the field could feed information to the computer in the "doctor's office," which in turn would generate a proposed treatment and communicate it back to the cellphone in the field—truly the electronic doctor!

Treatment itself might also differ with the electronic doctor. Thus, we are told that "[f]ans of genomics have long argued that decoding genomes one person at a time would revolutionise health care by leading to 'personalised' medicine, in which doctors match the treatment to the individual."[45] Some surgeons are being supplanted by computer-controlled robots: "In prostate surgery, it is rapidly becoming unusual for a urologist to operate without using" a robot.[46] In May 2008, a robot was used to remove a brain tumor for the first time.[47] "Robots are more precise with a scalpel or laser than a person could ever be. And they can enter the body through a small 'keyhole' incision no bigger than 2 cm (0.8 inches), which means that surgery is less invasive. That improves the prognosis and speeds convalescence."[48]

Even something so simple as using computers to keep medical records might cause a major change in the delivery of medical care. The *New York Times*, for example, reports on efforts to persuade New York to shift to using computers to prepare patient records by using as an example a doctor who graduated from medical school in 1962 and regards the shift to computerized record-keeping to be "as profound a

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42. Arthur S. Elstein & Georges Bondage, *Psychology of Clinical Reasoning*, *in* PROFESSIONAL JUDGMENT, *supra* note 39, at 109, 118–19; *see also* Jerome R. Kassirer, *A Report Card on Computer-Assisted Diagnosis—The Grade: C*, 330 NEW ENG. J. MED. 1824, 1824 (1994) (reporting that use of computers to diagnose medical conditions began in the 1950s).

43. F.T. de Dombal, *Computer-Aided Diagnosis of Acute Abdominal Pain: The British Experience*, *in* PROFESSIONAL JUDGMENT, *supra* note 39, at 190, 196 (cautioning that although the data indicated that computerized diagnoses were correct almost twice as frequently as the admitting doctor, the difference was not as dramatic as it seemed).

44. Kenneth I. Shine, *The Physician as Health Agent*, 729 ANNALS N.Y. ACAD. SCI. 73, 73 (1994).

45. *Getting Personal*, ECONOMIST, June 21, 2008, at 76; *see also Signs of a Long Life*, ECONOMIST, June 28, 2008, at 87 (describing a new procedure that may enable doctors to predict the diseases that will afflict given patients before any symptoms have appeared).

46. Barnaby J. Feder, *Prepping Robots for the O.R.*, N.Y. TIMES, May 4, 2008, Sunday Business, at 1.

47. *Tiny, Careful Cuts*, ECONOMIST, June 21, 2008, at 91 (adding that "[r]obots should soon be able to perform cardiac surgery without the trauma and the potential risk of breaking open the chest and plugging the patient into a heart-bypass machine").

48. *Id.*

shift in the way he treats patients as advances in diabetes drugs."[49] Another article in the *Times* says that "there is broad agreement that moving patient records into the computer age . . . is essential to improving care and curbing costs."[50] This report is fairly gushing in praise of the impact of computerized records on patient care:

> A paper record is a passive historical document. An electronic health record can be a vibrant tool that reminds and advises doctors. It can hold information on a patient's visits, treatments, and condition, going back years, even decades. It can be summoned with a mouse click, not hidden in a file drawer in a remote location and thus useless in medical emergencies.
>
> Modern computerized systems have links to online information on best practices, treatment recommendations and harmful drug interactions. The potential benefits include fewer unnecessary tests, reduced medical errors and better care so patients are less likely to require costly treatment in hospitals.[51]

Altogether, then, there could be a fundamental challenge to the role of doctors in the era of the electronic doctor. At least some doctors foresee such a challenge in medical practice. In his 2007 book *How Doctors Think*, Professor Jerome Groopman of Harvard Medical School argues that there has been a change in the way doctors approach their work.[52] He was prompted to write the book by the concern that "the next generation of doctors was being conditioned to function like a well-programmed computer that operates within a strict binary framework."[53] As a proponent of doctors thinking "outside their boxes," Dr. Groopman says that medical students are now "taught to follow preset algorithms and practice guidelines in the form of decision trees," and that "algorithms discourage physicians from thinking independently and creatively."[54] In essence, he sees the electronic doctor as a threat to important aspects of medical practice:

> Electronic technology can help organize vast clinical information and make it more accessible, but it can also drive a wedge between doctor and patient when used in this way to increase "efficiency." It also risks more cognitive errors, because the doctor's mind is set on filling in the blanks on the template. He is less likely to engage in

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49. Anemona Hartocollis, *Looking to Private Records for Public Health Goals*, N.Y. TIMES, Dec. 30, 2008, at A18.

50. Steve Lohr, *Health Care that Puts a Computer on the Team*, N.Y. TIMES, Dec. 27, 2008, at B1.

51. *Id.*

52. JEROME GROOPMAN, HOW DOCTORS THINK (2007).

53. *Id.* at 6.

54. *Id.* at 5.

> open-ended questioning, and may be deterred from focusing on data that do not fit on the template.[55]

The role of computers is central to this evolution. For example, Dr. Groopman reports that, after the Food and Drug Administration approved a computer-aided diagnostic system for use by radiologists, there was an increase in false positives.[56] "This demonstrates the power of technology, particularly computer-based, in shaking the confidence of a specialist in his initial diagnosis."[57] "Scoring schemes are proliferating in all branches of medicine," he says, and many young doctors "look to classification schemes and algorithms to think for them."[58] There is, for example, "a fundamental schism in the field of oncology, between those who are driven almost entirely by data and those who are willing to treat patients outside of proven protocols."[59]

Responding to the challenges of practicing medicine in the computer era, Dr. David Blumenthal wrote in 2007 that health information technology is "a potentially transformative force that ultimately will bring about a radical redesign of the processes by which care is delivered."[60] Five years before, he wrote that the information revolution, coupled with other developments like healthcare consumerism and the rise in alternative providers of healthcare, could mean that "the medical profession might be headed, if not for extinction, at least toward a profoundly diminished role and status in ministering to society's ills."[61] But he concluded then that the medical profession "does not seem headed for extinction—like some quaint species of the era between Hippocrates and Gates."[62]

In sum, the advent of the electronic doctor might produce revolutionary results in medical practice, whether for good or ill.[63] Although

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55. *Id.* at 99; *see also* Anne Armstrong-Coben, Op-Ed., *The Computer Will See You Now*, N.Y. TIMES, Mar. 6, 2009, at A27 (arguing that "the computer depersonalizes medicine").

56. *Id.*

57. *Id.*

58. *Id.* at 238.

59. GROOPMAN *supra* note 52, at 199.

60. David Blumenthal & John P. Glaser, *Information Technology Comes to Medicine*, 356 NEW ENG. J. MED. 2527, 2527 (2007).

61. David Blumenthal, *Doctors in a Wired World: Can Professionalism Survive Connectivity?*, 80 MILBANK Q. 525, 526 (2002).

62. *Id.* at 543.

63. A different slant, not pursued here, is that medical "advances" during the last century have not produced desirable results, even though they have increased longevity in much of the world and eliminated or very substantially reduced mortality due to certain infections. This attitude is a feature of the contemporary critique of the idea of progress. For a collection of essays on this topic, see generally PROGRESS: FACT OR ILLUSION? (Leo Marx & Bruce Mazlish eds., 1996). For a very effective rebuttal of the application of this skepticism to medicine, see Leon Eisenberg, *Medicine and the Idea of Progress*, *in* PROGRESS: FACT OR ILLUSION?, *supra*, at 45.

it is not possible for those of us who are outside that profession to be certain about the importance of these developments in medical practice, the possible impact of the electronic doctor can at least provide a comparison to the Electronic Lawyer's impact on legal practice. And though the world of the Electronic Lawyer is pervasively affected by electronic gadgets, it does not seem presently likely to be affected in so fundamental a fashion as some doctors foresee for the electronic doctor.

III. THE COMPUTER AS LAWYER?

We have seen that some fear that the role of the doctor will be transformed by the advent of electronic devices. Of course, dire predictions about the transformation of medical care are just predictions. But could something similar lie in lawyers' futures?

One reaction is that lawyers' work is fundamentally different from doctors' work, and therefore immune to similar technological pressures. Professor Groopman's book *How Doctors Think*[64] lends some support to that view. It begins with the observation that "[m]y generation [of doctors] was never explicitly taught how to think as clinicians."[65] From his point of view, the problem is that *now* medical students are taught differently, inclining them to take a computer-like approach to medical problems.[66]

Certainly the education of lawyers has not neglected the core question of how they should think about doing their jobs. To the contrary, as made famous in the 1970s book and movie *The Paper Chase*,[67] learning to "think like a lawyer" is a central focus of legal education. That centrality is continually recognized. There is, for example, a 2007 Oxford University Press book on the topic,[68] and there are myriad articles about it.[69] Actually, that inclination in legal education originated a century before Professor Kingsfield's famous line in *The Paper Chase*: "You come in here with a skull full of mush and you

64. *See* GROOPMAN, *supra* note 52.

65. *Id.* at 4.

66. *See id.* at 5 (asserting that current-day medical students are "taught to follow preset algorithms and practice guidelines in the form of decision trees").

67. JOHN JAY OSBORN, JR., THE PAPER CHASE (1971); THE PAPER CHASE (Twentieth Century Fox 1973).

68. ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007).

69. *See, e.g.*, Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583 (1998); Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994).

leave thinking like a lawyer."[70] As Professor LaPiana has shown, Langdell's case system might best be understood as designed to prepare law students to do what lawyers have to do in court—analyze and apply cases.[71] "The power of the case method to teach legal reasoning thus became its ultimate justification."[72] Surely computers can't do what lawyers do?

Actually, it's not so clear. For one thing, the role of something like the case method is not unique to legal education. Despite Professor Groopman's report that doctors are not taught how to think,[73] the case method has long existed in medical education also. President Eliot of Harvard approved of Langdell's innovations in legal education partly because they resembled changes in the Harvard Medical School, where laboratory and clinical work was added to the curriculum—"students learned by doing what professionals did in practice."[74] In 1910, clinicopathological conferences modeled on Langdell's case method were introduced at Massachusetts General Hospital.[75] So medical education itself has had something analogous; if that form of clinical analysis can be performed by computers, so might legal analysis.

Perhaps more significantly, the whole notion that legal analysis is distinctive has come under fire in recent years. Some urge that reasoning by analogy is a unique feature of legal reasoning,[76] but others contend that there is nothing special about legal reasoning.[77] Trying

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70. THE PAPER CHASE (Twentieth Century Fox 1973).

71. *See* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 70–73, 95–108 (1994) (describing the way in which close analysis of cases became crucial for lawyers at the end of the nineteenth century, partly due to the introduction of the Field Code).

72. *Id.* at 151.

73. *See* GROOPMAN, *supra* note 52.

74. LAPIANA, *supra* note 71, at 26.

75. David M. Eddy & Charles H. Clanton, *The Art of Diagnosis: Solving the Clinicopathological Exercise*, *in* PROFESSIONAL JUDGMENT, *supra* note 39, at 200, 200 (reporting that clinicopathological conferences "are the offspring of the case method of teaching instituted at the Harvard Law School in the 1870s and introduced to the Massachusetts General Hospital in 1910 by Dr. Richard Cabot").

76. *See, e.g.*, LLOYD L. WEINREB, LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT (2005) (arguing that lawyers and judges use analogies, without relying on some general principle extracted from them, as grounds for deciding cases).

77. *See, e.g.*, Richard A. Posner, *Reasoning By Analogy*, 91 CORNELL L. REV. 761, 768 (2006) ("Analogies are not reasons . . . ."); Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 517 (1997) ("[T]hinking like a lawyer is just ordinary forms of thinking clearly and well."); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1082 (1996) ("[C]laims about the distinctive character of legal reasoning appear increasingly implausible—'thinking like a lawyer' is a phrase heard less and less these days.").

to unravel this dispute is far beyond the goals of the current piece, but the existence of the dispute provides reason for caution about thinking legal analysis immune to poaching by computers because of its distinctive nature.

There seems nonetheless some room to argue that the most creative legal work depends on something that it would be difficult for a computer to emulate. Professor Groopman's main objection to the new orientation of medical analysis is that it does not legitimate thinking "beyond the box," which can be crucial to successfully solving some of the most difficult medical diagnostic problems.[78] But assuming that much sophisticated legal analysis is beyond the competence of computers[79] does not mean that most lawyers do that sort of thing most of the time. To the contrary, there is more reason to believe that most lawyers spend most of their time doing legal analysis that is more of the "fill in the blanks" variety. *That* sort of activity might be done with some frequency by a computer.

Richard Susskind, an English legal theorist, announced in a 2000 book that computers will soon be doing that kind of work.[80] Contrary to those who contend that legal reasoning is unique, he asserted that "there is nothing inherent in the process of legal reasoning or in the nature of law that constitutes a theoretical or practical obstacle to the development of rule-based expert systems in law of restricted scope."[81] He forecast that information and the Internet would "fundamentally, irreversibly and comprehensively change legal practice, the administration of justice and the way in which non-lawyers handle their legal and quasi-legal affairs."[82] In his view, "by 2015, the *main* way in which legal service is delivered across the world will be through access to online legal service as opposed to consultation with human lawyers."[83] Most lawyers—like travel agents—are therefore threatened with "disintermediation" because their customers will be able to make their own legal arrangements using computer-based systems without the direct involvement of human professionals.[84]

In this Brave New World for lawyers, then, most Americans would get their legal advice from the legal equivalent of TurboTax. Lawyers

78. *See* GROOPMAN, *supra* note 52, at 5.

79. *See infra* notes 95–101 and accompanying text (discussing the difficulties of modeling American lawyers' analysis by computers).

80. *See* RICHARD SUSSKIND, TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE (2000).

81. *Id.* at 213.

82. *Id.* at viii–ix.

83. *Id.* at 29.

84. *See id.* at 45–46.

could find work for companies that design such computer programs, but (usually) not advising individual clients. At least some legal practices might be ripe for this sort of thing; family law practices or drafting wills come to mind. Recurrent situations might really be easily handled by a properly programmed computer. There have at least been suggestions that computers will threaten other learned professions.[85] Indeed, Milton Friedman once urged that the Federal Reserve Board be replaced by a computer.[86]

It need hardly be emphasized that such a change would be revolutionary. Susskind sugar coats the pill by urging that the main effect will be to provide access to (computerized) legal advice for those who cannot presently afford the human version. And in the UK there seems to be some reason to think this sort of thing could be designed. Susskind reported in 2000 that a program existed that permits a lay person to navigate Scottish divorce law without the assistance of a solicitor or barrister,[87] and some suggest that computers would be adapted to perform other forms of legal problem-solving.[88]

But the likelihood of this sort of revolution happening, or happening soon, seems remote in the U.S. For one thing, some of Susskind's predications already look inaccurate, at least for the U.S. For example, in 2000 he predicted that by 2002 clients will insist on being able to log onto a law firm's website and check the progress of work on their cases, including specifics about tasks being performed or already finished, and that any firm not offering this service will be at a disadvantage.[89] Although by 2009, many American firms probably have

85. *See, e.g.*, IAN AYRES, SUPER CRUNCHERS 167 (2007) (arguing that automated decision-making has supplanted bank loan officers and will do the same to other professional jobs); *Hold the Front Page*, ECONOMIST, Mar. 8, 2008, at 90, 90 (suggesting that computer programs could "turn editorial decisions into a rational process, rather than an intuitive one").

86. *See* Hillel J. Einhorn, *Accepting Error to Make Less Error*, *in* PROFESSIONAL JUDGMENT, *supra* note 39, at 181 (citing Friedman comment).

87. SUSSKIND, *supra* note 80, at 210 (describing prototype of an expert system in Scottish divorce law).

88. *See*, e.g., François Brochu, *The Internet's Effect on the Practice of Real Property Law: A North American Perspective*, 2003(2) J. INFO. L. & TECH., www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_2/brochu.

89. *See* SUSSKIND, *supra* note 80, at 19–20. The author identifies eight categories of "first generation" client relationship systems:

> 1. *Status tracking systems.* These enable clients to monitor the status of any matter being conducted on their behalf so that they can determine, for example, what the latest activity has been, on whom the next responsibility falls, or the basic milestones and deadlines for the matter in question.
>
> 2. *Financial reporting systems.* These offer clients the facility to find out, in respect of any particular matter, how much time has been recorded, what bills have been rendered so far, the level of outstanding work in progress, the charge-out rates being applied, and other related financial information.

some services along the lines Susskind envisioned for 2002,[90] these stop far short of supplanting the lawyer herself with a computer, and it seems likely that developments along that front have not proceeded at the pace he predicted.[91]

Perhaps more significantly, there remains a legitimate question about the extent to which computers *can* be programmed to perform the sort of analysis that good lawyers provide to clients. To take the TurboTax analogy, it is clear that some of these legal materials have come into existence.[92] And there surely seems to be a market for these materials, given the striking rise in *pro se* litigation in recent years. Thus, we are told that "myriad websites devoted to pro se litigation now exist and are accessible to anyone possessing Internet access and the ability to perform a simple search engine query."[93] At the same time, we are also warned that "the growing availability of

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3. *Contact systems.* So that clients are able to determine the identities, qualifications, and experience of lawyers working on any particular matter, these systems make that information easily available, alongside the ability to search for suitable practitioners for particular classes of work.

4. *Virtual deal rooms and other virtual case rooms.* These are online, secure sites for the posting and accessing of documents pertaining to any particular deal or dispute.

5. *Online archives.* Developed for particular clients, these provide an online collection of all advice, documents, agreements, and other work produced for that client, held in one indexed and easily accessible repository.

6. *Online instruction.* This is a facility to enable law firms to be invited to begin work on new matters without cumbersome, face-to-face procedures or exchanges of formal letters.

7. *Case/matter management services.* A form of project management facility, and often embracing many of the above categories of client relationship system, these enable clients to monitor the flow of individual matters or to assess the collective workload being undertaken by a particular firm.

8. *Client relationship sites.* These are online sites dedicated to the particular relationship between one client and one law firm, being a first port of call for the client wanting access to any of the firm's services.

Id.

90. *See infra* notes 125–131 and accompanying text (describing services offered by some American law firms in 2007).

91. For further discussion of the electronic law office, involving services like those listed by Susskind in note 89, see *infra* notes 108–135 and accompanying text.

92. *See, e.g.*, Christine Larson, *A Need for a Will? Often, There's an Online Way*, N.Y. TIMES, Oct. 14, 2007, at 8. Larson describes a service offered by LegalZoom, which offers will-drafting online for a charge of about $70. *Id.* But this service relies on a LegalZoom employee (not a lawyer) who reviews answers to questions the customer provides online and develops a will based on those answers. *Id.* The article also points out that WillMaker Plus, a program from Nolo Press, experienced an increase of nearly thirty-three percent in sales from 2005 to 2006. *Id.* It also refers to Suze Orman's Will and Trust Kit, which reportedly costs $17.99. *Id.*

93. Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 1007 (2007).

Internet resources can raise important concerns over accuracy and relevance due to the medium's inherent openness."[94]

The diversity of state and local laws, as well as the variety of federal laws and regulations, that must often be considered in the U.S. would make the task of designing a program that reliably could substitute for a knowledgeable lawyer much more difficult than in other countries.[95]

Indeed, it seems that—as currently used by lawyers—computers play a very different role from the one they play in the diagnostic and treatment activities of doctors. For doctors, computers and other electronic devices may provide insights and information that they cannot obtain another way. Thus, the X-ray, CAT scan, and other techniques permit doctors to discern the patient's condition in a way that they could not without the electronic devices. Moreover, electronic devices—including robots that perform surgery—permit doctors to provide treatment in a way, or with a degree of accuracy, that they could not provide without the devices. Some might argue that computers could provide *better* treatment than human doctors.

It does not seem that anyone is arguing that computers can provide *better* legal advice than lawyers, only cheaper advice. Indeed, the nature of computerized support for lawyers seems qualitatively different from that used by doctors. Computerized legal research, for example, is a faster method of locating possibly pertinent legal materials. But the computer is not in a position to assess the importance of the fruits of that research. To the contrary, the very sorts of argument-development skills that the Langdellian method of instruction imparts to lawyers are still needed to construct the legal arguments that the research can be used to support. So, much as computers and other electronic devices have had and will continue to have a major impact on the operation of American law offices,[96] it presently does not seem that they are likely to provide a better substitute for the work of human lawyers.

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94. *Id.* at 1009; *see also* Terry Carter, *Who's Putting a Price on Free Legal Aid*, A.B.A. J., Sept. 2008, at 32 (describing cybersquatters who divert poor seekers of free legal advice to look-alike sites that charge for advice).

95. This point reappears in relation to the balkanized regulation of American lawyers, for they must increasingly consider the laws of multiple jurisdictions. *See infra* notes 149–175 and accompanying text. The point there is that lawyers nowadays need to be able to analyze the handling of legal issues under the law of several jurisdictions. The point here is similar—that the range of pertinent legal regimes now worth considering complicates the lawyer's task and also the job of designing a computer program that would substitute for a lawyer doing that task.

96. See *infra* notes 108–135 and accompanying text for further discussion of the electronic law office.

The very nature of American adjudication could further complicate the effort of using computers to devise legal arguments. In many countries that rely on detailed codes, it is said that judges have limited latitude for making decisions, and that they ordinarily must apply the code rather automatically.[97] The role of American judges is quite different. They often have some latitude to make decisions based on the circumstances of the particular case—doing "justice"—without slavish application of some statutory or regulatory directive.[98] And they do so in a somewhat intuitive way that could prove highly difficult to emulate in a computer. A recent study of American judges' actual decisionmaking found that "judges are predominantly intuitive decision makers,"[99] but urged that they move toward what the authors called an "intuitive override" model, in which judicial first impressions are reexamined by deliberation. The authors supported this argument with examples from medical decisionmaking[100] and closed with a quotation from Professor Groopman's study of how doctors think.[101] Whether American judges will move further toward such a model remains to be seen, but the study underscores the difficulty of modeling some legal issues for resolution by a computer.

Looking into the future, and considering the notion that the capacity of computers tends to increase geometrically, it may be that breakthroughs in computing capacity will at some point permit computers

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97. *See, e.g.*, CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS (2003). Goodman explains that the common-law process of lawmaking "may be viewed as a 'bottoms up' system where the law is created (or 'found') as a consequence of lawsuits brought by individuals." *Id.* at 7. Goodman adds:

> Unlike the common law system, the civil law system that was developed on the continent of Europe was a system based on an entirely different philosophy. Here was no "bottoms up" system but rather a "top down" system of law making. The "top down" model of lawmaking has a long and honorable tradition. . . . Under the civil law system's top down model judges were neither as important nor as influential as judges in the common law system.

Id. at 8; *see also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 11 (2001) (contrasting American courts with German and French courts, "where bureaucratically recruited and embedded judges—not the parties' lawyers and not lay juries—dominate both the evidence-gathering and the decisionmaking processes").

98. According to Kagan:

> Compared to most national judiciaries, American judges are less constrained by legal formalisms; they are more policy-oriented, more attentive to the equities (and inequities) of the particular situation. In the decentralized American legal system, if one judge closes the door on a novel legal argument, claimants can often find a more receptive judge in another court.

KAGAN, *supra* note 97, at 16.

99. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007).

100. *See id.* at 33 (using a doctor's diagnosis as an example).

101. *See id.* at 43 (quoting GROOPMAN, *supra* note 52, at 9).

to do something like the analysis of client problems that lawyers do. Even if that proves true, it seems unlikely that computers will also be able to bring creativity to this process; for at least high-end transactions, therefore, human help is likely to remain crucial. Indeed, Susskind recognizes that for such high-end, high-value work, individually tailored legal work will remain the norm, but he sees computers displacing "the standard and repetitive work of our current lawyers."[102]

For clients needing such standardized legal work, this may be a liberation. Many are presently priced out of the American legal market—hence the growing presence of *pro se* litigants—and it is possible that such breakthroughs will not divert much current legal work from actual lawyers because those who use the legal TurboTax programs of the future already have foresworn lawyers. Nonetheless, there may be considerable fights about unauthorized practice of law if computerized services providing legal advice become more prevalent.[103] For example, Nolo Press, a California concern that produces hard-copy books that assist lay people in handling their own legal problems, got into trouble about unauthorized practice in Texas.[104]

Susskind predicts that lawyers' monopoly on the provision of legal services will be shattered by the computer,[105] but that has not yet happened. Noting that most state statutes are somewhat vague on what constitutes the practice of law, Professor Hadfield foresees ongoing difficulties for computer-based products:

> Consider even a basic consumer product such as the standard-form simple wills, originally in hard-copy books and now packaged in software and online, delivered by entities such as Nolo Press. State bar associations challenged the sale of these products in their state as unauthorized practice of law (UPL). Even though many states have exempted such products from the UPL restrictions, it is a state-by-state process, and the standards vary from state to state. Moreover, in order to stay on the right side of the UPL restrictions and state bar associations, Nolo Press products and similar products must be generic and not intended to tailor solutions to the unique "circumstances or objectives of another person." More elaborate products that use, for example, artificial intelligence mechanisms to

102. SUSSKIND, *supra* note 80, at 113.

103. Other and different issues about the impact of technology on authorization to practice law are considered in notes 149–175 and accompanying text.

104. *See In re* Nolo Press, 991 S.W.2d 768 (Tex. 1999) (addressing a dispute arising out of the proceedings by the Texas Unauthorized Practice of Law Committee to investigate the activities of Nolo Press). Nolo Press sought a jury trial on whether it had engaged in the practice of law, but just as the case was going to trial the Texas legislature amended the state's unauthorized practice statute to exempt books and software. Kathy M. Kristof, *Legal Champion for the Middle Class*, L.A. TIMES, Nov. 18, 2007, at C3.

105. *See* SUSSKIND, *supra* note 80, at 98–99.

> tailor documents or route nonstandard issues into online advisory services or "chat with a lawyer now!" mechanisms are presumably beyond the pale.[106]

At least some examples of such UPL restrictions on computer-based legal assistance can be found.[107]

For the present, then, the computer as lawyer is surely a thing of the distant future, even if the computer as doctor may come to be a current reality sooner and more frequently.

IV. THE ELECTRONIC LAW OFFICE

Although the American lawyer may not herself have been supplanted by a computer, her office is hugely dependent on computers for myriad everyday activities from billing to communications to legal research. As noted above, Susskind foresees more aggressive involvement of computers in everyday law firm activities.[108] Even if his forecasts have not yet come true, it is undoubtedly true that computers have affected legal practice in a wide variety of ways.

It also seems that there has been a revolution in practice—particularly of large commercial law firms—in the last generation or so.[109] Since 1970, American law firms have become less and less stable. Law firm partners once retained their firm affiliations for their entire careers, but now laterals frequently shift from firm to firm. Corporate clients once established long-term relationships with given law firms but now play the field, often assigning work on the basis of "beauty contests" consisting of competing presentations by various law firms for specific projects. Law firms have been merging with increasing frequency, creating multi-city (and sometimes multi-national) behemoths with hundreds (and sometimes thousands) of lawyers. Individ-

106. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1724 (2008).

107. *See, e.g.*, *In re* Reynoso, 477 F.3d 1117 (9th Cir. 2007) (upholding an injunction against a company that maintained websites that helped customers prepare bankruptcy petitions and schedules). In *Reynoso*, the court found that the program offered more than mere clerical assistance since it did more than simply insert responses into fields on a form. *Id.* at 1125. The program "determined where (particularly, in which schedule) to place information provided by the debtor, selected exemptions for the debtor and supplied relevant legal citations." *Id.* Accordingly, although it "express[ed] no view as to whether software alone, or other types of programs, would constitute the practice of law," the court concluded that the guidance provided by this particular program did constitute practice of law. *Id.* at 1126 n.9. *See also* Richard F. Mallen & Assocs., Ltd. v. Myinjuryclaim.com Corp., 769 N.E.2d 74 (Ill. App. Ct. 2002) (upholding standing of personal injury lawyers to sue company that provided settlement estimates to people injured in car accidents).

108. *See* SUSSKIND, *supra* note 80; *supra* note 89 and accompanying text (listing functions that could be provided to clients on a routine basis).

109. For further discussion of these issues, see generally Marcus, *supra* note 10.

ual "partners" no longer enjoy the level of participation or the degree of control they once did, which feeds the tendency of successful lawyers to shop for a better deal with other firms. For at least some lawyers, this regime has produced fabulous financial rewards.

We began by recognizing that technology—the telephone—played an important role in the emergence of those law firms.[110] Technology—enabling varying versions of the Electronic Lawyer—has undoubtedly played a role in the recent changes in law firms. A multinational law firm relies on electronic communications to facilitate its worldwide activities, including virtual "partnership meetings." The Internet has become a marketing tool. A decade ago, it was a big new thing for a law firm website to attract attention.[111] Now websites are clearly designed to impress potential clients and provide them with marketers' information. Firms also use the Internet to attract associates with videos and other postings that convey a "fun" image of the firms.[112]

Technology can affect the actual organization of law firms. E-Discovery—responding to discovery requests for electronically stored information—may be fostering the creation of a new layer of lawyer-employees at law firms. Traditionally, the law firm ladder has been fairly clear. The firm hires associates, and either they become partners or leave the firm. This "up or out" approach has been softened with expanded use of "of counsel" or "senior associate" positions, but the essentially tenure-track aspect of initial hiring has not changed. The burden of E-Discovery, however, is prompting some firms to experiment with a new niche of permanent staff attorneys who specialize in this activity.[113] Using staff attorneys could mean lower bills for cli-

110. *See supra* note 7 and accompanying text (quoting Galanter & Palay).

111. Thus, the San Francisco Recorder ran a story in 1997 reporting that the Orrick law firm was experiencing 5000 hits a week on its website. *See This Week in Recorder History*, S.F. RECORDER, July 9, 2007, at 5.

112. *See, e.g.*, Karen Donovan, *Law Firms Go a Bit Hollywood to Recruit the YouTube Generation*, N.Y. TIMES, Sept. 28, 2007, at C6 (reporting that law firms are creating websites "with the look and feel of YouTube" to persuade law students that the firms "are young-thinking and hip"); Sheri Qualters, *Law Firms Post Online Video Clips to Attract Associates*, S.F. RECORDER, Jan. 23, 2007, at 3 (reporting that Web videos featuring only associates, conceived as a marketing project for clients, are now perceived as a valuable recruiting tool to reach law students as well).

113. *See* Jill Redhage, *Enlisting Staff Attorneys to Tame Discovery Fees*, S.F. DAILY J., June 23, 2008, at 1 (reporting that the growing burdens of E-Discovery meant that "the work stopped being well received among partnership-track associates" at Bingham McCutchen, and prompted the firm to develop an in-house staff attorney program to do this work, using lawyers who are not on the partnership track); Kellie Schmidt, *Firm to Fill Cheap Seats*, S.F. RECORDER, Nov. 1, 2007, at 1 (reporting that Chicago firm McDermott, Will & Emery responded to the dramatically escalating costs of E-Discovery by creating a new position of staff attorney to deal with this work).

ents because the billing rates of these lawyers are lower than the rates charged for partnership-track lawyers.[114] Some suggest that lawyers in the new positions will be happier than associates in traditional tenure-track positions.[115] Whatever the likelihood of that result, the central point is that a significant feature of the conventional law firm arrangement—the "up or out" expectations for young lawyers—may be abandoned due to the demands of technological change.

The operation of the law firm may be altered in other significant ways. In 2002, the San Francisco law firm Orrick shifted a great deal of its "back office" work from San Francisco to Wheeling, West Virginia.[116] It estimates that this move saved the firm $26.5 million during the first five years of the West Virginia office's operations.[117] Since then, "offshoring" of such work has grown. Howrey has opened an office in India,[118] as has Clifford Chance.[119] Baker & McKenzie has moved its back office work to the Philippines.[120] Moreover, Indian firms employing Indian lawyers are increasingly providing low-cost services for American law firms or clients, moving beyond providing purely back office services. One estimate is that the number of Indian lawyers engaged in this activity increased threefold between 2005 and 2006.[121] Another estimate is that the dollar value of this activity might rise approximately fiftyfold to four billion dollars by 2015.[122] Although some law firms resist such offshoring as undermining the professional atmosphere of American law firms,[123] client pressures may mean that the frequency of such arrangements rises. Thus, a recent article begins with the illustration of a corporate general

114. *See, e.g.*, Redhage, *supra* note 113 (reporting that salaries and billing rates for staff attorneys are lower than for partnership-track associates).

115. *See id.* (reporting that the director of the Bingham McCutchen staff attorney program says that "staff attorneys escape the stress of the partnership track and enjoy . . . a less competitive work environment with more camaraderie").

116. Kellie Schmitt, *The View From Wheeling*, S.F. RECORDER, May 5, 2008, at 1.

117. *Id.*

118. Daphne Eviatar, *Howrey Opens India Office for Document Management*, S.F. RECORDER, Feb. 11, 2008, at 3.

119. Richard Lloyd, *Home Away From Home*, AM. LAW., Sept. 2007, at 75.

120. Zusha Elinson, *Orrick Spins the Globe*, S.F. RECORDER, May 23, 2007, at 1.

121. Aruna Viswanatha, *Inside Out*, AM. LAW., Mar. 2008, at 20 (reporting an estimate that from March 2005 to the end of 2006, the number of Indian lawyers so employed rose from 1800 to 6000); *see also* Niraj Sheth & Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, WALL ST. J., Nov. 26, 2008, at B1 (reporting rapid growth in outsourcing to India).

122. *See* Vesna Jaksic, *Guidelines for Outsourcing Grow*, NAT'L L.J., Apr. 30, 2007, at 5; Arin Greenwood, *Manhattan Work at Mumbai Prices*, A.B.A. J., Oct. 2007, at 36, 39.

123. *See* Elinson, *supra* note 120 (quoting the chair of a large American law firm, who stated that "[w]e depend very heavily on personal relationships between lawyers and staff and it would be a very substantial change and disruption if we told people you either don't have a job or you can move to wherever").

counsel asking himself, "Why pay big-firm associates $200 an hour to do document review when you can ship it out to India for $25 an hour?"[124] Answering that question will likely become a bigger concern of American law firms.

Closer to home, law firms are beginning to offer the kinds of electronically assisted access opportunities that Susskind predicted.[125] American firms have been using computers for multiple tasks for some time. More than twenty years ago, the *American Bar Association Journal* was already reporting that "legal computing is no longer just for cutting and pasting standard forms, but for building cases, administering estates, creating personal research libraries, and much more."[126] In 2007, some twenty-four percent of firms were giving in-house lawyers at corporate clients access to the law firm's knowledge management systems.[127] Corporate clients are now requesting specific technological arrangements from law firms, such as electronic billing and access to their case materials via the firm's extranet, and twenty percent of those potential clients said that access of this sort affected decisions whether to retain a specific law firm.[128] E-billing is a high priority; "[e]lectronic invoices are typically broken down into exquisite detail, so company lawyers and CFOs can see exactly how a case was staffed, what the firm charged for late-night takeout dinners for the paralegals, and whether the amount billed falls within the budgeted range."[129] This scrutiny can even be used to confirm that staffing complies with the client's diversity goals.[130] For example, we are told that in mid-2008 "Wal-Mart, a leading corporate advocate of diversity in the legal profession, is deploying new software to keep a watchful eye on its law firms and make sure the attorneys working on its matters are diverse."[131]

For the firm's attorneys themselves, offsite access is becoming total:

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124. Zusha Elinson, *GCs Embracing Outsourced Work*, S.F. RECORDER, Jan. 24, 2008, at 1.

125. *See* SUSSKIND, *supra* note 80; *supra* note 89 and accompanying text (listing potential services).

126. Robert L. Perry, *The Case for Computers in the Law Office*, A.B.A. J., June 1, 1987, at A9.

127. Anthony Paonita, *All Aboard*, AM. LAW., Mar. 2007, at 77.

128. *Id.*

129. *Id.* at 78.

130. *Id.* (quoting Pitney Bowes's manager of legal operations as explaining that E-billing data enables the corporation to confirm that law firms are actually using diverse teams on its legal matters).

131. Alana Roberts, *A Tug of War*, MIAMI DAILY BUS. REV., July 11, 2008, at A1. The article adds that "[t]he new software is an example of the evolving approach taken by general counsel to ensure more minorities and more women are staffing their outside legal assignments." *Id.*; *see also* Leigh Jones, *Microsoft to Offer Counsel Diversity Bonuses*, NAT'L L.J., July 21, 2008, at 4 (reporting on Microsoft "tracking plan" to achieve these diversity goals).

> Firms are thinking not just about remote access, but also about universal access as well. It is not enough that attorneys are able to communicate around the clock; they now want complete and fully secure office capabilities. This way, they can respond to conflict checks, download client reports, and complete time reports anytime, anywhere.[132]

Together, these changes surely mean that the Electronic Lawyer operates in an environment significantly different from the one her predecessors experienced in earlier decades. One consequence has been noted already—the stress on the work-life balance.[133] When the cares and burdens of the office could largely be left behind at the office, these concerns were not so pressing. But now that being at the office is hardly integral to being "at work," the potential exists for work to intrude into every waking moment, and perhaps some sleeping ones as well. As those who renamed BlackBerries "CrackBerries" recognize, technology can produce qualitative changes in life for professionals. The increased access afforded clients is likely to magnify this effect, enabling them to monitor lawyers' activities minutely and continuously, and prompting them to demand responses on shorter turnaround times. *Michael Clayton* illustrates this effect vividly; the title character seems to be constantly on call, and required to head out at a moment's notice no matter what the time of day or night. Many contemporary lawyers feel somewhat the same way.

Indeed, Professors Galanter and Henderson have recently emphasized the role of electronic media in the transformation of the big law firm:

> [T]he advent of the computer and sophisticated software has profoundly influenced the behavior of the market participants. Increasingly, the financial performance of a firm is tracked internally on an office-by-office, practice-group-by-practice-group, lawyer-by-lawyer level. . . . With the interconnectivity of business over the Internet, a large proportion of clients are demanding that law firms submit their bills electronically using a standardized format that facilitates firm-to-firm comparisons on similar matters. Thus, from virtually every perspective, the economic contribution of specific lawyers or law firms has become more measurable and transparent.[134]

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132. *See, e.g.*, Marcy Burstiner, *Making It Better*, AM. LAW., Nov. 2006, at 55.

133. *See supra* note 25 and accompanying text.

134. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1897–98 (2008). Galanter and Henderson note:

> From the emergence of the promotion-to-partnership firm until about 1960, the office, research, and communication technology of law practice remained largely unchanged. Then, in rapid succession, the firm's productivity, scope, and scale were enlarged by

As we shall see,[135] the electronic effect may not be causative, but it is nonetheless central.

Looking to the future, then, one would expect more of the same; for many attorneys, the stresses of practicing law are not likely to abate due to technology. Coping with these stresses will likely be a major concern for the bar over coming decades.

V. A TWO-TIER PROFESSION?

Another possible feature of the future—potentially exacerbating other stresses on the profession—is that it may become a two-tier legal affair. Competitive forces, we are told, may increasingly limit top-dollar legal work to a small number of law firms, leaving the others to scrap for the less exalted work in a highly competitive environment leavened by the possibility of budget offshore placement of legal work formerly given to American lawyers.[136] It seems that the concentration of success at the very top, recognized more generally a decade ago,[137] may become the lot of the legal profession.

There is certainly some evidence that this phenomenon is taking hold in the legal profession. The distribution of starting salaries for recent law graduates, for example, does not form a Bell curve, but rather shows two distinct peaks, with the high-earning young lawyers making far more than the rest.[138] Fifteen years ago Galanter and Pa-

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photocopying, computers, jet air travel, faxing, the Internet, and the myriad innovations that accompanied them.

Id. at 1881.

135. *See infra* notes 239–270 and accompanying text.

136. *See, e.g.*, Mehul Patel, *Ecosystem of Legal Services Is Evolving*, NAT'L L.J., Apr. 28, 2008, at S1. Patel, who is executive vice president of a "new model firm that changes the way attorneys and clients work together," explains as follows:

> For a handful of the most successful traditional law firms, this environment brings an opportunity to adapt, differentiate, and garner the premium price-insensitive bet-the-company work that will drive growth in profits per equity partner. For most others, it will mean a new era of competition, both with other traditional firms and with a new category of firms that will enter the market in response to the needs of corporate buyers.

Id.

137. *See* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US (1995) (examining the tendency of concentration of economic activity to magnify the take of the "winners" but not of the rest).

138. For the law school class of 2006, the National Association of Law Placement (NALP) compiled data about the distribution of full-time salaries, which revealed a bimodal distribution, with one peak at about $35,000 per year and another at about $135,000 per year. *See* NALP, A Picture Worth 1,000 Words (Sept. 2007), http://www.nalp.org/content/apictureworth1000words. For graduates of the class of 2007, NALP compiled similar data, yielding a chart again with two high points, one at a salary of about $40,000 and another at a salary of about $160,000. *See* NALP, Another Picture Worth 1,000 Words (July 2008), http://www.nalp.org/anotherpicture. A

lay began their book on law practice with a similar orientation, seeking to examine "the two hemispheres of the profession."[139] The 2005 study of the Chicago bar by Professor Heintz and his colleagues found such a divergence comparing a study of the Chicago bar in the mid-1970s. The American Bar Association, for example, included more graduates of elite law schools and attorneys from big firms than others.[140] This divergence has happened even though law firms have become more diverse in many ways.[141] A small number of elite law schools increasingly send their graduates to large law firms than do other law schools.[142] For 2008, however, the level of hiring reached such a point that some predicted that fully a quarter of all law school graduates would be hired by big firms, which would seem to spread the opportunities to graduates of a larger collection of law schools.[143] But the reportedly growing divergence in incomes between the largest law firms and moderate-sized firms may mean that for partners the difference becomes more and more pronounced.[144]

For those who favor a unified bar, these prospects are troubling. The advent of the Electronic Lawyer could exacerbate the divergence. A 2002 study in England found a divide between small and large firms in their use of information technology.[145] But generally the costs of technology are relatively low, and with the Electronic Lawyer, a small firm may be better able to compete with the big firm than without

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similar analysis of the salaries upon graduation of the members of the classes of 1991 and 1996 looked quite different, with only one high point at around $28,000 (in 1991) and $33,000 (in 1996). By the class of 2000, however, the trend observed in 2007 and 2008 had begun to emerge, with one high point at about $35,000 and another at about $125,000. *See* NALP, *Salaries for New Lawyers: How Did We Get Here?*, NALP BULLETIN, Jan. 2008, *available at* http://www.nalp.org/content/index.php?pid=561.

139. GALANTER & PALAY, *supra* note 7, at 1. Professor Galanter's more recent study of big law firms suggests that stratification may emerge even among big firms. *See* Galanter & Henderson, *supra* note 134, at 1882–1906. In the 1920s, one study concluded that "there were two American bars which practiced two very different kinds of law, and the divisions ran along economic and class lines." LAPIANA, *supra* note 71, at 163.

140. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 55 (2005).

141. *See id.* at 69–71, 288–95 (noting that large law firms had become much more diverse in terms of ethnicity, race, and gender, but that the stratification among them had also become more pronounced).

142. *See* Leigh Jones, *Survey: More Top Grads at Nation's Largest Firms*, S.F. RECORDER, Apr. 15, 2008, at 3 (reporting that a "bigger percentage of students graduating from top law schools in 2007 took jobs" at the 250 largest law firms in the nation than in 2006).

143. Aric Press, *The New Reality*, AM. LAW., Aug. 2007, at 91.

144. *See* HEINZ ET AL., *supra* note 140, at 291 (reporting that the incomes at the largest law firms grew during the period from the 1970s to 1990s, but that the incomes fell at small firms).

145. Gurmark Singh et al., *An Empirical Study of the Use of IT by Small and Large Legal Firms in the UK*, 2002(1) J. INFO. L. & TECH., http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2002_1/singh.

high-tech assistance. That's the possibility foreseen by Bob Stein, former Executive Director of the ABA, who asked in 2006: "Will the new technologies level the playing field so that solo and small firm practitioners will have the same practice resources presently available primarily in large firm settings?"[146] Heinz and his colleagues found that technology held this promise: "Although access to electronic communication technology is now essential to an efficient and effective law practice, that technology is not so expensive that large numbers of lawyers must share it in order to make it a sensible investment."[147] Even if the continued stratification of the profession proves to be an ongoing reality, it does not seem that the technological aspects of practice contribute to it in this country.[148]

VI. MOVING AWAY FROM BALKANIZED REGULATION?

There has been no shortage of complaints about lawyer regulation in recent decades. As Professor Hadfield put it in her recent study of the subject, "[f]ew commentators, outside of the practicing bar and the judiciary, find much to recommend the modern system of professional regulation of lawyers."[149] Whether or not reliance on professional self-regulation is overthrown, the advent of the Electronic Lawyer places heavy stress on the localized and balkanized nature of that regulation.

Since we began by comparing the impact of electronic devices on doctors,[150] it might be worthwhile to contrast the licensure practices for them. State-by-state standards for doctors would seem anomalous given that humans are essentially the same everywhere, although presumably there could be some differences in medical needs in different climates. For doctors, licensure results from a rigorous long-term se-

146. Robert A. Stein, *The Future of the Legal Profession*, 91 MINN. L. REV. 1, 9 (2006).

147. HEINZ ET AL., *supra* note 140, at 285.

148. A number of studies support this conclusion. Thus, it is said that new technologies permit small firms and solo practitioners to better compete with large firms. *See, e.g.*, Susanne Brent, *The New Technological Law Practice*, ARIZ. ATT'Y, June 2001, at 20, 25 (observing that technology may tip the balance in favor of a small firm); Ellen E. Deason, *Allerton House Conference '98: Confronting and Embracing Changes in the Practice of Law*, 86 ILL. B.J. 628, 633 (1998) (noting that small firms may be more nimble in adapting to rapid technological change); Neil Pederson, *Staying Competitive for the Solo and Small Firm: The Paperless Law Office*, ORANGE COUNTY LAW, July 2008, at 18, 18 (reporting on the equalizing effect of technology in overcoming the tendency of large firms to try to overwhelm small firms with paperwork); *Deliberations of the ABA Committee on Research About the Future of the Legal Profession: Part II: Access to Legal Services*, ME. B.J., Winter 2002, at 48, 54 (2002) (noting that technology permits solo practitioners to be admitted to and maintain virtual offices in multiple jurisdictions).

149. Hadfield, *supra* note 106, at 1690.

150. *See supra* notes 18–63 and accompanying text.

ries of examinations and, although it is offered by states, those who complete the examinations are eligible to practice in any state.[151] But even for doctors, complete portability is not assured; states may limit their movement.[152]

The United States certainly has a stronger tradition of localism than many countries, perhaps explaining this enduring localism in licensing doctors. That localism is surely reflected in the regulation of the legal profession, which remains a state-by-state affair. When that technique emerged, of course, it made perfect sense; a lawyer in one state would rarely engage in activities in another state that could be called legal representation there. Moreover, except for the distracting possibility under *Erie*[153] that a federal court in a state would apply "general" common law rather than the state's law, lawyers rarely had to worry about the content of the laws of other states. And despite the brooding omniscience of the "general" common law, by the late nineteenth century, state laws differed on many things.

But that early nineteenth-century simplicity for legal practice must have slipped away by the end of that century, and at the beginning of the next century the introduction of the telephone further tied the nation together and meant that lawyers could not always comfortably limit their attention to the law of their own states.[154] Nonetheless, the state-centric mode of regulation has endured. Efforts to establish Federal Rules of Attorney Conduct for lawyers in the federal courts

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151. *See, e.g.*, Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admissions: Lessons From the Medical Profession*, 53 J. LEGAL EDUC. 340, 342–48 (2003) (describing the process of licensure for American doctors).

152. Barnard and Greenspan explain:

> Portability becomes more difficult as the doctor progresses through her career. For example, some states limit a candidate's right to licensure by endorsement (the term used to describe a transfer of license from state to state) to a defined number of years after initial licensure. After that period, an additional written qualifying exam, known as the Special Purpose Examination or SPEX, may be required.

See id. at 348.

153. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

154. *See, e.g.*, SEAN WILLIAMS & DAVID NERSESSIAN, OVERVIEW OF PROFESSIONAL SERVICES INDUSTRY AND THE LEGAL PROFESSION 11, *available at* http://www.law.harvard.edu/programs/plp/pdf/Industry_Report_2007.pdf (last visited Feb. 16, 2009). According to Williams and Nersessian:

> This state-by-state licensing scheme was adequate at one time because most legal work was local. Today, however, it is common for lawyers to represent individuals and corporations with business dealings in multiple states. Unfortunately, the regulation of legal practice at the state level has failed to develop in tandem with business realities. This often creates impediments to the efficient delivery of legal services.

Id.

bore little fruit.[155] The question whether lawyers admitted in one state can provide legal services in another is slightly different. Many states will grant admission to attorneys admitted in other states on a reciprocity basis, but some—notably California and Florida—will not. There is surely a temptation to regard the requirement of local admission to practice as protection for local lawyers.[156]

That localism became harder and harder to justify through the twentieth century.[157] Particularly in the last third of that century, it saw the emergence of firms with multiple offices, often in many states, and the growth of international practices. To illustrate, the head of the real estate practice in the Los Angeles firm Paul Hastings recently moved to London after practicing for more than twenty years in Los

155. For general discussion of the experience in adopting uniform rules of attorney conduct for federal courts, see ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, WORKING PAPERS OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE: SPECIAL STUDIES OF FEDERAL RULES GOVERNING ATTORNEY CONDUCT (Sept. 1997), *available at* http://www.uscourts.gov/rules/WorkingPapers-AttorneyConduct.pdf. Some commentators strongly urged adoption of such rules. *See, e.g.*, Linda S. Mullenix, *Multiforum Federal Practice: Ethics and* Erie, 9 GEO. J. LEGAL ETHICS 89, 126–27 (1995) (discussing the difficulty that attorneys confront in ascertaining the appropriate standards of professional conduct); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 379–80 (1994) (discussing the growing need for federal codification of professional standards due to the increasing nationalization of legal practice). *But see* Note, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063 (1998) (arguing against adoption of proposed uniform rules). Professor Kaufman has concluded that localism should triumph over national rules, so that federal courts should adhere to the professional responsibility rules of the states in which they sit ("vertical" uniformity) rather than ensuring that all lawyers in federal court nationwide operate under the same set of rules ("horizontal" uniformity). Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 160 (2000). Kaufman explains:

> For me, the long-term solution begins with my instinct, which has no empirically proven basis, that there are many more private lawyers who practice in both the federal and state systems in their states than who practice in the federal system in many different states. If that is the case, then it seems that the better solution to the local federal rule problem begins with vertical uniformity between the federal and state courts in a given jurisdiction . . . .

Id.

156. One explanation for the refusal of California and Florida to afford reciprocity to experienced lawyers from other jurisdictions is that they are popular destinations, particularly for retirement. *See, e.g.*, Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 397 (1996); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1219 (1995). But it is worth noting that less "popular" states deny reciprocity. *See* NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2008, at 28, *available at* http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide.pdf (last visited Feb. 16, 2009).

157. At least sometimes lawyers take up arms against it. For example, Steve Levine "promised to do all [he] could to support the interstate practice of law" when he ran for president of the Wisconsin State Bar. *See* Steve Levine, *One Nation, Indivisible*, WIS. LAW., Mar. 2007, at 2, 2 (explaining opposition to pending proposals because they would "place an outmoded 20th century regulatory framework on interstate practice for decades to come").

Angeles, where he grew up, to join the Paul Hastings office in London.[158] The reason? "There's the weakness of the dollar" and clients want to diversify outside this country.[159] London may be a rather pedestrian destination. A recent article in the *ABA Journal* described the considerable rise in the number of U.S. firms opening offices in Dubai.[160]

These developments hardly fit the old-style model of lawyer regulation. Individual lawyers *need* to operate in more than one state, and perhaps more than one country. Thus, in *Michael Clayton*, the George Clooney figure must travel from New York to Wisconsin to deal with the behavior of the firm's lead litigator during a deposition there. Law firms increasingly provide services across multiple venues using lawyers from multiple places to provide those services. Although the ABA in 2002 revised its Model Rules of Attorney Conduct to expand opportunities for "temporarily" practicing law in other jurisdictions,[161] the actual regimes of even the states that follow those Model Rules diverge from one another.

In 2006, Bob Stein, Executive Director of the ABA, predicted that "there will be extraordinary change in the relatively near future in the way our profession is regulated."[162] As he noted, lawyers engage in representational activities in multiple jurisdictions with sufficient frequency that an ABA Commission in 2002 recommended a more liberal policy.[163] Meanwhile, the World Trade Organization was investigating the extent to which the current American methods of licensing lawyers interfere with fair trade.[164]

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158. *See* Niraj Chokshi, *Paul, Hastings Lawyer Moves to London*, S.F. RECORDER, Mar. 27, 2008, at 8.

159. *Id.*

160. *See* Jill Schachner Chanen, *Going for Gold in the Gulf*, A.B.A. J., Feb. 2008, at 18 (reporting that at least eleven U.S. firms have recently opened offices in Dubai).

161. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2008) (allowing an attorney to provide legal services out-of-state so long as the services are "reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice").

162. Stein, *supra* note 146, at 6.

163. *See id.* (citing COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, REPORT 201B: ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE REPORT TO THE HOUSE OF DELEGATES 2–4 (Aug. 2002), *available at* http://www.abanet.org//cpr/mjp/201b.doc).

164. *See id.* & n.27. It appears that the collapse of the Doha Round has blunted formal action in regard to American restrictions on providing legal services. *See generally* Laurel S. Terry, *Current Developments Regarding the GATS and Legal Services: The Suspension of the Doha Round, "Disciplines" Developments, and Other Issues*, B. EXAMINER, Feb. 2007, at 27. The ABA has adopted a resolution supporting the development of practice admission rules that "do not unreasonably impinge on the regulatory authority of the states' highest courts of appellate jurisdiction over the legal profession in the United States." *Id.* at 28. *See also* ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, RECOMMENDATION 105, at 6 (Aug. 7–8, 2006), *available at* http://www.abanet.org/cpr/regulation/home.html.

Surely the emergence of the Electronic Lawyer is not the sole cause of the current stresses on the traditional state-by-state regulatory apparatus. But equally surely electronic communications make that apparatus obviously inadequate for the demands of the twenty-first century, for it is now possible for a lawyer to engage in active practice in a distant state without leaving her home state. A recent personal jurisdiction ruling by the New York Court of Appeals is illustrative.[165] Plaintiff, a New York lawyer, was contacted by mail, email, and telephone by defendants, who operated a business in California and wanted to sue an Oregon company on a business-related claim.[166] He filed suit for them in federal court in Oregon, and later had a falling-out with his clients that led to his resignation from the case.[167] The Oregon court ruled that it did not have jurisdiction to award him a fee, although it did hold that the emails between the attorney and the clients established the attorney's right to a fair legal fee for his work.[168] He then sued the California clients for payment in New York.[169] The New York court upheld personal jurisdiction.[170]

The relevance of this case is that the New York lawyer did all his work on the case from New York.[171] His only contact with his clients was by telephone, email, and fax.[172] By telephone, he defended depositions, appeared at court conferences, and argued a motion for summary judgment.[173] True (and necessarily under our current system), he was admitted *pro hac vice* for the case by the Oregon court.[174] But the reality of this Electronic Lawyer's activities from New York underscores the difficulty of justifying the current regime in a day of instantaneous electronic communications.[175]

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165. Fischbarg v. Doucet, 880 N.E.2d 22 (N.Y. 2007).

166. *Id.* at 24–25.

167. *Id.* at 25.

168. *Id.*

169. *Id.* at 24.

170. *Id.*

171. *Fischbarg*, 880 N.E.2d at 24.

172. *Id.* at 24–25.

173. *Id.* at 24.

174. *Id.*

175. For other illustrations of this phenomenon, see Medical Assurance Co. of Miss. v. Jackson, 864 F. Supp. 576, 579 (S.D. Miss. 1994) (involving a suit alleging breach of settlement agreement against attorney who negotiated and concluded the settlement from another state); Bond v. Messerman, 895 A.2d 990, 993 (Md. 2006) (involving a malpractice suit against attorney who provided legal advice from another state regarding expungement of a criminal record); Summit Lodging, LLC v. Jones, Spitz, Moorhead, Baird & Albergotti, P.A., 627 S.E.2d 259, 261–62 (N.C. Ct. App. 2006) (involving a malpractice suit against lawyers who drafted operating agreement, filed articles of organization, and conducted negotiations for purchase of property from another state).

VII. ADDITIONAL ISSUES

The foregoing attempts to identify some issues that the emergence of the Electronic Lawyer has raised and will likely continue to raise. This Part identifies some additional issues that seem worthy of mention.

A. The Attorney-Client Privilege

There has never been a certain empirical basis for the attorney-client privilege,[176] but it is a hallmark of Anglo-American jurisprudence. Because it curtails access to what might well be highly important evidence, the privilege has also come under pressure. Wigmore, for instance, urged that it be restricted to its narrowest confines.[177] And doctrines of waiver have long been employed as one way to get around privilege.[178]

As the twenty-first century began, new pressures came to bear on the protection of the privilege. Most prominently, the U.S. Department of Justice (DOJ) policy known as the "Thompson Memo," issued in 2003, has assertedly placed huge pressure on corporations to waive their privileges when under investigation in order to qualify as cooperating with the investigation.[179] The DOJ position assertedly led to a "culture of waiver" that excited strong opposition[180] and

176. *See* David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956) (noting that there is no empirical evidence that the existence of the privilege actually promotes disclosure by clients).

177. According to Wigmore, "the privilege remains an exception to the general duty to disclose. . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §2291, at 554 (McNaughton ed. 1961).

178. *See* Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1605–06 (1986) (discussing grounds for finding that privilege has been waived).

179. *See* Lawrence Hurley, *DOJ Considers Changes to Waiver Policy*, S.F. DAILY J., July 2, 2008, at 1.

180. *See* Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 133, 136–48 (2007). For an argument that increased activism by the DOJ is desirable, see Frank O. Bowman III, *Filling the Vacuum*, AM. LAW., Aug. 2008, at 138. Bowman explains:

> Business is right in thinking that the Justice Department now has a greater presence in the corporate arena than ever before. Federal white-collar prosecutions increased throughout the 1990s, and despite some recent relaxation of effort, the quantity and significance of federal business crime cases remains historically high. But businesses should recognize this swarm of prosecutors as a pestilence it brought upon itself. In a period of chronic underregulation of business behavior, federal prosecutors stand as perhaps the only remaining authority able to hold corporate outlaws accountable for the misconduct that inevitably follows concentrations of wealth.

Id.

prompted proposed legislation.[181] At least one California court has labelled the DOJ program "coercive" and refused to find that submission of privileged materials to the DOJ waived the privilege in other litigation.[182] Eventually, the DOJ announced plans to change the waiver policy that might forestall a final vote on the legislation.[183] Nonetheless, other similar pressures exist, such as new proposed standards from the Financial Accounting Standards Board, which arguably might require revelation of otherwise privileged information.[184]

Given these manifold contemporary pressures on the privilege, it is hardly surprising to find that the advent of the Electronic Lawyer also puts potential pressure on the privilege. To start with an unnerving issue, it would surely be a challenge to adapt the privilege to an era in which the computer itself became the lawyer.[185] To the extent the privilege is necessary to encourage the client to make frank disclosures to the lawyer, it might be argued that similar insulation is necessary to encourage customers to be candid in making entries on TurboTax type programs designed to provide legal advice. But there could even be questions about whether those are "disclosures" within the meaning of the attorney-client privilege; perhaps they should be likened to diary entries or other such communications people have with themselves. On the other hand, so long as there is a possibility that provision of such programs for computerized self-help could constitute unauthorized practice of law,[186] it would seem consistent somehow to say that the privilege could apply.

Fortunately, we have not yet encountered these issues. But the era of the Electronic Lawyer has already generated new issues, or new versions of old issues. One area that has been significantly affected

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181. *See* Zach Lowe, *Attorney-Client Privilege Legislation Expected to Pass*, S.F. RECORDER, June 25, 2008, at 3 (reporting that proposed legislation passed the House of Representatives on a voice vote and was expected to pass the Senate).

182. *See* Regents of the Univ. of Cal. v. Superior Court, 81 Cal. Rptr. 3d 186, 194 (Cal. Ct. App. 2008).

183. *See* Lawrence Hurley, *DOJ Announces Changes to Privilege Waiver Policy*, S.F. DAILY. J., July 10, 2008, at 1 (describing a letter from Deputy Attorney General Mark Filip to key lawmakers outlining plans for a change in DOJ policy).

184. *See* Sheri Qualters, *Litigation Disclosure Rule Faulted*, NAT'L L.J., June 30, 2008, at 8. As described in the article, the proposed new standards would require that public companies disclose their "best estimate" of their exposure in pending litigation and disclose information about their reserves for such litigation. *Id.* "The qualitative disclosures would most likely be based on confidential communication between companies and their counsel, said Clorox Co. Senior Vice President and Corporate Counsel Laura Stein . . . ." *Id.*

185. *See supra* notes 64–107 (discussing the possibility of direct client service by computer program).

186. *See supra* notes 103–107 and accompanying text (discussing possible unauthorized practice of law issues relating to computerized self-help programs).

has been initial contacts with clients. Until recently, lawyers made contact with clients either over the telephone or by office visits, events that the lawyer could arrange in a way that both ensured an appropriate understanding of whether an attorney-client relationship had been established and provided suitable protections for client (and prospective client) confidences. But as a 2005 Ninth Circuit decision recognized, things have changed:

> What is "new" about the case is attorneys trolling for clients on the internet and obtaining there the kind of detailed information from large numbers of people that used to be provided only when a potential client physically came into the lawyer's office. Two things had to happen to bring this about: the change in law in the 1970s that permitted attorney advertising, and the sufficiently widespread use of the internet, within the past five or ten years, that makes internet advertising worthwhile.[187]

The magnitude of these changes will almost certainly increase, and new privilege issues will arise. To get a feel for the potential, consider that one study reported that some four million people a month used the Internet to search for legal services in 2006 and forecast that the number would reach seven million per month in 2007.[188] The *ABA Journal* reports that "[f]or lawyers, one byproduct of the explosion in electronic communications has been an increase in unsolicited e-mails from people seeking legal services."[189] The article details examples of lawyers who had been retained by one party to a dispute receiving electronic communications from the adverse party providing incriminating information. Should this information be covered by the privilege? Could the adverse party claim to be a "client" when the lawyer already had a client involved in the dispute? The resolution of these issues may depend on the exact content of the lawyers' web pages in making clear that no lawyer-client relationship exists unless some further event occurs, such as formal retention.[190]

Working out that question can prove difficult. In the Ninth Circuit case quoted above, a law firm interested in representing users of the pharmaceutical Paxil posted a questionnaire on the Internet seeking information from "potential class members."[191] Those interested in legal services were to fill out a form, but to do so they had to click a

187. Barton v. U.S. Dist. Court, 410 F.3d 1104, 1109 (9th Cir. 2005).

188. Geri L. Dreiling, *Choosing Up Sides*, A.B.A. J., May 2007, at 28 (reporting results of study by the Pew Internet & American Life Project). The article reports on the issues raised by online "legal match" services that put potential clients in contact with potential attorneys, and particularly the question of referral fees. *Id.*

189. Kathryn A. Thompson, *The Too Much Information Age*, A.B.A. J., July 2007, at 28.

190. *See id.* at 29.

191. *Barton*, 410 F.3d at 1107.

"yes" box acknowledging that the questionnaire "does not constitute a request for legal advice and that I am not forming an attorney client relationship by submitting this information."[192] Eventually, the district court did not certify a class, but four who filled out the forms (as thousands of other people also had) retained the firm to file suit on their behalf.[193] Defendant demanded production of the four clients' answers to the questionnaire as the trial approached, and the district court ordered production, stressing that the form itself said there was no attorney-client relationship.[194]

The court of appeals reversed, finding under California law that this disclaimer did not prevent a prospective client from relying on confidentiality even when there was no existing attorney-client relationship.[195] It recognized that the law firm had to have such a provision to protect itself against possible malpractice liability to all who submitted forms, and emphasized that, although the form said there was no attorney-client relationship, it was consistent with the firm maintaining confidentiality of the answers (although saying explicitly that the answers would be held in confidence would probably be a good idea).[196]

Contrast a district court decision in a suit brought by the ACLU regarding police activities during the 2004 Republican National Convention.[197] The ACLU had an online "intake form" that invited anyone to submit information on his or her interaction with the police, the use of force by the police, and similar matters.[198] In the ACLU's suit, the city demanded production of the online reports.[199] The court ruled that they were not protected by the attorney-client privilege, distinguishing the Ninth Circuit decision on the ground that the form in

192. *Id.* at 1107 n.5. Formal Opinion 07-445 by the ABA explains as follows:

> Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for purpose of the Model Rules prior to certification of the class and the expiration of the opt-out period.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-445 (2007), *reprinted in* ABA, LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 109, 111 (2007).

193. *Barton*, 410 F.3d at 1106 n.1.

194. *Id.* at 1108.

195. *Id.* at 1111.

196. *Id.* at 1111–12.

197. Schiller v. City of New York, 245 F.R.D. 112 (S.D.N.Y. 2007).

198. *Id.* at 113–14.

199. *Id.* at 115.

this case says nothing about providing legal services, and that there was no showing that those who filled out the forms were seeking legal representation.[200]

Once the attorney-client relationship has been formally established, additional issues confront the Electronic Lawyer. Until recently, it was fairly clear how to communicate with the client—in person, by letter, or by telephone. True, cellphones may increase the risk of interception (as Newt Gingrich discovered when his cellphone activities were tape recorded),[201] but so long as one was prudent about such communications one could be relatively confident that the privilege would apply.

Nowadays, a large proportion of the U.S. population relies on email or instant messaging and texting to communicate. The security of these new media is at least uncertain. Attorneys' initial unease about email may have been overstated,[202] but the ease of forwarding and the tendency to send copies to multiple recipients both place pressure on the privilege under the Wigmorian attitude that any disclosure outside the charmed circle destroys the privilege for all and for all time. The advent of E-Discovery poses new challenges to preserving the privilege.

These complications may proliferate because people often use their computers at work for multiple purposes, including communicating with their lawyers. Employers generally have a right to inspect what their employees do using the employer's computer,[203] and they are increasingly prone to do so. Indeed, they may have a duty to engage in such surveillance of employee computer use to guard against workplace harassment and the like. Beyond that, increasingly refined programs exist to enable them to achieve marketing and other goals.[204] What if the employee uses the employer's system (including handheld devices like a BlackBerry) to communicate with her lawyer? In a New York case in which a doctor filed a breach of contract action

200. *See id.* at 116–18.

201. In 1996, while Gingrich was Speaker of the House, two citizens used a police scanner to record a telephone conference call in which Gingrich discussed imminent ethics charges. *See* Adam Clymer, *Gingrich Is Heard Urging Tactics in Ethics Case*, N.Y. TIMES, Jan. 10, 1997, at A1 (describing taped conversation). Two days later the contents of the tape were on the front page of the *New York Times*. *Id.*

202. *See, e.g.*, David Hricik & Amy Falkingham, *Lawyers Still Worry Too Much About Transmitting E-Mail over the Internet*, 10 J. TECH. L. & POL'Y 265 (2005).

203. *See* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3d Cir. 2003) (holding that an employer's sifting through an employee's email did not violate federal privacy protections).

204. *See, e.g.*, William M. Bulkeley, *Email Software Delves Into Employees' Contacts*, WALL ST. J., Apr. 21, 2008, at B9 (describing programs that enable companies "to mine their employees' emails and electronic address books for contact information").

against the hospital at which he worked, the court ruled that the doctor's email communications with his lawyer using the hospital computer system were not covered by the privilege.[205]

The foregoing privilege issues are not qualitatively different from similar issues that have existed before, but their importance is likely to increase in the future as the Electronic Lawyer tries to obtain the same protections that the privilege provided in the past.

B. Coping with the Surveillance Society

A second emerging concern is not so much about the activities of the Electronic Lawyer as it is about the consequences of high-tech information-gathering and the resulting potential for governmental surveillance.[206]

For lawyers, the development of the laptop and other handheld computer devices has opened a world of communication formerly unimaginable. A laptop can store and make available at any location much of what a law office contains, including a variety of extremely sensitive materials. That's why the electronic law office is quite different from earlier operations.[207] But as unfortunate experiences with laptops containing other types of sensitive data have shown,[208] some significant risks accompany these benefits. Given the growing globalization of law practice, lawyers crossing borders face the additional risk that government agents will insist on access to all files on their computers. In the view of two criminal defense lawyers, "attorneys traveling with computers containing legal files are faced with a Hobson's choice. Customs officials and other federal agents may now

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205. Scott v. Beth Israel Med. Ctr., Inc., 847 N.Y.S.2d 436, 443 (N.Y. Sup. Ct. 2007). For a similar example, although perhaps with an important difference, see Jonathan D. Glater, *Open Secrets*, N.Y. TIMES, June 27, 2008, at C1. The article describes a suit brought by the former president of a company against the company, claiming that it improperly accessed his Yahoo email account and read attorney-client communications on that account. *Id.* In the words of plaintiff's attorney, "It's kind of like the other side gets your playbook or they're spying on your locker room." *Id.* The company said that it was able to access the Yahoo account because plaintiff had used one of its computers to access the account and improperly send confidential company information to the account. *Id.*

206. *See generally* Jack M. Balkin, *The Constitution and the National Surveillance State*, 93 MINN. L. REV. 1, 19–21 (2008) (discussing "National Surveillance State" of governmental use of data collection, and the limited effect of Fourth Amendment protections against such activity).

207. *See supra* notes 108–135 and accompanying text.

208. *See, e.g.*, Rick Weiss & Ellen Nakashima, *Stolen NIH Laptop Held Social Security Numbers*, WASH. POST, Apr. 10, 2008, at A5 (reporting on loss of information of about 1200 participants in a National Institutes of Health study); Eric Dash, *Ameriprise Says Stolen Laptop Had Data on 230,000 People*, N.Y. TIMES, Jan. 26, 2006, at C5 (reporting that company laptop with information including social security numbers and internal account numbers had been stolen).

search any computer at the border for any reason, or no reason at all."[209]

But most travel and activity by American lawyers does not presently involve crossing borders, and lawyers are rarely the objects of governmental scrutiny. Their clients may be, however, and they are subject to a growing array of search techniques, including regular seizure and search of suspects' computers. Beyond that, increasingly large sectors of domestic public space are subject to twenty-four-hour surveillance by increasingly sophisticated video devices. As a former Director of the Federal Bureau of Investigation reports, efforts to defeat terrorists have amplified these activities: "The British agency responsible for internal affairs spends nearly three-quarters of its crime prevention budget on the administration, operation, and maintenance of [video] cameras—one for every 14 inhabitants of the United Kingdom . . . ."[210] Global positioning systems, meanwhile, enable law enforcement to monitor the precise movements of a vehicle or other physical item for weeks or months at a time.[211]

Anyone who watches television crime shows will appreciate the impact these technologies have had on twenty-first-century law enforcement activities; it seems from *CSI* and similar shows that crime detection would be impossible without them. But what of the privacy of all the rest of us? The former FBI Director's conclusion was that "pervasive video surveillance threatens fundamental tenets of our democratic society."[212] For lawyers, the question is whether current legal protections are sufficient. Professor Kerr, for example, believes that major changes in Fourth Amendment analysis are necessary to deal properly with the search of computers.[213] Professor Hutchins

209. Nanci Clarence & Craig Bessenger, *They Have Ways of Making Your Laptop Talk*, S.F. RECORDER, June 27, 2008, at 5. This article was prompted by *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008), which rejected Fourth Amendment objections to the search at the Los Angeles airport of the laptop of a passenger from the Philippines that revealed child pornography, leading to a prosecution for possession of child pornography. In that case, the Ninth Circuit held that, because this was a border search there was no need for probable cause to justify it. *Id.* at 1010; *see also* David E. Brodsky et al., *At Border, Laptops Are Open Books*, NAT'L L.J., July 21, 2008, at S1 (reporting that some foreign companies "have instructed executives to keep confidential business information off their traveling laptops" in reaction to the possibility of search at U.S borders).

210. William S. Sessions, *Evil Eye*, AM. LAW., Nov. 2007, at 75. Recently, one MP resigned from the Tory Party in part in protest against the development of what he called "a database society" in England. *See Davis Blows His Top*, ECONOMIST, June 14, 2008, at 71.

211. *See* Renée McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 414–21 (2007).

212. *See* Sessions, *supra* note 210, at 75.

213. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 537 (2005) (asserting that "[t]he widespread use of computers in recent years has led to a new type of

similarly thinks that proper Fourth Amendment treatment of the use of GPS technology will require that use of this technology only be permitted after issuance of a warrant.[214]

In regard to all these technologies, lawyers will have to litigate the protections in court. In criminal cases, the issues may come up on motions to suppress evidence obtained by such technological means. In criminal and civil cases, lawyers will be called upon to litigate the additional protections provided by statutes for the privacy of users of various sorts of electronic communication devices. As a panel of the Ninth Circuit recently put it in holding in a civil case that a city violated the Fourth Amendment by reading the erotic text messages one of its policemen sent his wife on his city-provided pager:

> The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored.[215]

Somewhat similar issues may increasingly be involved in a whole range of civil cases when parties seek E-Discovery, "the hottest issue by far" in legal tech circles.[216] Initially, the heat generated by E-discovery was from corporations and other large organizations concerned about the burdens of producing huge amounts of electronically stored information.[217] That is why the pressures of E-Discovery are contributing to the creation of a new niche of lawyers in some law firms.[218] For some time, many seemed to have thought that E-Discovery was a problem only for such large organizations. But the perva-

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search"); Orin Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 293 (2005) (asserting that administrators of ISPs can access "a user's entire online world"). For further discussion of whether there has been a revolution in criminal procedure as a result, see generally Marcus, *supra* note 10. *See also* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008) (discussing the Fourth Amendment ramifications of the multiple applications of iPhones if they can be searched incident to a search).

214. *See* Hutchins, *supra* note 211, at 464–65.

215. Quon v. Arch Wireless Operating Co., 529 F.3d 892, 904 (9th Cir. 2008). The city did not possess the contents of the messages and had to get them from a company that provided the messaging service. *Id.* at 898. The court also held that the company had violated the Stored Communications Act in turning the messages over to the city. *Id.* at 903.

216. Jake Widman, *Discovering a New Practice*, CAL. LAW., July 2008, at 26.

217. This was the pervasive thrust of the hearings and consultations that led to amendments to the Federal Rules of Civil Procedure to adapt them to E-Discovery that went into effect on December 1, 2006. I served as Special Reporter to the Advisory Committee on Civil Rules in connection with the drafting of those rule amendments. The sentence in text summarizes that experience, including the public commentary and hearings phase of the amendment activity. In this piece, I am speaking only for myself and not for the Advisory Committee or anyone else.

218. *See supra* notes 113–118 and accompanying text.

siveness of electronic communications has led to similar concerns on both sides of the aisle, underscoring the consequences for lawyers of the surveillance society. For example, a recent article in *Trial* magazine counsels plaintiffs' lawyers as follows:

> To effectively represent a client now, you need to be well aware of the types of evidence that he or she—or family members, friends, and so on—has posted on the Internet. More and more, defendants request production of the client's personal computer, giving rise to legal issues such as relevance, the client's privacy, and third-party privacy.[219]

The sorts of concerns lawyers must have about their own computers when crossing borders[220] will increasingly apply to discovery in much civil litigation; like the police, civil litigants may obtain access to much previously confidential information.

C. *The Electronic Law School*

What of the electronic law school? Law schools might change a great deal due to the advent of universal electronic communications. "Distance learning" is now possible in ways not formerly true. Should it be tried for legal education? Law schools could embrace this trend and substitute online instruction for the traditional in-class variety. There is at least one law school—the Concord Law School—that provides an entirely online experience.[221] To date, the ABA has stood firm against this sort of innovation.[222] Concord Law School is therefore not ABA-accredited, and the only state in which its graduates can take the bar examination is California, which does not require attendance at an ABA-accredited law school.[223] Although the days of

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219. Karen Barth Menzies, *Perils and Possibilities of Online Social Networks*, TRIAL, July 2008, at 58, 60.

220. *See supra* note 209 and accompanying text.

221. For Concord Law School's online self-description, see http://www.concordlawschool.edu (last visited Feb. 16, 2009). *See generally* DAVID I.C. THOMSON, LAW SCHOOL 2.0 (2009) (describing ways in which law school could be revised to exploit the capabilities of computers and the Internet).

222. *See, e.g.*, ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 306(d) (providing that, although a law school may grant credit toward a J.D. degree for study offered through distance learning, it may not do so for more than a total of twelve credit hours). For an argument that law schools will need to add distance education, see Diana L. Gleason, *Distance Education in Law School: The Train Has Left the Station*, 2006 BERKELEY ELECTRONIC PRESS LEGAL SERIES No. 1762, *available at* http://law.bepress.com/expresso/eps/1762.

223. On occasion, Concord Law School graduates have received waivers that permitted them to take bar examinations alongside graduates of traditional law schools. *See* Kristina Horton Flaherty, *Court Win for Online Law School Grad*, CAL. ST. B.J., Jan. 2009, at 6 (reporting ruling permitting Concord Law School graduate to take Massachusetts bar exam).

Kinsgsfield are gone (if ever they existed),[224] law schools continue to adhere to in-class instruction, sometimes "socratic."

The electronic law student therefore attends a class in much the same way as her predecessors, but her experience has been altered by the advent of electronic communications. Almost all law students use laptop computers, in class and out. All or almost all faculty applaud the change from having to read handwritten exams to being able to read laptop-generated typewritten ones. In-class use of laptops has not had such a warm reception, however. The question whether to ban laptops from the classroom has generated considerable controversy, which illuminates the ways in which laptops could alter the in-class experience.[225] Those who have banned laptops or considered doing so emphasize various effects. Laptops are a distraction in a way that is not true of notebooks for handwriting; students can do almost anything—check email, send instant messages, watch movies, view pornography, play games—rather than pay attention to what's going on in class, and they do.[226] These activities can have an impact on other students in the class. At a minimum, they likely mean that the student engaged in them is not ready to respond to questions about the class discussion.[227] Beyond that, laptops can distract other students in the classroom.[228] Altogether, they can harm class discussion.[229]

Laptop computers also permit students to take down everything, a "stenographic" approach to class that is inconsistent with the sort of analytical activity classroom discussion is designed to stimulate.[230] Other faculty counter that the real problem is boring classes; they say that the solution is to liven up classes, partly with technological whiz-bang adjuncts to the instructional enterprise.[231] This debate is ongoing, but it underscores the potential effect of technology on the law school experience. Obviously, those who favor distance learning via computer are likely to place less stress on traditional in-class instructional practices than most. But for the present, it seems that the impulse is to adapt that technique; Langdell's method has not been killed by laptops.

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224. *See supra* note 70 and accompanying text.

225. *See* Kevin Yamamoto, *Banning Laptops in the Classroom: Is it Worth the Hassles?*, 57 J. LEGAL EDUC. 477 (2007) (citing multiple sources).

226. *See id.* at 487–89.

227. *Id.* at 487.

228. *Id.* at 487–89.

229. *Id.* at 489–90.

230. *See id.* at 490–91.

231. Yamamoto, *supra* note 225, at 481.

The out-of-class character of legal education may change. Whether to instruct students on legal research in libraries rather than solely online can be debated.[232] The law school casebook "is probably on its way to extinction," according to one advocate of electronic casebooks.[233] But that seems not to have happened yet; even if we have arrived at the paperless law office, we have not arrived at the paperless law school. The debate over whether to ban laptops from the classroom underscores this point. One of the proposed reasons for doing so is to permit students more space to have casebooks open before them.[234] Surely banning laptops from the classroom is not consistent with relying on electronic casebooks, unless there is some other way for students to use electronic casebooks.

So for the near future, it seems likely that the profession will find that newly minted lawyers have emerged from a law school experience relatively similar to the experience of past generations. Their experience beyond law school may vary more significantly. Concern in the profession about the limited writing skills of many new lawyers will probably deepen as a generation steeped in instant messaging and its indifference to conventional grammar arrives at the office. The short attention spans of this newest generation may present challenges also. But as jurors are increasingly drawn from the ranks of this newer generation, its lawyers may be singularly effective in tailoring their messages to suit the new-style juror.

Perhaps the greatest change to legal education wrought by electronic communications has been for faculty, not students. They can now exchange ideas and drafts with colleagues across the country and across the world. Collaboration has become easier. Some types of data analysis—important in a day of multidisciplinary work—are considerably easier. And, perhaps most importantly, now there is blogging. It is said that about ten percent of all adult Americans have

232. *See, e.g.*, Sarah Hooke Lee, *Survey on Access and Teaching of Alternative Legal Research Using Internet Portals and Gateways*, *in* 12 BRIEFS IN LAW LIBRARIANSHIP SERIES 3–4 (Roberta Studwell ed., 2006) (describing the evolving methods of teaching legal research); Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 2005 BERKELEY ELECTRONIC PRESS LEGAL SERIES No. 701, at 8, http://law.bepress.com/expresso/eps/701 (discussing the "cultural conflict" between those who favor a "books first" approach and those who favor beginning with online research); Thomas Keefe, *Teaching Legal Research from the Inside Out*, 97 LAW LIBR. J. 117 (2005) (urging emphasis on online sources for teaching legal research).

233. Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10 (2007).

234. *See* Yamamoto, *supra* note 225, at 492 ("[T]here is no space for a laptop, casebook, and Codebook on their desks.").

blogs.[235] Certainly a significant proportion of American law professors blog on a regular basis. Consider Professor Volokh, one of the most successful American legal scholars of his generation. He also has a blog, which regularly receives 20,000 hits a day.[236] The success of his blog has caused him to ask "just how much should we value our 'traditional scholarship.'"[237] Others have considered similar issues.[238] Nonetheless, for the practicing lawyer legal scholarship has long since become relatively unimportant, and this shift in faculty behavior is unlikely to loom large.

In sum, although greater changes may occur, it does not appear that traditional legal education is poised for a metamorphosis into electronic legal education in a way that will present significant challenges to the profession.

VIII. QUESTIONS ABOUT CAUSATION AND NOSTALGIA

Law practice has changed greatly in the last fifty years, since the "golden age" identified by some.[239] These changes have presented challenges for the profession, and the advent of the Electronic Lawyer may add new challenges. But there seems too much temptation to treat the past as golden without looking sufficiently carefully at it, and too much temptation to treat such developments as the advent of pervasive electronic communications as causal factors when they should more properly be viewed, at best, as facilitators for changes whose underlying cause lies elsewhere. As *The Economist* observed in a recent study of governmental bureaucracy, "processing power and good software can make government more user-friendly and sometimes also more efficient, but technology on its own cannot compensate for the mistakes of bureaucrats and politicians."[240] I pause here, there-

235. *See* Kara Jessela, *Blogging's Glass Ceiling*, N.Y. TIMES, July 27, 2008, at ST 2 (reporting that fourteen percent of American men and eleven percent of American women have blogs).

236. *See* Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089, 1089 (2006).

237. *Id.*

238. For further discussion, see the symposium issue *Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025–1261 (2006) (containing numerous articles discussing blogging and legal scholarship). Of particular interest are Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071 (2006); James Lindgren, *Is Blogging Scholarship? What Do You Want to Know?*, 84 WASH. U. L. REV. 1105 (2006); Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH U. L. REV. 1127 (2006); Randy E. Barnett, *Caveat Blogger: Blogging and the Flight from Scholarship*, 84 WASH. U. L. REV. 1145 (2006).

239. *See, e.g.*, GALANTER & PALAY, *supra* note 7, at 20–36 (describing 1950s and 1960s as the "golden age" of private law practice).

240. *The Electronic Bureaucrat, A Special Report on Technology and Government*, ECONOMIST TECH & GOV'T REP., Feb. 16, 2008, at 4.

fore, to caution that if the "fixer" portrayed in *Michael Clayton* is indeed the future of the Electronic Lawyer, it may not be because of the electronic aspects of the lawyer's practice.

The sociologist C. Wright Mills saw larger forces at work more than fifty years ago when he reflected on the mid-century fate of professions in America:

> In no sphere of twentieth-century society has the shift from the old to the new middle-class condition been so apparent, and its ramification so wide and deep, as in the professions. Most professionals are now salaried employees; much professional work has become divided and standardized and fitted into the new hierarchical organizations of educated skill and service; intensive and narrow specialization has replaced self-cultivation and wide knowledge; assistants and sub-professionals perform routine, although often intricate, tasks, while successful professional men become more and more the managerial type.[241]

Mills's description captures many aspects of the modern law firm that trouble thoughtful legal professionals. Law firms now feature salaried lawyers in place of true partners; standardized, specialized work in place of the generalist orientation of old; and hierarchy with numerous layers of lawyers ranging from equity partners to other "partners" to associates to staff attorneys to contract attorneys, all sometimes governed by a nonlawyer firm manager. Writing in the 1950s, Mills was struck that the professions of law and medicine "remain free" and that they "have in a curious new way become a new seat of private-enterprise practice."[242] It seems that developments since the 1950s—the growth of the commercial law firm for lawyers and the growth of managed care for doctors—have eroded their prior exceptional status. For many—particularly Dean Kronman[243]—these developments have also undercut critical features of what they do as professionals.

Whether the lawyer-statesmen Dean Kronman reveres predominated in a prior era is at least uncertain, however. In 1905, Louis Brandeis asserted that "able lawyers have, to a great extent, allowed themselves to become adjuncts of great corporations."[244] Two years later, John Dos Passos, Sr. (father of the great novelist) wrote that in his modern world "[l]awyers are made up to be mere instruments for their clients, without any attention being paid to their

241. MILLS, *supra* note 19, at 112; *see also* DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN PRACTICE 5 (1983) (asserting that "there has been a virulent ideological attack on the professions, mostly from the Left").

242. MILLS, *supra* note 19, at 112–13.

243. *See* KRONMAN, *supra* note 4.

244. Louis Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559–61 (1905), *quoted in* HEINZ ET AL., *supra* note 140, at 180.

duties to the State."[245] He asserted that the legal profession reached its zenith just before the Civil War,[246] although he also traced the emergence of unprofessional tendencies to 1275, when lawyers began representing individual clients.[247] He also lambasted the Langdellian case method.[248]

Connecting this welter of century-old views to the issues embroiling the profession today is not easy. As early as 1939, a writer lambasted the "law factories," using a term he said was "widely used in the legal profession."[249] Compared to the law firms of today, of course, pre-World War II law firms look like intimate and congenial places. And Dos Passos's high-toned rhetoric might be measured against some of his actions. Thus, Howe & Hummell, the "Cadwalader, Wickersham & Taft of low practice" of the era,[250] frequently turned cases over to Dos Passos "when it was felt that the name of the shyster firm would be a liability."[251] Moreover, Howe & Hummell itself was regarded as a "law factory" in the late nineteenth century.[252]

Whatever golden age one invokes—whether before the Civil War or after World War II—was also an age of pervasive ethnic and racial discrimination.[253] Even Dean Kronman acknowledges that large law

245. JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE CAN BE 50–51 (1907). "The modern idea of a great lawyer is one who can most successfully *manipulate* the law and the facts." *Id.* at 130–31.

246. *Id.* at 31.

247. *Id.* at 9–11.

248. As Dos Passos explains:

> Modern methods of legal education are akin to the age. Lawyers are machine made. . . . The aim of law schools and colleges is to manufacture the lawyers quickly. Hardly any of the instructors or professors have any practical knowledge of the profession. They are theorists and students. They have no clinical experience.

Id. at 55.

249. *See* Ferdinand Lundberg, *The Law Factories: Brains of the Status Quo*, HARPER'S MAG., July 1939, at 180, 180. Lundberg posited that "[m]any lawyers have quit the law factories to escape monotony" due to "[t]he robotization to which the members of large law-office staffs lend themselves." *Id.* at 182.

250. RICHARD H. ROVERE, HOWE AND HUMMELL: THEIR TRUE AND SCANDALOUS STORY 123 (1985) (1947). Rovere reports that Howe & Hummell "had bribed judges, suborned perjury, and engaged in every other malpractice." *Id.* at 73.

251. *Id.* at 49.

252. Rovere recounts:

> "Talk about your law factories," one local attorney, a man who started his career as an office boy with Howe & Hummell fifty years ago, recalled the other day, "that was the only one I ever heard of that had a night shift. The doors were open around the clock. You could get a lawyer from Howe & Hummell at four in the morning if you wanted to."

Id. at 125–26.

253. *See, e.g.*, Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803 (2008) (describing the discrimination against Jewish lawyers at leading firms in the period after World War II).

firms have improved in that sort of egalitarian terms.[254] Whether law firms today are entirely at the beck and call of their clients is not entirely clear. Thus, Professor Heinz and his colleagues, writing in 2005, note that "[t]he superior social position of business lawyers may permit them to exercise considerable professional autonomy even though their clients typically have bargaining power."[255] In *Michael Clayton*, the head of the litigation department decides to violate his code of loyalty to the client and publicize harmful documents about what the client did. Without going that far, others may influence what clients do.

But this seemingly eternal tension about independence and loyalty to clients is ultimately somewhat beside the current point. The real question is whether the circumstances of the Electronic Lawyer are singular because she is the *electronic* lawyer. That seems difficult to establish. As Professors Galanter and Henderson have recently emphasized, technological changes have pervasively affected the practice of law.[256] To take just one illustration, E-Discovery has changed the way many firms operate. Some treat it as a practice area.[257] More have responded by creating a new "professional" position within the firm for staff attorneys dedicated to E-Discovery matters, or instead have turned to temporary attorney employees to handle the document review work that is required for E-Discovery.[258] These professionals operate in a world very much like the one described by Mills,[259] in dead-end positions designed to free up regular associates from performing these tasks.[260] They may work in "some grim environments," and most firms don't allow temps to make phone calls, use the In-

254. *See* KRONMAN, *supra* note 4, at 291–92.

255. HEINZ ET AL., *supra* note 140, at 115.

256. *See supra* note 134 and accompanying text.

257. *See, e.g.*, Widman, *supra* note 216, at 26 (reporting that some firms have established formal E-discovery practice groups); Janet H. Kwuon & Karen Wan, *High Stakes for Missteps in EDD*, N.J. L.J., Dec. 31, 2007, at E2 (observing that "it is unclear to what extent e-discovery can be considered a specialized substantive expertise in the same vein as, for example, patent law, or whether it is more akin to a learnable skill such as taking depositions").

258. *See* Julie Triedman, *Temporary Solution*, AM. LAW., Sept. 2006, at 97 (describing the use of temporary lawyers to handle E-Discovery issues); Kellie Schmidt, *McDermott Plans to Fill Cheap Seats*, S.F. RECORDER, Nov. 1, 2007, at A1 (describing plan by Chicago firm McDermott, Will & Emery to create a "new tier of attorneys"—permanent contract associates—to handle E-Discovery).

259. *See supra* note 241 and accompanying text.

260. Thus, an attorney at the Washington D.C. firm Howrey explained: "Associates understand that if [they] come to Howrey, the grunge work typically offered to junior associates is going to go to several layers of folks devoted to that work. That's a major selling point." Triedman, *supra* note 258, at 101.

ternet, or use email on the job.[261] For temporary E-Discovery attorneys, this is hardly a golden age.[262]

But the more general notion that pervasive changes in the legal profession resulted from technological advances is harder to accept.[263] As we've already seen, some of these changes began over a century ago,[264] and although many relate in a general way to the phenomenon of "globalization," they hardly seem to be fueled primarily by the advent of the Electronic Lawyer.

More generally yet, the whole notion that technology drives social change is at least debatable. Seventy-five years ago, Lewis Mumford set out to explore the connection between social change and the development of what he called "the machine," by which he meant the aggregate set of mechanized products on which twentieth-century society depended.[265] His thesis was that something more than technological innovation was necessary to supply the germ of social change: "Before the new industrial processes could take hold on a grand scale, a reorientation of wishes, habits, ideas, goals was necessary."[266] The need for this transformation of attitudes, he said, emerged only in Western Europe:

> Other civilizations reached a high degree of technical proficiency without, apparently, being profoundly influenced by the methods and aims of techniques. All the critical instruments of modern technology—the clock, the printing press, the water-mill, the magnetic compass, the loom, the lathe, gunpowder, paper, to say nothing of mathematics and chemistry and mechanics—existed in other cultures. The Chinese, the Arabs, the Greeks, long before the Northern European, had taken most of the first steps toward the machine . . . . They had machines; but they did not develop "the machine." It remained for the peoples of Western Europe to carry the physical sciences and the exact arts to a point no other culture had reached, and to adapt the whole mode of life to the pace and capabilities of the machine.[267]

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261. *Id.* at 100.

262. An anonymous piece in the *ABA Journal* illustrates. The author, a former law firm associate who was laid off, found work as a contract attorney doing "mind-numbing" work reviewing electronic materials for production in discovery. Anonymous, *Down in the Data Mines: A Tale of Woe from the Basement of Legal Practice*, A.B.A. J., Dec. 2008, at 32. The author adds that "[i]n social situations I avoid telling people what I do—I am somewhat embarrassed," for "[i]f I tell them that I am a contract attorney, it is to admit that—despite being highly educated—I spend my days reading someone else's emails." *Id.*

263. *See* Marcus, *supra* note 10.

264. *See supra* notes 244–245 and accompanying text.

265. LEWIS MUMFORD, TECHNICS AND CIVILIZATION 9–59 (1934).

266. *Id.* at 3.

267. *Id.* at 4.

More recent work has carried forward this analysis,[268] although there are surely dissenting voices.[269] For our purposes, it suffices to recognize that one must be cautious in attributing change in social institutions—such as the practice of law—to technological change. The modern megafirm may be dependent on technology,[270] but it is a product of much more.

IX. CONCLUSION

The pervasive power of electronic communication is breathtaking. In Egypt, for example, authorities focus their pursuit of political dissidents mainly on their blogging activities.[271] In London, authorities clamp down on partying on the Tube that is Internet-dependent.[272]

As promised, this discussion has been impressionistic, speculative, and general. I began with a vision of the legal profession resembling the world of *Michael Clayton* more and more, and sought to determine whether the central role of electronic communications in the movie portended such a development for lawyers who themselves rely heavily on electronic devices. Perhaps the electronic element of lawyering might even be responsible for the malaise portrayed by Dean Kronman.[273]

I conclude with a much more nuanced view. Perhaps electronic diagnostic methods, communications, and treatment portend a revolution in the medical profession,[274] but that does not seem imminent in

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268. *See, e.g.*, FRIEDEL, *supra* note 18, at 2 ("The story of modern technology is largely a Western one, at least to the extent that we focus on the creation of the technologies and the technological order that is now dominant throughout the world at large."); Jill Lepore, *Our Own Devices: Does Technology Drive History?*, NEW YORKER, May 12, 2008, at 118.

269. For an examination of divergent attitudes toward the Western concept of "progress," see PROGRESS: FACT OR ILLUSION?, *supra* note 63. See particularly Ali A. Mazrui, *"Progress": Illegitimate Child of Judeo-Christian Universalism and Western Ethnocentrism—A Third World Critique*, *in* PROGRESS: FACT OR ILLUSION?, *supra* note 63, at 153.

270. *See supra* note 134 and accompanying text.

271. *See Price Hike Protesters Freed*, EGYPTIAN MAIL, June 3, 2008, at 1 (describing release of men arrested for allegedly fomenting protests at a textile plant over price hikes; one of them reported that "questioning focused mainly on his blog and his connection to other bloggers").

272. *See* Paul Bracchi & Laura Moss, *Facebook Tube Party that Ended in Drunken Riot Was Organised by City Banker*, LONDON DAILY MAIL, June 3, 2008, *available at* http://www.dailymail.co.uk/news/article-1023417/Facebook-Tube-party-ended-drunken-riot-organised-City-banker.html. One wild party on the London Tube organized by Internet posting led to several arrests. *Id.* Bracchi and Moss see two morals to draw from the story: (1) banning alcohol from the Tube is necessary; and (2) the power of the Internet is undeniable. *Id.* "Could an event billed as no more than a good-natured get-together have been organized—and degenerated so quickly and dramatically into scenes more commonly associated with football terraces—without sites such as Facebook?" *Id.*

273. *See supra* notes 4–6 and accompanying text.

274. *See supra* notes 18–63 and accompanying text.

the legal profession. Computers will not soon supplant lawyers in providing client advice,[275] but the stresses of the electronic law office may be key causes of the advent of a 24/7 life for many lawyers and the resulting burnout and concern with work-life issues.[276] As Professors Galanter and Henderson conclude, "because of the relentless pace of modern large law firm practice, there are few (if any) partners who regard the present as a golden era."[277] A two-tiered profession may be emerging more forcefully, but that problem is not necessarily worsened by high-tech advances.[278] Our balkanized system of lawyer regulation—already under pressure—will come under more pressure due to the advent of "global" law practice enabled by electronic communications.[279] Other elements of lawyers' lives—the protection of the attorney-client privilege, the protection of client confidences more generally in the surveillance society, the traditional jury trial, and the traditional method of educating lawyers—may also feel stresses.[280]

But in the end, continuity seems to outweigh change. The legal golden age of the past seems always, on inspection, to have feet of clay. The current age, for all its difficulties, may have significant advantages over the former periods. More importantly for our purposes, it seems that although electronic means are central to current legal practice, they are only to a limited extent the cause of those aspects of practice that tempt some lawyers to despair. The Electronic Lawyer is not Michael Clayton, and need not necessarily either be a happy or unhappy lawyer.

275. *See supra* notes 64–107 and accompanying text.
276. *See supra* notes 108–135 and accompanying text.
277. Galanter & Henderson, *supra* note 134, at 1871.
278. *See supra* notes 136–148 and accompanying text.
279. *See supra* notes 149–175 and accompanying text.
280. *See supra* notes 176–238 and accompanying text.

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E-DISCOVERY AND BEYOND: TOWARD BRAVE NEW WORLD OR 1984?

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E-DISCOVERY BEYOND THE FEDERAL RULES

Richard L. Marcus†

Keynote Address given at
The University of Baltimore Law Review
Symposium on March 13, 2008

Those who work on the Federal Rules of Civil Procedure (Federal Rules) are sometimes tempted to think that the world revolves around them. With e-discovery, that temptation has been particularly strong because the federal rulemakers began addressing it before most others did, and because the amendments to the Federal Rules have received a great deal of attention. As one who spent about a decade considering those issues,[1] I am peculiarly tempted to this sort of self-absorption.

Now, the federal rulemaking process is over, and it is time to reflect on the other forces that will affect e-discovery in the future, in particular the other sources of rules that may govern this form of discovery. This symposium is an occasion for that sort of evaluation, particularly important here because Maryland has leading examples of two other sources of direction on e-discovery—district court guidance and state court rulemaking—that will be addressed by those experienced with those activities.

I intend to set the scene for that evaluation in four steps. First, I will stress the broad impact of e-discovery. Second, I will indulge in a bit of a travelogue to chronicle and summarize the federal rulemaking experience, because that experience should be a useful touchstone for others considering similar efforts. Third, I will identify three sources of e-discovery regulation or guidance from beyond the Federal Rules. And fourth, I will reflect on the perennial rulemaking question—are rules better? I will then offer some concluding thoughts.

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† Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law. This Essay is based on my remarks as keynote speaker at the *University of Baltimore Law Review*'s Symposium on Advanced Issues in Electronic Discovery on March 13, 2008.

1. Since 1996, I have been the Special Reporter of the Advisory Committee on Civil Rules, working largely on discovery matters. In my speech and this Essay, however, I speak only for myself and not for any organization or other person.

I. THE BROAD IMPACT OF E-DISCOVERY

It is hard to miss e-discovery nowadays. Indeed, the use of evidence from electronically stored information has emerged in the international sphere. Recently, for example, armed forces from Colombia killed a rebel leader just inside Ecuador and captured his laptops, supposedly yielding information about support the rebels were receiving from the government of Venezuela, and Colombia said it might file charges against Venezuelan President Hugo Chavez in the International Criminal Court.[2] That episode is not, of course, what we would usually think of as e-discovery, but it hints at the potential importance of forensic use of electronically stored information.

Focusing more closely on our topic today, we must recognize how riveting it has become in American litigation. As Judge (now Dean) John Carroll has said: "[E]lectronic discovery is the hottest topic in civil litigation. Articles on the issue routinely run in the *Wall Street Journal* and *New York Times*, and there are more seminars . . . on the topic than kudzu in Alabama."[3] Judge Carroll comes from Alabama, so he knows whereof he speaks regarding kudzu.

I cannot identify all impacts of e-discovery today, but believe we should focus particularly on three:

A. Corporate America

As I will mention later, corporate America did not initially seem to appreciate the importance of e-discovery. It is not likely that Microsoft Corporation foresaw the uses to which internal email messages could be put in *U.S. v. Microsoft*, the first occasion when such evidence got a lot of attention. More recently, however, corporate America has awakened to e-discovery in its many guises. Rather than taking Deep Throat's recommendation to "follow the money," the modern investigator may be better advised to "follow the email trail." In short, for most organizations, it is not too far from the truth to say that *everything* is in electronically stored information; it could be viewed as the "corporate equivalent of DNA."[4] And that

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2. *See* Alexei Barrionuevo, *U.S. Studies Rebels' Data for Chávez Link*, N.Y. TIMES, Mar. 14, 2008, at A8.
3. John L. Carroll, *E-Discovery: A Case Study in Rulemaking by State and Federal Courts*, *in* THE RULE(S) OF LAW: ELECTRONIC DISCOVERY AND THE CHALLENGE OF RULEMAKING IN THE STATE COURTS 45, 46 (Pound Civil Justice Inst. ed., 2005) [hereinafter THE CHALLENGE OF RULEMAKING].
4. Nicholas Varchaver, *The Perils of E-mail*, FORTUNE, Feb. 17, 2003, at 96.

"everything" would likely include a lot more loose banter than previously would have been written down.

Corporate America has reacted to this new situation. One reaction is to urge employees to be more circumspect in what they write in email. Some employers reportedly have tried formally to school their employees in how to use email. In the same vein, law schools have begun offering courses in use of email.[5]

Retraining and self-control are probably not by themselves sufficient. Attention has therefore turned also to document retention. This can be serious business. Consider, for example, the recent report that Morgan Stanley agreed to pay "$12.5 million to resolve charges that it failed to produce e-mail in arbitration cases and falsely stated that the messages were lost in the Sept[ember] 11[th] . . . attacks."[6] The September 11th attacks did indeed destroy the firm's servers, but many of the emails had been saved on other servers or on employees' individual computers. So they could still be found.

Given these concerns, it is not surprising that the market has responded. One response is the self-destructing email message. Some of us remember a TV show called *Mission Impossible*, which began each episode with the chief protagonist receiving instructions on his next assignment on a tape that promptly self-destructed. The *Wall Street Journal* reported in mid-2006 that new services are available that permit the sender of an email message to arrange that it will self-destruct after the passage of a pre-set time.[7] It is called Kablooey Mail. A 2007 article in the *National Law Journal* reported that insurers have begun to focus on email in setting premiums for their errors and omissions policies. According to the author—who identifies himself as head of his law firm's "e-discovery practice group"—"businesses seeking liability insurance will face questions from their insurers regarding the robustness of the company's document-retention and e-mail-retention policies and procedures; [and] the existence, or lack, of an electronic discovery readiness plan . . . ."[8]

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5. *See* Eron Ben-Yehuda, *Sending Unwise E-Mails Can Be Hazardous to Your Career*, S.F. DAILY J., Oct. 11, 2004, at 4; *see also* Richard L. Marcus, *E-Discovery & Beyond: Toward* Brave New World *or* 1984*?*, 25 REV. LITIG. 633, 644 (2006).
6. Reuters, *Wall St. Firm Settles Case on Handling of E-Mail*, N.Y. TIMES, Sept. 28, 2007, at C5.
7. *See* Andrew LaVallee, *This Email Will Self-Destruct*, WALL ST. J., Aug. 31, 2006, at D1.
8. Edwin M. Larkin, *Insurers Are Getting in on the Act*, NAT'L L.J., Aug. 20, 2007, at 51.

Besides preparation for e-discovery, companies also use email as a mode of monitoring what their employees do. In 2001, it was reported that about three-quarters of U.S. companies monitored employee use of the Internet and spied on employee email.[9] "Snoop" software has been developed to assist companies in doing this surveillance.[10] Thus, it may be that failure to monitor employee activities could itself expose a company to liability for workplace harassment and similar claims; at least it seems that companies are regularly using electronically stored information to detect it.

In sum, by now, e-discovery has become a very big deal for corporate America.

B. Law Firms

Whatever becomes a big deal for corporate America is likely to become a big deal for many law firms also. E-discovery surely has become a big deal for law firms.

To begin with, a number of law firms have created e-discovery departments. Thus, the author of the article about insurers' attention to e-discovery identifies himself as the head of his firm's e-discovery department. It may be that this is necessary as a matter of self-preservation for firms. According to one vendor, "[w]e have already observed . . . many companies changing counsel because of the lack of expertise of certain law firms regarding electronic discovery."[11]

This self-preservation may go beyond keeping clients; malpractice concerns loom in the background. According to two lawyers writing in the *National Law Journal* in December 2007, "[i]n the context of electronically stored discovery, the skills and legal knowledge that might be deemed an essential part of 'competency' are rapidly changing with technological advances," and as a result it is "highly probable that malpractice claims will largely center on counsel's competency in advising clients as to preservation and production of e-discovery."[12]

E-discovery may further affect the organization of law firms. The Chicago-based firm McDermott, Will & Emery, for example,

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9. Kevin Livingston, *Battle over Big Brother*, S.F. RECORDER, Aug. 30, 2001, at 1.
10. John Schwartz, *Snoop Software Is Generating Privacy Concerns*, N.Y. TIMES, Oct. 10, 2003, at C1.
11. Michael R. Arkfeld, *Growing Pains for the Amended Federal Rules*, *in* AM. LAW (SPECIAL ADVERTISING SECTION; TRIAL TACTICS & TECHNOLOGY; THE NEW HORIZONS OF E-DISCOVERY) (2007) (on file with author).
12. Janet H. Kwuon & Karen Wan, *High Stakes for Missteps in EDD*, N.J. L.J., Dec. 31, 2007.

reportedly plans to create a new tier of attorneys—perhaps to be called permanent contract associates. Part of the explanation is that regular associates have become very expensive, and "electronic discovery has dramatically increased the amount of basic work that usually goes to those high-priced associates."[13] E-discovery, then, may be an important stimulus in creating this new variety of associate. And for all associates, it may transform document review. Formerly occupied by review of hard copies in client quarters, perhaps in remote locations, it may now instead involve days or weeks before computer screens. Whether this is an improvement could be debated.

Law firms may also be more inclined to consider outsourcing because of e-discovery. A January 2008 article in the *San Francisco Recorder* reported, for example, that "[h]igh rates and the increasing bulk of e-discovery have pushed the associate general counsel of San Francisco-based Del Monte Foods to seriously consider using sources outside his outside law firm for the grunt work of litigation."[14] In February 2008, another article reported that the Washington-based law firm Howrey was opening an office in India that "will handle document management in litigation."[15]

Even where they retain their traditional clients' work in-house, law firms may find their role changing. As noted again below, the challenges and stresses of e-discovery seem to be putting an unprecedented premium on outside counsel's familiarity with their clients' information-management arrangements and capabilities.[16]

Thus, at bottom, e-discovery could have a broad effect on law firms, possibly creating new practice groups (or even what one would describe as new practices), presenting a new breed of malpractice claims, rearranging the internal hierarchy of the firm, and leading to outsourcing in various manners. Yet at the same time, it seems that many lawyers are far behind the curve on e-discovery issues. A February 2008 article in the *National Law Journal*, for example,

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13. Kellie Schmitt, *McDermott Plans to Fill Cheap Seats*, S.F. RECORDER, Nov. 1, 2007, at 1.
14. Zusha Elinson, *GCs Embracing Outsourced Work*, S.F. RECORDER, Jan. 24, 2008, at 1; see also Aruna Viswanatha, *Inside Out: Working the Split Shift at an Indian Legal Outsourcing Company*, AM. LAW., Mar. 2008, at 20 (reporting that the estimated number of people working at legal outsourcing firms in India tripled from 1,800 to almost 6,000 lawyers between March 2005, and the end of 2006, and that document review projects done by these firms are typically billed at $15 to $25 per hour).
15. Daphne Eviatar, *Howrey Opens India Office for Document Management*, S.F. RECORDER, Feb. 11, 2008, at 3.
16. *See infra* Part V.

reports that "lawyers specializing in legal technology[ ] report they still encounter large numbers of lawyers who ask: 'What in the world is metadata and why should we be worried?'"[17] The article recounts the debate about whether it is proper for lawyers to search for metadata in files received from other counsel and the divergence in advice from state ethics authorities on this subject. One point worth noting is that this debate underscores the potential malpractice issues mentioned above.

C. The Vendor Phenomenon

Lawyers like to think of themselves as independent actors; they may hire outsiders—such as expert witnesses or consultants—to assist them in doing their professional jobs, but ultimately they are free-standing professionals providing advice and representation to the client.

With e-discovery, the advent of departments devoted to that activity may foster a continuing sense of independence, but the growing importance of e-discovery vendors calls it into question. Almost unknown just a few years ago, e-discovery vendors have become a very big deal. One forecast is that their revenues during 2009—next year—will top $4 billion.[18] For lawyers, deciding whether to hire a vendor, and selecting a vendor, may involve important new professional skills.

Making a poor choice of vendor can certainly cause headaches for lawyers. In January 2008, for example, it was reported that the New York law firm Sullivan & Cromwell had sued an e-discovery vendor in federal court in New York for "untimely and inaccurate" work that allegedly hindered the firm's staffing arrangements and caused it to expend extra resources on discovery. The law firm asked the court to rule that it should not have to pay $710,000 in outstanding billing from the vendor.[19] The vendor promptly filed a countersuit in a Washington state court to compel payment of the bills, and the parties shortly thereafter announced a confidential settlement.[20] Also in January 2008, the Los Angeles law firm O'Melveny & Myers apologized for a discovery "mishap" in which more than 700,000

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17. Marcia Coyle, *"Metadata" Mining Vexes Lawyers, Bars*, NAT'L L.J., Feb. 18, 2008, at 1.
18. *See* GEORGE SOCHA & THOMAS GELBMANN, EDD SHOWCASE: EDD HITS $2 BILLION 1 (2007), http://www.sochaconsulting.com/2007_Socha-Gelbmann_ED_Survey_Public_Report.pdf.
19. *See Sullivan Sues Over E-Discovery Problems*, S.F. RECORDER, Jan. 8, 2008, at 14.
20. *See Law Firm, E-Discovery Vendor Settle Suits*, S.F. RECORDER, Jan. 18, 2008, at 9.

emails were not turned over in discovery, blaming an "outside vendor" in a court filing about the discovery issue.[21] Getting it right in hiring a vendor can be a high-stakes business.

This is not an entirely comfortable position for law firms to be in; as explained in a recent article in the *California Lawyer*:

> E-discovery has brought about a kind of role reversal in the legal profession: Now it's the lawyers who find themselves surrounded by circling sharks. Once an e-discovery vendor identifies an attorney or law firm as a potential client, there's often no end to the sales pitches, product demos, complimentary mouse pads, and follow-up emails from perky PR reps.[22]

Although one may find it a little difficult to worry about the plight of Sullivan & Cromwell and O'Melveny & Myers as they attempt to deal with these "sharks," the notion that even they might fall victim to overconfident vendors is unnerving to the rest of us.

At the same time, there can be uncertainty about whether there is really any need for a vendor at all. A continuing marketing theme from vendors is the riskiness for lawyers of "[t]rying to go it alone."[23] In a sense, that's the same sort of thing lawyers tell potential clients—you need a lawyer to protect yourself and should not try to proceed without one. Now, perhaps, the shoe is on the other foot.

But do lawyers always need to put on that shoe? An October 2007 article in the *California Lawyer* suggests that they need not: "[E]ven some e-discovery consultants caution against the overuse of outside experts. Except in complex cases, 'a paralegal who has been sent to a workshop and trained on a piece of software can probably handle e-iscovery,' contends [an e-discovery vendor who sells such software]."[24] But another article in the same issue seems to point the other way: "Most comprehensive e-discovery setups must be customized for each case, and this is usually a job for the e-discovery installers or third-party consultants."[25]

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21. *See* Dan Levine, *O'Melveny Says It's Sorry for Missing E-Mails*, S.F. RECORDER, Jan. 23, 2008, at 1.
22. Tom McNichol, *The E-Vendors Cometh*, CAL. LAW., Feb. 2008, at 37.
23. *See* Julie Noble, *Dangers in E-Discovery*, LEGAL TIMES, June 3, 2002, at 15 (identifying "trying to go it alone" as the most common mistake in regard to e-discovery).
24. Eamon Kircher-Allen, *Electronic Expertise*, CAL. LAW., Oct. 2007, at 9.
25. Sandra Rosenzweig, *Up to Speed on E-Discovery*, CAL. LAW., Oct. 2007, at 28.

Lawyers contemplating these choices do so under a possible malpractice sword of Damocles. In the words of the already-quoted malpractice fearmongers:

> Whether the use of e-discovery vendors can dispel e-competency obligations remains to be seen. Moreover, it is unclear to what extent e-discovery can be considered a specialized substantive expertise in the same vein as, for example, patent law or whether it is more akin to a learnable skill such as taking depositions . . . .[26]

Frankly, conceiving of e-discovery skills as akin to patent law seems implausible to this observer. Nonetheless, the question whether retaining a vendor will protect the lawyer underscores the potential for risk in the process right now. Failing to retain a vendor presumably means that the lawyer is entirely exposed to charges that one should have been hired. Having a paralegal do the job instead could look problematical if something goes wrong.

In sum, the vendor possibility underscores and complicates the challenges of e-discovery for lawyers.

II. THE FEDERAL RULES EXPERIENCE AND THE AMENDMENTS' ORIENTATION

This is the travelogue portion of our program, for I spent a considerable portion of the last decade addressing the issues raised by e-discovery in service to possible amendments to the Federal Rules of Civil Procedure dealing with them. It is worth recalling that this is only a decade's experience and yet it covers virtually the entirety of the history of e-discovery.

As background, it is important to remember that the phenomenon of broad discovery is itself a relatively recent development in American litigation. As Professor Subrin showed a decade ago, the adoption of broad discovery in the original Federal Rules in the 1930s represented a revolution and created a regime never before seen anywhere.[27] And the initial version of those rules was relaxed further so that, by 1970, the era of broad discovery had reached its zenith. Most states followed the federal lead, either by adopting rules mirroring the federal provisions or expanding discovery under their own rules. But from the perspective of the rest of the world, where

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26. Kwuon & Wan, *supra* note 12, at E2.

27. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

party-controlled discovery was an unknown thing, this produced a different reaction. As Professor Subrin has also written, it might be summed up with three words: "Are We Nuts?"[28]

In the U.S., a reaction began in the 1970s. In part, this reaction was fueled by developments in substantive law. After the 1930s, American substantive law evolved rapidly in ways that magnified the opportunity to seek relief in court. The first private federal securities fraud suit, for example, was in 1947. In the 1950s and 1960s, products liability law relaxed and expanded. Congress and state legislatures adopted many measures that permitted private suits—sometimes for statutory damages—on a variety of grounds. These substantive changes magnified the importance of broad discovery. So did technological developments. The introduction of the photocopier in the 1950s and 1960s meant that there was a great deal more to discover.

However one interprets the cause for the reaction, there is no question that there was a reaction in the U.S. starting a third of a century ago.[29] In terms of rule amendments, the basic orientation was to contain and constrain discovery rather than to abandon the basic commitment to pretrial access to important information. In 1983, this effort produced the proportionality provisions now in Rule 26(b)(2)(C). It also prompted the expansion of judicial management embodied in amendments that year to Rules 16(b) and (c). In addition, it produced the 1983 amendments to Rule 11 and the addition of Rule 26(g). Together, these changes not only required that lawyers sign filings in court and discovery papers, but also provided that they thereby certified the legitimacy of the litigation maneuvers in those papers. In 1993, further amendments fortified this containment effort—the meet-and-confer requirement of Rule 26(f), the discovery moratorium under Rule 26(d) until that conference occurs, and the disclosure requirements of Rule 26(a), which were designed to obviate discovery requests for certain basic information.

Despite these efforts, concern about discovery problems endured. That concern led to the Discovery Project of the Advisory Committee on Civil Rules, inaugurated in 1996. That project was, in a sense, born in Baltimore—it began as Judge Paul Niemeyer of the Fourth Circuit assumed the post of Chair of that Advisory Committee. I was

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28. *See* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

29. This reaction is chronicled in Richard Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

given the opportunity to act as Special Reporter on this project. Although one could head for the law library to try to develop ideas for further discovery reforms, the more important thing to do was to obtain input from the practicing bar about what issues really warranted attention.

So the Advisory Committee convened several conferences of experienced lawyers to solicit ideas and feedback about possible rule amendments. The great majority of what those lawyers said dealt with matters that were expected. Besides specifics about individual possible rule changes, the overarching theme was that lawyers needed "adult supervision" from judges in the discovery arena.

But there was one big new thing that emerged from those conferences—e-discovery.[30] From the outset of this process of interacting with the bar that began in early 1997, the Committee was told that it was fighting the last war. "The real discovery issue is email," many said. When the package of discovery amendments that emerged from the Discovery Project did not include any specifically keyed to e-discovery, the absence of such provisions produced unhappiness in some circles. A prominent Philadelphia lawyer, for example, came to the December 1998 hearing on those proposed amendments here in Baltimore and urged rulemaking to deal with e-discovery issues.

Dealing with e-discovery issues in the rules presented problems, however. These issues were new, and devising appropriate reactions was a major challenge. Some ideas suggested then may seem quite curious from today's perspective. A number of people, for example, said that the right approach would be to declare somehow that email is not discoverable. Given the prominence of email in litigation of many types, one can appreciate how dramatic such a measure would be. Although they spoke vigorously of the problems that e-discovery presented, lawyers had few specific ideas about what to do to solve them. One thing was relatively clear, however—technological change was rapid, and e-discovery was a moving target. Coupled with the unfamiliarity of the terrain, this moving-target problem played a significant role in explaining the absence of e-discovery provisions in the package of amendments that went into effect in 2000.

Once that amendment package was completed, however, attention to e-discovery returned to the fore. In January 2000, the Chair of the

30. For a chronicle of this activity of the Advisory Committee, see Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004).

Advisory Committee and I attended the American Bar Association Section of Litigation leadership meeting and held an open-mic session with lawyers there about e-discovery. In addition, we were buttonholed during the event by lawyers concerned about these issues. Without overstating, it seems fair to say of these leaders of the bar that they probably had many prominent corporations among their clients. Assuming that's correct, the recurrent messages they offered were significant in at least two ways.

First, several said something like, "Amend the rules to make it clear that email and other computer information are subject to discovery." The explanation for this desire? "I can't get my clients to take this discovery seriously." Compare the current impact of e-discovery on corporate America,[31] and one can appreciate that there has been a major shift in reported corporate attitudes.

Second, many said, "Tell us exactly what to do." This sort of request often focused on preservation or form of production issues. The theme was that if the Advisory Committee would prescribe a precise protocol for handling e-discovery—perhaps even endorsing some specific computer program for dealing with it—it would provide the sort of assistance the lawyers were seeking. But a moment's reflection will demonstrate that such a course of action would not work. Computer programs to deal with e-discovery are commercial products, and the Committee could hardly endorse one of them, even if it were technologically knowledgeable enough to make a choice. And these products were continuously changing. Rule changes take years to accomplish, so even if one could make a choice in 2000 there would be no reason to think that it would still be the right choice by the time the rule changes went into effect, much less for years after that.

Throughout 2000, further study of e-discovery ensued. This effort culminated in a mini-conference in October 2000, that considered a package of possible areas for rule changes which corresponds significantly with those ultimately adopted in 2006—amending Rule 26(f) to call for early discussion of e-discovery issues, excusing responding parties from producing inaccessible electronically stored information unless ordered to do so by the court, addressing form of production, dealing with preservation of electronically stored information, considering allocation of costs of e-discovery, and

31. *See supra* Part I.A.

responding to the problems presented by privilege waiver.[32] The reaction of the participants in this mini-conference was that the problems presented by e-discovery were not so acute as to warrant rulemaking right at the time, and that the particular rulemaking ideas that had emerged did not necessarily seem promising. The bottom line: Back off.

The Advisory Committee backed off for a couple more years. In September 2002, it wrote to about 250 carefully-selected lawyers nationwide seeking reactions on whether rulemaking for e-discovery would be a good idea.[33] The letter outlined the Committee's work on the subject so far and possible areas for rulemaking. It asked recipients to respond with their reactions. It also invited them to pass along the request to anyone else they knew who might have views on the subject. The 250 lawyers had been selected because they had been involved in CLE programs about e-discovery or otherwise were connected with these issues.

The response was not overwhelming. Although many responses were very thoughtful and helpful, there were only about a dozen of them. The Committee nonetheless began serious evaluation of e-discovery amendments in 2003, leading to a preliminary draft of proposed amendments published in August 2004. That package included features that eventually went into effect on December 1, 2006—amending Rule 26(f) to call for early discussion of e-discovery, particularly form of production, and of preservation of all sorts of discoverable material, amending Rule 34(b) to address form of production, amending Rule 26(b) to deal with problems of accessibility, amending Rule 37 to limit sanctions for loss of electronically stored information, and amending Rule 26(b)(5) to provide a protocol for handling situations in which assertedly privileged information had been produced.

The publication of the preliminary draft provoked intense interest. More than 250 written comments came in on the draft, and so many people signed up to testify about them that an extra day of hearings in Washington, D.C. had to be added to accommodate them all.[34] After

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32. *See* Memorandum from Rick Marcus, Special Reporter, Advisory Comm. on Civil Rules, to Participants in Oct. 27, 2000 Conference on Computer-Based Discovery at Brooklyn Law School (Oct. 4, 2000) (on file with author).

33. *See* Letter from Richard L. Marcus, Special Consultant, Discovery Subcommittee, to E-Discovery Enthusiasts (Sept., 2002) (on file with author).

34. Transcripts of the hearings and a summary of the comments are on file with the Administrative Office of the United States Courts, http://www.uscourts.gov/rules/index.html.

the comment period, significant refinements were made in several of the rule amendments, and they went forward. The federal rulemaking initiative was finished, at least for this phase.

III. BEYOND THE FEDERAL RULES

Although the Federal Rules may be the most important set of rules, they are not the only ones. Lawyers and litigants need to pay attention to other sources, and those sources could produce markedly different treatments of these issues. For present purposes, it seems valuable to note three sources—state court rules, federal local rules, and international regulations.

A. E-Discovery in the State Courts

Some might think that e-discovery is the exclusive (or at least main) preserve of the federal courts. Those courts have many of the high-value, prominent lawsuits, and are centered in the larger cities. Yet if one reflects for a moment, one will realize that most litigation is in the state courts. And because most Americans by now utilize email and rely on computers for a variety of other activities, e-discovery would seem equally likely in state court litigation. Moreover, even the federal court experience suggests that e-discovery is not solely a big-city phenomenon. The first federal district courts to have local rules focused on e-discovery were in Arkansas and Wyoming, not New York or San Francisco.

The likelihood that state courts would experience e-discovery can be gleaned from popular culture. Consider a recent *New Yorker* cartoon showing a man seated at a desk looking quizzically about the contents of the desk drawer to a standing woman who says to him: "Oh that—that's the hard drive from my first marriage." Such a hard drive could be plumbed through e-discovery in a divorce case. Similarly, consider a recent headline in the *Oakland Tribune*: "Lawyers Dig into FasTrak Data."[35] FasTrak is the computerized method of paying tolls for bridge crossings in the San Francisco Bay Area, and lawyers have found that it offers a dandy way of showing where opposing parties were. Thus, one can prove that the wandering husband was actually in Marin County with his squeeze rather than being (as he claimed to his wife) hard at work at the office in the city.

35. John Simerman, *Lawyers Dig into FasTrak Data*, OAKLAND TRIBUNE, June 5, 2007, at 1.

Actually, Texas got a jump on the federal rulemakers in devising rules designed specifically for e-discovery; in 1996, it adopted a provision to regulate that form of discovery.[36] Justice Nathan Hecht of the Texas Supreme Court, who played a role in the drafting of the Texas provision, was a member of the Advisory Committee on Civil Rules when it considered federal e-discovery provisions. And the report then from Texas was that there were no cases interpreting the Texas provision, perhaps proof of its success.

However one interprets the Texas experience, it seems unavoidable that state courts will encounter e-discovery with growing frequency. Without meaning to be limiting, I suggest that there are many types of cases in which such discovery is likely:

Commercial disputes: Commercial disputes can readily be in state court, either because they do not satisfy federal court jurisdictional requirements or because the parties would prefer state court. Almost all commercial enterprises nowadays rely primarily or entirely on computers to store and generate the information on which they rely in their everyday operations. Just as in federal court, those cases will involve e-discovery.

Marital litigation: As the cartoon and newspaper article mentioned above suggest, marital litigation is likely to involve e-discovery. It seems that this likelihood is becoming reality. Thus, a September 2007 article in the *New York Times* offered the following report about divorce cases: "'In just about every case now, to some extent, there is some electronic evidence,' said Gaetano Ferro, president of the American Academy of Matrimonial Lawyers, who also runs seminars on gathering electronic evidence. 'It has completely changed our field.'"[37] A New York state court divorce case, for example, involved what the court described as a "preemptive strike [by the wife] to clone the computer records" of the husband based on claims that he had in the past diverted marital assets.[38] In another New York state court case, the wife simply took the husband's laptop to obtain access to information on his finances.[39] Similarly, in a Connecticut case, a court ordered a wife's laptop seized.[40]

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36. *See* TEX. R. CIV. P. 196.4.
37. Brad Stone, *Tell-All PCs and Phones Transforming Divorce*, N.Y. TIMES, Sept. 15, 2007, at A1.
38. Etzion v. Etzion, 796 N.Y.S.2d 844 (N.Y. Sup. Ct. 2005).
39. Byrne v. Byrne, 650 N.Y.S.2d 499 (N.Y. Sup. Ct. 1996).
40. *See* Thomas B. Scheffey, *Locking Down a Laptop*, NAT'L L.J., Mar. 29, 2004, at 4.

By definition, divorce litigation is state court litigation.[41] State courts dealing with it will need to deal as well with e-discovery.

Personal injury litigation: Another staple of state court litigation is personal injury litigation. A bit of reflection suggests the possible importance of email and other electronic communications in such suits. For example, suppose the plaintiff, the day after the accident, sent an email message to his mother about his injuries. What would he be likely to say? Often, something like, "Don't worry, Mom. I really wasn't hurt at all." If plaintiff later sues claiming serious injuries, wouldn't the defense want to use this message as evidence?

This sort of situation probably presents serious preservation issues. Will the plaintiff delete the email message to his mother? Will the defendant be able to require the plaintiff to make considerable efforts to retrieve it? For the present, it is not clear whether such issues are being litigated, but the potential seems impossible to overlook.

It is not certain whether that sort of discovery has frequently occurred yet, but there is at least one appellate court case involving a remarkable dispute about access to a plaintiff's home hard drive in a personal injury case.[42] Plaintiff received serious head injuries in a collision with defendant's truck and claimed that the injuries prevented him from continuing to work. Plaintiff submitted expert testimony that he had suffered traumatic brain injury, significantly impairing his work and social capabilities. Witnesses called by plaintiff testified that he had difficulties with memory, planning, and controlling his temper, that he missed meetings, was confused, and could no longer make critical decisions. Defendant obtained production of plaintiff's home computers and was able to show that somebody had accessed unallocated space on the laptop and "scrubbed" it using a "WipeInfo" program. Defendant's expert also found child pornography on the computer.[43]

Defendant argued that plaintiff had "wiped" much of the offending child pornography from the computer, that his ability to do so contradicted his claims that he could not perform difficult tasks, that the presence of child pornography provided an explanation for his social difficulties unrelated to the accident, and that the spoliation of the hard drive of the laptop justified dismissal of plaintiff's case. The trial court refused to dismiss, but did give an adverse inference

41. *See* Ankenbrandt v. Richards, 504 U.S. 689 (1992) (upholding "domestic relations exception" to diversity litigation to exclude from federal court all cases involving divorce, alimony, or child custody disputes).

42. Foust v. McFarland, 698 N.W.2d 24 (Minn. Ct. App. 2005).

43. *Id.* at 27–29.

instruction. The jury nonetheless returned a verdict for more than $11.3 million, and defendant appealed, urging the appellate court that the case should have been dismissed. The appellate court affirmed, finding the likely relevance of the lost evidence small and the adverse inference instruction sufficient.[44]

Certainly one could debate the relevance of the lost evidence in this case, particularly when compared to the high risk of unfair prejudice resulting from knowledge of the child pornography. Indeed, one could question the showing needed to justify such discovery in the first place. But the case emphasizes the potential for discovery from plaintiffs in personal injury cases.

Discrimination litigation: In a variety of contexts, American courts see discrimination claims. Often email communications lie at the heart of such cases.

Theft of trade secrets: Particularly in high-tech enterprises, there are often claims that former employees have stolen trade secrets. When their employers sue former employees, the employers frequently seek discovery of their computers to show that the former employees took the employer's proprietary information with them. There are several state court examples of such discovery disputes.[45]

The state courts outside Texas have certainly not been blind to the prospect of such discovery. To the contrary, both the Conference of Chief Justices and the National Commissioners on Uniform State Laws have drafted and promulgated models for states to follow in adopting rules for e-discovery. There are varying counts on how many states have moved toward adoption.[46] We are told that "[l]awyers accept state electronic discovery rules as inevitable and potentially helpful for clarifying thorny issues."[47] Even my home

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44. *Id.* at 28–29, 34.

45. *See, e.g.*, Autonation, Inc. v. Hatfield, No. 05-02037 2006 WL 60547 (Fla. Cir. Ct. Jan. 4, 2006) (court issuing injunction requiring return to plaintiff of all computer disks with plaintiff's information); Elec. Funds Solutions v. Murphy, 36 Cal. Rptr. 3d 663 (Cal. Ct. App. 2005) (defendants accused of converting plaintiff's assets while working for plaintiff); Hildreth Mfg., L.L.C. v. Semco, Inc., 785 N.E.2d 774 (Ohio Ct. App. 2003) (claimed breach of agreement regarding formation of competitor of plaintiff); Dodge, Warren & Peters Ins. Serv., Inc. v. Riley, 130 Cal. Rptr. 2d 385 (Cal. Ct. App. 2003) (former employee of plaintiff allegedly took electronic trade secret information).

46. Sheri Qualters, *States Launching E-Discovery Rules*, NAT'L L.J., Oct. 8, 2007, at 1. (describing move by many states to adopt e-discovery rules).

47. *Id.*

state of California, after hesitating about doing so, has moved forward on proposed rules and statutes for e-discovery.[48]

So one place to look beyond the Federal Rules is in state court rules. As a generalization, it is comforting to those in the federal rulemaking effort to be able to report that many of these state court rules appear to resemble, and perhaps to emulate, the Federal Rules amendments that went into effect in 2006. To some extent, this experience may show that the federal rulemakers can still be leaders for the state courts.[49] In any event, it does show that those dealing with e-discovery must look beyond the Federal Rules.

B. Federal Local Rules

The national rulemakers have what might be called a love-hate relationship with local rules. On one hand, at least some national rulemakers have been heard to suggest that there should be an absolute numerical limit on local rules, although counting them might prove challenging. In the 1980s, there was a Local Rules Project by the national rulemakers that produced a catalogue of local rules that went beyond the apparent authority for local rulemaking.[50] At the same time, local rules can be a proving ground for reforms that eventually find their way into the national rules.

Discovery provides examples of this interaction. A number of amendments to the national discovery rules can be traced to local rule provisions. Thus, numerical limitations on interrogatories and the 2000 amendment to Rule 5(d) to forbid filing of discovery papers can be traced to provisions in local rules that could have been challenged as exceeding the proper scope of local rules. On the other hand, the proliferation of divergent local regimes regarding initial disclosure—though explicitly authorized by the national rules—was an important stimulus behind the 2000 adoption of uniform initial disclosure provisions for the entire nation.

Sometimes the emergence of divergent local rule regimes is— as with the 2000 amendment of Rule 26(a)(1) on initial disclosure—itself a stimulus to national rulemaking. In the view of some, that

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48. Electronic Discovery: Legislation and Rules, (Item W08-01/Leg08-01) (proposed Jan. 2008), *available at* http://www.courtinfo.ca.gov/invitationstocomment/documents/w08-01.pdf (last visited Jan. 9, 2008).

49. *See* Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. (forthcoming 2008) (using example of e-discovery to show that the federal rulemaking process retains the capacity to provide leadership in dealing with new issues).

50. *See* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FED. PRACTICE & PROCEDURES § 3152, at 498–502 (2d ed. 1997).

situation was beginning to emerge with regard to e-discovery. Here are the views of a corporate general counsel:

> [W]hat we began to see was a series of . . . inconsistent and somewhat troublesome [local] rules being adopted at the local district court level around the United States. Delaware would have one rule. New Jersey would have another rule. They were not consistent, and so a company with multinational . . . or multi-state operations might be facing one series of rules in one place and one in another. The result was we saw a need for a national, federal approach.[51]

This is, however, not the only approach to local rules. Judge Ronald J. Hedges, for example, has lamented that "it is unfortunate that the Judicial Conference or one of the committees on the Judicial Conference thinks as long as three districts have separate rules there is something evil, and you've got to have a national rule to deal with it."[52]

There is likely no all-purpose resolution of the potential tension between local rules and national rules. On the one hand, to have local rules that diverge significantly from national rules can undermine the national scheme. On the other hand, local rules can provide implementing detail that is not appropriate for national rules. They can also respond to local legal culture in a way that would not likely be workable for a national rule. And they probably could be modified much more rapidly than a national rule.

Here in Maryland, the U.S. District Court has adopted not local e-discovery rules but a suggested protocol for e-discovery. It is a remarkably detailed and informative document, and likely to be very useful for counsel. As you review it, consider whether local rules would suitably contain so much detail, and reflect as well on the level of detail that would be suitable in a national rule that cannot be changed in less than five years. It may be that experience under Maryland's suggested protocol will in time provide a basis for adopting local provisions that go beyond suggestions.

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51. Comments by Panelists, *in* THE CHALLENGE OF RULEMAKING, *supra* note 3, at 66, 69–70 (quoting Thomas Y. Allman, Esq.) [hereinafter Comments by Panelists].

52. *Id.* at 74 (quoting Hon. Ronald J. Hedges).

According to one source, a third of the U.S. district courts have adopted e-discovery local rules.[53] So this is another source of rules for those concerned with e-discovery.

C. International Limitations

As noted above, the U.S. discovery revolution was not embraced abroad. To the contrary, many countries even adopted "blocking statutes" designed to impede or prevent U.S. discovery on their soil. One could say that the European attitude toward information-disclosure by defendants is the obverse of the American attitude. In this country, the criminal accused has the protection of the Fifth Amendment, but there is no right to remain silent for the accused in most European courts. In civil cases, on the other hand, the Europeans look with alarm at the idea of forcing defendants to reveal possibly harmful information, at least when the force is being applied by private plaintiffs. Here, of course, we have for 70 years embraced very broad privately-controlled information extraction from defendants.

These tensions in attitudes manifest themselves in a number of ways. In the wake of the September 11th attacks, European attitudes toward surveillance of potential terrorists seem to have been more cautious than the U.S. approach. Regarding discovery, the American judicial response has generally been skeptical about limiting U.S. discovery just because the information is located abroad. Thus, the Supreme Court has resisted the notion that U.S. district courts should curtail discovery regarding cases before them in deference to the Hague Evidence Convention[54] and affirmed that American courts have broad authority by statute to authorize U.S. discovery for use in foreign proceedings whether or not the same discovery would be authorized in the court in which the litigation is proceeding.[55] But the Court has recognized that there may be cases in which foreign law prevents a party to a U.S. case from complying with domestic discovery demands.[56]

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53. K & L Gates, http://www.ediscoverylaw.com/2008/02/articles/resources/updated-list-local-rules-forms-and-guidelines-of-united-states-district-courts-addressing-ediscovery-issues/ (last visited Mar. 31, 2008) (listing rules in 38 district courts).

54. Société Nationale Industrielle Aérospatiale v. U. S. Dist. Court, 482 U.S. 522, 539–40 (1987).

55. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259–63 (2004).

56. *See* Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197 (1958) (overturning litigation-ending sanctions against litigant who could not comply with discovery due to Swiss laws restricting release of information).

There is at least a possibility that e-discovery will prompt a confrontation between the American attitude toward discovery and the European attitude toward privacy in relation to private civil litigation. Without claiming any breadth of understanding of the issues, I can affirm that they have surfaced. Reportedly, European data protection provisions may restrict responses to U.S. e-discovery.[57] There has been at least one effort (unsuccessful) to invoke such protections against a U.S. e-discovery order.[58] So, international limitations on data release constitute another source of directives for e-discovery beyond the Federal Rules.

IV. ARE RULES BETTER?

Having briefly canvassed the various sources of rules on e-discovery, one can turn to the question of whether it is better or worse to have rules. Those considering adopting rules might properly reflect on this question before acting.

The anti-rule view might be summed up by the attitude of a fellow American Law Institute (ALI) member I talked to more than twenty years ago at an ALI function. "The worst thing they ever did," he asserted, "was to create a permanent committee on the Federal Rules." Better, he thought, to leave the rules in their original open-ended form and rely on judges to develop case law to guide other judges on how to apply those rules. This attitudinal difference can be quite basic. When the Model Rules of Evidence were in the drafting stage, for example, John Henry Wigmore (he of the hefty evidence treatise) urged that a detailed set of rules be devised (along the lines of his treatise) to deal specifically with all the problems he had found in a lifetime of reading evidence cases. Charles Clark, who had been Reporter of the committee that drafted the original Federal Rules of Civil Procedure, responded by suggesting that there be only one rule—evidence should be admissible unless its prejudicial effect outweighed its probative value—and that everything else be left to the discretion of the trial judge.

When revisions are suggested for the Federal Rules, one recurrent reaction is that they are not needed. There is often much force to such arguments. Consider, for example, the observations Judge Paul W. Grimm made in a 2003 e-discovery case (although not on the

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57. *See, e.g.*, Jaculin Aaron & Laura J. Lattman, *Another Story in Europe*, NAT'L L.J., Dec. 10, 2007, at E1 (discussing possible impact, on U.S. discovery, of stringent European data privacy laws).

58. *See* Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443 (C.D. Cal. 2007).

subject of whether there should be Federal Rules e-discovery amendments):

> Under Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination and the quality and quantity of the factual information provided by the parties to be used by the court in evaluating the Rule 26(b)(2) factors.[59]

A plaintiff's lawyer somewhat similarly observed regarding e-discovery that "[w]ithout any rule and without any case law, the state trial court knew how to handle this."[60]

Any rulemakers should consider such a possibility, something like the "first do no harm" attitude of doctors. At least some suggest the amendment to the Federal Rules might not pass this test. One vendor began an assessment of the effect of the Federal Rules amendments by asking, "Have the amended federal rules brought corporate America to its knees?"[61] A partner in a Seattle firm was quoted as saying that "[e]verybody is a little terrified" as the effective date of the rule amendments approached.[62] Around the same time, an article in the *San Francisco Recorder* entitled "Easing the Pain of E-Discovery" and subtitled "New Discovery Rules Giving You a Headache?" began by saying:

> I wish I could say take two aspirin and call me in the morning, but solving the technological headaches attorneys will undoubtedly grapple with under the framework of the new Federal Rules of Civil Procedure will require a much stronger dose of medicine, not to mention a dose of reality.[63]

In the same vein, a California lawyer reacted to the recent proposals to adopt e-discovery rules for the California state courts by

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59. Thompson v. U. S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98–99 (D. Md. 2003).

60. Comments by Panelists, *supra* note 51, at 73 (quoting Michael J. Ryan, Esq.)..

61. Arkfeld, *supra* note 11, at 3.

62. Leigh Jones, *E-Discovery Zero Hour Approaching*, NAT'L L.J., Aug. 21, 2006, at 1.

63. Matthew D. Nelson, *Easing the Pain of E-Discovery: New Discovery Rules Giving You a Headache? Follow These Tips to Keep Costs Down and Make the Process Smooth and Efficient*, S.F. RECORDER, Aug. 23, 2006, at 5.

saying that it would have been "more prudent" to wait and see what happens as lawyers practice under the new Federal Rules.[64] And the malpractice fearmongers quoted earlier observe that the Federal Rules amendments "have raised the stakes."[65] Although this attitude is not universal,[66] it may provide a caution for those considering adopting e-discovery rules in other sectors.

Frankly, I find it implausible that doing e-discovery without rules is really superior to having rules to provide guidance. Of course, for those who thought Federal Rules would really tell them "exactly what to do," the actual rules may be disappointing. And some may have been hoping to pretend electronically stored information is not there, and limit discovery to hard-copy materials. One suggestion of this view is the observation in an article in the *California Lawyer* in February 2008 that "amendments to the Federal Rules of Civil Procedure that went into effect in 2006 essentially elevated electronic discovery from a best practice to a mandatory practice."[67] But these amendments don't mandate any form of discovery; they only instruct about how to handle e-discovery if it occurs. Maybe in the short term having such rules makes it more likely that litigants will think about seeking this material through discovery, but it is hard to believe that they would abstain from demanding it for long whether or not rules mentioned the possibility.

Another possibility is that having rules is not a problem in the abstract, but that *these* particular rules are so bad that they are worse than no rules at all. That possibility seems unpersuasive, however, in light of the widespread emulation of provisions of the Federal Rules amendments in state court rules dealing with e-discovery.

In any event, it seems worthwhile to itemize some characteristics of the Federal Rules provisions that may prove informative to other potential rulemakers:

(1) The amendments emphasize party agreement. Rather than dictate the answers to a variety of questions such as the form of production or the breadth of searches for responsive materials or the preservation of electronically stored information, the rules direct the

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64. Matthew Hirsch, *News Keeps E-Discovery on Radar in State*, S.F. RECORDER, Jan. 24, 2008, at 1, 10.

65. Kwuon & Wan, *supra* note 12, at E2.

66. *See, e.g.*, Joseph Burton, *Rules of Evidence Should Codify Challenges of Digital Age*, S.F. DAILY J., Jan. 11, 2008, at 6 ("On the eDiscovery front, our ability to respond to the changes in practice required by this information has been eased by December 2006 amendments to the Federal Rules of Civil Procedure.").

67. McNichol, *supra* note 22, at 37.

parties to talk about it. In this way, they can design the most suitable arrangements for their cases.

(2) The amendments also emphasize judicial supervision. Recall that the message from lawyers over a decade ago about what they needed in discovery—parental supervision. The amended rules provide a vehicle for such supervision when needed. If the parties cannot agree on any of a variety of issues, they can submit them to the judge for resolution.

(3) The amendments avoid detailed directives. To the disappointment of lawyers who wanted rules that would "tell them exactly what to do," these rules do not. Rulemakers' knowledge of the specifics of given cases is limited. Their ability to foresee the evolution of technology is possibly even more limited. So the application of the rules can evolve as technology evolves. Under Rule 26(b)(2)(B), for example, the determination of whether certain sources of electronically stored information are reasonably accessible could easily change as new technology makes such information accessible in new ways.

(4) The amendments emphasize the desirability of focusing on e-discovery early. There have been far too many stories of avoidable calamities already in the annals of e-discovery history. At the same time, the premium on early focus can provide those who are well prepared with an advantage. Litigants who are prepared to go to a Rule 26(f) conference with an informed and fair set of proposals will often benefit. If the other side won't agree, they should be in a good position to persuade the judge that their proposals are reasonable. If the other side just says, "Do whatever you want to do, I don't have to assent," they will not likely get into trouble later for doing what they said they would do.

(5) The Federal Rules amendments place an emphasis on pragmatism. Some seem to regard discovery as inherently either good or bad. Thus, some lawyers argue that they have a "right" to do discovery of certain dimensions. Although the objective of federal discovery is unquestionably to provide legitimate access to necessary evidence, it is often not helpful to treat this objective as conferring a "right" to a certain amount. Neither does a responding party's assertion that it has provided a certain amount of discovery inherently entitle it to refuse to provide more. With e-discovery, as with all discovery, the goal should be to bring a rule of reason to allocation of burdens in a given case.

V. CONCLUDING OBSERVATIONS

Some may be tempted to agree with the lawyer who recently opined that "[k]eeping up with the subject of electronic discovery is a lot like following the latest developments in the lives of Britney Spears or Lindsay Lohan: every week a new story and never good news."[68] I hope most have a more sanguine outlook.

For me, having spent much of the last decade focused on e-discovery, it is interesting to consider how differently we might look at e-discovery in another decade. The rate of change is likely to abate somewhat, but given how different things are now from how they were a decade ago it seems dubious to expect that things will remain the same. So I'm not going to try to make predictions. Rather, I have some observations about how things may evolve and some questions about whether the fears of the past become the reality of the future.

(1) *E-discovery may become more democratic.* Until recently, it has seemed to be a prime example of what is sometimes called "one-way discovery," generally typified by a suit by an individual plaintiff against an organizational defendant, often a corporation. The assumption has been that only the defendant has any significant amount of information or risks problems with preservation and the like.

Computer use is no longer the preserve of the big corporation, and computer capabilities mean that large numbers of Americans have accumulated large amounts of electronically stored information. So preservation and access may begin to be headaches for parties on both sides of the "v." At least some cases show that discovery is sought from plaintiffs as well as defendants. For example, Judge John M. Facciola recently ordered a plaintiff in a workplace harassment suit to produce images stored on his cell phone in response to a discovery demand by a defendant.[69]

Somewhat similarly, it seems that litigants are increasingly finding social networking sites a fruitful source of potential evidence. An article in the *National Law Journal* in October 2007 reported that "[l]awyers in civil and criminal cases are increasingly finding that social networking sites can contain treasure chests of information for their cases."[70] In a recent New Jersey case, an insurer that was sued

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68. John J. Coughlin, *Learning from the E-Discovery Mistakes of Others*, NAT'L L.J., Dec. 10, 2007, at E4.
69. Smith v. Café Asia, 246 F.R.D. 19 (D.D.C. 2007).
70. Vesna Jaksic, *Litigation Clues Are Found on Facebook*, NAT'L L.J., Oct. 15, 2007, at 1.

for failure to pay health benefits for an alleged disability obtained an order that plaintiffs turn over postings on MySpace and Facebook, as well as mirror images of the hard drives of all the computers used by plaintiffs' families so defendant could check on statements about their health conditions.[71]

(2) *The enduring prominence of vendors is uncertain.* A straight-line projection of vendor income a decade from now would lead to an astronomical figure. From almost nothing in 2001 or 2002, they are expected to exceed $3 billion this year (2008) and $4 billion next year (2009); where this trend could lead at the end of another ten years is hard to imagine. But it is also a bit hard to imagine that law firms and corporate clients would willingly pay such amounts for the open-ended future rather than taking the work in-house somehow. There is at least some reason for caution in addressing vendors' claims. As Judge Hedges has said, "Wherever you go, you'll see a vendor who can do something better than the last vendor did and will promise you that he or she will deliver something at half cost."[72] At some point, something has got to give.

(3) *Access to an opposing party's computer system may become a fertile field for litigation.* Another change made in 2006 was little remarked upon at the time but might prove significant: Rule 34(a)(1) now provides not only that a party may request an opportunity to "copy" another party's documents or electronically stored information, but also to "test" or "sample" them. Previously that testing and sampling option had been explicitly provided only with regard to tangible things. Before this change, at least one court of appeals had overturned an order authorizing direct access to an opposing party's computer system.[73] Although the Advisory Committee's note sought to limit this possibility,[74] an interesting

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71. Mary Pat Gallagher, *MySpace, Facebook Pages May Aid Insurance Dispute*, S.F. RECORDER, Feb. 4, 2008, at 3.

72. Comments by Panelists, *supra* note 51, at 74 (quoting Hon. Ronald J. Hedges).

73. *See In re* Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (parties are not entitled to "unlimited, direct access to [the other party's] databases . . . without—at the outset—a factual finding of some non-compliance with discovery rules").

74. The Advisory Committee's note cautioned as follows:

> Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in

question could arise about whether this new permission would often be used to justify access to an opposing party's electronic information system. This provision has begun to receive some attention,[75] and handling of such access deserves continued attention.

(4) *There may be a new or enlarged role for Rule 26(g).* Rule 26(g) was added in 1983, at the same time that Rule 11 was substantially revised to strengthen its provisions. At the time, it was expected (perhaps hoped) that Rule 26(g) would be just as important as Rule 11.[76] Needless to say, that did not happen. Amended Rule 11 mushroomed into the most prominent rule of its day, eventually being narrowed in 1993 to contain its effects. Rule 26(g) slipped from view, and had minimal effect.

It is possible that e-discovery will breathe new life into Rule 26(g). The extensive responsibilities of counsel in regard to consultations about e-discovery arrangements call for counsel to make representations to the other side, and sometimes to the court, about what can be done and when it can be done. Recently, some courts have reacted to unfounded (perhaps not entirely honest) statements as violating Rule 26(g).[77] Maybe it will become the "new Rule 11."

(5) *There could be new pressures on outside counsel.* The people who sign discovery papers and are subject to Rule 26(g) sanctions are usually outside counsel. Often they act in reliance on what they are told by inside counsel or by other insiders at the organizational client. In the words of one former general counsel, "There is a major distinction in America between what outside . . . and inside lawyers

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> some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

FED. R. CIV. P. 34(a) advisory committee's note to the 2006 amendments.

75. *See, e.g.*, Nolan M. Goldberg, *Discovery and the Reluctant Host*, NAT'L L.J., March 10, 2008, at S1 (discussing direct access to an opposing party's computer system).

76. *See* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURES § 2052, at 630 (2d ed. 1994).

77. For application of Rule 26(g) in e-discovery situations, *see* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (granting in part and denying in part a defendant's motion for sanctions for failure to produce certain emails during discovery), *enforcing*, 2007 WL 2900537 (S.D. Cal. Sept. 28, 2007), *vacated and remanded in part*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); Wingnut Films, Ltd. v. Katja Motion Pictures Corp., No. CV 05-1516-RSHL SHX 2007 WL 2758571 (C.D. Cal., Sept. 18, 2007) (partially granting a plaintiff's motion for sanctions due to "significant gaps" in defendant's discovery responses); Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc., 244 F.R.D. 614, 636–37 (D. Colo. 2007) (a defendant's "failure to comply with the requirements of Rule 26(g)" may deem "that a monetary sanction is appropriate" under the specific facts and circumstances of the case).

think and know about electronic information, and it is not all that favorable to outside lawyers."[78] There certainly have been instances of sanctions on parties when erroneous assertions are made by counsel relying on what they are told by the client.[79] Whether such failures to communicate will produce sanctions directly on counsel under Rule 26(g), remains to be seen.

(6) *The question of whether the bad results some opponents of the Federal Rules amendments predicted have occurred or will occur deserves attention.* During the hearing process, a number of opponents to certain amendments predicted that they would prompt undesirable behavior, principally among prospective defendants. Opponents of the inaccessible information provisions of Rule 26(b)(4)(B) argued that many corporations would revise their electronic information systems to make most information inaccessible. Similarly, opponents of the sanctions limitation now in Rule 37(e) urged that it would prompt corporations to reset their systems to delete information with alacrity. To both arguments, many others responded that this would be foolish behavior for corporations, who rely on preservation of and access to electronic information to run their businesses. Because this was such a frequent theme during the Federal Rules amendment process, it would be very interesting (and quite important) to know whether there is any indication whether the Federal Rules amendments actually produced any change in behavior.

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The bottom line for me is that this has been a fascinating decade. I now look forward to the next decade to answer these questions and learn where e-discovery goes from here.

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78. Comments by Panelists, *supra* note 51, at 70 (quoting Thomas Y. Allman, Esq.).

79. *See, e.g.*, GFTM, Inc. v. Wal-Mart Stores, Inc., No. 98 CIV 7724 RPP 2000 WL 335558 (S.D.N.Y. 2000) (sanctioning defendant after its lawyer assured the court—based on what the in-house contact for outside counsel said—that certain electronically stored information was no longer available, but a later deposition of one of defendant's IT personnel showed that it had been available at the time the representation was made but subsequently destroyed).

PANEL 2
New Means of Financing Lawsuits and Law Firms

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Crowd-Classing Individual Arbitrations in a Post-Class Action Era

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CROWD-CLASSING INDIVIDUAL ARBITRATIONS IN A POST-CLASS ACTION ERA

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ABSTRACT

Class actions are in decline, while arbitration is ascendant. This raises the question: will plaintiffs' lawyers skilled in bringing small-value, large-scale litigation – the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years – hit upon a viable business model which would allow them to arbitrate one-on-one claims efficiently and profitably. The obstacles are tremendous: without some means of recreating the economies of scale and reaping the fees provided by the aggregative device of Rule 23, no rational lawyer would expend the resources to develop and arbitrate individual, small-value claims against well-heeled defendants. But despite these complications, we think there are at least two possible models that might allow for informal aggregation of like claims in at least some subset of cases.

One hybrid model would seek a judicial liability judgment upon which serial, individual arbitrations could later rely. The antecedent judicial judgment could take a number of different ,so long as it has preclusive force that can be leveraged in subsequent arbitration hearings. A second, complementary model envisions "arbitration entrepreneurs" (either lawyers or non-lawyers) purchasing legally-identical, individual claims which these legal capitalists believe to have value in the arbitral forum. Upon procuring as many discrete claims as the market will bear, the arbitration entrepreneur would seek to resolve the hundreds or even thousands of claims she has amassed in a single arbitral session. With one arbitration entrepreneur as the lawful owner of a multitude of claims, this form of aggregation implicates neither the prohibition against class arbitration nor the contractual definition of "a claim" subject to arbitration.

CROWD-CLASSING INDIVIDUAL ARBITRATIONS IN A POST-CLASS ACTION ERA

MYRIAM GILLES
ANTHONY SEBOK

The Supreme Court's recent rulings limiting class action litigation make it increasingly difficult, if not impossible, for lawyers to represent vast numbers of absent class members in court.[1] In particular, the Court has repeatedly endorsed class action waivers in arbitration agreements, sending parties to individually arbitrate claims that would otherwise have been litigated under Rule 23 in the federal courts.[2]

While many commentators have questioned whether individuals will indeed seek to arbitrate their disputes in light of these developments,[3] we think the better question is whether plaintiffs' lawyers skilled in bringing small-value, large-scale litigation – the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years – will hit upon a viable business model which would allow them to arbitrate one-on-one claims efficiently and profitably.

At first blush, the financial incentives for lawyers to seek out and arbitrate individual, small-value claims appear quite weak.[4] In the

[1] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).
[2] *See* AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011); American Express v. Italian Colors Restaurant et al., 570 U.S. __ (June 20, 2013).
[3] *See, e.g.,* Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw. L. Rev. 87 (2012) (exploring whether it is "realistic to think that class actions might be replaced by individual claims [and whether] many individuals who were blocked from filing class actions [will] proceed individually" in arbitration); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 646 (2012) ("Nor should anyone expect that consumers will actually go forward with one-on-one arbitrations, even as consumer arbitration clauses are liberalized to provide ostensible incentives to intiate proceedings…").
[4] The financial incentives for the defendant run in exactly the opposite direction. As Korn and Rosenberg explain, the incentive for a defendant to invest heavily to defeat a small-value consumer claim is the same in individual arbitration as in a class action: *Concepcion's* "pro-defendant bias is endemic to the process of resolving common question claims in individual arbitrations . . . [and] occurs in the individual arbitration process because of the lack of symmetry between the defendant's classwide stake and

absence of some mechanism to achieve economies of scale – i.e., to reduce the otherwise exorbitant information and transaction costs of individual claiming – no rational lawyer would expend the resources to develop and arbitrate small-value claims against well-heeled defendants. Even in the best-case scenario – say, a credit card company's undisclosed policy imposing late charges on payments posted after 3:00 pm on the due date[5] -- determining the inception and extent of the policy, what forms of disclosure are required by relevant laws and regulations, the identity of the injured consumers, and other salient facts would require an army of lawyers and staff. And this army would necessarily have to deal with hundreds or thousands of individual clients, rather than simply a handful of class representatives, which would itself absorb a tremendous amount of time and money.[6]

In all but the simplest cases, expert testimony and other expensive forms of proof would be necessary – all of which would be on the lawyers' dime at the front-end and would non-recoupable,[7] even if the claims are subsequently successful.[8] Further, the rules governing the dominant arbitral bodies do not provide for consolidation of related cases before a single arbitrator, nor is there any intra-arbitration *res judicata*

each plaintiff's recovery-specific stake in the outcome of the common question litigation." David Korn and David Rosenberg, Concepcion's *Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution* at *4 (on file with the authors).

[5] Based on allegations made in Discover Bank v. Superior Court, 113 P.23d 1100 (2005), overruled by *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

[6] Adam Zimmerman blog ("Individuals must develop their own evidence, retain witnesses, expend time, and support their claim for damages with a well-grounded legal theory. Most studies of small claiming patterns suggest that these problems, combined with apathy, inertia and cognitive bias, will persist."). *See also* [cite] (reporting that Vioxx plaintiffs' lawyers reportedly spent 10,000 hours interviewing, meeting, reviewing individual clients' files at a cost of $13.5 million.).

[7] The bulk of expert fees constitute out-of-pocket costs that lawyers must pay during the course of litigation. While plaintiffs lawyers' may seek reimbursement for costs associated with generating an expert report upon successful completion of the litigation, courts are bound by the limit of 28 U.S.C. § 1821(b), which sets expert fees at only forty dollars per diem. *See Amex* I, 554 F.3d 300, 318 (2d Cir. 2009); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 439 (1987).

[8] This, of course, assumes that a single expert report could be retailed across multiple individual arbitrations – which remains an open legal question, and may depend upon the confidentiality provisions of the underlying agreement. *See, e.g.*, Amex v. Italian Colors [cite oral argument transcript].

effect awarded to prior victories.[9] Informal cost-sharing by centralizing expert work is further doomed by the confidentiality terms that are standard in contemporary arbitration agreements.[10] Procedurally, therefore, individual arbitration provides no incentives to consolidate or even serialize claims formally or informally: lawyers seeking to individually arbitrate our hypothetical misrepresentation/consumer fraud case across multiple plaintiffs would not be guaranteed the ability to bring these claims seriatim before the same arbitrator in a compressed time-frame, to use the same expert report or other evidence across multiple arbitrations, nor to rely upon prior arbitral determinations of fraud, liability, or damage.

And, perhaps most critically, the amount of money an attorney could expect to make by bringing a series of individual arbitrations will not, in most (all?) cases, justify these significant expenditures of time and money.[11] Again, take our credit card late-fee example: even if a group of attorneys were somehow able to identify a segment of affected consumers, develop a streamlined and efficient means of presenting the straightforward facts of each case to an arbitrator, and "win" a significant number of these individual arbitrations, these lawyers would still walk

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[9] *See* Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 734 (1981) (denying preclusive effect to an arbitrator's resolution of an employee's Fair Labor Standards Act claim).

[10] *See, e.g.*, In re American Express Merchants' Litig., 554 F.3d 300, 307-8 (2009) (*Amex I*) (finding the arbitration agreement contains a "confidentiality provision [that] effectively block[s] that method of informal cost-sharing" because it precludes the introduction of evidence adduced in one arbitration in subsequent arbitrations).

[11] Gilles & Friedman, *supra* note __, at 646 ("The main problem will be attracting plaintiffs' counsel: rational lawyers will be deterred by prohibitive disincentives."), *citing* Concepcion, 131 S.Ct. at 1761 (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"); Sutherland v. Ernst & Young LLP, 768 F.Supp.2d 547, 553 (S.D.N.Y. 2011) ("Even if [plaintiff] were willing to incur approximately $200,000 to recover a few thousand dollars, she would be unable to retain an attorney to prosecute her individual claim…[Plaintiff's counsel] will not prosecute her individual claim without charge, and will not advance the required costs where the [arbitration] Agreement's fee-shifting provisions present little possibility of being made whole."); Picardi v. Eighth Judicial District Court, 251 P.3d 723, 725 (Nev. 2011) (noting plaintiffs' argument that "the class action waiver was exculpatory because, in cases . . . where the individualized claims are relatively small, it is almost impossible to secure legal representation unless those claims are aggregated with the claims of other similarly situated individuals").

away with little or nothing for their efforts. Thirty-three percent of, say $30, even if multiplied by ten thousand claims, is only $100,000 – which be utterly insufficient to cover the costs of case intake, expert fees, neutrals' fees, travel, and other expenses.[12] And the availability of attorneys' fees under fee-shifting statutes is not, in itself, a reliable or realistic inducement in consumer cases. Furthermore, the rules of the arbitral bodies prohibit the separate award of costs (unless authorized by an underlying fee shifting statute), rendering many arbitral claims net-negatives.[13]

In sum, individual, small-claims arbitration seems to mean exactly that: claims are brought on behalf of one person without regard to others affected by the same or similar allegedly injurious conduct; an arbitrator decides the claim and if the plaintiff is successful, the defendant pays the small amount at stake in the proceedings; the presence of lawyers is discouraged (by the defendant, the rules of the arbitral associations, and the arbitrator) because the proceedings are meant to be quick and efficient, without procedural hiccups or substantive overkill. On this view, there seems little room to develop a business model that harnesses the potentially large numbers of people who are harmed in small ways by corporate practices, but who may not have any knowledge of the harm or lack any incentive to pursue their small claims.

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[12] *See* Gilles & Friedman, *supra* note __, at 646-7 (noting that even the Concepcions' case is not as uncomplicated as it may appear and that they could "surely incur well over $25,000 in legal fees to establish liability in a one-on-one proceeding"); Glover, *supra*note __, at 1210 ("it is inconceivable that a private attorney, who might be sufficiently expert in consumer fraud, would have the economic incentive to root out consumer fraud if the only economic gain is to be had through individual arbitrations; the significant investment of resources required to identify wronged individuals and to pursue their small claims one-by-one likely would not justify any eventual gains").

[13] Although it is theoretically possible that a layperson could secure funding from a litigation funding company in a jurisdiction in which so-called "alternative litigation funding" is legal, it is obviously risky (and imprudent) to borrow against the possibility of later vindication—especially when, as noted above, the compensation in a consumer case can be so small. *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (discussing the litigation funding industry in the United States); STEVEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS AND UNKNOWNS (2010), available at: http://www.rand.org/pubs/occasional_papers/OP306/ (same). In any event, it is highly unlikely a consumer could obtain funds given that "consumer" side funders do not fund litigation but only purchase a property interest in the future proceeds of a case funded by a contingency fee attorney. *Id*.

Perhaps this analysis is too parochial, and in a post-class action universe, one must boldly consider options outside traditional legal contexts.[14] Possibly claimants themselves may become so frustrated with corporate malpractice that they will seek out efficient means of banding together through the use of social media and other technological developments. Indeed, we may already be witnessing the early stages of an internet-driven movement towards democratizing claims-bringing. For example, California lawyer Heather Peters, who had purchased a Honda Civic with electrical problems, decided to opt-out of the class action settlement and instead filed her own lawsuit in small claims court.[15] She also created a website to blog about the process of filing and litigating the claim, opened a Twitter account for brief updates, and posted a YouTube video of the car's problems, all in the hope of sparking a "small claims flash mob" of other Honda purchasers to do the same.[16] And it partly worked: nearly a thousand claimants individually opted out of the class action settlement and filed their own small claims suits against Honda.[17] But Ms. Peters herself was unsuccessful: while she won nearly $10,000 in small claims court, she lost on appeal and was required to pay Honda's court costs.[18] Nonetheless, her story underscores the possibilities that

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[14] And, it seems that corporate entities are sufficiently worried about this possibility to warrant our attention. *See, e.g.,* Alan Kaplinsky & Mark J. Levin, *Consumer Advocates Form "Anti-Arbitration" Organization*, Oct. 9, 2012, available at http://www.ballardspahr.com/alertspublications/legalalerts/2012-10-09-consumer-advocates-form-anti-arbitration-organization.aspx ("The attempted use of mass arbitration to destroy consumer arbitration does a great disservice to consumers who stand to benefit from the efficiencies and economies inherent in the arbitral process.").

[15] Jerry Hirsch, *Honda Loses Small Claims Court Suit Over Civic Hybrid Fuel Economy*, L.A. Times, Feb. 2, 2012,available at http://articles.latimes.com/2012/feb/02/business/la-fi-autos-honda-lawsuit-20120202 (last visited June 26, 2013) (reporting that Ms. Peters opted out of a class action settlement that would have paid her $300 and coupons towards the purchase of another Honda vehicle.

[16] Jerry Hirsch, *Car Owner takes legal fight away from lawyers*, L.A. TIMES, Dec. 27, 2011, available at http://articles.latimes.com/2011/dec/27/business/la-fi-autos-honda-smallclaims-20111227 (last visited April 7, 2013).

[17] Honda Wins Reversal of Civic Hybrid Small-Claims Judgment, Huffington Post, Apr. 20, 2012, available at http://www.huffingtonpost.com/2012/04/20/honda-hybrid-lawsuit_n_1441913.html (reporting that 1,700 Honda owners were spurred by Ms. Peters to opt out of the settlement and bring claims on their own).

[18] Jerry Hirsch, Honda Wins Reversal of Civic Hybrid Small-Claims Judgment, L.A. Times, May 9, 2012, available at http://www.latimes.com/business/money/la-fi-mo-honda-civic-lawsuit-20120509,0,3088344.story.

exist where a single person can leverage social media and her knowledge of an underlying claim to bring about a massive and untapped response by claimants all over the country. Indeed, Ms. Peters was able to accomplish something that massive print and mailer class notice rarely can: actual, engaged responses from injured parties seeking remedy.

A related example is Consumer Count, an organization designed to use social media "to help multiple consumers bring claims against companies without resort to class actions."[19] Consumers can post complaints about companies' practices or products on the Consumers Count website, and "once a 'critical mass' of consumers has complained about the same practice, Consumers Count will spring into action and refer to the complaints to a law firm which can then enter into fee agreements with the multiple consumers and attempt to pursue their claims in court, in arbitration, through referral to a governmental agency, or in the press."[20]On this model, motivated claimants could use Facebook, Twitter,[21] Google+, and other social networking sites to locate and communicate with potential claimants; gather information on potential claims via YouTube, Shutterfly, Photobucket, Instagram, or Flickr; track claimants via Pinterest, Foursquare, and Yelp; manage information on blog-style platforms such as Tumblr; survey claimants on Reddit or Betterific to gauge experiences with specific arbitrators; raise money and solicit contributions on ActBlue or Kickstarter[22]; and perhaps even offer "litigation kits" via Groupon[23] to enable claimants to easily bring their

[19] Sternlight, *supra* note __, at 124; see also www.consumerscount.org (last visited June 26, 2013).

[20] *Id*.,

[21] Twitter provides a platform that allows its users to release timely bits of information (through "Tweets" of 140 characters or less) that allow single voices "that might have gone otherwise unnoticed" to reach "millions of people." About Twitter, Twitter, http://twitter.com/about (last visited June 18, 2012).

[22] Kickstarter describes itself as "the world's largest funding platform for creative projects," and it works by having project creators post an idea and a funding goal, and if users like the idea, they can pledge money. If the project succeeds in reaching its funding goal, users' credit cards are charged. 44% of Kickstarters projects have been fully funded, and applies a 5% fee to funds collected. *See* http://www.kickstarter.com/help/faq/kickstarter%20basics (last visited April 4, 2013).

[23] Groupon is a social media site that offers discounts on goods and services offered by its advertisers. The advertiser then pays Groupon a percentage of the fee earned by the advertiser from registered Groupon users who obtain and use the discounts. North Carolina's state bar has raised the concern that lawyers' use of Groupon would constitute impermissible fee-splitting. *See* North Carolina Proposed Formal Ethics Opinion 7 [cite]

own claims in arbitration. This grassroots, tech-savvy approach to accessing, identifying, and enabling individual claimants to effectively arbitrate disputes is further assisted by the increase in online arbitration methods.[24] By leveraging the internet's vast resources and connectivity,[25] as have "political campaigns, social protest movements, product launches, and new businesses globally,"[26] claimants may be empowered to engage the arbitral fora in new and powerful ways.[27]

But we think the grassroots model is ultimately incomplete, in part because it is not "scalable".[28] While it may be trendy to contemplate the impact of social media on all aspects of modern life, we remain unconvinced that the ability to communicate in virtual communities and networks will have significant effects in engaging injured claimants. The impediments that many scholars have described remain, even with the

[24] Jeff Howe, *The Rise of Crowdsourcing*, WIRED MAGAZINE, 2006 ("Crowdsourcing is an online, distributed problem-solving and production model.").

[25] Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media*, 27 ENT. & SPORTS L. 24, 24 (2010) (reporting on a recent study finding "that 73 percent of Americans regularly use social media"); Matthew Auer, *The Policy Sciences of Social Media*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974080 (last visited April 6, 2013).

[26] CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008) (describing the striking use of flash mobs in antigovernment protests in Belarus, which used text messaging and weblogs to bring protesters together, with little or no advance planning); Molly Land, *Networked Activism*, 22 HARV. HUM. RTS. J. 205 (2009).

[27] A number of commentators have pointed to the increased reliance on networks and social norms to replicate or improve accountability, access and information in complex litigation. *See, e.g.*, Elizabeth C. Burch, *Litigating Together: Social, Moral and Legal Obligations*, 91 BOSTON U. L. REV. 87 (2011); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (2005); Howard Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

[28] By "scalable" we simply mean taking a well-functioning, smaller-scale program and replicating its essential functions so that it can work in a similar fashion for more people. *See* Paul N. Bloom and Brett R. Smith, "Identifying the Drivers of Social Entrepreneurial Impact: An Exploratory Empirical Study," *in* PAUL N. BLOOM & EDWARD SKOOT, SCALING SOCIAL IMPACT: NEW THINKING (2010) at 11; *see also* Sternlight, *supra* note __, at 118 (noting that, while using the internet to identify potential claimants may be "effective in some cases [where] consumers' claims are large enough and easy to identify," but that it may not work in other contexts).

help of the internet.[29] We would also worry that only the most egregious, widespread, or newsworthy corporate conduct would pique the interest of injured consumers, leaving most wrongdoing unremedied.[30] And, as Jean Sternlight writes, "it seems unlikely that the internet can help many consumers *win* their claims -- bringing a claim is one thing, and winning that claim is yet another."[31] In the end, it seems to us necessary to engage the ability and experience of plaintiffs' lawyers or motivated entrepreneurs in any enterprise that involves ferreting out, investigating, and bringing small-value claims.[32] The question therefore remains: is there a viable business model which would allow plaintiffs' lawyers or entrepreneurs to arbitrate small, individual claims efficiently and profitably?

We think there are two potential approaches that might allow for informal aggregation of arbitral claims in at least some subset of appropriate cases. The first is a hybrid model which seeks an initial public

[29] Zimmerman, *supra* note __ ("There are many impediments for individuals who choose to litigate by themselves. Individuals must develop their own evidence, retain witnesses, expend time, and support their claim for damages with a well-grounded legal theory. Most studies of small claiming patterns suggest that these problems, combined with apathy, inertia and cognitive bias, will persist."); *see also* Sternlight, *supra* note __, at 118 (asserting that few consumers see notices or choose to respond, and are unlikely to be aware that "they are subjected to particular small but incorrect charges on, for example, their cell phone bill"); *id.* ("we all suffer from information overload as it is: how many of us have ever even looked at the websites that already list ongoing class actions from which one might seek relief, much less taken any steps to benefit from such a website?").

[30] Critics of crowdsourcing have noted that participants are a nonrandom sample of the population, and that a crowdsourced project will often fail due to lack of motivation. *See, e.g.*, Daren Brabham, *Managing Unexpected Publics Online: The Challenge of Targeting Specific Groups with the Wide-Reaching Tool of the Internet*, INT'L J. OF COMM. (2012), available at http://ijoc.org/ojs/index.php/ijoc/article/view/1542/751; *see also* Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 111 (2011) (reporting that between 2003 and 2007, only 170 consumers out of nearly 54 million subscribers saw fit to access AT&T's inexpensive arbitration procedure); Coneff v. AT&T Mobility, 620 F. Supp.2d 1248, 1258 (W.D. Wash. 2009), rev'd on other grounds, 673 F.3d 1155 (9th Cir. 2012) (finding only an "infinitesimal" number AT&T customers had filed arbitration claims).

[31] Sternlight, *supra* note __, at 118-9.

[32] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1176-1217 (2012) ("the ferreting out of misconduct like consumer fraud requires expertise frequently not in the hands of consumers; they are thus unlikely, on their own, to possess or process relevant information in such a way that would motivate them to arbitrate").

determination of liability in court, followed by the contracted-for, atomized, serial arbitration proceedings(which, in our view, would function in effect like damages inquests). The public court determination might come about in several different ways. In some cases, the plaintiffs' lawyers may be able to bring an individual claim in court seeking a declaratory judgment of the defendant's wrongdoing. This may be possible where there are any claimants who are not covered by an arbitration clause, or where the demand for declaratory or injunctive relief is determined to be outside the authority of a single arbitrator.[33] In other cases, the judicial liability determination can come about through public enforcement actions, whether brought by agencies acting in a law enforcement capacity or by state Attorney Generals in *parens patriae*.[34] Indeed, enterprising plaintiffs' lawyers might even be well advised to offer their services at a discount to public enforcers in order to obtain the springboard of a judicial liability holding.[35]

Once lawyers have obtained a judicial declaration of wrongdoing, many of the financial disincentives to individual arbitration described above are altered. Most significantly, lawyers are spared some of the expense of proving wrongdoing: in the case of an arbitration-free client, for example, lawyers would be able to recoup their fees and other related costs of proving wrongdoing. In the case of a public enforcement action, those costs have been absorbed by the state. In addition, once relieved of the financial burden of re-proving liability in each arbitration, lawyers need only identify and contract with similarly-situated claimants for

[33] There may be claimants whose contracts, by happenstance, do not yet contain a class action waiver. Lawyers representing those individual claimants in court can litigate liability, and if successful, this judgment can be used in subsequent arbitrations by similarly-situated claimants. *See Marcus Corp. v. American Express Co.*, No. 04 cv 05432 (GBD), 2005 WL 1560484 (S.D.N.Y. July 5, 2005) (an action alleging claims on behalf of a merchant who does not have an arbitration clause, along with identical claims on behalf of a putative class).

[34] Public entities litigate and obtain judgments on all manner of claims. Importantly, these enforcers are not subject to contractual waiver provisions; on the other hand, state actors often settle for consent decrees with no admission of liability, which have no preclusive force in subsequent arbitrations. *See infra* Part II.A.

[35] After all, public lawyers already "face resource constraints that limit the scope of possible enforcement actions," and given these "shrinking state budgets and the growing list of potential big-ticket claims involving harms to consumers" and others, it would seem an ideal moment to partner with the private bar. Maggie Lemos, *State Enforcement of Federal Law*, 85 N.Y.U. LAW REV. 698, 761 (2011).

serialized arbitrations. And, even these transaction costs are significantly reduced where discovery under the hybrid model produces the identities of affected consumers, enabling lawyers to contact potential clients to determine their willingness to sell, assign or otherwise have their claims arbitrated.[36]

With the fully-enforceable judicial declaration in hand, lawyers could then move to the arbitral fora to individually arbitrate claims in what essentially become a series of damages inquests. Here, a liability judgment obtained court that has preclusive effect on identical claims and may generate the functional equivalent of precedent. These effects are neither certain nor complete, as the major arbitral bodies currently do not provision for mass, serial arbitration of like claims; but we predict that necessity will likely force these entities to change or amend their rules in order to better manage mass claiming. Up until now, the American Arbitration Association ("AAA") and JAMs have had little reason to develop comprehensive solutions to mass arbitration, but in our view, these associations will inevitably consider consolidation procedures, appointment of arbitrators qualified to administer mass arbitrations, the admissibility of evidence and expert testimony from prior, like hearings, and other aggregation-friendly rules.The second and complementary model envisions "arbitration entrepreneurs" – either lawyers or non-lawyers – buying up legally-identical, potentially-valuable individual claims that are subject to arbitration.[37] Upon procuring as many discrete

[36] Arguably the most straightforward means of using Rule 23 to obtain the identities of injured victims is through the notice requirement, but Rule 23(c)(4) does not require notice to be provided to class members in a (b)(2) class, given that its members cannot opt out. Some courts have nonetheless required notice in some (b)(2) class actions where necessary.

[37] This arbitration entrepreneur would resemble the claims agents of yore – non-lawyers who actively identified, investigated, processed, aggregated and assisted injured parties in bringing their claims in exchange for a fee or percentage of recovery. Claims agents have a long and somewhat controversial history in Anglo-American society. Blackstone called them "the pests of society" and early English courts renounced them as "prowling assignees." Agents were held to be "officious intermeddlers" and the doctrines of champerty and maintenance were deployed by courts to stop them from "stirring up strife and contention" in pursuit of profit or some other self-interested motive. Huber v. Johnson, 68 Minn. 74, 78 (Minn. 1897). However, as the Supreme Court has noted, resistance to the claims agent gradually disappeared during the Nineteenth Century, so that "'*many, probably most, American jurisdictions* [allowed] an assignee'" to help another enforce their legal rights. *Sprint Communs. Co., L.P. v. APCC Services*, 554 U.S.

claims as the market will bear and which can net a profit, the arbitration entrepreneur would then file a single arbitration seeking to collectively resolve the hundreds or even thousands of claims she has amassed. This claims-buying model resembles previous efforts to individually process claims that had marginal but not negligible value when viewed in isolation and significant value when handled by a specialist or repeat player.[38]

We are taking the claims-buying model one step further and extending it to the next frontier for civil justice in the United States: arbitration. In doing so, we build on the precedent set in the debt-buying industry, where firms purchase debt claims from credit card companies, cell phone providers and other providers of consumer credit, and bring massive numbers of individualized recovery proceedings. Consumer credit is a powerful example of mass small claims litigation that makes economic sense, although ironically, it is an example where the consumer is the defendant, not the plaintiff.[39]

This paper will proceed as follows: Part I will describe the current state of class action and arbitration jurisprudence, with particular focus on the Supreme Court's recent pronouncements approving class action waivers in arbitration agreements. Part II takes up the hybrid model of securing a "judicial launchpad" prior to engaging in mass arbitrations. Part III focuses on the claims-buying model, which contemplates the intervention of an arbitration entrepreneur modeled against the practices of consumer debt buying companies in recent years. This Part will focus on the ability to freely buy, trade, assign and sell claims in arbitration, as well as the question of whether a single arbitration seeking to represent collective claims can survive under current law and practice.

269, 282 (2008) (*quoting* Clark & Hutchins, *The Real Party in Interest*, 34 Yale L.J. 1, 264 (1925).

[38] *See, e.g.*, the cases discussed in *Sprint Communs. Co., L.P*, 554 U.S. at 280-81 ("[D]uring the 19th century, most state courts entertained . . . suits by individuals who were assignees for collection only . . . .").

[39] *See* Lauren Goldberg, Note, *Dealing in Debt: The High Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006).

PART I
THE END OF CLASS ACTIONS

Class action litigation is in decline.[40] Over the past decade, the Supreme Court and a number of influential circuit courts have revealed deep-seated skepticism (and hostility) to class action litigation, finding doctrinal and policy-based rationales to support cutting back on this potent procedural device.[41] Standards for certifying high-stakes class actions have become increasingly more demanding,[42] small-claims consumer

[40] Although some studies show that the number of class actions filed has remained fairly steady over the past three years, others reveal that, given the increased evidentiary and burden of proof standards that plaintiffs must satisfy, a significant number of these classes are not certified. Compare Fulbright & Jaworski LLP, 7th Annual Litigation Trends Survey Report (2010), available at http://www.fulbright.com/litigationtrends (last visited Jan 9, 2013), with Joel S. Feldman, Simone R. Cruickshank, and Gary J. McGinnis, *Evidentiary and Burden of Proof Standards for Class Certification Rulings*, 11 BNA CLASS ACTION LITIG. REP. 536, 541 (June 11, 2010). Securities fraud class actions appear to be the exception. *See* Jordan Milev, Robert Patton, and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review* (National Economics Research Associates, July 26, 2011), available at www.nera.com/nera-files/PUB_Mid-Year_Trends_0711(3).pdf (last visited Jan 9, 2013) (reporting that securities class action filings remained steady and suggesting that "a wave of new cases alleging breach of fiduciary duty in connection with" mergers and acquisitions is the cause).

[41] *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) (asserting that judicial decisions limiting class action litigation are primarily concerned that "class practice allows private lawyers to assume the representation of vast sets of absent plaintiffs and to use that power, monitored by no one except overworked judges, as a club with which to extract massive settlements from risk-averse corporations"); Robert Klonoff, *Reflections on the Future of Class Actions*, 44 LOYOLA U. CHI. L.J. 533 (2012).

[42] Whereas courts previously avoided any "preliminary inquiry into the merits" at the class certification stage, recent years have seen the development of a standard under which plaintiffs are required to prove by a preponderance of the evidence – just as they would at trial – any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits. *See e.g.*, In re Initial Public Offerings Securities Litigation, 471 F3d 24, 41–42 (2d Cir 2006) (rejecting the "some showing" standard and adopting a requirement that plaintiffs provide "definitive" proof, through "affidavits, documents, or testimony to . . . [establish] that each Rule 23 requirement has been met"); In re Hydrogen Peroxide Antitrust Litigation, 552 F3d 305, 316, 320 (3d Cir 2008)("overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. . . . Factual determinations necessary to make Rule 23 findings must

class actions have been fundamentally circumscribed,[43] and employment class actions must now meet ever-more restrictive interpretations of the commonality requirement of Rule 23(a).[44] With few exceptions,[45] the Supreme Court's jurisprudence in this area has been marked by an effort to limit, restrict and reduce the availability of class remedies.

A. *Class Action Waivers*

The real game-changer has been a series of Supreme Court decisions upholding class action waivers and instructing lower courts to enforce arbitration agreements according to their specific terms.[46] In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the Court held that the Federal Arbitration Act ("FAA") prohibits arbitrators from imposing class arbitration on parties that have not agreed to such procedures.[47] And then in *AT&T Mobility LLC v. Concepcion*, the Court struck California's so-

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be made by a preponderance of the evidence"). *See also* Comcast v. Behrend, __ S.Ct. __ (No. 11-864) (March 27, 2013) (finding that under a rigorous analysis of Rule 23(a)'s certification requirements, plaintiffs' expert failed to establish that damages can be measured on a classwide basis).

[43] Consumer class actions have been plagued by the adoption of an "implicit requirement" of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of "reliable proof of purchase or a knowable list of injured plaintiffs." This ascertainability requirement has sounded a death knell for many (if not most) cases arising from small retail purchases, where consumers are unlikely to retain proof of purchase. *See* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 331 (2010).

[44] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). *See also See, e.g.*, Arthur H. Bryant, Editorial, *Class Actions Are Not Dead Yet*, NAT'L L.J., June 20, 2011, at 46; John C. Coffee Jr., *The Future (if Any) of Class Litigation After 'Wal-Mart,'* NAT'L L.J., Sept. 12, 2011, at 12; Editorial, *The Wal-Mart Ripple Effect*, WALL ST. J., Oct. 18, 2011, at A36.

[45] *See, e.g.*, Erika P. John Fund v. Halliburton, 131 S.Ct. 2179 (2011) (plaintiff-friendly decision finding that loss causation is not a component of reliance, and therefore, irrelevant at the class certification stage); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437-48 (2010) (upholding Rule 23 over inconsistent state law); Amgen v. Connecticut Retirement Plans & Trust Funds, __ S.Ct. __ (Feb. 27, 2013) (finding proof of materiality is not required before certifying a class based on the fraud-on-the-market theory).

[46] *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671-73 (2012); Concepcion, 131 S. Ct. at 1745-46; Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010); Stolt-Nielsen, 130 S. Ct. at 1773-76.

[47] 130 S. Ct. 1758 (2010).

called "*Discover Bank* rule" – a judge-made rule providing that arbitration agreements attended by class action waivers are unenforceable if those agreements are contained in standard form consumer contracts.[48] Most recently, in *American Express v. Italian Colors Restaurant*, a 5-3 majority held that class action waivers embedded in arbitration clauses are enforceable even where proving the violation of a federal statute in an individual arbitration would prove too costly to pursue.[49] In short, "the Court has nearly concluded its slow march toward universal arbitrability."[50]

Not surprisingly, many corporate actors have shrewdly responded to this spate of judicial decisions by incorporating class action waiver language in their standard-form contracts with consumers and employees,[51] rendering these groups unable to band together and seek legal redress. Since 2000, when the Supreme Court began to develop its pro-arbitration jurisprudence in earnest,[52] a significant number of companies have inserted arbitration clauses into their contracts with consumers and employees.[53] And it's a fair bet that number has spiked

48 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746, 1748 (2011), *abrogating* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

49 570 U.S. at __ ("the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy").

50 David Horton, *Arbitration and Inalienability*, 60 U. KANSAS LAW REV. at __.

51 *See, e.g.*, Myriam Gilles, *Killing With Kindness*, 88 NOTRE DAME L. REV. 825, __ ("most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop"); Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY. L.A. L. REV. 435, 440 (2012) ("It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.").

52 *See, e.g.*, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 89 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration....").

53 See, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1167 (2012) (reporting on a study of contracts imposed by financial services and telecommunications firms finding "that 75 percent contained mandatory arbitration clauses, and 80 percent contained class action waivers," and that "a stunning 93 percent of these companies' employment agreements mandated arbitration" (*citing* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882–84 (2008)); see also Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The*

since the Court's 2011 decision in *Concepcion*, where the majority lauded AT&T's arbitration clause as being fundamentally fairer and better for consumers than litigation.[54] As a result of the Court's extended emphasis on AT&T's "consumer-friendly" arbitration clause, it "has become a sort of gold standard to transactional attorneys," and corporate advisors are actively urging clients to follow AT&T's model.[55] Our research indicates

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Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 n.30 (2004) (finding that approximately 55 percent "of businesses that offer an ongoing product or service" included an arbitration clause in the written contract); Chris Drahozal & Peter Rutledge, *Contract and Choice*, __ B.Y.U. L. REV. __ (forthcoming 2013) (reporting that 48% of consumer credit card agreements contain arbitration clauses, and that 99% of those clauses contain class action waivers).

[54] AT&T's arbitration clause provided that all fees and costs of suit are recoverable by a prevailing plaintiff, and offered cash bounties where claimants receive an arbitration award superior to defendant's final pre-award offer, among other features. AT&T Mobility Arbitration Agreement (on file with the authors).

[55] See, e.g., Gibson Dunn LLP, *U.S. Supreme Court Finds That Class Action Waivers in Arbitration Agreements Are Enforceable under the Federal Arbitration Act* (Apr. 27, 2011), http://www.gibsondunn.com/publications/pages/USSupremeCourtFinds-ClassActionWaiversInArbitrationAgreementsAreEnforceableUnderFederalArbitrationAct.aspx (last visited Jan. 20, 2013) ("The wording of the majority decision in AT&T Mobility does not seem to require similar provisions in an arbitration agreement, although the Court did observe that the district court concluded that the guaranteed amounts would put the Concepcions in a better position than if they were participants in a class action."); Alan Kaplinsky, *Status of Overdraft Fee Litigation*, 1871 PLI/CORP. 209, 2011 (recommending that banks facing class action liability on overdrafts—"only a handful [of which] have arbitration provisions"—draft "the types of consumer-friendly features necessary to ensure enforceability"); see also JOSEPH MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS, §2.14 (8th ed. 2011) ("Although *Concepcion* was not predicated on the existence of consumer-friendly provisions, cautious drafting should lead companies to hew closely to the terms of the agreement involved in that case and: [m]ake consumer arbitration low cost or cost-free [and] . . . [c]onsider using premiums: financial incentives for customers or employees to arbitrate and allow arbitrators to award attorney's fees."); Weil, Gotshal & Manges LLP, *Second Circuit Strikes Down Class Arbitration Provisions in In re American Express Merchants Litigation*, *3 (Feb. 26, 2009), available at http://www.weil.com/files/upload/WeilBriefing_LitReg_090226.pdf (last visited Jan. 20, 2013) ("Another option for businesses to consider, to the extent they wish to increase the possibility that their class arbitration waiver provisions will be enforceable under In re American Express, is the inclusion of a fee-shifting provision for attorneys' fees and expert costs."); Hilary B. Miller, *What Payday Lenders Need to Do About Arbitration* (May 2, 2011), http://myemail.constantcontact.com/What-Payday-Lenders-Need-To-Do-About-Arbitration---Now.html?soid=1101566873044&aid=SGkv356PqJU (last visited Jan. 20, 2013) ("Lenders should give serious consideration to updating their agreements to provide for

that clients have taken this advice to heart as an efficient means of avoiding nearly all forms of aggregate liability.[56]

In the aftermath of *Concepcion*, lower federal courts have compelled individual arbitration of otherwise class-able claims in the vast majority of cases,[57] and courts will likely continue to do so in the wake of

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every one of the consumer protections included in the AT&T arbitration agreement. In other words, at a minimum, the lender-eats-fees provision, venue, preservation of small court claims, opt-out and bump-up provisions of AT&T's clause should be an element of any class action waiver provision.").

[56] *See* Gilles, 88 NOTRE DAME L. REV. at __ (showing that 32 major U.S. consumer-oriented companies amended their arbitration clauses in the aftermath of *Concepcion* to add more consumer-friendly provisions).

[57] *See, e.g.*, *Coiro* v. Wachovia Bank, N.A., 2012 WL 628514, at *6 (D.N.J. Feb. 27, 2012) ("After considering the evidence presented to it, the Court is not convinced that Plaintiff has met her burden in demonstrating that enforcement of the class-action waiver would effectively preclude any action seeking to vindicate proposed class members' legal rights."); Emilio v. Sprint Spectrum L.P., 2012 WL 917535, at *4 (S.D.N.Y. Mar. 16, 2012) ("Petitioner has not demonstrated that any of his statutory rights would be precluded through the Court's enforcement of the class action preclusion provision . . . ."); LaVoice v. UBS Fin. Servs., Inc., 2012 WL 124590, at *7–8 (S.D.N.Y. Jan. 13, 2012) (finding the evidence of prohibitive costs of individual arbitration "too speculative to justify the invalidation of an arbitration agreement"); Herrington v. Waterstone Mortg. Corp., 2012 WL 1242318, at *2 (W.D. Wisc. Mar. 16, 2012) (finding plaintiff failed to prove that the costs of individually arbitrating her claims would be prohibitive "because she failed to conduct any comparison of the costs of litigating in federal court"); Khan v. Orkin Exterminating Co., 2011 WL 4853365, at *4 (N.D. Cal. Oct. 13, 2011) (where plaintiff is "seeking to establish that it is too costly for him to pursue consumer protection claims on an individual as opposed to a class basis, the Court notes that post-*Concepcion* decisions have rejected the cost of litigation as a basis for invalidating a class action waiver"); Tory v. First Premier Bank, No. 10 C 7326, 2011 WL 4478437, at *4 (N.D. Ill. Sept. 26, 2011) ("*Concepcion* moots any argument on the cost benefits to the plaintiff of a class action versus an individual arbitration."); Black v. JP Morgan Chase, Civil Action No. 10-848, 2011 WL 3940236, at *21 (W.D. Pa. Aug. 25, 2011) (same); In re Apple and AT&T iPad Unlimited Data Plan Litig., 2011 WL 2886407, at *3 (N.D. Cal. July 19, 2011) ("Plaintiffs contention that their modest claims 'simply do not provide sufficient motivation for an aggrieved customer to seek redress' on an individual basis is the very argument that was struck down in *Concepcion*."); Arellano v. T–Mobile USA, Inc., 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (finding that *Concepcion* forecloses argument that an arbitration agreement is void because small claims might be prohibitively expensive to pursue on an individual basis); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1207 (11th Cir. 2011) (finding that "[i]nsofar as Florida law would invalidate [class action waivers] as contrary to public policy . . . such a state law would 'stand[] as an obstacle to the accomplishment and execution' of the FAA, and thus be preempted" under Concepcion) (internal citations omitted); Simpson v. Pulte Home

American Express. And there seems no help in sight: neither legislation overruling *Concepcion*[58] nor regulatory measures rendering class action waivers unenforceable appear likely in the current political climate.[59] To

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Corp., 2012 WL 1604840, *5 (N.D. Cal May 7, 2012) ("In view of *Concepcion* and its progeny, the Court is not persuaded by Plaintiffs' contention that the class action waiver is substantively unconscionable."); Alvarez v. T-Mobile USA, Inc., 2011 WL 6702424, *7 (E.D. Cal. Dec. 21, 2011) (refusing to consider public policy-based arguments against enforcement of class action waiver because "those arguments are not viable post-*Concepcion* [as] state laws advancing those policies are preempted by the FAA"); In re California Title Ins. Antitrust Litig., 2011 WL 2566449, at **2–3 (N.D. Cal. June 27, 2011); Clemins v. Alliance Data Sys. Corp, No. 11-C-36 (E.D. Wisc. Oct. 12, 2011) (applying *Concepcion* and enforcing class action waiver in credit card agreement); Chavez v. Bank of Am., 2011 WL 4712204 (N.D. Cal. Oct. 7, 2011); Kaltwasser v. AT&T Mobility LLC, 812 F. Supp. 2d 1042, 1048-9 (N.D. Cal. 2011) (declaring that the vindication-of-right doctrine has no viability after *Concepcion*, at least insofar as class action waivers are concerned); Villegas v. U.S. Bancorp, No. C-10-1762, 2011 WL 2679610, (N.D. Cal, June 20, 2011).

[58] Congress continues to consider various versions of the Arbitration Fairness Act, which would amend the FAA to invalidate all arbitration clauses in consumer or employment contracts. *See* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., 1st Sess. § 4, 155 CONG. REC. H1517 (Feb 12, 2009) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, S1782 § 4, 110th Cong, 1st Sess., 153 CONG. REC. S9144 (July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong, 1st Sess., § 4, 153 CONG. REC. H7774 (July 12, 2007) (invalidating agreements requiring arbitration of employment, consumer and civil rights disputes).

In the immediate wake of the Supreme Court's decision in *Concepcion*, Senators Al Franken and Richard Blumenthal, along with Congressman Hank Johnson, reintroduced a 2011 version of the bill, which would prohibit class waivers in all consumer, employment, and civil-rights-related contracts. This most recent version has also failed to garner much legislative support. *See, e.g.*, Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, at A26 (noting that the chances of federal legislation overriding Concepcion "aren't great in the current political environment").

And again, in 2013, anticipating the outcome in *American Express*, another version of the bill was introduced in the House and Senate. *See* H.R. 1844, 113th Cong., available at http://www.govtrack.us/congress/bills/113/hr1844/text; S. 878, 113th Cong., available at http://www.govtrack.us/congress/bills/113/s878. And again, the odds of either even making it through committee seem slim.

[59] For example, the Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB"), and required the agency to conduct a study of and submit a report to Congress on the use of arbitration in consumer transactions, and "prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." Dodd-Frank Wall Street Reform

sum it up: we now exist in a world where contractual bans on aggregate claiming are per se enforceable, where every company has the option to exempt itself from class action liability by simply adding a "consumer-friendly" arbitration clause language to its terms and conditions, and where the Supreme Court has repeatedly hailed arbitration as providing a relatively inexpensive vehicle for addressing individual, small-value claims-- one that is both more accessible than the courts and where claimants might fare at least as well as they might in court.

These developments in class action and arbitration jurisprudence foretell a massive transformation in adjudicative structures and procedures, as claims shift wholesale into arbitral fora. Currently, however, the major arbitral bodies appear ill-prepared for the onslaught of claims that may be coming their way now that public courts have closed the door to many forms of aggregate litigation.

B. *Arbitral Unease with Aggregation*

Arbitration, in its ideal form, allows both sides of a legal dispute to trade the advantages of adjudication in a court of law in exchange for advantages gained in so-called "alternative dispute resolution" systems. Under basic economic theory, both contractual partners can benefit from arbitration.[60] It is theoretically possible that "individuals may be better off agreeing [to] arbitration clauses instead of retaining their right to go to court, if the resulting cost savings are passed on to consumers through reductions in the price of goods and services [or] to employees through higher wages."[61] And it is even more likely that the businesses which

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and Consumer Protection Act § 1021, 12 U.S.C § 5511, § 5518. (2010). The CFPB is currently running its arbitration study, but the embattled agency has other items on its plate. *See, e.g.*, Jennifer Bendery, *Richard Cordray CFPB Confirmation Imperiled by Senate Republicans, Again*, available at http://www.huffingtonpost.com/2013/02/01/richard-cordray-cfpb_n_2599838.html.

[60] *See, e.g.*, Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5-7 (1995) (describing benefits that parties might derive from ex ante alternative dispute resolution agreements).

[61] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741; *see also* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements-- with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93 (asserting that

employ and enforce arbitration clauses against consumers, employees and others benefit from a combination of fewer claims, reduced costs, and greater predictability in outcomes. The idea that arbitration could work to the mutual advantage of parties who were otherwise typically locked in conflict was a major reason for the early enthusiasm for arbitration among progressives and reformers.[62]

The reality is more complex, and the debate over whether arbitration can be beneficial for most potential litigants is tied up in arguments over consent, access, cost, and the neutrality of decisionmakers.[63] This article will not delve into these debates; rather, we take the arbitral rules and practices as a given. But we also predict that these rules and practices may prove insufficient to the task of

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adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees).

[62] Arbitration gained prominence in the labor industry, for example, as a means of fostering self-government and peace preservation. *See, e.g.*, Textile Workers Union of Am. v. Lincoln Mills of Alabama Goodall-Sanford, Inc., 353 U.S. 448, 462-63 (1957) (Frankfurter, J., dissenting) (observing that judicial intervention in arbitration threatened "the going systems of self-government"). An early arbitration scholar, Frances Kellor, commenting on arbitration in general, noted that "any instrumentality which reduces the burden of waste and cost of disputes to a nation is an activating power for the advancement of civilization." FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS 117 (1948).

Laura Nader has argued that the ADR movement gained momentum when elite lawyers endorsed a "harmony model" of law which turned away from a traditional conflict-driven legal system (which had dominated the nation's first 150 years). Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 7 (1993). To illustrate her point, Nader cited Chief Justice Warren Burger, who extolled arbitration and "said lawyers should serve as healers, rather than warriors, procurers, or hired guns." *Id. See also* Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 85 (arguing that the premise under which parties with legal claims prefer to resolve their "claims through mediation rather than adversarial litigation and adjudication seems to be based on questionable assumptions and debatable extrapolations from other social conflict contexts").

[63] *See, e.g.*, Jean R. Sternlight, *ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 303 (2003) (asserting the importance of a conflict resolution "system that contains multiple procedures (e.g. both litigation and mediation)"; Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (attacking mediation because of power imbalances for minorities in American society); Bryant Garth, *Tilting The Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927 (2002).

administering and managing mass individual arbitrations under either model we describe in the next two Parts – necessitating amendment and revision to account for the impending surge of claims.

For example, the major arbitration associations and their supporters often tout the "streamlined and efficient" manner in which arbitration is conducted.[64] These efficiencies are largely achieved by rules limiting the parties' ability to engage in fact-discovery,[65] exchange pre-hearing briefs,[66] rely on standard admissibility of evidence,[67] or appeal arbitral decisions.[68] Arbitration hearings are restricted to brief presentations of sworn evidence, with few of the procedures that serve as markers of due process in the civil justice system.[69] As critics of arbitration have long argued, these seemingly neutral rules may have disproportionately negative effects on consumers and employees.[70] But,

[64] *See, e.g.*, Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS, Apr. 18, 2002, at 3 ("[A]rbitration typically reduces costs ... by streamlining discovery.").

[65] For example, the AAA's Healthcare Payor Provider Arbitration Rules, which govern billing-related disputes, limit discovery to one deposition per party unless ordered by the arbitrator. *See* AAA Rule 19. Similarly, AHLA rules provide that the "arbitrator may allow the parties to conduct such reasonable discovery and exchange exhibits as the arbitrator believes necessary or proper." *See* AHLA Rule 4.02. *See also* Foremost Yarn Mills v. Rose Mills, 25 F.R.D 9 (E.D. Pa. 1960) (finding that the FAA does not make discovery procedures available to parties to an arbitration").

[66] *See* AAA Rule 28 (describing preparation of an "Arbitration Record" in advance of hearing, which should states facts both conceded and in dispute, in lieu of pre-trial briefing).

[67] *See* AAA Rule 31 ("Conformity to legal rules of evidence shall not be necessary.")

[68] The FAA limits judicial review of arbitral awards to cases involving "manifest disregard of the law," 9 U.S.C. § 10, or "evident material miscalculation." 9 U.S.C. § 11(a)-(c). The Uniform Arbitration Act and the acts adopted by most states allow an award to be vacated only upon the showing of: (a) corruption, fraud or other influence exercised as a means of obtaining the award; (b) evident partiality or misconduct on the part of the neutral arbitrators; (c) the arbitrators exceeding their powers; (d) arbitrator's refusal to postpone a hearing or refusal to hear material evidence without sufficient cause; or (e) lack of agreement to arbitrate by the parties. *See also infra* Part III.A.

[69] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ("[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, often are severely limited or unavailable.")

[70] *See, e.g.*, Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 683 (1996) (asserting

for our limited purposes here, these privately-ordered modifications of the public adjudicative system will not have distinctly negative effects on the models we describe, as they do not in themselves create any obstacles to informal aggregation of claims.

Other rules may, however, prove deeply problematic to any efficient massing of arbitrations. Formally, it is now broadly accepted that "[p]rinciples of stare decisis and res judicata do not have the same doctrinal force in arbitration proceedings as they do in judicial proceedings."[71] This means that each arbitration stands on its own and has no precedential effect on similar, unrelated arbitration proceeding.[72] And, because arbitrators lack the authority to enjoin ongoing wrongful activity, each claimant bringing a separate claim has no overall impact on policy or practices that have widespread effect.

But even informally, the principal arbitral associations have promulgated a set of rules and expectations that hinder any attempt to generate precedent. For example, the AAA currently requires that "all disclosures to the arbitrator, and any determinations of the arbitrator, shall remain confidential, not subject to disclosure in any subsequent arbitration or litigation between the parties."[73] Further, no arbitral body currently requires that a legal record of the proceedings be kept.[74] This means that,

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that the arbitral rules limiting discovery harm consumers because the corporation is the party with all the records, and the consumer is the one that needs access to them).

[71] *See, e.g.*, Connecticut Light & Power Co. v. Local 420, 718 F.2d 14, 20 (2d Cir. 1983), *citing* Butler Armco Independent Union v. Armco Inc., 701 F.2d 253 (3d Cir.1983); Metropolitan Edison v. NLRB, 663 F.2d 478 (3d Cir.1981), cert. granted, 457 U.S. 1116 (1982); Riverboat Casino, Inc. v. Local Joint Executive Board of Las Vegas, 578 F.2d 250 (9th Cir.1978).

[72] As a practical matter, however, arbitrators may take prior decisions into account, and, given the informal evidence rules of arbitration, it is hard to see on what grounds efforts to include information about prior decisions could be excluded, even if they do not have any binding effect. *See* Korn & Rosenberg, *supra* note __ at *30 n.89 ([a]rbitrators increasingly rely on arbitral precedents—case records, orders, and awards—in making their decisions").

[73] AAA Rule 14.6. While parties in traditional litigation can also obtain confidentiality orders and submit documents and testimony under seal, obtaining privacy in traditional litigation is a far more burdensome and less certain process than in arbitration.

[74] *See, e.g.*, House Grain Co. v. Obst, 659 S.W.2d 903 (Tex. App. 1983). *See also* Gordon Firemark, *Arbitration in Entertainment Contracts: Worth Fighting About?* ("[S]ince no written opinion exists, an arbitration award has little or no significance as precedent for the parties or others to follow in future situations."); Ted Johnson, *Arbitration Clauses Irk Creatives*, VARIETY (Oct. 2011), available at

even in a jurisdiction such as California that requires publicity of arbitral awards, there is no requirement that the arbitrator explain her reasons or provide any reliable analysis of the issues.[75] The rules that shroud arbitration decisions are bolstered by the underlying contracts of many consumer-oriented companies, which specifically provide that "no arbitration award or decision will have any preclusive effect as to the issues or claims in any dispute with anyone who is not a named party to the arbitration."[76] Moreover, it would be naive to assume that all of this can be dealt with by back-end judicial review of arbitral decisions; such review is quite limited by FAA §10 to cases involving "manifest disregard of the law" – a high standard that seems especially difficult where an arbitrator's regard for "the law" is opaque.[77]

Taken together, these rules contemplate and conspire to silo individual claims by removing any practical means of transmitting information adduced or determinations made in one arbitration to subsequent, related arbitrations. Broad confidentiality and the absence of a written record make it virtually impossible to reproduce in arbitration the collateral estoppel effects that create the efficiencies witnessed in traditional litigation.[78]

Indeed, the problem may lie deeper than the arbitral bodies' positive rules or the unilateral ability of companies to add even more iron-clad promises of privacy to existing arbitration clauses; the utter absence of procedures designed to facilitate mass arbitrations is also striking. For example, neither AAA nor JAMs currently have any discernible rules on how to obtain a single arbitrator for a set of related arbitrations, how to schedule related arbitrations in a compressed timeframe, or how to use a

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http://www.variety.com/article/VR1118045188 (asserting that because there is no precedential value from prior arbitration proceedings, it is as if each new proceeding is like "groundhog day").

[75] Rule R-41(a)-(b); *see also* Standing up For Seniors: How the Civil Justice System Protects Elderly Americans, www.justice.org/seniors (predicting that "many offenses will never see the light of day due to arbitration clauses" because, "[w]hile litigation has revealed instances of abuse," arbitration reveals nothing).

[76] *See, e.g.*, Agreement for American Express Card Acceptance, Nov. 2012 (on file with the authors).

[77] FAA § 10.

[78] *See, e.g.*, Collins v. D.R. Horton, Inc., 361 F.Supp.2d 1085, 1097 (D.Ariz.2005) ("The reasons for requiring arbitrators to apply res judicata and collateral estoppel are the same as those underlying the doctrines themselves—finality, protection of judgments, prevention of duplicative litigation, and avoidance of inconsistent results.")

single expert report across multiple arbitrations. There are no "best practices" governing damages calculations or the alignment of awards across arbitrations. Nor do the major arbitral associations currently offer volume discounts on arbitral costs or neutrals' fees for those seeking to arbitrate a mass of related claims.

On the other hand, nothing *prevents* one or all of arbitral bodies from adopting new practices designed to meet new needs of the parties before them. In fact, if, as the Supreme Court has repeatedly held, a "fundamental attribute" of arbitration (at least as intended by Congress) is "to facilitate streamlined proceedings," then it is hard to see why arbitral bodies would resist accommodating parties who must appear in related separate arbitrations by coordinating schedules, offering volume discounts on arbitral costs or neutrals' fees, or even providing greater transparency about awards for similar claims.[79]

So while existing procedures are clearly designed to aid the individual claimant in the individual arbitration to resolve a specific, fact-intensive dispute, we think claimants and lawyers will push for more friendly procedures to maximize efficiencies, and that ultimately, the arbitral bodies will find workable mechanisms to manage mass arbitrations. After all, there was a period (between *Bazzle* and *Stolt-Nielsen*) during which the AAA changed its rules to accommodate class arbitration. It eliminated the presumption of confidentiality and promulgated other class-friendly procedures.[80] These changes demonstrate that arbitration is a market-driven, private enterprise, and that the arbitral bodies are fully capable of responding to changes in client needs and the legal environment.[81] The models we describe in the next two Parts are heavily reliant on the ability of private arbitration to adapt to evolving public needs.

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[79] *See AT&T Mobility* at 1748 ("The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to *facilitate streamlined proceedings*.") (emphasis added).

[80] *See* AAA Supplementary Rules of Class Arbitrations (July 14, 2005).

[81] For example, in 1999, the AAA significantly revised its rules in response to concerns relating to discretion and authority of arbitrators. Over the years, the association has added Optional Procedures for Large, Complex Cases, and amended the Expedited Procedures for small cases to make them more efficient.

PART II
THE HYBRID MODEL

One potential work-around to current anti-class action jurisprudence and the inefficiencies of individual arbitration is to leverage the rules and authority of a judicial judgment to maximize the efficiency of mass private arbitrations. This hybrid approach, drawing on both judicial and arbitral processes, will not work in all cases and faces serious challenges; nonetheless, we think the various pathways to obtaining a public liability ruling will motivate entrepreneurial lawyers in a significant subset of claims.

A. *The Public Liability Ruling*

Lawyers seeking an enforceable judicial judgment upon which to base subsequent serial arbitrations have a number of options. This may be possible where, for example, the arbitration clause specifically denies the arbitrator the authority to grant injunctive relief in an individual arbitration. In this scenario, plaintiffs may argue that claims for injunctive relief are properly before the court.[82] One challenge that plaintiffs will confront, even in the subset of cases where they can show that broad injunctive relief is necessary, is the argument that even claims for injunctive or declaratory relief must nonetheless be brought in an individual arbitration hearing. In other words, defendants may argue that the individual plaintiff could obtain the broad, and even potentially market-wide, injunctive relief in an individual proceeding – and more specifically, in the contracted-for individual arbitration.[83] But it remains

[82] Of course, many of the cases comprising contemporary class practice do not implicate injunctive concerns. Oftentimes, the complained-of conduct has ceased by the time a class action is filed, or by the time certification is sought.

[83] *See, e.g.*, Craft v. Memphis Light, Gas, and Water Div., 534 F.2d 684, 686 (6th Cir. 1976), *aff'd*, 436 U.S. 1 (1978) (finding (b)(2) class certification inappropriate where class treatment is "not needed"); Ali v. Quarterman, No. 9:09-CV-52, 2009 WL 1586691, at *1 (E.D. Tex. June 4, 2009) (justifying denial of certification because injunctive relief in pending non-class action would provide same remedy); Access Now Inc. v. Walt Disney World Co., 211 F.R.D. 452, 455 (M.D. Fla. 2001) (finding "complexity and expense" of class action unnecessary when injunctive relief in a single case would provide same remedy); Fairley v. Forrest Cnty., Miss., 814 F.Supp. 1327, 1329-30 (S.D. Miss. 1993) (determining class action unnecessary because declaratory and injunctive relief would have same effect); see also United Farmworkers of Fla. Hous. Project, Inc. v.

to be seen how many defendants will be willing to agree that plaintiffs may take aim at their nationwide practices in a string of individual, largely non-reviewable arbitrations.[84]

A second pathway to a judicial ruling on liability that can be used in the arbitral arena arises where there are some stray claimants who are not bound by arbitration clauses, but who are similarly situated with the claimants who are bound by such clauses. This arises more frequently than one might think[85]: large consumer-facing organizations encounter massive challenges in managing multiple iterations of agreements, phasing out legacy or grandfathered agreements and regularizing terms and

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City of Delray Beach, 493 F.2d 799, 812 (5th Cir. 1974) ("Even with the denial of class action status, the requested injunctive and declaratory relief will benefit not only the individual appellants ... but all other persons subject to the practice under attack."); Green v. Williams, 1980 U.S. Dist. LEXIS 17881, at *5 (E.D. Tenn., Dec. 17, 1980) (finding that "certification of an action as a class action under Rule 23(b)(2)... is inappropriate where the injunctive and declaratory relief sought… would automatically accrue to the benefit of the class members").

[84] *See infra* text accompanying notes __-__ (describing AT&T's response to thousands of individual arbitrations filed to block its merger with T-Mobile); *see also* AT&T Mobility v. Concepcion, 131 S.Ct. at 1750 (in derogating class arbitration, the majority concluded "[w]e find it hard to believe that defendants would bet the company with no effective means of review"). *See also* Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 108 (2012) (asserting that "the very narrow grounds for judicial review of arbitration awards may make the risk of an aberrational award unacceptably high"); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 454 (2010) (identifying high-risk categories where defendants prefer litigation over arbitration); Sternlight, *supra* note __, at 91 (noting that "a company might hurt itself rather than consumers by eliminating class actions, because the company might then face numerous individual claims brought in arbitration" – which may create a greater financial threat if injunctive relief is sought that could force the company to change its practices in ways that harm its profitability).

[85] Given how easy it is for businesses to add or amend arbitration clauses to their new and existing agreements, one might assume that all companies have done so effectively in response to recent pro-arbitration legal decisions. *See, e.g.*, Gilles, 88 NOTRE DAME L. REV. at __ (noting that "most companies can quickly amend their clauses in response to or anticipation of litigation outcomes, revealing a nimble and adaptive corporate feedback loop"), citing Ann Marie Tracey & Shelley McGill, *Seeking a Rational Lawyer for Consumer Claims After the Supreme Court Disconnects Consumers in* AT&T Mobility LLC v. Concepcion, 45 LOY L.A. L. REV. 435, 440 (2012) ("It will take only seconds for businesses to amend unilaterally their online contracts of adhesion and remove class actions from existence, assuming they have not already done so.").

conditions in the wake of acquisitions and mergers.[86] Of course, the judicial liability ruling will have no value in the arbitral arena unless the requirements of non-mutual, offensive issue preclusion are met. But here, where the arbitral claimants by definition "could not easily have joined" the prior judicial proceeding,[87] the test boils down to whether the issue in the two proceedings is identical.

A third route to judicial resolution runs through the offices of public enforcers. Where state attorneys general, administrative agencies or others establish critical liability facts in the course of judicial enforcement actions, the predicate may be established for plaintiffs' lawyers to avail themselves of serial arbitration strategies. For example, when a state attorney general pursues a claim against a wrongdoer on behalf of citizens of the state, she generally does so based on a state or federal remedial statute that specifically provides for a broad grant of *parens* patriae authority to seek injunctive or declaratory relief.[88] Those efforts can inure to the benefit of private lawyers, who may employ judgments attained in enforcement actions in later arbitral hearings alleging the same wrongdoing. Indeed, it may be in the interests of private lawyers to enlist public enforcers towards these ends, and even to offer their services at discounted rates.[89]

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[86] A surprising example comes from Alan Kaplinsky who observes that, in the *Checking Overdraft* cases, where the players were sophisticated and well attuned to the dangers of class litigation, a number of the defendant institutions were vulnerable because they failed to maintain class waivers with respect to some subset of their consumers. Alan Kaplinsky, *Status of Overdraft Fee Litigation*, 1871 PLI/CORP. 209 (2011) (reporting that "only a handful [of banks] have arbitration provisions" leaving many vulnerable to class action liability on overdrafts").

[87] *See, e.g.,* Parklane Hosiery v. Shore, 439 U.S. 322, 331 (1979) ("The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where … the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.").

[88] *See*, Gilles & Friedman, *supra* note __, at 662.

[89] *Id.*, *supra* note __, at 669. In these arrangements it will be particularly important for the State to retain control of the litgation, since the private counsel will have an interest in obtaining a judicial resolution that can be retailed in arbitrations. But that is nothing extraordinary: the state must retain ultimate authority in any event under the law of most states. *Id*. at __ ("The principal legal constraint is the requirement, imposed by several courts, that the AG must maintain total control over all key decision making lest the retainer agreement [with private counsel] violate public policy as an unlawful delegation of the AG's authority.").

Whatever pathway to a judicial resolution is taken, this entire model depends upon the supposition that arbitrators will accord preclusive effect to the liability determinations made in court.[90] The case law suggests that they should – *i.e.*, that the doctrine of *Parklane Hosiery* ought to apply with full force in the judicial-to-arbitral context: "[a]rbitrators are not free to ignore the preclusive effect of prior judgments under the doctrines of res judicata and collateral estoppel."[91]

B. *The Return on Investment*

Tremendous benefits obtain from a judicial determination of liability. First, if there is an underlying fee-shifting statute,[92] lawyers can recover their fees and costs in the case of an individual claimant or in representing an arbitration-free client seeking an injunction or declaratory judgment. The current practice is for courts to grant class counsel attorneys fees on a rate-times-hours-worked lodestar basis (generally

[90] It appears settled that determinations made in the arbitral fora are accorded preclusive effects in subsequent litigation. *See* WAYNE J. POSITAN & DOMENICK CARMAGNOLA, EMPLOYMENT TORTS, IN BUSINESS TORTS LITIGATION 81, 123 (David A. Soley et al. eds., 2d ed. 2005) (citing examples where preceding arbitration decisions were deemed to have preclusive effect in subsequent court proceedings). This appears the case even where "the arbitration procedures, especially regarding discovery, may offer less protection than those of a civil trial." Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damage Limits*, 94 CORNELL L. REV. 1459, 1474 (2009).

[91] Aircraft Braking Sys. Corp. v. Local 856, 97 F.3d 155, 159 (6th Cir.1996); Miller v. Runyon, 77 F.3d 189, 193 (7th Cir.1996); John Morrell & Co. v. Local Union 304A, 913 F.2d 544 (8th Cir.1990); Collins v. D.R. Horton, Inc., 361 F.Supp.2d 1085, 1097 (D.Ariz.2005) ("The reasons for requiring arbitrators to apply res judicata and collateral estoppel are the same as those underlying the doctrines themselves—finality, protection of judgments, prevention of duplicative litigation, and avoidance of inconsistent results."), *affirmed*, 505 F.3d 874, 880 (9th Cir. 2007).

[92] Alexander G. Osevala, *Let's Settle This: A Proposed Offer of Judgment For Pennsylvania*, 85 TEMP. L. REV. 185, 195 (2012) (noting that there are over "200 federal and close to 2,000 state statutes that allow the shifting of attorneys' fees"). These include civil rights statutes, *see, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2006); Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988 (1982); employment-related statutes, *see, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (2006); and consumer rights statutes, Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3) (2006).

without a multiplier[93]) in non-common-fund, statutory fee-shifting cases.[94] If the claim is brought by the public enforcer – by the legal staff of a state attorney general, agency or other public entity, or in conjunction with private lawyers – the costs of proving wrongdoing are paid in salaries to public officials or in accordance with contracts entered into with private lawyers.[95] In either event, the ability to recover these initial investment costs is critical to the profitability of the next phase of the venture.

Importantly, however, expert costs are not generally recoupable.[96] The Supreme Court has repeatedly held that the "costs" recoverable under 28 U.S.C §1920 and FRCP 54(d) exclude expert witness fees, and that the cost-shifting provisions of statutes such as the Clayton Act simply do "not permit a shift of expert witness fees."[97] Not all cases require expensive or extensive expert engagement, but for those that do, counsel will necessarily factor this cost into the initial determination of whether the case is worth the investment.

Second, the antecedent court proceeding may make available a list of injured victims, either through discovery or in the case of judicially-mandated class notice.[98] Once lawyers can contact victims to explain the nature of the claim, they can structure a variety of agreements that would allow the claimant to transfer, assign, or pay a percentage of recovery upon success of her claim in arbitration. Because the attorney is acting for herself and not representing the claimholder in a legal proceeding, ethical restrictions should not stand in the way; for example, neither MRPC 1.8(a), which imposes special duties on attorneys who seek to enter into a business transaction with a *client*, nor MRPC 7.3(a), prohibiting direct solicitation of a *client*, limits an attorneys freedom of action compared to

[93] *See, e.g.,* Purdue v. Kenny A. ex rel. Winn, 559 U.S. 542 (2010) (finding that enhancement of the lodestar is may only be awarded in "rare" and "exceptional" circumstances).

[94] *See* MANUAL FOR COMPLEX LITIGATION, § 24.13 ("[I]n a statutory fee case... the lodestar is the appropriate method.")

[95] *See* Gilles & Friedman, *supra* note __, at __ (describing contacting strategies between public and private enforcers).

[96] 28 U.S.C. §1920.

[97] *See* West Virginia University Hospitals, Inc v Casey, 499 U.S. 83, 94, 99-100 (1991); Crawford Fitting Co v J.T. Gibbons, Inc, 482 U.S. 437, 442 (1987).

[98] This assumes that the information is not protected by a protective order – which typically limits information to the instances of the litigation for which it was produced – which is far more likely in a case brought on behalf of an arbitration-free client or when representing the state.

an arbitration entrepreneur who is not an attorney, would apply to our model.[99]

The transaction costs of contacting each claimant and negotiating each retainer agreement will be high, but attorneys will have an incentive to run as many arbitrations as possible off a single liability judgment to increase their overall profit.[100] Also, we can imagine lawyers negotiating volume discounts on arbitration rates and neutrals' fees, which would also incentivize greater numbers of claims in order to reduce overall transaction costs.

Importantly, profit margins in these individual arbitrations would remain small – but because other costs can be significantly reduced or recouped on the hybrid model, any damages awarded in the individual arbitrations are gravy. Nevertheless, the low profit margins will make many claims unattractive to many lawyers, and more generally, renders this model an imperfect substitute for class action litigation. Still, we think the hybrid approach has the potential to be a second-best in a world purged of the class action device, where lawyers experienced in aggregate litigation are seeking ways to ply their trade and where the alternative is that vast number of small-value claims are simply never brought.[101]

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[99] ABA Model Rules of Professional Conduct ("MRPC"), Rule 1.8(a) limits the circumstances under which a lawyer may enter into a "business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client." MRPC Rule 7.3(a) prohibits "in‑person, live telephone or real-time electronic contact" to solicit *professional* employment. A lawyer may contact a non-client to solicit a non-professional business relationship. *See, e.g.* Indiana State Bar Association Legal Ethics Committee, Formal Opinion 02-1 (2002) (lawyer may contact non-clients to market financial products and lawyer may market financial products to clients as long safeguards required by MRPC Rule 1.8(a) are observed).

[100] It is not obvious that the transaction costs of aggregating small-value claims are necessarily prohibitive. In Australia, for example, litigation funding firms such as IMF have built a successful business model based on opt-in consumer class actions. *See* Christopher Hodges, John Peysner & Angus Nurse, *Litigation Funding: Status and Issues* 55-57 (2010) *available at* http://ssrn.com/abstract=2126506 ("Absent legislative change that would enable a funder to recover from all members of a class (and such a rule would be highly questionable on constitutional grounds), the right to recovery has to be contractual . . . [t]hus, funders need to have contracted with all, or at least a sufficient number, of class members before committing their money.").

[101] Some commentators believe that class action lawyers are moving entirely away from fields typically associated with aggregate litigation. *See, e.g.,* Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform*, at http://ssrn.com/abstract=1878966 (July 12, 2012).

PART III
THE CLAIMS-BUYING MODEL

A second and complementary model envisions "arbitration entrepreneurs" – either lawyers or non-lawyers – buying up the claims of similarly-situated plaintiffs and then filing a single arbitration seeking to collectively resolve the hundreds or even thousands of accrued claims.[102] To some extent, this model proceeds from fairly straightforward business principles: for example, the initial legal research and reconnaissance into the strength and value proposition of the legal claim, as well as its potential risks and costs, resembles the inquiry that any entrepreneur would undertake prior to investment. Pricing and purchasing the claims on the open market should also be fairly clear-cut. The questions that this model provokes will center on the buying of legal claims and the bundling of those claims into a single arbitral hearing or a series of informally aggregated, streamlined, hearing.

A. *Buying Claims*

Consumers have legally enforceable rights and obligations which may have monetary value. For example, if a consumer has purchased a product, she has rights in warranty and tort law in the event of a legally cognizable injury.[103] The conventional way to transfer these rights is by assignment.[104] An assignment is the act of transferring to another all or

[102] From the perspective of the claims-buying model, lawyers and non-lawyers are the same in every respect: A lawyer buying a claim and litigating it on her own behalf is not representing a client nor earning a fee (although they may be a client and may pay a fee to a lawyer who may be in fact, themselves). *See Ness v. Gurstel Chargo, P.A.*, 2013 U.S. Dist. LEXIS 39012 (D. Minn. Mar. 20, 2013).

Note that in at least one state (New York) attorneys are prohibited from purchasing legal claims for themselves from anyone. See NY CLS Jud § 488 ("An attorney or counselor shall not . . . take an assignment of or be in any manner interested in buying or taking an assignment of a . . . thing in action, with the intent and for the purpose of bringing an action thereon.").

[103] *See,e.g.*, Robert F. Cooter, *Commodifying Liability*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 139 (F. H. Buckley, ed. 1999).

[104] *See* Harold R. Weinberg, *Tort Claims as Intangible Property: An Exploration from an Assignee's Perspective*, 64 KY. L.J. 49 (1975) *and* Andrea Pinna, *Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims*, in NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE 119 (Mark Tuil and Louis Visscher, ed. 2010).

part of one's property, interest, or rights.[105] While transfer of legal claims was prohibited at early common law, the rule of non-assignability has been almost fully abandoned,[106] with the exception of personal injury claims.[107] Importantly, for the purpose of the claims-buying model, the modern law of assignment does not distinguish between purchases of single claims as opposed to multiple claims.[108]

Indeed, bulk assignment of claims has a long history in the United States,[109] as courts have come to recognize the benefits of bundling claims.[110] Nonetheless, barriers may persist against the purchase of claims

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[105] 6 AM. JUR. 2D, Assignments § 1 (2010).

[106] *See* Osuna v. Albertson, 184 Cal. Rptr. 338, 345 (Ct. App. 1982) (noting "the tendency of modern jurisprudence [to] strongly favor[] the assignability and the survivability of things in action"); McKenna v. Oliver, 159 P.3d 697, 699 (Colo. App. 2006) (finding that Colorado law generally favors the assignability of claims, with an exception for causes of action for invasion of privacy); Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 236 (Iowa 2001) ("[T]he law now generally favors the assignability of choses in action, and courts have permitted the assignment of insurance policies under statutes providing for the assignment of contracts in exchange for a money payment."); Lemley v. Pizzica, 36 Pa. D. & C.2d 327, 330 (Ct. Com. Pl. 1964) ("The trend of judicial decisions as to the assignability of certain causes of action is to enlarge, rather than to restrict the causes that may be assigned."); Wis. Bankers Ass'n v. Mut. Sav. & Loan Ass'n of Wis., 291 N.W.2d 869, 876 (Wis. 1980) (describing the principle of assignability as exemplifying a trend of increasing commercial flexibility, shared by the courts and legislature).

[107] This exception is enforced everywhere except in Texas. *See, e.g.,* Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987) ("[A] cause of action for damages for personal injuries may be sold or assigned [in Texas].").

[108] The Supreme Court held that an assignee could purchase the contract claims of approximately 1400 payphone operators against various major long-distance phone companies even if the assignment required the assignee to return all of the damages recovered to the assignors (in exchange for a fee, the assignee took the claims "lock, stock, and barrel" and promised to remit "all proceeds" collected from the defendants to the assignors. *Sprint Communs. Co., L.P.*, 554 U.S. at 272 and 286.

[109] *See, e.g.,* McCord v. Martin, 166 P. 1014, 1015 (Cal. Dist. Ct. App. 1917) (assignment of other shareholders' fraud claims to one shareholder to prosecute upheld); Metropolitan Life Insurance Co. v. Fuller, 61 Conn. 252 (1891) (policyholders assigned claims to Fuller to prosecute after he had successfully sued the defendant in a prior proceeding; assignments were upheld against allegations of champerty). In the *Sprint* opinion, Justice Breyer pointed to *Spiller v. Atchison, T. & S. F. R. Co.*, 253 U.S. 117 (1920), which involved approximately 2000 individual claims assigned to a single assignee who then brought 2000 suits in order to collected (and remit) the damages suffered by the assignors. *See* Atchison, T. & S. F. R. Co. v. Spiller, 246 F. 1, 20 (8th Cir. Mo. 1917).

[110] *Id.* ("It would manifestly be both useful and convenient to policy-holders of the plaintiff, residing in this state, who . . . having . . . just demands, the individual

by lay persons or lawyers.[111] A minority of jurisdictions impose limitations on the assignment of claims for speculation or profit, by legislation.[112] Other states have held that bulk assignments for profit by parties without any connection to the underlying claim are against public policy.[113] In those states where bulk assignments are illegal, arbitration entrepreneurs could get around the prohibition by offering their services as "representatives" of the consumer in exchange for a large—perhaps all—of the recovery (minus a small payment paid in advance)[114] or buying a share of the underlying property interest for a token amount.[115]

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enforcement of which, to any person in ordinary circumstances, would be so expensive and difficult as to amount to a practical impossibility, that a more fortunate person, of experience, ability and inclination, should assist them, and wait for his compensation until the suits were determined, and be paid out of the fruits of it.").

[111] It should be noted that the purchase of claims to be arbitrated by an attorney in her own name is not the same thing as the purchase of a claim by an attorney from her client, which may raise serious ethical issues. *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.8(i) (lawyer may not acquire an interest in cause of action of client). This does not prohibit a lawyer from purchasing a claim from a non-client, though some states prohibit this practice by statute. *See, e.g.*, NEW YORK JUD. LAW § 489 (prohibiting an attorney from taking an assignment of a claim in order to bring suit upon it).

[112] For example, New York's Judicial Law § 489 provides, in part, that no person or corporation shall "solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a . . . thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon*. (emphasis added) This restriction has been interpreted quite broadly, and allows for the purchase of legal rights which *may* require litigation to be realized if informal means fail. As the New York Court of Appeals recently stated, § 489 distinguishes between an assignee "who acquires a right in order to make money from litigating it" and "one who acquires a right in order to enforce it." *Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors v. Love Funding Corp.*, 918 N.E.2d 889, 895 (N.Y. 2009).

[113] *See, e.g.*, Accrued Fin. Servs. v. Prime Retail, Inc., 298 F.3d 291 (4th Cir. 2002) (company with expertise in forensic accounting took assignments of the legal claims of commercial tenants in over 50 shopping malls and promised to remit to the assignors between 50-60% of any discrepancies discovered and paid to the company by the assignors' landlords, some of which were in Maryland; this was held to violate Maryland public policy against champerty). As noted in note __, *supra*, Minnesotan courts struck down bulk assignments to claims agents on behalf of landowners. *See Gammons v. G. Gulbrason*, 78 Minn. 21 (1899), *Gammons v. Johnson*, 76 Minn.76 (1899), *and Huber v. Johnson*, 68 Minn. 74 (1897). In these cases, the Minnesota Supreme Court held the conduct of all the parties—including the layperson who took partial assignments in the causes of action and the lawyer who sued the railroad—violated Minnesota's public policy. This is still good law in Minnesota.

[114] Arbitral bodies generally permit a consumer to have a representative appear on her behalf before the neutral, and this right is almost certainly part the 'best practices'

B. *Challenges to Aggregating Purchased Claims*

When our arbitration entrepreneur has purchased as many discrete claims at the right price as possible, she will then seek to resolve them all in a single arbitral session. The claim-buying model is contingent upon successfully aggregating purchased claims in the arbitral fora, as this is crucial for the entrepreneur to recoup the costs of investigating and purchasing the claims. We suspect that defendants faced with these massive aggregations will immediately call foul, and assert, among other things, that contractual definitions of "a claim" subject to arbitration do not contemplate multitudes of individual claims bundled together to be decided as a collective.[116] Defendants are clearly uncomfortable with non-class aggregation of arbitration claims, as illustrated by AT&T's post-*Concepcion* response to three law firms' efforts to sign up individual AT&T customers to arbitrate claims that the company's proposed merger with T-Mobile violated the Clayton Act.[117] One of the firms, Bursor &

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endorsed by major arbitral bodies. *See, e.g.*, National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol Statement of Principles*, Principles 9 ("The right to be counseled by an attorney or other representative is an important one that is frequently reflected in standard rules governing ADR proceedings.") (2010).

[115] Ironically, Justice Breyer argued that the fact that a prohibition against assignment could be so easily circumvented by purchasing a share of the property interest at stake for a dollar supported the Court's conclusion that there was no "practical" argument for barring mass assignments to claims agents. *Sprint Communs. Co., L.P.*, 554 U.S. at 289. Justice Roberts argued that the lack of any interest in the underlying claim made all the difference in the world for Article III standing: "'When you got nothing, you got nothing to lose.'" *Id.* at 301 (Roberts. C.J, *dissenting*, *quoting* Bob Dylan, Like a Rolling Stone, on Highway 61 Revisited (Columbia Records 1965)).

[116] Joel Rosen & James Shrimp, *Yes to Arbitration, But Did I Also Agree to Class Action and Consolidated Arbitration*, 30 FRANCHISE L.J. 175, 176 (2011) ("A franchisor might opt for the streamlined procedures and limited review of arbitration for a single dispute with a franchisee that involves limited monetary exposure; however, the franchisor might not opt for the streamlined procedures and limited review of the arbitration of dozens, if not hundreds or thousands, of claims brought in a consolidated or class action arbitration with millions of dollars at stake.")

[117] In June 2011, AT&T announced a $39 billion takeover of T-Mobile that was immediately controversial. The Justice Department, the Federal Communications Commission ("FCC) and various state regulators objected to the merger, and in August 2011, DOJ filed suit alleging the proposed merger violated the Clayton Act, Section 7. United States v. AT & T Inc., No. 1:11–cv–01569 (D.D.C.).

Fisher, sued the FCC for the release of data relating to the merger, and then posted this information on its website, urging consumers to individually arbitrate their claims in order to block the merger.[118] The firms filed more than 1,000 individual demands for arbitration – each "almost identical to each other aside from the names and addresses of the claimants"[119] – before AT&T eventually enjoined the arbitrations on the grounds that the demand (to block the merger) exceeded the scope of the arbitration agreement.[120] We should expect similar responses from defendants faced with mass arbitrations under our claims-buying model, although such challenges are belied by the prominent example of claims-buying and aggregation in the debt-collection industry, which we consider in detail in the final subsection.

Nearly every arbitration clause we have examined broadly defines a "claim" as a dispute or controversy between the parties. Presumably, once our arbitration entrepreneur has lawfully purchased the "claim," she has the right to adjudicate it to judgment in accord with the terms of the arbitration agreement. It is fairly clear that, where the underlying agreement does not contemplate or explicitly prohibits class arbitration, our entrepreneur cannot aggregate her claims in that form.[121] But nothing in the underlying agreement nor in the FAA itself appears to preclude informal aggregation of claims by a single owner in a single hearing. Indeed, even the most aggressive peddlers of class action waivers require only that "all parties to the arbitration must be individually named" and proclaims that "there is no right or authority for any claims to be arbitrated on a class-action or consolidated basis…or joined or consolidated with claims of other parties."[122] But the legal entrepreneur would name each claimant from who she purchased a claim in her notice of arbitration. Further, resolving all purchased, related claims in one fell swoop is not the equivalent of joinder or consolidation as those terms are used in the

[118] *See* http://www.fightthemerger.com/ (last visited June 26, 2013)
[119] AT&T Mobility LC v. Bernardi, 2011 WL 5079549 at *2 (N.D. Cal. 2011).
[120] *See, e.g.*, AT & T Mobility LLC v. Bushman, et. al., No. 11–80922 (S.D.Fla. Sept. 23, 2011); AT & T Mobility LLC v. Smith, No. 11–5157, (E.D.Pa. Oct. 7, 2011); AT & T Mobility LLC v. Gonnello, No. 11–5636 (S.D.N.Y. Oct. 7, 2011).
[121] *See* Stolt-Nielsen, 130 S. Ct. at 1773-76 (finding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to class arbitration).
[122] Agreement for American Express Card Acceptance, Nov. 2012 (on file with the authors).

federal rules.[123] Nor is this form of aggregation a class action, as it does not seek to meet the procedural requirements of Rule 23 and does not bar subsequent claims.[124]

C. *A Case Study: Small-Value Debt Collection Litigation*

Despite the economic inefficiencies inherent in pursuing small-value claims, companies are nonetheless expending a great deal of time, money and effort doing just that.[125] The nation's most vigorous civil law enforcement is the consumer debt collection industry, where professional companies pursue claims against consumers involving relatively small amounts.[126] Typically, these consumer debts are purchased for 4% of face

[123] While there seems currently no formal right by a participant in arbitration to demand that her arbitrations be scheduled on the same day if she has multiple claims against the same opponent, there is some evidence that arbitral bodies have, in the past, accommodated this rather simple and easy request. One arbitral body, NAF, created a subsidiary (Forthright) whose purpose was to administer arbitrations on behalf of corporate clients who were plaintiffs in the hundreds of thousands of arbitrations brought before its neutrals. During Forthright board meetings, board members discussed "methods to increase the number of *large batch claims* being processed by arbitrators." Complaint, State of Minnesota v. National Arbitration Forum, Inc., *supra* note __ at 37. The practicality of such coordination (and the pretextual nature of any objection from defendants party to the arbitration agreement) is illustrated by the best practices recommended by the AAA, which strongly encourages the use of remote arbitrations. *See* National Task Force on the Arbitration of Consumer Debt Collection Disputes, Principle *supra* note __ at 7 ("In some cases, it may be reasonable to conduct proceedings by telephone or electronic data transmission, with or without submission of documents. *Such options may be particularly desirable in the case of arbitration of small claims,* since the parties have the choice of going to small claims court.") (emphasis added).

[124] The Court rejected the argument that mass assignments by multiple claimholders to a single claims agent who would litigate on their behalf was a "circumvention" of F.R.C.P. Rule 23. *See Sprint Communs. Co., L.P.*, 554 U.S. at 291. As the court noted in that case –which, we recognize, was not a mass arbitration but a mass lawsuit – class actions "are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one [] forum. *Sprint Communs. Co., L.P.*, 554 U.S. at 291. We couldn't agree more, and the claims-buying model should be seen as a separate but parallel legal pathway to achieve many (but not all) of the same goals as a class action.

[125] *See* Lauren Goldberg, Note, *Dealing in Debt: The High Stakes World of Debt Collection After FDCPA*, 79 S. CAL. L. REV. 711 (2006).

[126] The FTC reports that the average face value of the consumer debt accounts purchased by companies whose only purpose is to sue on those accounts is $1,348. Federal Trade Commission, *The Structure and Practices of the Debt Buying Industry*, Table 2 (2013). The face value of the accounts purchased is not an accurate measure of the value of the

value, a discount which reflects that "debt buyers typically do not attempt collections on all accounts they purchase, do not usually realize recoveries on every account for which collections are attempted, and do not typically recover the full face value on accounts for which they do realize recoveries."[127] The basic business model is to cast a broad net in the hope of catching a small piece of a portion of a large portfolio.[128]

Given a purchase price of four cents to the dollar, the actual recovery for any claim that is made (and there is no reason to assume that debt buyers make a claim on every debt they purchase) is most likely a fraction of the original face amount. For the debt buyer to turn a profit, however, the actual recovery must still be greater, in the aggregate, than his information and transactions costs, plus his original investment in the aggregate. Given that information and transaction costs typically exceed the compensation that any single case can produce, there is no reason to believe that merely aggregating small-value consumer cases changes that equation. Aggregation of a small-value claim without an additional source of savings merely reproduces the negative value problem in bulk.[129] So how do the debt-buyers enforce their legal rights without losing money?[130] They sue.

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claim made by the debt buyers as plaintiffs, since the debt sold is "charged off" debt which means that the original owner of the debt (a bank) has determined that it was unlikely to recover it. *Id.*

[127] *Id.* at 23.

[128] *Id.* ("'[Debt] buyers hope to make a profit by collecting at least a small percentage of [the accounts they purchase].'") (quoting source at n. 44).

[129] This is assuming that the variation in compensatory award in small value cases is not large and that the average compensatory award in a small value case does not exceed the average sum of the information and transaction costs in a individual small value case.

[130] Some have suggested that debt buyers are able to keep transaction costs low by seeking payment by informal means, such as telephone calls and other contacts. *See* Rick Jurgens and Robert J. Hobbs, *The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts*, National Consumer Law Center 6 (2010). But others observe that informal collection methods are decreasing, not increasing, as the ownership of debt moves from the original debt holders to professional debt purchasers. *See* Jon Leibowitz et al., Federal Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* at 6 (July 2010) ("Collectors may also employ litigation more quickly than in the past; industry sources 'have noted that the growth of the debt-buying industry has resulted in increases in collection lawsuits because entities that purchase delinquent debt often use collection law firms as their *primary tool for recovery*.'") (emphasis added).

The number of cases filed against consumers by debt buying companies in recent years is staggering. A 2010 report from the National Consumer Law Center, based on data gathered by journalists and other sources, gave a snapshot of the volume of the litigation: In Massachusetts debt collectors filed 575,000 lawsuits between 2000 and 2005, or three out of every five civil lawsuits.[131] In Minnesota, the volume of debt collection lawsuits doubled from 2006 to 2008, and the volume of default judgments rose 58 percent in a single year.[132] In the San Francisco Bay Area, the number of lawsuits filed to collect consumer debts rose to 96,000 in 2009 from 53,700 in 2007.[133] In New York City, "researchers concluded that a surge in debt collection lawsuits was a major contributor to a near tripling in all civil court lawsuits, from 213,000 in 2000 to 618,000 in 2007."[134] In 2008 Encore Capital Group, which hires outside law firms to do collections on a contingency fee basis, reported that its lawyers filed nearly 450,000 lawsuits, up 18% in just one year; and Portfolio Recovery Associates Inc. paid outside attorneys $33 million in contingency fees, up 14 percent from $29 million in 2007.[135] Academic research supports these observations.[136]

And it isn't simply that debt collection companies are inexhaustible litigators, but that they have learned how to litigate on the margins in a highly cost-effective manner. Partly, this is a function of the lack of competition within the industry: the FTC reports that, even though "there are no significant barriers to entry into the debt buying industry,"

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[131] Jurgens & Hobbs, *The Debt Machine*, *supra* note __ at 13 ("In Boston, 40,000 debt collection suits accounted for 85 percent of all small claims cases over a five year period.").

[132] *Id.* at 16.

[133] *Id.*

[134] *Id.*, *citing Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, MFY Legal Services Inc., Consumer Rights Project, June 2008.

[135] *Id.*

[136] Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 25 ("The overwhelming majority of civil suits filed in Virginia are consumer debt collection filings, and the evidence suggests that consumer debt collection accounts for a very high percentage of the civil filings of other states."), Spector, *supra* note __ at 279 (describing debt buyer cases as making up a "sizeable portion" of the Dallas County docket); and Judith Fox, *Do We Have a Debt Collection Crisis? A Cautionary Tale of Debt Collection in Indiana*, 24 LOY. CONSUMER L. REV. 355, 370 (increase in civil docket between 2005-09 in Indiana due to debt collection cases).

the industry is dominated by "large debt buyers [who] purchase most debt."[137] For example, one study of Indiana consumer debt litigation found that thirteen debt buying firms accounted for 79% of all filings, with one firm dominating the docket by filing 22% of all consumer debt plaintiff suits.[138] A similar pattern was found in Dallas: two firms appeared in 36% of all the consumer debt suits, and five plaintiffs comprised 64% of all the suits filed.[139]

The concentration of claiming by a handful of firms necessarily produces a form of specialization. And, in turn, specialization by its very nature produces economies of scale by reducing both information and transaction costs. And finally, where there is concentration and specialization, cost-effective aggregation of like claims becomes possible. Not only are information and transaction costs reduced by lowering the cost of regularly performing certain tasks (or getting certain information) compared to an individual who completes such tasks only occasionally, but by transforming these tasks so they can be efficiently done for thousands, if not tens of thousands, of similar legal claims.[140]

The debt collection industry has used the high volume of claims to take advantage of two features of small claims courts: (a) the high default rate by defendant-consumers;[141] and (b) the minimum factual foundation

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[137] FTC Report, *supra* note ___ at 14. In 2008 nine companies bought 76.1% of all consumer debt (with a face value of $55 billion)—and 78% of that was bought directly from credit card issuers who, presumably, found it too expensive to try to enforce their legal rights. *Id*. at Table 1.

[138] Fox, *supra* note __ at 372.

[139] Spector, *supra* note at 280.

[140] There is some evidence that this is exactly what has happened after the debt buying industry took over the enforcement of the banks and other creditors legal rights. The main innovation was to figure out how to turn arbitration and small claims courts into creditor/plaintiff "judgment mills." *See* Holland, *supra* note __ at 272 ("'small claims courts' have in reality become 'creditor's courts'"). A large debt buyer said that filing cases against debtors in small claims and similar courts "allows us to work accounts that we would not normally pursue through the use of contingent fee collection attorneys because of cost." See Portfolio Recovery Associates Inc. Form 10-K for 2008, p. 11.

[141] *See, e.g.*, A Broken System, *supra* note __ at 7, n.8 (estimating that the rate of default judgments in consumer debt cases in small claims court is between 60%-90%); Claudia Wilner & Nasoan Sheftel-Gomes, Neighborhood Econ. Dev. Advocacy Project, et al., Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-income New Yorkers, May 2010, p. 1 (90%); Fox, *supra* note __ at 379 (74%); Urban Justice Center, Debt Weight, the Consumer Credit Crisis in New York City and Its Impact on the Working Poor 21 (2007) (80%) *and* Russell Engler, *Out of Sight and Out of Line: The*

required by the fora to sustain a default judgment.[142] These two factors combine to lower the cost of making a claim by reducing transaction costs to a minimum and information costs to potentially near zero, since the risk of being challenged on the factual foundation of the claim is, it turns out, close to zero.

The debt buying industry's experience with mass small-value litigation has important lessons for us. First, while much of the mass litigation action has taken place in small claims court in recent years, the debt buying industry initially launched its mass claiming campaign in the arbitral fora.[143] Plainly, these creditors perceived no legal barriers to exercising their rights under their contracts to arbitrate hundreds of thousands of claims. The arbitral bodies were able to handle the flood of cases, but only because they were dealing with a group of highly concentrated specialty debt purchasers who were repeat players before the neutrals.[144] One firm had more than 1,000 employees and 24 offices, operated two call centers and "had an infrastructure that supported 35,000

Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons, 85 CAL. L. REV. 79, 119 (1997) (70% to 90%).

[142] Spector concluded that more than 95% of the complaints filed by consumer debt plaintiffs in Dallas County "failed to provide any information regarding date of default or calculation of the amount allegedly owed, allegations the FTC suggests are necessary to insuring due process." Spector, *supra* note __ at 298. A further reason why debt buyers are rational to invest so little in information about their cases is that they can limit their losses if a defendant answers the complaint and challenges the plaintiff's claim in court. As Spector observed in Dallas, there were a "surprising number" of voluntary dismissals without prejudice in the cases she observed when the defendant appeared (62%; 75% if a lawyer appeared with the defendant). *Id.* at 295.

[143] *See* Staff Report of the Domestic Policy Subcommittee Minority Staff, Oversight and Government Reform Committee, *Justice or Avarice: The Misuse of Litigation to Harm Consumers*, July 22, 2009 (describing the shift from arbitration to small claims court in consumer debt cases).

[144] In 2006 the National Arbitration Forum heard 214,000 consumer debt arbitration claims, of which 125,000 were filed by two law firms (who also partly owned the companies that owned the debt). *See* Second Consolidated Amended Class Action Complaint, In re: National Arbitration Litigation Forum Litigation, Civ. No. 09-1939 (PAM-JSM) (D. Minn., May 5, 2010) at 12. The number of arbitrators used to process this flood of cases was extraordinarily small, and the speed with which they disposed of the cases was remarkable. *See* Public Citizen, *Press Release: Mandatory Arbitration Stacks Deck Against Credit Cardholders, Data Show*, September 27, 2007 ("90 percent of the NAF cases were handled by just 28 arbitrators, who awarded businesses $185 million. One arbitrator handled 68 cases in a single day – an average of one every seven minutes, assuming an eight-hour day.").

lawsuits per month, 20,000 arbitration filings per month and $55 million in collections per month."[145]

Second, however, it is not clear the arbitral bodies are similarly equipped to handle the large volume of claims that arbitration entrepreneurs may bring to them on a claims-buying model in the post-class action era. In its 2010 report, the FTC concluded that consumer debt arbitration "failed" to provide consumers with "meaningful choice" and was not "fair to creditors, collectors, and consumers."[146] The justification for arbitration (and the sacrifice of traditional elements of adjudication) had not been realized, and the problem did not lie just in one "bad apple" like the NAF. Even the AAA's specialized consumer debt arbitration program was a dismal failure in part because 97% of consumers did not participate and suffered default judgments.[147]

We recognize, therefore, that the post-class action era poses both an opportunity and a challenge to entrepreneurs who want to do well by "doing good" for consumers. If the promise of mass arbitration for consumers will be a reality, stakeholders in the arbitral profession will have to work together to help the major arbitral bodies develop structures that are large and robust enough to handle thousands of claims. The leading arbitral bodies have, until now, rarely attempted to process claims at this scale, and when they did, they failed miserably. An explicit commitment to developing truly meaningful mechanisms for virtual hearings and efficient scheduling are at the top of our list, and we see no legal reason why consumers cannot demand this sort of accommodation.[148]

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[145] *See* Jurgens & Hobbs, *Forced Arbitration*, *supra* note __ at 10.

[146] *A Broken System*, *supra* note __ at 40-41.

[147] *See* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L. J. 77 (2011) at Table 2. The program was designed to process thousands of claims brought by a single creditor against consumers. *Id.* at 83 and Appendix A (describing the program). This disappointing result is consistent with the FTC's conclusion, which was that "over ninety percent of consumers do not participate in [consumer debt] arbitration." Jon Leibowitz et al., Federal Trade Comm'n, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*, 54 (July 2010). This estimate was based on a submission from Richard W. Naimark of the AAA. *Id.*

[148] In fact, we would be curious to know why a defendant would resist an arbitration entrepreneur's reasonable demands for this sort of flexibility. If arbitral bodies failed to adopt these mechanisms, then state legislatures could require them. We would be even more curious to know under what interpretation of the FAA a federal court would hold

CONCLUSION

We have described two possible models that might overcome the anti-aggregation jurisprudence of recent years. Neither is a sure bet, both face serious challenges, and even if used in tandem by sophisticated legal risk-takers, these approaches do not provide a very satisfactory substitute for class action litigation. But if we still believe that, in this post-class action moment, sound public policy requires some form of aggregative procedure be available for small-claim plaintiffs who would not have the incentive or resources to remedy harms or deter wrongdoing in one-on-one proceedings – then we must begin to examine second-best proposals, as imperfect as they may be. The alternative is too grim to conceive.

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that such state regulation is inconsistent with Congress's goal of promoting arbitration as an alternative to litigation.

ON THE CASE DECEMBER 3, 2019 / 7:50 PM / 2 MONTHS AGO

Mass arbitration ethics: Can one firm protect the interests of tens of thousands of clients?

Alison Frankel 9 MIN READ

(Reuters) - I've been proselytizing quite a bit of late about mass arbitration as a way of restoring leverage to workers (and, potentially, consumers) forced to accede to mandatory arbitration contracts in which they waive the right to sue or arbitrate as a class. Everyone knows that it doesn't make economic sense for a plaintiffs' firm to represent a single worker demanding to arbitrate a $100, or even $1,000, wage-and-hour claim. But if you represent 1,000 or 5,000 or 10,000 workers with very similar claims, the economics change – especially when you also have the leverage of millions of dollars in arbitration fees to encourage employers to negotiate.

Employers facing mass arbitration campaigns have been known to resort to words like "extortion" and "shakedown," to describe such negotiation requests. But really, they're complaining about the consequences of the very contracts that they imposed on their workers. As U.S. District Judge **William Alsup** of San Francisco observed at a hearing last week in a case involving mass arbitration against the delivery service DoorDash, there's some poetic justice, to use Alsup's phrase, in watching companies that fought for the right to force their workers to arbitrate squirming to respond when masses of workers do, in fact, demand to vindicate their contractual rights.

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If workers' interests are being compromised, though, mass arbitration loses its patina of righteousness. DoorDash and other companies facing mass arbitration have raised concerns about whether a single law firm, **Keller Lenkner**, can ethically and responsibly represent tens of thousands of workers. And though Keller Lenkner has repeatedly assured judges and arbitrators that it can – and there is virtually no credible evidence that the firm has failed to serve the interests of the tends of thousands of employees it represents – it's worth highlighting why mass arbitration is potentially a tricky business.

The ethical complexities of representing masses of clients are laid out in a declaration that DoorDash's lawyers at **Gibson Dunn & Crutcher** filed in connection with that hearing last week before Judge Alsup in San Francisco. The hearing addressed a motion for a temporary restraining order that Keller Lenkner ended up withdrawing, but not before Gibson Dunn executed some hard jabs in a brief opposing the TRO. DoorDash's lawyers described a "shakedown scheme" in which Keller Lenkner approached the company with a letter vowing to file thousands of arbitration demands – with fees approaching $20 million – unless DoorDash chose to discuss an alternative resolution of workers' claims.

In Gibson Dunn's telling, Keller Lenkner has never had the slightest intention of actually arbitrating thousands of individual cases – and, according to DoorDash's lawyers, has rejected every proposal to establish an orderly process of adjudicating claims individually. In fact, according to DoorDash and its lawyers, Keller Lenkner is so heedless of its clients' individual claims that some of those clients don't even show up in the company's records as DoorDash workers.

As I said, Keller Lenkner has very sound responses to those accusations. Partner **Warren Postman** told Judge Alsup at last week's hearing that the firm has partnered with **Quinn Emanuel Urquhart & Sullivan** and is prepared to litigate every client's case. Postman also said he had brought along boxes full of declarations and retention agreements to assure the judge of Keller Lenkner's client relationships. If there are gaps in the record of his clients' work for DoorDash, he said, it's probably because DoorDash hasn't used all criteria to search for those workers' records.

But the declaration Gibson Dunn submitted from **Richard Zitrin**, an ethics professor at the University of California, Hastings, did not rely on assertions of improper behavior. (Zitrin even said that although he had seen documents suggesting that some Keller Lenkner clients were not DoorDash workers and that Keller Lenkner was using arbitration fees as leverage to obtain a global settlement, "it is not now my opinion that plaintiffs' counsel has engaged in unethical conduct.") But the professor said it is "hugely problematic" and "near impossible" for plaintiffs' firms to meet their ethical obligations to every client when they represent a massive client base. "Where, as here, plaintiffs' counsel purports to represent thousands of clients against a particular defendant, red flags go up in my mind about whether such representation meets the ethical requirements all lawyers must abide by," the professor wrote.

Those ethical concerns are particularly acute, Zitrin said, when clients are weighing individual settlement offers. Zitrin said he has advised firms that to fulfill their ethical duties in mass litigation, they should, among other things, obtain extensive conflict waivers from every client; should, to the extent possible, inform all clients of settlement offers to other clients; should assure that the interests of non-settling clients are protected; and should not coerce clients to settle even if the law firm recommends accepting the deal. "Without such complete protection for clients, it is my opinion that such massive mass actions cannot be done ethically," Zitrin wrote.

Keller Lenkner's **Travis Lenkner** sent me a long email responding to Zitrin's declaration and, more broadly, to assertions by mass arbitration defendants that his firm cannot ethically vet and represent tens of thousands of workers seeking individual arbitration. Lenkner said that the firm has consulted "numerous experts" to ensure that it is complying with ethical rules and has a team of lawyers and professionals who keep the firm's clients apprised of developments in their cases. Even Zitrin, the law professor who submitted a declaration on DoorDash's behalf, admitted that it's possible to represent a mass client base ethically, Lenkner said, and there is not "a shred of evidence" that his firm has done anything less.

Hong Kong bans entry of visitors from China virus province

Trump lawyers offer surprisingly un-Trumpy defense to impeachment

Xi says China faces 'grave situation' as virus death toll hits 42

Bernie Sanders, stuck in Trump's trial, leans on star power of 'AOC'

"It takes real chutzpah for these companies and their lawyers to question our ethics, without support, when they are the ones who engineered a system that requires individual arbitration and promised courts that individual arbitration would be accessible and streamlined," Lenkner's email said. "Now that firms like ours have done the work necessary to bring a substantial number of claims in individual arbitrations, defendants are showing their true colors. Many defendants thought arbitration agreements would let them avoid accountability for widespread legal violations, they are angry that this isn't true, and they are lashing out."

Keller Lenkner's client relationships will likely be put to the test in its mass arbitration campaigns against DoorDash and the delivery service Postmates. Both companies have reached prospective class action settlements that encompass claims by Keller Lenkner clients. The firm attempted, unsuccessfully, to intervene in the Postmates settlement in state court in San Francisco, but has made clear that it will object to the deal if it receives preliminary approval. It will presumably take the same approach to the more recently disclosed DoorDash prospective settlement. Will the firm advise its clients to opt out? Will it weigh each client's possible recovery under the settlements before offering that advice?

These settlements could be an example of the ethical minefield Zitrin warned about. Keller Lenkner had better step carefully.

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BENTHAM IMF

New Means of Financing Lawsuits and Law Firms

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FEBRUARY 7, 2020

What is Commercial Litigation Funding?

- Commercial vs. Consumer Funding
- Commercial sector financing (vs. consumer funding)
  - A contract between the funder and litigant or funder and law firm
  - Usually non-recourse
  - Amount and form of recovery may depend on the length of the case and/or amount of recovery
  - Extensive due diligence (impacts privilege issues which will be discussed)
- Common subject matters: breach of contract; breach of fiduciary duty; intellectual property; copyright; patent; domestic and international arbitrations; complex business disputes; antitrust; environmental; and qui tam.

Partnering with Commercial Litigation Funders for Mass Tort Cases

Clients

Access funding directly from select commercial litigation funders to help cover legal fees and costs for mass tort cases

- Typically available on a single-case or portfolio basis
- Not offered by all commercial litigation funders

Law Firms

Access portfolio funding from commercial litigation funders to help mitigate risks assumed when handling cases on contingency

- Typically available for portfolios containing a combination of mass tort and commercial litigation cases
- Offered by well-capitalized commercial litigation funders

Flexible Bespoke Solutions

Claimant Funding

Funder contracts with the claimant, from whom a portion of any litigation proceeds are received

Typical Uses

- Paying legal fees and costs
- Monetizing litigation assets
- Obtaining working capital
- Preserving resources
- Improving corporate balance sheets

Features

- Non-recourse
- Aligns incentives
- Available at any stage of litigation
- Flexible pricing models
- Hedges risk

Law Firm Funding

Litigation funding company provides financing directly to the law firm, collateralized solely by the law firm's contingency share of a portfolio of cases.

Typical Uses

- Sharing risk
- Improving the bottom line
- Delivering service at competitive prices
- Smoothing cash flows
- Increasing revenues with measured risk

Features

- Non-recourse
- Available for diverse portfolios of cases
- Offsets operating costs between recoveries

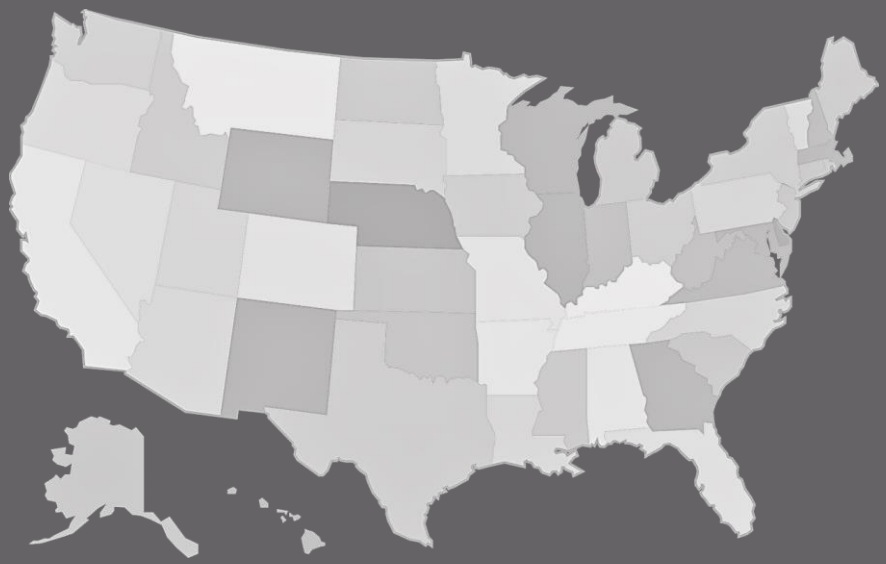
Ethical Considerations

- **Confidentiality**
- **Attorney-client Privilege**
- **Fee Sharing**
- **Champerty and Maintenance**

A 2019 study conducted by *ALM Intelligence* found that 93% of law firm respondents who have used funding reported a positive experience and 98% would use it again.

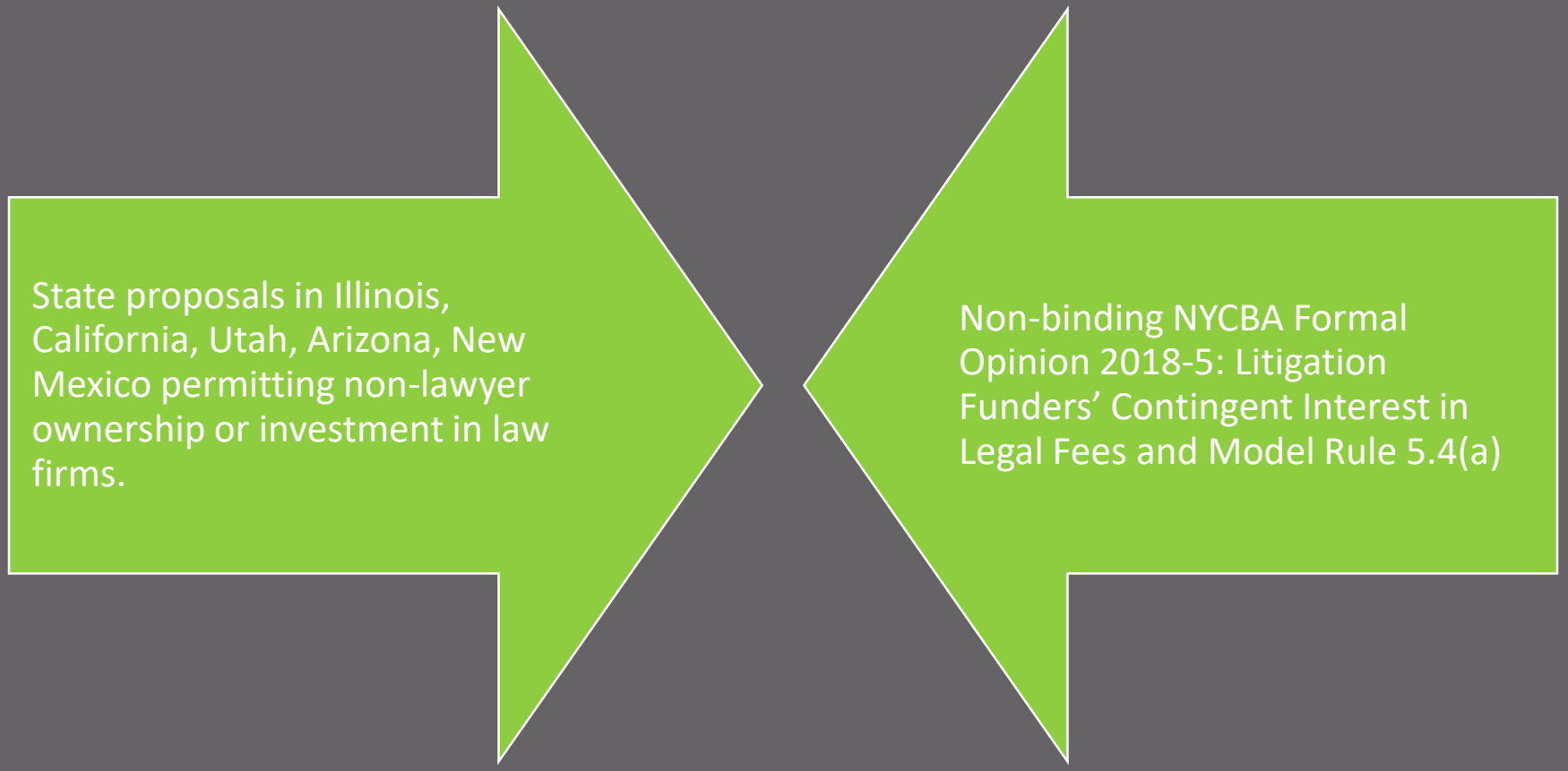
US Regulation of Funding

- Prohibited or restricted in approximately 20 states under these legal concepts:
  - ***Maslowski v. Prospect Funding Holdings, LLC,* No. A16-0770, 2017 WL 562532 (Minn. Ct. App. 2017)**
  - ***Boling v. Prospect Funding Holdings, LLC,* No. 1:14-CV-00081 (W.D. Ky. 2015)**
  - ***Telesocial v. Orange,* No. 3:14-cv-03985 (N.D. Cal. 2015)**: continuance to find funding



- Otherwise self-regulated in US – subject to judicial control and legal ethics rules
- The ABA, NY State Bar, NYC bar and other state bars have issued guidance to lawyers advising clients about litigation finance.

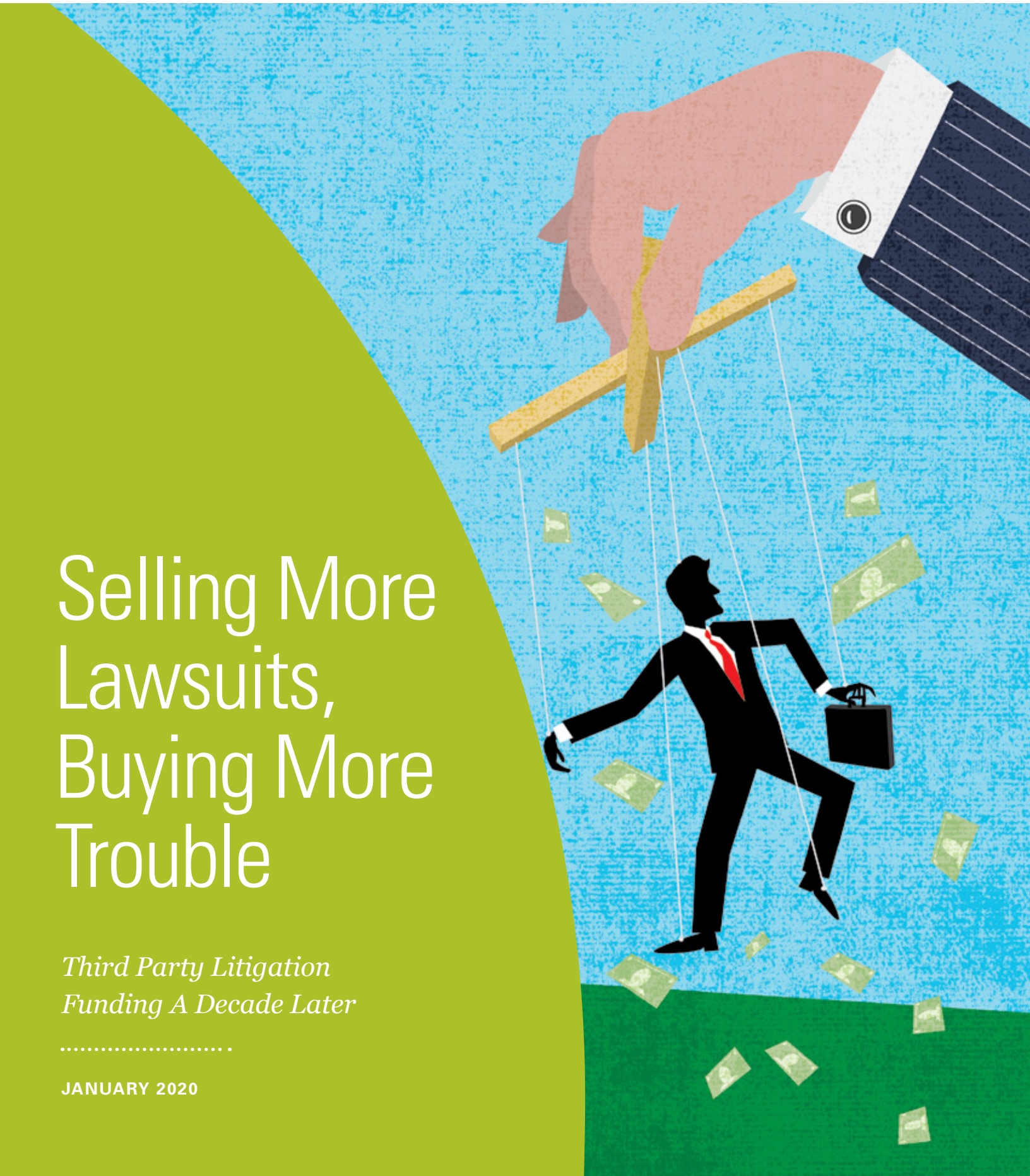
Industry Disruption: Impede or Facilitate?



Recommendations

- Familiarize yourself with local laws, rules, and ethical decisions regarding litigation funding.
- Enter into a Non-Disclosure Agreement prior to engaging in substantive discussions with funders. Do not simply rely on oral assurances of confidentiality.
- In jurisdictions with statutory prohibitions on champerty and maintenance, review case law regarding how those statutes are applied.
- Review Local Rules regarding mandatory disclosure.

U.S. CHAMBER
Institute for Legal Reform



Selling More Lawsuits, Buying More Trouble

Third Party Litigation Funding A Decade Later

JANUARY 2020

U.S. CHAMBER
Institute for Legal Reform

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Table of Contents

Prepared for the U.S. Chamber Institute for Legal Reform by

John H. Beisner, Jessica D. Miller, and Jordan M. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP

Executive Summary

In 2009, the U.S. Chamber Institute for Legal Reform (ILR) published *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States*, which described the introduction of third party litigation funding (TPLF) in the United States and warned of the possible ill effects of an unregulated and undisclosed financing regime on the American civil justice system at large.[1]

The 2009 paper began by explaining what TPLF is and how it works.[2] As the paper explained, TPLF "is a term that describes the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement."[3] TPLF generally falls into two broad categories: (1) consumer lawsuit lending, which typically involves individual personal injury cases; and (2) investment financing, which includes investments in large-scale tort and commercial cases and alternative dispute resolution proceedings. In either scenario, the TPLF provider essentially invests money in the outcome of lawsuits, betting that they will be successful.

At that point, TPLF was "not widespread" in the United States and was largely concentrated in Australia.[4] As the paper presaged, however, that is no longer the case. Over a decade later, the TPLF landscape has changed dramatically, with the practice becoming an increasingly ubiquitous feature of civil litigation in the United States. "Lawsuit finance is no longer in its infancy in the United States. What began as a financial tool for 'David vs. Goliath' cases—small plaintiffs who used funding to sue large defendants in bet-the-company cases—has gone mainstream."[5] An annual survey of in-house counsel and law firm lawyers taken by Burford Capital Limited (Burford)—the largest TPLF company in the world—reported that, "[i]n 2018, it's hard to find any lawyers who say they've never heard of litigation finance."[6] According to the survey, "[r]eported use [of litigation finance] has risen dramatically."[7]

In addition to introducing the phenomenon of TPLF, the 2009 paper drew from the Australian experience to warn about potential dangers associated with the practice, including the prospect of frivolous and abusive litigation and various ethical consequences, particularly those at play when TPLF is involved in aggregate

litigation or class actions. Unfortunately, a decade later, those warnings have proved well-grounded. Although TPLF arrangements generally are not required to be disclosed—and therefore largely operate under a veil of secrecy—those that have been made public tell an ominous story of TPLF spawning frivolous and abusive litigation, particularly in the mass tort arena; TPLF spurring myriad ethical violations, ranging from improper fee-splitting between lawyers and funders to conflicts of interest and violations of decades-old champerty and maintenance prohibitions; and TPLF seeping into the class action arena, subordinating the interests of class members to those of outside funders.

This paper seeks to update the earlier 2009 research regarding TPLF.

- Part I recounts the dramatic expansion of TPLF in the United States, as well as its diversification.
- Part II chronicles some of the most egregious examples of frivolous and abusive litigation that have been facilitated by TPLF.
- Part III addresses the various ethical implications of TPLF.
- And Part IV proposes potential solutions for reining in TPLF, including—at a minimum—a disclosure requirement such as the one currently under consideration by the federal Advisory Committee on Civil Rules.

The TPLF Industry Has Expanded by Leaps and Bounds

The most logical starting point for any assessment of TPLF in the United States is a review of the economic health of the industry supporting the practice, which has become both richer and more diversified over the past decade.

One recent article described investment in the TPLF industry as capital "rush[ing] into [the] space like a flash flood into a canyon gully."[8] The TPLF industry is now massive, with some analysts estimating "that litigation finance is at least a $10 billion industry."[9] Although the industry has already become an economic behemoth, it still has plenty of room to grow, considering "U.S. tort system costs totaled $429 billion in 2016, or 2.3 percent of the nation's [GDP]."[10] TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, fueling the expansion of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits. The rapid financial expansion and funding diversification of the industry are described in more detail below.

Financial Expansion

The last 10 years have witnessed unprecedented financial expansion on the part of those engaged in TPLF. As one recent article put it, "[t]he figures just get bigger and bigger,"[11] or as Allison Chock, chief investment officer of a prominent funding company, summed it up: "[f]ive or 10 years ago this industry barely existed in the USA. Now it's thriving … ."[12] According

"TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, fueling the expansion of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits."

to one recent survey, "private funders in the U.S. have a whopping $9.52 billion under management for commercial case investments."[13] The following examples illustrate this trend:

- Burford recently revealed that it held "new investment commitments of $1.3 billion in 2018."[14] That staggering figure "represent[s] 30x growth from 2013."[15] Burford also recently secured $667 million in new capital from an undisclosed sovereign wealth fund.[16] Burford, which can be seen as emblematic of the TPLF industry, has gone from receiving "131 inquiries for funding … in its first twelve months of doing business, [to receiving] 1,470 inquiries for funding in 2018."[17] "In other words, demand grew 1022%."[18]

- In late 2018, Bentham IMF, an Australia-based litigation funder, announced the launch of a new litigation fund.[19] The new fund—the fourth fund of its kind launched by Bentham that is focused on U.S. litigation—will initially be valued at $500 million, with the potential for investors to increase the fund to $1 billion.[20] Charlie Gollow, Bentham's U.S. Chief Executive, emphasized the increasing demand for litigation funding in the U.S. by saying in a press release that "[i]n the last three years, we've seen a 110% increase in qualified applications for funding in the U.S. and greater interest in larger deals."[21]

- Therium Group Holdings Limited (Therium) recently surpassed the $1 billion institutional investment milestone, largely thanks to its recent announcement of a new $430 million fund.[22] The new fund is the largest to date for Therium and follows a $265 million fund raised in February 2018.[23]

- Longford Capital Management LP, which was founded in 2014 and invests in contract, antitrust, and other claims, raised $56.5 million for its first fund.[24] The litigation funder experienced significant economic growth in its initial venture, obtaining returns in the "70-90 percent range."[25] The funder has announced a whopping $500 million for a second fund, dwarfing the initial $56.5 million.[26]

The dramatic increases in investments illustrated above point to one unmistakable conclusion: litigation funders are reaping enormous financial benefits from investing in litigation. Although many funders are not publicly traded and therefore need not report their earnings and various other economic figures, the numbers reported by two of the largest publicly traded funders (Burford and Bentham) support this conclusion and portend even greater expansion of TPLF going forward. Specifically, in its 2018 annual financial report, Burford touted after-tax profit of $328 million, up 24 percent from 2017, and

"The dramatic increases in investments … point to one unmistakable conclusion: litigation funders are reaping enormous financial benefits from investing in litigation."

> *"Another indicator is the growth of practice groups providing legal advice regarding TPLF."*

cash generation at a "robust" $513 million, up 41 percent from 2017.[27] Burford also reported income of $420 million, which is up 23 percent from 2017.[28] Similarly, according to Bentham's most recent financial report (June 2018), Bentham's net assets have almost doubled from $206.3 million in June 2017 to $367.8 million in June 2018.[29] The news for total investments was similar, with Bentham reporting $190.9 million in 2017 and $321.3 million in 2018.[30]

As the numbers above amply demonstrate, investments in the TPLF industry are extremely lucrative, and the finance world has noticed.[31] *The New York Times* recently reported that, "according to lawyers and lending executives … [h]edge funds such as Fortress Investment Group, Pravati Capital and Virage Capital Management have lent money to mass-tort law firms in recent years."[32] The TPLF industry is an attractive market for hedge funds, largely because the industry is not subject to the same limitations as the stock market or, as one article described it, "is uncorrelated with anything else."[33] Indeed, the TPLF industry is considered to have "investments that won't perform in lock step with stock markets or the overall economy."[34] Accordingly, many hedge funds are jumping to invest in litigation. For example, EJF Capital (based in Arlington, Virginia), a $6 billion hedge fund, began raising money in early 2018 for a new $300 million fund dedicated to investing in mass tort cases.[35] The new fund is on top of the $450 million that the hedge fund already invested in personal injury law firms.[36]

The financial success of TPLF has come with other indicators of a maturing industry that are further solidifying the influence of litigation funding on the American civil justice system. For example, due to the significant growth of the TPLF industry, Chambers & Partners—one of the world's most renowned legal directories—started ranking funders in the U.S. and U.K. in 2018.[37] Another indicator is the growth of practice groups providing legal advice regarding TPLF. One law firm, McDonald Hopkins LLC, has even opened up a new practice group focused exclusively on the TPLF industry.[38] The new practice group "will represent plaintiffs who are seeking litigation funding for individual cases and portfolios of cases and law firms who are seeking litigation funding for portfolio cases … . The firm will also represent litigation funders who are seeking assistance with due diligence as they evaluate potential investments."[39] These are attributes of a robust TPLF industry—one that is becoming enmeshed in the U.S. civil justice system.

Expanding Funding Models

The TPLF industry is not only growing financially but is also diversifying and becoming more sophisticated, expanding into portfolio investing, defense-side litigation funding, claim monetization, crowdfunding and other models—all of which have enabled the industry to reach more cases and more sectors of the civil justice system.

PORTFOLIO INVESTING

As funders seek to get their hands on more profit, they have transitioned from funding individual cases to investing in an entire portfolio of cases at a given firm. Under this approach, the funder essentially bankrolls all or part of a firm's operations, including the firm's day-to-day operating expenses, and then takes a cut of any litigation proceeds.[40] By spreading an investment across a portfolio of cases, funders hope to make their investments less risky: "In a sector already adverse to risk, a portfolio of cases could work much the same as mutual funds, helping to improve the chances of strong returns from multiple sources, rather than relying on just one piece of litigation."[41] Funders have enthusiastically embraced this model, largely eschewing their previously touted vetting processes for evaluating the merits of the cases that they are financing.

> *"Funders have enthusiastically embraced this model, largely eschewing their previously touted vetting processes for evaluating the merits of the cases that they are financing."*

For instance, Burford's portfolio investments have "grown to become a significant portion of Burford's investment[s] … . In 2018 alone, Burford committed over $450 million to portfolio finance investments,"[42] and 62 percent of Burford's investments are described as portfolio investments, compared to only 15 percent of single case finance.[43] Portfolio investing is becoming a bigger and bigger part of the industry, with one article reporting that "[o]f the litigators who obtained third-party funding in 2017, nearly 40% used the capital received to finance portfolios containing several cases."[44] And according to a more recent survey of private funders, 47 percent of total investments made in cases in the 12-month period ending in June 2019 went to portfolio arrangements.[45]

DEFENSE-SIDE FUNDING

The TPLF industry has long funded plaintiffs, but it is now making a concerted effort to fund defendants as well. Because the nature of litigation financing is traditionally dependent on the funded party "winning" the case and getting a payout, defense-side financing takes on some unique packaging of claims, such as a hybrid model in which both defense and plaintiff-side claims, or counterclaims, are packaged together.[46] Essentially, the theory is that under the hybrid model of defense-side litigation funding, the client would have certain claims of its own "with enough upside to offset the risks associated with

financing the defense" of other claims in the same or other litigations.[47] As this description illustrates, however, even so-called defense-side funding encompasses significant elements of traditional plaintiff-side funding.

On the other side of the spectrum is "'pure defense' financing."[48] A typical agreement would provide that the case is "successful" if it is settled below a certain threshold.[49] The funder would agree to finance the legal fees and to cover any settlement that exceeds the agreed-upon threshold. Conversely, the client would agree to pay the funder a multiple of the funder's investment if the case is ultimately "successful."[50] However, in many respects, such arrangements may look more like law firm bonus compensation arrangements than actual litigation funding.

Although there has been much recent talk about funding defendants' litigation efforts, the extent to which such activity is occurring is far from clear.[51]

CLAIM MONETIZATION

Another new and sophisticated funding model is "claim monetization." In claim monetization, "parties use the capital for a purpose other than covering the costs of litigation."[52] For example, the funder might provide the plaintiff with "working capital," which serves as an "advance" on an ultimate judgment.[53] As with other forms of litigation funding, claim monetization is non-recourse in nature, which means that the funder is only repaid in the event that the client prevails in the underlying litigation.

Although this paradigm resembles the model employed by consumer lawsuit lending—i.e., the practice of funders advancing money to individuals to pay for their living expenses during the pendency of litigation—monetization is increasingly being used by commercial entities. "Parties large and small are interested in pure claim monetization at various stages of litigation, even if they are willing to pay their counsel on an hourly basis."[54] And monetization can be provided as a lump-sum payment or on a schedule of key developments, such as surviving a motion to dismiss or withstanding a later dispositive motion. "Claim monetization is merely a different way to unlock a litigation asset's value. In contrast to typical litigation funding, monetization's main benefit is time: it is no secret that litigation often takes years to resolve, and monetization enables parties to realize the value of their litigation assets without waiting to prevail in litigation."[55]

CROWDFUNDING AND OTHER MODELS

Yet another funding model employed by litigation funders is crowdfunding. In particular, one company, LexShares Inc., is attracting investors, commercial plaintiffs, and plaintiffs' firms to its online marketplace by applying a crowdfunding strategy to TPLF.[56] Accredited investors are able to shop among individual cases and

> *"In claim monetization, 'parties use the capital for a purpose other than covering the costs of litigation.'"*

contribute as little as $2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment.[57] Unlike traditional TPLF firms, LexShares solicits investments using a crowdfunding model, which allows ordinary accredited investors to choose among cases vetted though LexShares' due diligence.

Notably, the examples of funding models described above are by no means exhaustive. Indeed, Burford recently announced a new $300 million fund for post-settlement deals, which marks yet another different type of fund to emerge in the industry.[58] It stands to reason that the continued expansion of TPLF will foster even more kinds of funding models in the near future.

At bottom, there is no question that, in contrast to 10 years ago, TPLF has become a prominent facet of civil litigation in the United States. And it has been accompanied by sophisticated changes in funding methods that will likely accelerate its growth.

TPLF Gone Awry

When ILR released its *Selling Lawsuits* paper roughly a decade ago, the authors—looking to the experience of TPLF in Australia—predicted that TPLF would not only increase the volume of litigation, but also encourage the filing of frivolous and abusive litigation.[59] After all, TPLF companies are mere investors, and they base their funding decisions on the present value of their expected return. As such, even if a lawsuit has little or no merit, it may be a worthwhile investment if there is a possibility (however small) of recovering a very large sum of money.

In addition, TPLF providers can mitigate their downside risk by spreading the risk of any particular case over their entire portfolio of cases and by spreading the risk among their investors—which is presumably why portfolio-based funding has become so pervasive. For these reasons, TPLF providers have higher risk appetites than most contingency-fee attorneys and will be more willing to back claims of questionable merit. Sure enough, this is the very dynamic that has played out in the TPLF arena over the last 10 years, perhaps best exemplified by the abusive and fraudulent *Chevron Corp. v. Donziger* litigation and the foray of litigation funders into the mass tort arena—both of which are explored in greater detail below.

Chevron Corp. v. Donziger

Two years after publication of the original *Selling Lawsuits* paper, one of the most notorious examples of TPLF playing a role in fueling abusive and frivolous litigation occurred in the case of *Chevron Corp. v. Donziger*.[60] In *Donziger*, an investment by a fund associated with Burford helped sustain a lawsuit against Chevron filed in an Ecuadorian court, alleging environmental contamination in Lago Agrio, Ecuador. Burford invested $4 million with the plaintiffs' lawyers in the Lago Agrio suit in October/November 2010 in exchange for a percentage of any award to the plaintiffs. In February 2011, the Ecuadorian trial court awarded the plaintiffs an $18 billion judgment against Chevron.[61] In March 2011, Judge Lewis Kaplan of the U.S. District Court for the Southern District of

> *Judge Kaplan also lamented the plaintiffs' lawyers' 'romancing of Burford,' which the court found led the plaintiffs' counsel to adopt a litigation strategy designed to maximize the plaintiffs' ability to collect on any judgment—rather than focus on securing a judgment ethically and honestly.*

New York issued an injunction barring the plaintiffs from trying to collect on their judgment because of what he called "ample" evidence of fraud on the part of the plaintiffs' lawyers.[62] Long before Burford had made its investment in the case, Chevron had conducted discovery into the conduct of the plaintiffs' lawyers under a federal statute that authorizes district courts to compel U.S.-based discovery in connection with foreign proceedings, and at least four U.S. courts throughout the country had found that the Ecuadorian proceedings were tainted by fraud.[63]

Sometime in 2011, Burford decided not to provide any additional funding in the Lago Agrio case.[64] Nevertheless, its year-long involvement—and its initial decision to invest $4 million despite allegations of fraud in the proceedings—vividly shows that TPLF investors have high risk appetites and are willing to back claims of questionable merit. Chevron ultimately sued the lead plaintiffs' attorney for civil racketeering for procuring the judgment fraudulently. In 2014, Judge Kaplan found that the "decision in the Lago Agrio case was obtained by corrupt means."[65] Judge Kaplan also lamented the plaintiffs' lawyers' "romancing of Burford," which the court found led the plaintiffs' counsel to adopt a litigation strategy designed to maximize the plaintiffs' ability to collect on any judgment—rather than focus on securing a judgment ethically and honestly.[66]

Mass Torts Warehouse

Because the increasingly common portfolio strategy by definition involves funding a larger and broader array of cases, it can be expected to increase the filing of ill-considered cases. Indeed, a case filed in 2015 revealed that TPLF is being used in major mass tort proceedings where lawyers amass as many "faceless clients as possible" without adequately investigating the merit of the claims.[67] A lawsuit brought by a former employee of plaintiffs' law firm AkinMears in connection with the use of TPLF in litigation involving allegedly defective mesh products summarized the business model employed by the law firm as follows:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or

buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[68]

This lawsuit, which had been reported on in the press, ultimately settled. However, the allegations in the petition underscore the tendency of TPLF to engender dubious claims in the mass tort arena. As one article explains, the funding company's "investment in a claims-bundling firm, known not for trial work but for multi-million-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder's usual customers: companies with big business disputes for their Am Law 200 firms."[69] In short, the AkinMears case illustrates that the buying and selling of questionable mass tort lawsuits on a massive scale is not only supported by third party funding, but is capable of reaching new heights precisely because of the availability of such funding.

Unnecessary Surgeries for the Sake of Dividends

In April 2018, *The New York Times* chronicled an even more troubling (albeit related) consequence of TPLF: litigation funders were pushing plaintiff law firms to encourage women to undergo unnecessary surgeries in order to drive up the value of their claims.[70] The article describes the story of a woman receiving a phone call from a stranger who tells the woman that she has a defective mesh implant and that she needed surgery to remove it. "Just like that, she had stumbled into a growing industry that makes money by coaxing women into having surgery—sometimes unnecessarily—so that they are more lucrative plaintiffs in lawsuits against medical device manufacturers."[71] "While studies have shown that up to 15 percent of women with mesh implants will encounter problems" and that "removing the mesh is not always recommended," some TPLF companies in control of litigation will apparently do anything necessary to increase the potential recovery, including pushing women to undergo unnecessary and dangerous surgeries.[72]

"[T]he buying and selling of questionable mass tort lawsuits on a massive scale is not only supported by third party funding, but is capable of reaching new heights precisely because of the availability of such funding."

> *If the government is not even aware that a relator has further assigned its interest (let alone the terms of that assignment) to an outside third party, then it obviously cannot properly supervise those cases in which it does not intervene.*

TPLF Being Used to Buy and Sell False Claims Act Lawsuits

Funders have also signaled that they are interested in entering the False Claims Act (FCA) fray.[73] Although funders have promoted the view that litigation funding "has the potential to increase the number of legitimate claims reaching the Department of Justice,"[74] it ignores serious constitutional and statutory problems with introducing TPLF into the FCA arena. In addition, the funders' view is precisely backwards, as TPLF-based FCA claims would engender more vexatious and frivolous lawsuits under that statute.

As a threshold matter, the use of TPLF is not authorized by the FCA. As the Supreme Court has explained, the FCA vests standing in a private *qui tam* relator by "effecting a partial assignment of the Government's damages claim."[75] To have standing to bring suit under this statute, the relator must comply with several important statutory requirements, including, for example, disclosing her case to the United States and affording it the opportunity to investigate and intervene in the proceeding.[76] However, the FCA does not authorize the relator to re-assign the government's claim to outside funders, which would effectively constitute a sale of all or part of the relator's share of the government's claim with consideration payable only to the relator.

Importantly, there are good reasons for this lack of statutory authorization. TPLF arrangements are generally kept secret, including from the government, whose interest the relator is pursuing. If the government is not even aware that a relator has further assigned its interest (let alone the terms of that assignment) to an outside third party, then it obviously cannot properly supervise those cases in which it does not intervene. Nor can it properly evaluate the fundamental question of whether the relator's assignment of its interest to a third party warrants the government intervening in the first place—such as if the funding

> *[S]uch delegation of executive power to outside entities with a pecuniary interest in the underlying litigation would be especially problematic in light of the punitive nature of FCA proceedings.*

agreement places constraints on the relator's actions that are incompatible with the interests of the United States—or dismissing the case altogether.

Moreover, permitting TPLF in the FCA context would raise serious constitutional questions by delegating control of FCA lawsuits—an executive function—to individuals who (unlike the *qui tam* relator) are complete strangers to the alleged misconduct at issue in the litigation. Indeed, such delegation of executive power to outside entities with a pecuniary interest in the underlying litigation would be especially problematic in light of the punitive nature of FCA proceedings.[77] The use of TPLF in FCA cases threatens the fundamental due process rights of defendants by undermining the impartiality and neutrality of these quasi-criminal proceedings. "'If you got pulled over by a cop and the cop made more money if he gave you a ticket and less if he didn't, no one would think that was fair.'"[78]

When a relator sells the government's claim to a financially interested TPLF entity, it is essentially creating that same kind of scenario. After all, and as elaborated throughout this paper, TPLF entities naturally and inevitably seek to influence the lawsuits they finance by, for example, deterring reasonable settlements so that they can maximize the return on their investment. And such pressure is extremely difficult to resist, raising the specter that a relator will subordinate the public interest in favor of the TPLF entity's personal, pecuniary interest. To be sure, private relators are also motivated at least in part by a desire to obtain a financial reward for their prosecution of the government's claims.

However, in stark contrast to relators (whose identity is known and over whom the government can exercise proper oversight), TPLF entities operate unbeknownst to the government and can therefore seek to exert control and influence over the prosecution of an FCA case with impunity. Needless to say, such a troubling dynamic does not exist when the government itself, or a properly supervised relator, is bringing claims against a defendant alleged to have violated the FCA.

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Allowing TPLF to fester in FCA litigation would also pose serious risks to the nation's civil justice system by incentivizing vexatious and frivolous litigation. As just discussed, because the goal of TPLF funders is to maximize the return on their litigation investments, they will naturally seek to exercise control over those investments by influencing key litigation decisions, such as those pertaining to settlement. And because most funder compensation turns on the plaintiff obtaining a monetary settlement, TPLF could jeopardize the chances of a non-monetary settlement that would satisfy the government but not the funder, needlessly protracting litigation. In addition, companies that might not already be involved in TPLF could seek to exploit the FCA's treble damages provision by bankrolling claims of questionable merit against their competitors for financial advantage. The result would be frivolous and vexatious litigation, which is expressly discouraged by the FCA.[79]

TPLF Potentially Being Used to Burden New York City with Abusive Litigation

There have also been troubling reports about litigation funders fleecing indigent people by encouraging them to file lawsuits against the City of New York and then charging them interest rates as high as 124 percent.[80] These schemes target vulnerable individuals, including convicted criminals, with promises of money for suing the city (often alleging mistreatment in the criminal justice system), but in the end the firms take home the bulk of the money.[81]

In short, TPLF is being used to gamble on questionable—and sometimes fraudulent—litigation. And because TPLF arrangements generally need not be disclosed, there are undoubtedly many other instances of abusive or frivolous litigation that have evaded public scrutiny. Inevitably, as TPLF companies continue to expand their coffers and multiply their returns on litigation finance, more and more examples of TPLF gone awry will come to light.

TPLF Is a Recipe for Ethical Impropriety

The many ethical concerns surrounding TPLF—initially touched upon in the original *Selling Lawsuits* paper—have not gone away. On the contrary, the handful of TPLF arrangements that have seen the light of day confirm that the practice is threatening core ethical principles.

These principles include that:

- the plaintiff and his or her lawyer (as opposed to an outsider) should control the prosecution of the underlying litigation[82];
- lawyers may not share fees with nonlawyers[83];
- lawyers have a fiduciary obligation to adequately represent class members in putative class litigation[84]; and
- lawyers and judges must avoid conflicts of interest.[85]

TPLF Undermines A Party's Control Over His Or Her Lawsuit

One of the most glaring ethical problems resulting from TPLF is the tendency of funders to exercise control over the underlying litigation. Such efforts are inevitable. If a third party has a financial stake in a lawsuit, that third party will naturally seek to control the lawsuit and, as a result, the lawyers being funded by that third party will be controlled by that third party, sometimes to the detriment of the actual party in interest. The ensuing interference in the fundamental attorney-client relationship contravenes Model Rule

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of Professional Conduct 2.1, which specifically requires attorneys to exercise independent professional judgment and to provide honest legal advice to their clients.[86] As a 2012 ABA Working Group on litigation funding explained, "[t]he attorney's advice should be based solely on what is best for the client, without regard to extraneous considerations such as the lawyer's interests or the interests of third parties."[87]

The exercise of control by outside funders also implicates the centuries-old prohibition against champerty, which bars "someone from funding litigation in which he or she is not a party."[88] The prohibition against champerty "is intended to prevent courts from becoming trading floors where people buy and sell lawsuits based on their perceived merit."[89] Although the TPLF industry has promoted the view that this doctrine (as well as the parallel doctrine outlawing maintenance, the funding of existing litigation) are a dead letter,[90] recent state and federal court decisions in the TPLF arena belie the notion that champerty and maintenance principles are moribund. Over the past few years alone, certain litigation funding agreements have been declared unenforceable under the laws of Minnesota, New York, North Carolina, Pennsylvania, and Kentucky, based on provisions purporting to vest the funder with control over key litigation decisions.[91]

Consistent with their unfounded claims regarding the vitality of champerty and maintenance, TPLF entities continue to deny that they can exercise control over litigation in which they invest. But such protestations are not credible. Would a hedge fund or other funder really invest in a venture it has no ability to influence?

"Notably, the 'best practices' guide of Bentham IMF, one of the largest litigation funding companies in the world, contemplates robust control by funders."

Notably, the "best practices" guide of Bentham IMF, one of the largest litigation funding companies in the world, contemplates robust control by funders. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the funding entity is permitted to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions.[92] Indeed, one need only look at the few funding agreements that have been disclosed to see that third party funders are adhering to Bentham's "best practices" and exercising a large degree of control over the litigations in which they choose to invest.

For example, in *Boling v. Prospect Funding Holdings, LLC*, the plaintiff entered into a series of funding agreements to finance his lawsuit, which eventually—after the resolution of his lawsuit—led to the plaintiff seeking a declaratory judgment that the agreements violated Kentucky's prohibition against champerty and also violated the

state's usury laws.[93] The U.S. Court of Appeals for the Sixth Circuit recently affirmed the district court's conclusion that the agreements were unenforceable, recognizing that the agreements "effectively g[a]ve Prospect substantial control over the litigation."[94] As the Court of Appeals made clear, the funding agreements were rife with clauses that ceded control over the underlying litigation from the claimant to the funder. Specifically:

- "All four Agreements limited Boling's right to change attorneys without Prospect's consent, otherwise Boling would be required to repay Prospect immediately."[95]

- The funder "had the right to examine the 'case files and to inspect the correspondence, books and records relating to [the plaintiff's] case or claim.'"[96]

- Two of the agreements at issue "authorized [the funder] to request 'pleadings, notices, orders, motions, briefs or other documents … correspondence,' [the plaintiff's] medical records, and 'documents relating to any other material developments with respect to' [the plaintiff's] claim or recovery in the suit."[97]

- Another provision "actually provided that if [the plaintiff] replaced his attorney, or hired an additional attorney, without notifying [the funder] and ensuring that the new attorney executed an acknowledgment of the litigation-funding agreement, [the plaintiff] was immediately required to pay [the funder] the amount due at 40 months of funding (over $34,000 for the $5,000 loan in the 2012 Agreement and over $68,000 for the $10,000 loan in the 2013 Agreement) regardless of when [the plaintiff] changed attorneys."[98]

In holding that these provisions rendered the TPLF agreements champertous under Kentucky law, the Sixth Circuit reasoned that the "conditions raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."[99] As part of its analysis, the Court of Appeals expressed concern that "agreements like this may interfere with or discourage settlement, which is inconsistent with Kentucky's public policy, 'because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan'" and that "such conduct encourages and multiplies litigation."[100] The Sixth Circuit's decision and explication of these agreements, and how they undeniably work to exert control over a litigation, is not an isolated incident.

Similarly, the elaborate funding agreement utilized by Burford in the *Donziger* litigation previously discussed "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the Funder's approval."[101] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[102] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[103]

> *These fee-sharing agreements are particularly problematic because they may exist without the attorney's client being fully aware of their existence—much less their ramifications—and are per se violative of Rule 5.4(a).*

As the Sixth Circuit aptly recognized in *Boling*, provisions like those described above vest the funder with significant control over key litigation decisions, threatening the autonomy of both the claimant and his or her lawyer. And even when a funder's efforts to control a plaintiff's case are not overt, the existence of third party litigation funding naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor.

TPLF Encourages Unethical Fee-Sharing Between Lawyers and Nonlawyers

Although all TPLF funding agreements have the potential to disrupt the attorney-client relationship, this concern is perhaps most apparent in contingency-based funding agreements entered into directly between a funder and an attorney as compared to contracts entered into between the funder and the litigant itself. These fee-sharing agreements are particularly problematic because they may exist without the attorney's client being fully aware of their existence—much less their ramifications—and are per se violative of Rule 5.4(a).

Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances.[104] "As stated in the comments to Rule 5.4, this prohibition is intended to 'protect the lawyer's professional independence of judgment.'"[105] "Fee splitting is [also] viewed as running the risk of granting nonlawyers control over the practice of law or potentially enabling lay persons to practice law without authorization."[106] Such a risk is essentially another variant of the control problem previously discussed, and demonstrates why it is especially egregious when a funding agreement is entered into between a funder and the claimant's lawyer, who owes a fiduciary duty to his or her client. While "[f]unders may … insist upon contracting directly with the client in order to circumvent the prohibition,"[107] some are ignoring this bedrock principle, as the *Gbarabe v. Chevron Corp.* case (described below) illustrates.

TPLF Can Engender Conflicts of Interest

Another potential ethical concern is the possibility of conflicts of interest. According to Canon 2 of the Code of Conduct for United States Judges, judges must avoid even the appearance of impropriety in all activities.[108] In particular, "[a] judge should not allow … financial … or other relationships to influence judicial conduct or judgment."[109] Similarly, judges shall perform their duties "impartially," disqualifying themselves from any matters in which they have a "financial interest."[110]

Disclosure of TPLF arrangements can ensure that judges faithfully abide by these important canons. "As some TPLF entities are multi-billion- and multi-million-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held TPLF entities, the web of interpersonal relationships judges [or other judicial officers] have could be impacted as well, leading to unintentional appearances of impropriety."[111]

This problem was once again on display in the *Donziger* case mentioned above.[112] During a deposition in that proceeding, lead plaintiffs' lawyer Steven Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.[113] Only after being ordered to answer the question by the special master presiding over the case did Donziger disclose that the funder was Burford.[114] The special master then disclosed that he was former co-counsel with the founder of Burford, and that he had received marketing materials from that same individual aimed at litigation funding.[115] The special master also disclosed that he was friends with Burford's former general counsel.[116] The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.[117] Nonetheless, as the special master recognized, the deposition "prove[d] … that it is imperative for lawyers to insist that clients disclose who the investors are."[118]

These Problems Are Magnified in Class Actions

It is no secret that in our civil justice system, the stakes are much higher in class (as opposed to individual) litigation. Class actions can be especially profitable for third party funders given the number of class members who may be involved and the aggregation of double- and triple-damages claims. But they are also uniquely prone to abuse. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail."[119] "Critics of class action litigation have … pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations."[120]

Moreover, few class actions provide meaningful benefits to class members in the first place. Indeed, "every study that has" looked at consumer and employee

> *"Allowing TPLF to fester in the class action setting will not only reduce the downside risk to mounting frivolous class actions, but also guarantee that such proceedings deliver even less money for the actual class members."*

class action settlements "reached the same conclusion: The overwhelming majority of [such] class actions deliver nothing to class members."[121] Those studies establish that lawyers are reaping most of the benefits of class action settlements. Allowing TPLF to fester in the class action setting will not only reduce the downside risk to mounting frivolous class actions, but also guarantee that such proceedings deliver even less money for the actual class members.

Ten years ago, few, if any, class actions used third party funding. However, TPLF has now undeniably seeped into the class action context. For example, the Virginia-based hedge fund EJF Capital specifically targets "class-action injury lawsuits" at "hefty interest rates," with the loans to be repaid by law firms "as they earn fees from settlements and judgments."[122] "[C]lass actions [also] make up a significant portion of the cases that [Bay Area-based Law Finance Group] invests in."[123] "Other firms, like New York-based Counsel Financial, also market themselves as offering various kinds of financing to class-action plaintiffs[']attorneys."[124]

Consistent with the veil of secrecy that has shrouded TPLF arrangements outside the class action context, the agreements that have been entered into in the class action realm have likewise gone undisclosed to class members or courts, even though some agreements require that portions of any recovery by the class be paid to the funder. This fact, and the increasing prevalence of TPLF arrangements in class actions, not only raise serious ethical questions, such as unethical fee-sharing under Rule 5.4(a), but also implicate the adequacy of representation that Rule 23(a)(4) requires must be established prior to certifying a putative class action.

"[T]he agreements that have been entered into in the class action realm have likewise gone undisclosed to class members or courts, even though some agreements require that portions of any recovery by the class be paid to the funder."

These ethics and adequacy issues were illustrated in *Gbarabe v. Chevron Corp.*[125] In that putative class action, the two attorneys representing the plaintiffs acknowledged to the court that they had to seek third party funding to advance their case and obtained a number of time extensions as a result.[126] When funding was apparently obtained but the plaintiffs refused to disclose its terms, Chevron moved to compel production.[127] Chevron argued, among other things, that the information about funding was relevant to the adequacy of the class representatives under Rule 23(a)(4) due to the possibility that the funding agreement created a conflict of interest with absent class members.[128] Chevron also argued that the agreement could be relevant to the suitability of the attorneys as representatives of the class under Rule 23(g), which requires a court appointing

class counsel to consider "the resources that counsel will commit to representing the class" and further permits the court to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[129]

The court agreed and ordered production of the funding agreement, which contained several significant provisions. Specifically, the agreement referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[130] The agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[131] Further, the agreement required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[132]

The funding agreement also provided that the lawyers shall endeavor to "recover the maximum possible Contingency Fee,"[133] a requirement that may conflict with class member interests. Further, under the agreement, counsel agreed that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees—plus two percent of the total amount recovered by the putative class members.[134] In other words, the agreement required attorneys to share their fees with nonlawyers, raising Rule 5.4(a) issues.

Provisions like these—which vest control in a funder as opposed to the actual plaintiffs and appear to subordinate the interests of the class members to those of the funder—raise serious ethical concerns for all of the reasons already discussed in this paper. Indeed, these concerns apply in spades in class proceedings given that class representatives tend to be among the least sophisticated and zealous, generally leaving the plaintiffs' attorneys in the driver's seat in such cases. In *Gbarabe*, for example, the representative knew nothing about the details of the funding agreement. Under these circumstances, it is difficult to see how the plaintiff could be expected to protect the putative class' interests regarding an agreement between the attorneys and a third party funder. And of course, such ethics- or adequacy-based problems are not only detrimental to the interests of the class members that the class device was supposedly designed to protect, but also threaten the interests of defendants. After all, these problems pose a substantial risk that any final resolution of classwide litigation could be invalidated by a court that ultimately learns that money belonging to the class must be siphoned off to pay a funder that has remained hidden during the course of the litigation.

Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation. Although the court did not expressly tie the TPLF agreement to its ruling on adequacy, it did find that plaintiffs' counsel "failed to diligently prosecute this case"—a failure the court suggested may have been linked to their struggle in securing funding early on in the litigation.[135] But it did not address any of the important issues presented by the TPLF agreement in the case, leaving them for further development by future cases. Nonetheless, class counsel and the named plaintiffs already have significant difficulty satisfying their fiduciary obligations to the class they are seeking to represent, and adding a funder to the class action mix only exacerbates that challenge and makes carrying out those fiduciary responsibilities all the more difficult.

Proposals for Reform

As the prior sections of this paper demonstrate, TPLF has gained a foothold in—and poses a number of nettlesome problems for—the American civil justice system. But there are means available to at least temper the adverse effects of TPLF.

Indeed, there are a handful of sensible measures that would go a long way toward that end, some of which have already been adopted in various forms by certain jurisdictions. At a minimum, lawmakers and rule makers should seriously consider requiring the disclosure of TPLF arrangements. Other potential reforms include outright prohibitions of TPLF fee-sharing arrangements between funders and lawyers on the ground that they violate Rule 5.4, as well as a prophylactic ban on TPLF in class actions.

> *"At a minimum, lawmakers and rule makers should seriously consider requiring the disclosure of TPLF arrangements."*

Disclosure

At a bare minimum, TPLF arrangements should be disclosed at the outset of civil litigation. After all, unless some light is shined on these agreements, plaintiffs will continue to utilize TPLF—in some situations, potentially illegally—without fair notice to the court or the opposing party. Disclosure would minimize the prospect for these abuses and promote other salutary effects on our civil justice system. Specifically:

- **Disclosure will reduce the likelihood of unethical fee-sharing between lawyers and nonlawyer funders consistent with Rule 5.4**. As the *Gbarabe* case illustrates, funders sometimes enter into arrangements directly with lawyers rather than the actual party litigant. Such agreements blur the line between lawyers and nonlawyers and threaten the professional independent judgment of attorneys, which is a cornerstone of the ethics rules. If TPLF agreements are disclosed as a matter of course early on in the life of a civil case, the parties and the court can

determine whether any provisions purport to commingle lawyer and nonlawyer funds in contravention of Rule 5.4.

- **Disclosure will minimize conflicts of interest**. As the *Donziger* case previously discussed illustrates, TPLF raises serious conflict-of-interest questions. Such conflicts can arise based on a pecuniary, familial, or other personal interest in the funder on the part of opposing counsel or perhaps even the court itself. As a result, the court needs to know the identity of funders to assess whether it or anyone else involved in the litigation unwittingly has a conflict of interest that warrants recusal or some other remedy. Disclosure would furnish that information.

- **Disclosure will help ensure that plaintiffs have control over the litigation**. As the examples summarized in this paper make clear, funders routinely seek to exercise control over key strategic decisions in litigation they finance. Mandatory disclosure requirements could temper this problem by discouraging funders from insisting on inappropriate control provisions in the first instance. And if funders persist in inserting such problematic provisions in their funding arrangements, disclosure will provide the courts with the necessary information to nullify them.

- **Disclosure of funding arrangements will further the enforcement of rules against champerty and maintenance**. As discussed above, the funding industry's mantra that states no longer recognize champerty and maintenance sweeps too broadly and ignores the recent judicial rulings from multiple states reaffirming the vitality of these important doctrines. Courts and parties cannot ensure that funding agreements are faithful to these principles unless they are disclosed.

- **Disclosure will facilitate efficient proportionality and cost-shifting determinations**. Under the Federal Rules of Civil Procedure, the parties' resources are highly relevant to a number of questions, including whether discovery is being conducted in a proportional manner.[136] Since a funder is effectively a real party in interest, its resources should be considered in resolving the question of proportionality. In addition, it should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs.[137]

- **Disclosure will facilitate more realistic settlement negotiations**. Courts sometimes want to hear from all parties with authority over the fundamental question of settlement. As some of the examples previously discussed in this paper illustrate, funders routinely seek to weigh in on that key strategic decision. But absent disclosure, a funder's role is completely hidden from the court and the opposing party, undermining accurate and realistic settlement negotiations between the parties.

- **Disclosure in FCA cases will ensure that claims being asserted on behalf of the government are actually being prosecuted for the public interest**. As previously discussed, the legal and ethical concerns implicated by TPLF are

> *As previously discussed, the legal and ethical concerns implicated by TPLF are accentuated in FCA litigation because the claims being prosecuted are those of the United States.*

accentuated in FCA litigation because the claims being prosecuted are those of the United States. Disclosure of TPLF in this context would apprise the government of its existence and afford the United States the opportunity to dismiss the case or intervene in order to avoid the nettlesome ethical, statutory, and constitutional problems previously discussed.

- **Disclosure would shine much needed light on abusive litigation funding practices**. For example, as already discussed, *The New York Times* recently published an exposé on litigation funders financing unnecessary surgery so women could file stronger claims in the vaginal mesh litigation.[138] Another publication reported on funders using their investments to encourage the filing of frivolous claims against New York City.[139] And in another troubling report, funders financed substantial advertising to buy control of mass tort claims.[140] These unseemly episodes would have come to light much sooner had funding disclosure been required.

Some legislatures and judicial bodies have begun to take heed of these important rationales. In 2018, Wisconsin enacted a comprehensive litigation funding disclosure requirement.[141] The Wisconsin law provides that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person … has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[142]

In late 2018, the U.S. District Court for the Northern District of California adopted a TPLF disclosure requirement for class actions. The court added to its "Standing Order for All Judges" a provision requiring that "in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."[143] As one attorney who studies the litigation funding industry explained, the Northern District of California rule is "really a harbinger and a signal that

> *Some legislatures and judicial bodies have begun to take heed of these important rationales.*

courts … need to consider the presence of third-party financiers in a lawsuit and consider their role."[144]

U.S. District Court Judge Paul Grimm of the District of Maryland, for example, recently required lawyers seeking to lead a sprawling MDL concerning a huge data breach of Marriott hotels to disclose whether they plan to receive outside finance.[145] In a recent article, Judge Grimm remarked that "it's important judges know everyone with a stake in a case" because "[w]hat you don't know, if you have third-party funding, is if someone from the outside has made a decision, an investment decision, that this case has merit, and they have advanced the money to take the case forward … [t]hen, when it comes time to resolve the case, those people are not in the room, and if they have minimal expectations of what they must recover in order to maximize their investment, that is an influence, a potential influence, in how the litigation is conducted and how the litigation might be resolved."[146] Another judge overseeing a large swath of federal opioid cases, Judge Dan A. Polster of the U.S. District Court for the Northern District of Ohio, also required that lawyers connected with the cases disclose to the court (but not to opposing parties) the fact of any third party funding.[147]

Notably, disclosure of TPLF arrangements is already required in several foreign countries that allow TPLF.[148] For example, Hong Kong recently enacted a law requiring the disclosure of TPLF arrangements in arbitration.[149] Similarly, Australia requires the disclosure of a TPLF funder's identity and portions of the underlying agreement in class action cases.[150] And in Canada, where TPLF has also been countenanced, TPLF

"Notably, disclosure of TPLF arrangements is already required in several foreign countries that allow TPLF."

arrangements are increasingly being subjected to various disclosure requirements in the class action arena.[151]

Importantly, "[r]equiring disclosure of a litigant's financial relationships in a case is not an original concept."[152] After all, Rule 26 also already requires that defendants automatically disclose (without need for a request) at the outset of litigation "any insurance agreement" that may apply to the litigation.[153] Thus, defendants already must disclose arrangements they may have for financing the prosecution or settlement of a litigation matter. Requiring that TPLF arrangements be disclosed would simply bring plaintiffs' Rule 26 disclosure obligations in line with those of defendants.

Against this backdrop, the federal judiciary's Advisory Committee on Civil Rules is actively considering a proposal to amend Federal Rule of Civil Procedure 26 and place TPLF agreements on the list of items that must be automatically disclosed.[154] And a bill pending in the U.S. Senate, the Litigation Funding Transparency Act of 2019, would require the disclosure of TPLF arrangements in both class actions and mass tort multidistrict litigation

> *A uniform rule is needed to make disclosure a standard practice routinely followed in all federal courts.*

proceedings.[155] Notably, a recent study conducted at the direction of the federal Advisory Committee on Civil Rules concluded that around half of U.S. federal appellate courts and one quarter of federal district courts already have rules that appear to require identification of litigation funders in civil litigation matters.[156] However, those disclosure requirements vary widely and are often ignored or misunderstood. A uniform rule is needed to make disclosure a standard practice routinely followed in all federal courts.

In short, there are a number of vehicles for instituting a mandatory disclosure requirement. Needless to say, a robust disclosure regime is a necessary first step to ensuring that TPLF in a given case is not running afoul of core legal and ethical precepts.

Fee-Sharing

Agreements to share fees between lawyers and nonlawyer funders are now a recurring feature of TPLF, as the *Gbarabe* case makes clear. Such arrangements threaten the independent professional judgment of attorneys, who have a fiduciary obligation to act in their clients' best interests rather than curry favor with an outside entity funding a lawsuit. They also threaten to take control away from the lawyer's client and place it in the hands of the funder, which has a financial incentive to influence key strategic decisions of the litigation it has rolled the dice on.

The New York City Bar Association recently recognized as much when it issued an August 2018 interpretation of New York's version of Rule 5.4(a). That interpretation concluded that fee-sharing with a litigation funder is unethical where "the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters."[157] As the opinion explains, Rule 5.4(a) "presupposes that when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer."[158] In short, the opinion concluded that one of the most common litigation funding arrangements—i.e., a deal under which a funder provides money to litigate a matter in

> *Such arrangements threaten the independent professional judgment of attorneys, who have a fiduciary obligation to act in their clients' best interests rather than curry favor with an outside entity funding a lawsuit.*

> *"[T]he opinion concluded that one of the most common litigation funding arrangements—i.e., a deal under which a funder provides money to litigate a matter in exchange for a percentage of the fee ultimately collected by plaintiffs' counsel—violates Rule 5.4(a)."*

exchange for a percentage of the fee ultimately collected by plaintiffs' counsel—violates Rule 5.4(a). Hardly the first professional association to reach this decision, the New York City Bar Association joined earlier decisions by the state bar associations of Maine, Nevada, Utah, and Virginia.[159]

The ethics rules are designed to protect the attorney-client relationship and safeguard the fair administration of justice. Instead of creating exceptions to these time-tested canons, state bar associations and courts should reaffirm their vitality and make clear that TPLF arrangements are not outside their scope. Because lawyer-funder agreements under which attorneys share their fees with outside funders facially run afoul of Rule 5.4, they should be explicitly prohibited.

Class Actions

TPLF in the class action context can also be a recipe for abuse, as the *Gbarabe* case illustrates. Because such aggregate litigation already raises significant concerns regarding control of the litigation, injecting TPLF into class actions increases the danger that a class action will be prosecuted primarily for the benefit of attorneys and funders, and not for the benefit of the class of claimants. As a result, policymakers should consider prohibiting TPLF in class actions.

> *"[I]njecting TPLF into class actions increases the danger that a class action will be prosecuted primarily for the benefit of attorneys and funders, and not for the benefit of the class of claimants."*

Conclusion

It can no longer be denied that TPLF is becoming increasingly prevalent in the United States. As this paper demonstrates, the marketplace for selling lawsuits and buying trouble has only multiplied and diversified, with TPLF companies investing billions of dollars, creating increasingly sophisticated investment models and reaching parts of the legal industry previously thought incompatible with litigation funding.

As expected, the problems have multiplied and diversified as well, with TPLF leading to dubious mass torts warehouses, unnecessary surgeries being foisted on unsuspecting plaintiffs, and funding agreements that plainly vest undue influence and control in the hands of the outside funder in both individual and class litigation. These problems illustrate the need for placing reasonable limits on TPLF, including—most fundamentally—a requirement that TPLF arrangements be disclosed at the outset of civil litigation both to the court and to the opposing party. The time for studying and observation has passed, and policymakers must now take concrete action to mitigate the abuses posed by this increasingly pervasive feature of our civil justice system.

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63 *See, e.g.*, Mem. Op. & Order Rejecting Claims of Att'y-Client Privilege & Ordering Produc. of Docs. at 11, *In re Chevron Corp.*, No. 1:10-mc-00021-JCH-LFG, ECF No. 173 (D.N.M. Sept. 13, 2010) (finding "that … discussions trigger the crime-fraud exception, because they relate to corruption of the judicial process, the preparation of fraudulent reports, the fabrication of evidence, and the preparation of the purported expert reports by the attorneys and their consultants"); *In re Appl. of Chevron Corp.* at 9, No. 3:10-cv-01146-IEG-WMC, ECF No. 81 (S.D. Cal. Sept. 10, 2010) (crime-fraud exception applies because "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own"); Order at 12, *Chevron Corp. v. Champ*, No. 1:10-mc-00027-GCM-DLH, ECF No. 26 (W.D.N.C. Aug. 30, 2010) ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."); Hr'g Tr. 23:14-20, *In re Appl. of Chevron Corp.*, No. 2:10-cv-02675-KM-MCA, ECF No. 34 (D.N.J. June 17, 2010) (plaintiffs' lawyers' actions could not constitute "anything but a fraud on the judicial proceeding"). On the Lago Agrio suit, *see generally* Roger Parloff, *Have you got a piece of this lawsuit? The bitter environmental suit against Chevron in Ecuador opens a window on a troubling new business: speculating in court cases*, Fortune (June 28,

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65 *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014).

66 *Id.* at 479.

67 David Yates, *"Mass tort warehouse" fires fund officer to avoid paying him millions for acquiring 14,000 mesh claims, suit alleges*, SE Tex. Rec. (Oct. 10, 2015), http://setexasrecord.com/stories/510642299-mass-tort-warehouse-fires-fund-officer-to-avoid-paying-him-millions-for-acquiring-14-000-mesh-claims-suit-alleges.

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71 *Id.*

72 *Id.*

73 *See* Donald Vinson, *How Litigation Finance Funds Whistleblower Actions*, Law360 (Jan. 5, 2016), https://www.law360.com/articles/742754/how-litigation-finance-funds-whistleblower-actions.

74 *Id.*

75 *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).

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77 *See United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 956 & n.24 (10th Cir. 2008) (recognizing punitive nature of FCA, which "seeks to sanction and deter wrongful conduct through the imposition of up to treble damages").

78 Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times (July 9, 2007), at A10 (quoting Jay T. Jorgensen).

79 *See* 31 U.S.C. § 3730(d)(4) (permitting attorneys' fees to a defendant if relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment").

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81 *Id.*

82 *See* ABA Model R. Prof'l Conduct 2.1.

83 *See* ABA Model R. Prof'l Conduct 5.4(a).

84 *See* Fed. R. Civ. P. 23(a)(4).

85 *See* Code of Conduct for United States Judges, Canon 2; Code of Conduct for United States Judges, Canon 3.

86 ABA Model R. of Prof'l Conduct 2.1.

87 ABA Comm'n on Ethics 20/20, Informational Report to the House of Delegates (2012), at 26, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

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103 *Id.* at 473.

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129 *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *3-4 (citation omitted); Fed. R. Civ. P. 23(g).

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132 *Id.* § 10.2.4.

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135 *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *7 n.7, *35 (N.D. Cal. Mar. 13, 2017) ("After discovery, Chevron now asserts that plaintiff's September 17, 2015 request for an extension [to file a class certification motion] was not actually based on difficulties presented by the rainy season, but rather due to the fact that plaintiff did not obtain funding until November 2015.").

136 *See* Fed. R. Civ. P. 26(b)(1) (scope of discovery shall be "proportional to the needs of the case, considering … the parties' resources … [and] whether the burden or expense of the proposed discovery outweighs its likely benefit").

137 Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 Vand. L. Rev. 727, 755 (2019).

138 Goldstein & Silver-Greenberg, *How Profiteers Lure Women*, *supra* note 70 ("[H]undreds … of women have been sucked into this assembly-line-like system … fueled by banks, private equity firms and hedge funds, which provide financial backing. The profits are immense.").

139 *See* Cohen et al., *supra* note 80.

140 Fisher, *supra* note 33.

141 *See* Jamie Hwang, *Wisconsin law requires all litigation funding arrangements to be disclosed*, ABA J. (Apr. 10, 2018), http://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed.

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143 Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (effective Nov. 1, 2018).

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145 *See* Amanda Bronstad, *Dozens of Lawyers Vie to Lead Data Breach Case Against Marriott*, Law.com (Apr. 22, 2019), https://www.law.com/2019/04/22/dozens-of-lawyers-vie-to-lead-data-breach-case-against-marriott/.

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147 Julie Steinberg, *Opioid Litigation Finance Arrangements Must be Disclosed*, Big Law Business (May 8, 2018), https://biglawbusiness.com/opioid-litigation-finance-arrangements-must-be-disclosed/. The order issued by Judge Polster requires attorneys who have obtained third party litigation funding to submit the following to the court *in camera*: (i) a brief description of the funding; and (ii) sworn affirmations from counsel and the funder stating that the arrangement does not create any conflicts of interest; does not undermine counsel's obligations; does not affect counsel's independent professional

judgment; does not give the funder control over litigation strategy or settlement decisions; and does not affect party control of settlement. *See* Order Regarding Third-Party Contingent Litigation Financing at 1-2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, ECF No. 383 (N.D. Ohio May 7, 2018).

148 Haston, *supra* note 111 (noting a "[g]lobal TPLF [d]isclosure [t]rend").

149 Kluwer Arbitration Blog, *Hong Kong Approves Third Party Funding for Arbitration* (July 16, 2017), http://arbitrationblog.kluwerarbitration.com/2017/07/16/hong-kong-approves-third-party-funding-arbitration/.

150 *See* Federal Court of Australia, Class Action Practice Note GPN-CA, paragraph 6.

151 *See Defendant access to third-party funding agreements in Canadian class actions*, Canadian Class Action Defence (Nov. 21, 2018), https://www.lexology.com/library/detail.aspx?g=912d3a6c-b609-458b-bdb1-f55d9b28df7d&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=toronto+lawyers+association+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2018-11-23&utm_term=. Courts in Ontario have taken the lead in requiring the disclosure of funding agreements in class proceedings subject to certain redactions. *Id.*; *see also* Ranjan K. Agarwal & Doug Fenton, *Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context*, 59 CBLJ 65 (2017).

152 Haston, *supra* note 111.

153 Fed. R. Civ. P. 26(a)(1)(A)(iv).

154 *See Report of the Advisory Committee on Civil Rules* at 176-179, Committee on Rules of Practice & Procedure (Dec. 4, 2018), https://www.uscourts.gov/sites/default/files/cv12-2018_0.pdf; *see also* Caroline Spiezio, *General Counsel Push for Full Disclosure of Third-Party Litigation Funding in New Letter*, The Recorder (Jan. 31, 2019), https://www.law.com/therecorder/2019/01/31/general-counsel-push-for-full-disclosure-of-third-party-litigation-funding-in-new-letter/. The organizations that have endorsed this proposal include: the Advanced Medical Technology Association, the American Tort Reform Association, DRI – The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, the Financial Services Roundtable, the Florida Justice Reform Institute, the Insurance Information Institute, the International Association of Defense Counsel, the Las Vegas Metro Chamber of Commerce, Lawyers for Civil Justice, the Louisiana Lawsuit Abuse Watch, the Michigan Chamber of Commerce, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the National Retail Federation, the Pennsylvania Chamber of Business and Industry, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Small Business & Entrepreneurship Council, the South Carolina Chamber of Commerce, the South Carolina Civil Justice Coalition, the State Chamber of Oklahoma, the Texas Civil Justice League, the U.S. Chamber Institute for Legal Reform, the U.S. Chamber of Commerce, the Virginia Chamber of Commerce and Wisconsin Manufacturers & Commerce.

155 Ross Todd, *Republican Senators Reintroduce Bill Pushing for Disclosure of Litigation Funding*, Nat'l L.J. (Feb. 13, 2019), https://www.law.com/nationallawjournal/2019/02/13/republican-senators-reintroduce-bill-pushing-for-disclosure-of-litigation-funding/.

156 *See* Agenda Book, Advisory Committee on Civil Rules, Apr. 10, 2018 meeting, at 209-229, http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

157 N.Y. City Bar, Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees at 1.

158 *Id.* at 5-6.

159 *Id.* at n.8 (citing Prof'l Ethics Comm'n Me. Bd. of Overseers of the Bar, Op. 193 (2007); State Bar of Nev. Op. 36 (2007); Utah Bar Ass'n Adv. Op. 97-11 (1997); Va. State Bar Standing Comm. on Legal Ethics, Advisory Op. 1764 (2002).)

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PANEL 3
New Developments in Tort Litigation

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION **THIS DOCUMENT RELATES TO:** **All Cases** **and** *The County of Summit, Ohio, et al., v. Purdue Pharma L.P. et al.,* Case No. 18-op-45090	**Case No. 1:17-MD-2804** **Judge Dan Aaron Polster** **MEMORANDUM OPINION CERTIFYING NEGOTIATION CLASS**

Before the Court is Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class. Doc. #: 1820. Various Defendants and a handful of putative class members oppose the motion, as do 37 State Attorneys General and the Attorneys General of Guam and the District of Columbia. After consideration of all of the briefing on this motion, and oral argument held on August 6, 2019, and all of the prior proceedings herein, the Plaintiffs' Motion is **GRANTED-IN-PART**. This Memorandum opinion explains the Court's reasoning. An Order will issue separately.

I. THE NEGOTIATION CLASS CERTIFICATION MOTION

A. Background

On December 12, 2017, the Judicial Panel on Multidistrict Litigation (JPML) transferred all opioid-related litigation pending in federal courts throughout the United States to this forum for consolidated pretrial proceedings. Doc. #: 1. At present, this multidistrict litigation (MDL) encompasses more than 2,000 individual actions. Most of these constituent cases have been filed

by cities and counties throughout the United States seeking, *inter alia,* reimbursement for monies they have expended – and continue to spend – addressing the opioid crisis. The Defendants include numerous manufacturers, distributors, and pharmacies. Beyond the thousands of cases pending here, many other municipalities are litigating similar opioid-related lawsuits in state courts throughout the United States.

From the outset of this MDL, the Court has encouraged the parties to settle the case. Settlement is important in any case. Here, a settlement is especially important as it would expedite relief to communities so they can better address this devastating national health crisis. A Court-appointed Special Master (Professor Francis McGovern) has overseen extensive settlement negotiations. The Defendants have insisted throughout on the need for a "global settlement," that is, a settlement structure that resolves most, if not all, lawsuits against them arising out of the opioid epidemic. This has created an obstacle to settlement. In a standard settlement class action, the class members can opt out of the class after the settlement is reached. With thousands of counties and cities already litigating, the Defendants in this MDL are concerned that many of these Plaintiffs could opt out. The Defendants would then have paid a lot of money to settle non-litigating claims but would still have to litigate a host of potentially significant claims. This situation required creative thinking. The Special Master, in conjunction with experts and the parties in the case, developed an innovative solution: a new form of class action entitled "negotiation class certification."[1]

[1] The Special Master and Professor Rubenstein, the Court's expert in this matter, have produced a scholarly version of the idea. *See* Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders* (Duke Law Sch. Pub. Law & Legal Theory Series, Paper No. 2019-41, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403834.

The idea is to undertake the class certification and opt-out process prior to a settlement being reached, as is done in a normal class action geared toward trial. This will fix a class size and provide the Defendants a sense of the precise scope of the group with whom they are negotiating. The class members' rights are protected in several critical ways. At the front end, before having to make the opt-out decision, the class members can calculate their share of any future settlement; here, groups of Plaintiffs and Plaintiffs' attorneys have worked together to establish a public health-based settlement allocation plan, the details of which are all made available to the Class and public at a case website, www.opioidsnegotiationclass.info. At the back end, each class member will be entitled to vote (yes or no) on whether a proposed settlement amount is sufficient, and no settlement will be deemed accepted unless it garners a supermajority (75%) of those voting; here, a proposal will need to secure approval from six separate supermajority vote counts, reflecting different slices of the class. Additionally, of course, the Court protects the absent class members: Rule 23 requires that the Court make specific determinations before permitting a class action to go forward, Fed. R. Civ. P. 23(a), (b)(3), (c), (g), and similarly requires that the Court – independent of the class's vote – approve any proposed settlement and attorney's fees, Fed. R. Civ. P. 23(e), (h).

As discussed more fully below, the Court is mindful of the fact that this is a novel procedure and one opposed by the vast majority of State Attorneys General, who themselves are actively pursuing important State opioid litigation. The Court has determined that the procedure is a legitimate one, that certification is warranted based on the facts of the case, and that the whole process is more likely to promote global settlement than it is, as the Attorneys General argue, to impede it. Regardless, there is nothing coercive about this process: no Defendant has to employ it. There is nothing exclusive about this process: it does not interfere with the States settling their

own cases any way they want, and it does not stop parties in the MDL from settling in other ways. And there is nothing intrusive about this process: it does not stop any litigation from continuing and in no way interferes with the upcoming bellwether trials in this MDL. This process simply provides an option – and in the Court's opinion, it is a powerful, creative, and helpful one. The Court therefore grants certification of the negotiation class but, mindful of the objections that have been mounted against it, upon terms more carefully prescribed and delimited than those proposed by the Plaintiffs.

B. The Motion

By motion dated June 14, 2019, the Plaintiffs' leadership team in this MDL filed a motion on behalf of 51 cities and counties entitled, Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, Doc. #: 1683; Doc. #: 1690 (corrected version). A variety of parties responded to this motion, including a group of Distributor Defendants, Doc. #: 1720, and a group of Pharmacy Defendants, Doc. #: 1723, but no Manufacturer Defendants. Moreover, two sets of State Attorneys General – representing 30 States, the District of Columbia, and Guam – sent letters to the Court registering their disapproval of the proposed motion. Doc. ##: 1726, 1727. The Court held a hearing on the initial motion on June 25, 2019, and at that time adopted a briefing schedule enabling the Plaintiffs to re-brief the motion in light of the filed oppositions. Accordingly, on July 9, 2019, the Plaintiffs filed a Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class. Doc. #: 1820; *see also* Doc. #: 2135 (Statement of City of Manchester, New Hampshire Supplementing Plaintiffs' Renewed Motion). On July 23, a set of nine Distributor and Pharmacy Defendants filed a brief opposing the motion, Doc. #: 1949, while a group of Manufacturing Defendants filed a brief asking the Court to clarify

the relationship of negotiation class certification to *American Pipe* tolling, Doc. #: 1952;[2] other Defendants subsequently noted their joinder in these responses, Doc. ##: 1954, 2057. A group of six (6) Ohio cities filed a brief in opposition, Doc. #: 1958, later joined by a seventh city, Doc. #: 2064, while another putative class member (City of Fargo, North Dakota) filed a brief asking the Court to clarify the end date for inclusion in a particular sub-group of the proposed negotiation class, Doc. #: 1953. A letter to the Court joined by 37 State Attorneys General, as well as the Attorneys General of the District of Columbia and Guam, strongly urged the Court to reject the motion. Doc. ##: 1951, 1955. The Ohio Attorney General, who signed that letter, also filed a separate letter of his own registering further opposition. Doc. #: 1973. On July 30, 2019, the Plaintiffs filed a reply to these oppositions. Doc. #: 2076. On August 6, 2019, this Court held a hearing on the motion.

C. The Proposed Process

The negotiation class certification process unfolds in five stages:

1. *Allocation/Voting*. Class members first develop a plan for allocating a lump sum settlement among the class and a plan for voting on the reasonableness of any lump sum settlement that is achieved. This enables each class member to know its settlement share and franchise prior to the opt-out deadline. Here, the MDL Plaintiffs' leadership has met with numerous groups of Plaintiffs and public health experts to create the allocation plan. Doc. #: 1820-1 at 49. The plan proposes distributing 75% of the lump sum to counties, with each county's share calculated according to three equally-weighted public health factors. *Id.* at 48–49, 55–60. The county's share is then divided among the county and its constituent cities, ideally through negotiated agreement.

[2] Movants disclaim any tolling effect of their motion, Doc. #: 2076 at 19, so the Court need not address this issue at this time.

Id. at 60. Of the remaining 25%, 10% is set aside for a "Private Attorneys' Fee Fund," from which private attorneys – defined as any counsel with representation agreements with one or more Class members executed as of June 14, 2019 – could seek fees in lieu of enforcement of private contingency fee contracts with their clients. *Id.* at 49–50. Finally, 15% is set aside for a "Class Members' Special Needs Fund," to cover the special needs and expenditures of any Class member that are not addressed by the class-wide allocation formula, including expenses associated with litigation. *Id.* at 96. All of these amounts are subject to Court approval and any of this 25% (the Private Attorneys' Fee Fund and the Class Members' Special Needs Fund) not so distributed is then re-distributed across the class according to the allocation plan. *Id.* at 95, 97.

The voting model is both simple and complex. Doc. #: 1820 at 8–9. If a lump sum settlement is reached with a Defendant, each class member will be given the opportunity to cast a single, simple, yes/no vote as to whether the size of the lump sum settlement is sufficient. The votes will then be counted to ensure the settlement is accepted by 75% of all voting entities by number, 75% of all voting entities by population, and 75% of all voting entities by allocation; each of those three types of votes will be counted twice, once among jurisdictions that had filed lawsuits as of June 14, 2019 ("litigating entities") and once among jurisdictions that had not ("non-litigating entities"). The various counts ensure that: (1) the plethora of smaller counties cannot alone control an outcome (the population vote guards against that); (2) the plethora of small-recovery counties cannot alone control an outcome (the allocation vote guards against that); and that (3) neither the litigating nor non-litigating entities alone can control an outcome.

Part IV of this Memorandum analyzes the equities of the allocation and voting plans.

2. *Class Certification.* With the allocation and voting plans in place, plaintiffs move for certification of the negotiation class, as have the present movants.

3. *Notice and Opt-Out Period.* If the Court approves the motion, the class members are given notice of class certification and an opportunity to opt out. Here, movants propose a 60-day opt-out period. During that time, class members can assess their share of a lump sum settlement and the proposed voting structure at the class website to determine whether they want to be part of this negotiating group.

4. *Lump Sum Settlement Negotiation.* At the conclusion of the opt-out period, with the size of the class set, the class is ready to negotiate a settlement with one or more defendants. No defendant is required to negotiate with the class and the underlying litigation activities continue unabated.

5. *Judicial Approval, Including Class Vote.* If a settlement is reached, the parties move for judicial approval, as required by Rule 23(e). That process encompasses three parts: (a) the Court must preliminarily approve the settlement, Fed. R. Civ. P. 23(e)(1); (b) class members are then given their opportunity to vote on the settlement, and they may file objections with the Court, Fed. R. Civ. P. 23(e)(5); and (c) if the Class votes to accept the settlement, class counsel moves for final approval. The Court would then make the same determination as to the settlement's reasonableness as Rule 23 requires it to do in any class action. Fed. R. Civ. P. 23(e)(2).

II. RULE 23 AUTHORIZES NEGOTATION CLASS CERTIFICATION

Rule 23 authorizes a court to certify a case, or issues within a case, for class treatment if certain requirements are met. Since adoption of the current version of Rule 23 in 1966, courts have generally certified two types of class actions: trial class actions and settlement class actions. The present motion asks this Court to certify a "negotiation class action." The concept and

procedure are set forth above. The question addressed here is whether Rule 23 authorizes this procedure. The Court finds that it does.

An important starting point is that the text of Rule 23 does not dictate, nor therefore limit, the uses to which the class action mechanism can be applied. Rule 23(a) and (b) set forth the requirements that must be met before a court can certify a class, but neither specifies that the class to be certified is for "trial" or "settlement" purposes. Defendants point to the fact that several passages in Rule 23 specifically reference settlement, as opposed to trial, classes. Doc. #: 1949 at 7. They argue that these passages demonstrate that the Rule authorizes only trial and settlement classes. *Id.* Their argument is not convincing. The passages they reference were not added to Rule 23 until December 2018, yet 21 years before that – when Rule 23 contained no explicit reference to settlement class actions – the Supreme Court affirmed courts' use of the settlement class action device. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 618 (1997). Moreover, the passages that were added in 2018 do not authorize settlement classes but simply identify certain procedures relevant to those types of class actions.

The history of class action law provides further support for this new use of the class action procedure. Soon after Rule 23's adoption in 1966, parties began asking courts to certify settlement class actions, that is, cases that had already been settled prior to the court's certification of a class. *See, e.g.*, *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364 (E.D. Pa. 1970), *aff'd and modified sub nom. Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971). This development was deemed novel and had its share of detractors. *See Manual for Complex Litigation* § 1:46 (4th ed. 1977) ("There is, to say the least, serious doubt that this practice is authorized by Rule 23 as amended, even if it is conceded that the courts are expected to develop new methods of employing the amended Rule 23."). Many critics made the same

argument then that detractors of the proposed negotiation class make now: that the use is not authorized by the rule. The lower courts rejected this argument, and in its 1997 decision in the *Amchem* case, the Supreme Court affirmed that Rule 23 authorized settlement class actions. *Amchem*, 521 U.S. at 618 (noting that "all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes" and approving use of the device). The Defendants' reliance on *Amchem* for the proposition that "in recent years [the Supreme Court has] repeatedly warned that new innovations that go beyond the express scope of Rule 23 are prohibited," Doc. #: 1949 at 8 n.8, is therefore unpersuasive and inapposite.

Finally, it is not surprising that the history of Rule 23 supports different uses of the class action device, and the text does not prohibit these, because Rule 23 is equitable in nature and its purpose is to provide practical means for addressing complex litigation problems. Myriad judicial decisions have accordingly supported liberal application of Rule 23. *See, e.g.*, *Schneider v. Elec. Auto-Lite Co.*, 456 F.2d 366, 370 (6th Cir. 1972) ("[T]he District Court was correct in liberally interpreting Rule 23 in order to avoid burdensome litigation and to give efficient disposition to this action.").

One aspect of the negotiation class action process that differs from a settlement class action is that class members must make their decision whether to opt out before knowing the size of the settlement. Some argue this violates the Due Process Clause. Doc. #: 1958 at 8–12. It does not. In a normal trial class action, class members must make their opt-out decision at the outset of the suit, before the result is known, and no one argues that process is unconstitutional. Moreover, in that process, if their trial attorneys later settle the case, Rule 23 enables a Court to offer a second opt-out opportunity but does not require it to do so. Fed. R. Civ. P. 23(e)(4). If there were a constitutional right to opt out once the outcome was known, Rule 23 would require a second opt-

out opportunity, not just authorize it. Here, class members are given sufficient information to make an informed decision about whether they want to bind themselves to a negotiation process, from which they will receive a known portion of the outcome and in which they will get a right to vote on the settlement. Moreover, the Court always retains the option of enabling a second opt-out opportunity if circumstances require.

The Defendants also note that a few courts have rejected the 75% voting idea when employed outside the class action context, Doc. #: 1949 at 25–26 (citing *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 521 (N.J. 2006); *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975)), and argue that the voting process therefore cannot be employed within the class action context. But the two contexts are distinct: class members in class actions, unlike individual mass tort plaintiffs, are not given individualized settlement approval rights. All class members are automatically bound unless they can and do opt out. Moreover, in a normal settlement class action, class members may either object or opt out, but if they object and lose their objection, they cannot then opt out: they are instead bound to a settlement with which they disagree. The voting process is therefore consistent with the class action mechanism.

More generally, the Defendants argue that a negotiation class violates Article III because it is somehow unrelated to a judicial function. Doc. #: 1949 at 7–8. They concede, as they must, that a settlement class is legitimate, noting that it assists a court in its judicial function of "entering a judgment of approval on a class settlement." *Id.* at 8. But negotiation class certification serves an even more important judicial function at an even more important juncture in the litigation: in certifying a negotiation class, the Court undertakes the familiar judicial function of ensuring that the class certification requirements are met and the absent class members' interests are protected by those who purport to represent them, *prior to those agents negotiating a settlement for the*

absent class members. Negotiation class certification therefore corrects one of the long-standing concerns of settlement class actions: that un-approved agents have settled un-certified claims. *See, e.g.*, *Ace Heating & Plumbing Co. v. Crane Co.,* 453 F.2d 30, 33 (3d Cir. 1971) (examining argument that lawyer, "having bargained the settlement terms with defendants prior to his official designation by the court as class representative . . . may be under strong pressure to conform to the defendants' wishes"). Moreover, assisting parties in creating a settlement, particularly in a large case of this type with contested liability and adversarial litigation, is itself a meaningful judicial function. *See, e.g.*, *In re Nat'l Prescription Opiate Litig*., 927 F.3d 919, 923 (6th Cir. 2019) (noting, without censure, that "[t]he district court presiding over this potentially momentous MDL has repeatedly expressed a desire to settle the litigation before it proceeds to trial").

III. THE REQUIREMENTS OF CLASS CERTIFICATION ARE MET

A. The Claims and Issues

Rule 23(c)(1)(B) states that: "An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). The Defendants argue that the movants have failed to proffer sufficient evidence in support of their motion and/or that the motion is not tethered to a particular complaint. Doc. #: 1949 at 9–13. (Defendants also complain about a lack of discovery concerning the class representatives. *Id*. at 12 n.13. They filed two briefs in response to movants' original proposal, Doc. ##: 1720, 1723, and appeared at the June 25, 2019 hearing on the motion, yet never asked for or filed a motion seeking discovery).

The current motion does not arise in a factual vacuum. This MDL has been pending for nearly two years. The Court has undertaken extensive review of the factual and legal issues in the case. Several bellwether trials will commence shortly and the Court has ruled on critical motions

to dismiss, myriad discovery matters, and a variety of complex and voluminous summary judgment motions. The Court and parties are deeply steeped in the legal and factual issues in the case, and the extensive record of the case – now over 2,500 entries on the MDL docket alone – provides more than sufficient factual and legal context for a decision on class certification. The Defendants' concern that the present motion is not tethered to a specific complaint implies that there is an absence of relevant pleading in this matter. If there is a problem in this case, however, it is one of glut, not famine: there are more than 2,000 complaints pending here, many of which exceed 300 pages in length. Although parties sometimes make class allegations in their complaint, Defendants point to no precedent holding that class allegations in a complaint are a necessary prerequisite to a class certification motion under Rule 23; similarly, although in MDLs of this type there are sometimes master complaints, there is no MDL-specific (or any other) rule requiring such a complaint and, absent specific agreement to the contrary, such complaints are typically purely administrative in nature. *See* William B. Rubenstein, 3 *Newberg on Class Actions* § 10:15 (5th ed. 2019) [hereinafter *Newberg on Class Actions*].

Contrary to the Defendants' assertions, the movants specifically point the Court to the allegations contained in Cuyahoga County, Ohio's pleadings. Doc. #: 1820-1 at 78 n.40. Given the Court's extensive knowledge of the heavily-developed legal and factual record in this matter, and the discretion Rule 23 delegates to it, the Court adopts movants' approach but utilizes as its reference the allegations in substantially similar complaints filed by Summit County, Ohio (Doc. ##: 513, 1466). The Court references the Summit County pleadings for several inter-related reasons: (1) Summit County is one of two bellwether cases set for trial in the coming month, with its facts and legal allegations well-known to the Court and litigants; (2) Summit County's complaint was extensively tested through motions to dismiss covering thousands of pages of

documents and nearly a year of litigation, Doc. #: 1203; (3) Summit County's complaint was the basis of a "short form complaint" process that enabled all plaintiffs in this MDL to incorporate by reference certain of the legal and factual allegations therein, Doc. #: 1282; (4) the vast bulk of the 49 putative class representatives – and numerous other plaintiffs – have accordingly adopted the Summit County pleadings.[3]

The Summit County complaint and related short-form complaint enabled MDL plaintiffs – by checking a few boxes – to adopt two federal RICO claims and a set of factual allegations encompassing, *inter alia*, issues arising out of the federal Controlled Substances Act. The first RICO claim, levelled against manufacturers labelled "RICO Marketing Defendants," alleges the manufacturers engaged in a variety of activities that misled physicians and the public about the need for and addictiveness of prescription opioids, all in an effort to increase sales. *See* Summit County Pleadings, Doc. #: 513, ¶¶ 814–48 (facts), ¶¶ 878–905 (law), Short Form Complaint Ruling, Doc. #: 1282-1 at 3 ¶3, at 3–4, ¶5. The second RICO claim, levelled against manufacturers and distributors labelled "RICO Supply Chain Defendants," alleges these defendants ignored their responsibilities to report and halt suspicious opioid sales, all in an effort to artificially sustain and increase federally-set limits (quotas) on opioid sales. *See* Summit County Pleadings, Doc. #: 513, ¶¶ 849–77 (facts) ¶¶ 906–38 (law), Short Form Complaint Ruling, Doc. #: 1282-1 at 3 ¶3, at 3–4, ¶5. The complaints also allege that the Controlled Substances Act required the manufacturers,

[3] The Court is aware that as Summit County's bellwether trial has approached, the County has settled with some defendants and that the County is no longer proposed as a class representative. Doc. #: 2583 at 5. However, using its complaints as the reference for analysis of the claims and issues suitable for class certification remains appropriate given that so many other plaintiffs here have adopted those same claims and issues through the short-form process and/or have filed complaints that are substantially identical in relevant passages to the Summit County complaint. *See, e.g.*, Second Amended Complaint of Cabell County Commission (W.Va.), Doc. #: 518; Second Amended Complaint of County of Monroe, Michigan, Doc. #: 522; Second Amended Complaint of Broward County, Florida, Doc. #: 525.

distributors, and pharmacies to create internal systems to identify, report, and suspend unlawful opioid sales, and that defendants failed to meet those obligations; these factual allegations underlie the second RICO claim above and are also pertinent to adjudication of myriad state-based legal claims, from public nuisance to negligence. *See* Summit County Pleadings, Doc. #: 513, ¶¶ 504, 506–659, Short Form Complaint Ruling, Doc. #: 1282-1 at 3 ¶ 3.

Based on these pleadings, which are common across many, if not most, of the MDL litigants and putative Class Representatives, the Court will analyze the movants' request to certify for class treatment:[4]

1. a RICO claim arising out of the alleged Opioid Marketing Enterprise, as against five (5) named Defendants – Purdue, Cephalon, Janssen, Endo, and Mallinckrodt – under Rule 23(b)(3) (Doc. #: 1820-1 at 83);

2. a RICO claim arising out of the alleged Opioid Supply Chain Enterprise, as against eight (8) named Defendants – Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen – under Rule 23(b)(3) (Doc. #: 1820-1 at 84); and,

3. two issues related to Defendants' obligations under the Controlled Substances Act, against thirteen (13) named Defendants – Purdue, Cephalon, Endo, Mallinckrodt, Actavis, Janssen, McKesson, Cardinal, AmerisourceBergen, CVS Rx Services, Inc., Rite-Aid Corporation, Walgreens, and Wal-Mart – under Rule 23(c)(4) (Doc. #: 1820-1 at 91 n.46 & at 84–86):

    a. What are the specific obligations of each defendant under the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*. and its implementing regulations, 21 C.F.R. § 1301 *et seq*., arising out of the requirement that registrants "provide effective controls and procedures to guard against theft and diversion of controlled substances," 21 C.F.R. § 1307.71(a)?

    b. Did each defendant's action satisfy these obligations with respect to prescription opioids?

[4] The Court uses simple names for the 13 Defendants listed in the following numbered paragraphs, but adopts the definitions of the related Defendant entities set out in the Summit County Complaint, Doc. #1466 at 13–35.

B. The Class Certification Standard

The Sixth Circuit has held that: "Any class certification must satisfy Rule 23(a)'s requirement of numerosity, commonality, typicality, and adequate representation [and] fit under at least one of the categories identified in Rule 23(b)." *Clemons v. Norton Healthcare Inc. Ret. Plan*, 890 F.3d 254, 278 (6th Cir. 2018). Under Rule 23(b)(3), class certification is appropriate if (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) class resolution "is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Additionally, Rule 23(c)(4) states that "[w]hen appropriate, an action may be . . . maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). The Sixth Circuit recently affirmed the utility of such "issue certification," explaining that Rule 23(c)(4) "contemplates using issue certification to retain a case's class character where common questions predominate within certain issues and where class treatment of those issues is the superior method of resolution." *Martin v. Behr Dayton Thermal Prod. LLC*, 896 F.3d 405, 413 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1319 (2019). After confirming existence of a cognizable class, this Court will accordingly consider all of the factors of Rule 23(a) and 23(b)(3) as they apply to both the RICO claims and the CSA issues, as against each relevant Defendant.

C. The Class is Ascertainable

Rule 23(b)(3) classes must be ascertainable. *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016). For a class to be ascertainable, the "class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012) (citation omitted). It is administratively feasible for the Court to determine class

membership if the class is defined by reference to objective criteria, and with reasonable accuracy. *See id.* at 538–39; *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015).

The present motion seeks certification of a single national class, defined as:

> all counties, parishes, and boroughs (collectively, "counties"); and all incorporated places, including without limitation cities, towns, villages, townships, and municipalities, as defined by the United States Census Bureau (collectively "cities") as listed on the Opioids Negotiation Class website, opioidsnegotiationclass.com.

Doc. #: 1820 at 3. The class definition is based on purely objective criteria and is accompanied by an Excel spreadsheet at the website that lists the names of each of the proposed class members in 34,458 rows. The class is therefore not only ascertain***able***, its membership has been ascertain***ed***. Defendants argue that the complexity of governmental structures across the country creates some ambiguous situations and they provide a single such example. Doc. #: 1949 at 3 n.3. Such minor technical issues can be worked out going forward. For purposes of class certification, the Court finds that the class is adequately defined.

D. Rule 23(a)(1): The Class is So Numerous That Joinder is Impracticable

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The Sixth Circuit has held that "no strict numerical test exists to define numerosity," *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013), but that "'substantial' numbers . . . are sufficient to satisfy this requirement." *Id.* The proposed class consists of 34,458 public entities dispersed throughout the entire United States. Defendants explicitly concede that "numerosity is self-evident here." Doc. #: 1949 at 13. The Court finds that the class is so numerous that joinder of all members would be impracticable and thus that this requirement has been satisfied.

E. Rule 23(a)(2): There are Common Questions of Law or Fact

Rule 23(a)(2) requires plaintiffs to prove that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Despite the Rule's use of the plural "questions," the Supreme Court has held that a single common question will suffice. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Yet, "because the commonality requirement is qualitative, not quantitative," 1 *Newberg on Class Actions* § 3:22, at least one common issue must be central to the litigation, *see Wal-Mart*, 564 U.S. at 350 ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

This putative class action occurs within a multi-district litigation (MDL). In creating this MDL, the Judicial Panel on Multidistrict Litigation (JPML) has steered thousands of individual actions pending throughout the nation to this Court. Its authority to do so turns on the presence of common questions. 28 U.S.C. § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."). In initiating this MDL, the JPML held:

> All actions involve common factual questions about, *inter alia*, the manufacturing and distributor defendants' knowledge of and conduct regarding the alleged diversion of these prescription opiates, as well as the manufacturers' alleged improper marketing of such drugs. Both manufacturers and distributors are under an obligation under the Controlled Substances Act and similar state laws to prevent diversion of opiates and other controlled substances into illicit channels. Plaintiffs assert that defendants have failed to adhere to those standards, which caused the diversion of opiates into their communities.

Doc. #: 1 at 3. Rejecting the argument that uncommon issues would generate inefficiencies if an MDL were formed, the JPML concluded: "All of the actions can be expected to implicate common

fact questions as to the allegedly improper marketing and widespread diversion of prescription opiates into states, counties and cities across the nation . . . ." *Id.*

While commonality for pre-trial centralization purposes under § 1407 may not be precisely the same test as commonality for class certification purposes under Rule 23, it is close[5] and, regardless, the JPML's recitation, like the movants' papers, Doc. #: 1820-1 at 64–66, 81, identifies common issues that are qualitatively decisive for Rule 23 purposes. Moreover, there is direct evidence of the commonality of the claims and issues in this matter given that the short-form complaint process enabled MDL plaintiffs to adopt these specific claims and issues, and many did so. The Court finds that there are questions of both law and fact, as to the specified claims and issues, common to the class with respect to each relevant Defendant; the discussion in sub-section I, below, concerning whether these common questions predominate, sets forth with more particularity the specific common RICO and CSA issues.

F. Rule 23(a)(3): The Class Representatives' Claims are Typical of Those of the Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "Typicality is met if the class members' claims are 'fairly encompassed by the named plaintiffs' claims'" such that "by pursuing their own interests, the class representatives also advocate the interests of the class members." *In re Whirlpool Corp.*, 722 F.3d at 852–53 (6th Cir. 2013) (quoting *Sprague v. Gen. Motors Corp.*,

[5] Defendants rely on *In re Saturn L-Series Timing Chain Prod. Liab. Litig.*, No. 8:07CV298, 2008 WL 4866604, at *25 n.21 (D. Neb. Nov. 7, 2008) to argue that "[c]lass certification thus cannot be bootstrapped from the existence of an MDL." Doc. #: 1949 at 27. But the footnote that they reference distinguished the JPML's finding of *commonality* from Rule 23's finding of *predominance*. Moreover, in referencing the JPML's commonality finding as a good description of the common issues in this case, the Court is not "bootstrapping" on those findings; it is making its own independent determination of the presence of these findings and using the JPML's recitation as a descriptor.

133 F.3d 388, 399 (6th Cir. 1998)). "The test for typicality is not demanding . . . . [T]he plaintiffs' claims need not be identical to those of the class; typicality will be satisfied so long as the named representatives' claims share the same essential characteristics as the claims of the class at large." 1 *Newberg on Class Actions* § 3:29 (internal quotation marks and footnotes omitted).

As to the claims and issues identified for class treatment, the Court finds that the Class Representatives' claims are typical of those of the Class. The movants propose a total of 49 different counties and cities – from 30 states – to serve as Class Representatives.[6] The Court has reviewed the complaints (and where filed, short-form complaints) of each of the 49 proposed Class Representatives. These complaints demonstrate that the Class Representatives and the absent Class Members share an identity of interests. All are cities or counties, and are all generally interested in the same end: recouping money they have been forced to pay to address the opioid epidemic and ameliorating that epidemic. If the Class Representatives pursue their own interests identified in these complaints, they will necessarily be pursuing the interests of the absent class members. There is nothing unique about any of the proposed Class Representatives that would set them apart in meaningful ways from the absent class members.

The Defendants set forth a list of contentions to the contrary, Doc. #: 1949 at 38–39, but most are either irrelevant, recede in importance given the Court's adoption of the short-form complaint claims and issues for certification ("Differences in the causes of action asserted in the complaints . . . Differences in the identities of the defendants . . . Differences in the nature and quality of evidence available . . . ."), or are differences that do not defeat typicality ("Differences in the . . . scope of opioid-related harms . . . ."), *see Daffin v. Ford Motor Co.*, 458 F.3d 549, 553

[6] The movants initially proposed 51 class representatives, Doc. #: 1820 at 2, but later withdrew two (Cuyahoga County, Ohio and Summit County, Ohio). Doc. #: 2583 at 5.

(6th Cir. 2006) (finding typicality requirement met where class representative's and "other class members' claims arise from the same practice . . . [and] the same defect . . . and are based on the same legal theory. Typicality is satisfied despite the different factual circumstances regarding the manifestation of the [defect] . . ."); 1 *Newberg on Class Actions* § 3:43 ("Courts routinely find that the proposed class representative's claims are typical even if the amount of damages sought differ from those of the class or if there are differences among class members in the amount of damages each is claiming.").

As to the RICO claims and CSA issues, the proposed Representatives' claims align with those of the class. The Court therefore finds that the claims of the 49 proposed Class Representatives are typical of those of the Class, as to the specified claims and issues, with respect to each relevant Defendant.

G. Rule 23(a)(4): The Class Representatives Will Adequately Represent the Class

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court looks to two criteria in determining adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 543 (6th Cir. 2012) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996)).

Movants propose 49 Class Representatives. In their moving brief, movants describe each entity and briefly summarize how the opioid epidemic has impacted it. Doc. #: 1820-1 at 19–46. As above, the Court has also reviewed all of the relevant complaints and short-form complaints. Those documents demonstrate that each of the proposed Class Representatives is a member of the Class and each shares the same overriding interests as the other members of the Class in addressing

the consequences of the opioid epidemic. Moreover, as each of these entities is a governmental unit – some, like Chicago, enormous – the Court is confident that the representatives have the capacity to perform the functions of being actively engaged in the litigation, assisting Class Counsel with settlement negotiations, and, importantly, monitoring Class Counsel to ensure that the Class's interests remain paramount.

Most, if not all, of the proposed Class Representatives are entities that have been active in opioid litigation prior to the filing of the class action motion ("litigating entities"). This of course is of great value to the class: the litigating entities understand the case best and have been expending their own resources for years in a way that may now benefit the whole class. Many are large counties or cities with significant resources, skilled counsel, and enormous expertise as to the opioid epidemic. Who better to serve as representatives of a class? Defendants latch on to the fact that the allocation mechanism favors class representatives that primarily seek monetary relief for past damages over non-litigating entities that may be more interested in non-monetary relief, Doc. #: 1949 at 21–22, and that the voting scheme requires separate sets of approval from litigating and non-litigating entities, Doc. #: 1949 at 23–25. Below, the Court addresses the fairness of the allocation mechanism and finds no immediate fault. For present purposes, it reveals no fundamental conflict between litigating and non-litigating entities as to pursuit of this case against the Defendants that would render the list of 49 proposed representatives inadequate. *See* 1 *Newberg on Class Actions* § 3:58 ("Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement."). Similarly, the Court rejects the Defendants' contention that there is a fundamental conflict between counties as a group and cities as a group that would require separate counsel and sub-classing. Doc. #: 1949 at 19–21, 25. It is true that if a settlement is reached, each county and

its constituent cities will need to work together – or, arguably, negotiate against one another – to divide the county-level allocation amongst themselves. But these negotiations are local in nature, will vary county to county, and, contrary to the Defendants' assertions, there is not one set of interests shared by all counties that fundamentally conflicts with one set of interests shared by all cities.

Lesser concerns are as easily dismissed. The State Attorneys General suggest that the range of Class Representatives is incomplete because it does not encompass representatives from each of the 50 states nor, they allege, from "smaller counties and cities." Doc. #: 1951 at 7; *see also* Doc. #: 1973 at 5. Here, the Court has considered for certification two federal (RICO) claims and several issues related to federal law (CSA) that are similar across the country and class. This is not a situation requiring class representatives from each of the 50 states. Moreover, the list of Class Representatives encompasses smaller areas such as Cass County, North Dakota; City of Concord, New Hampshire; County of Fannin, Georgia; and County of Gooding, Idaho. Doc. #: 1820 at 1. Importantly, as discussed more fully below, the allocation formula rebuts any concerns that hard-hit small counties are disadvantaged in some way by the movants' proposal. Finally, some of the Class Representatives are individually represented by lawyers who simultaneously represent States that are objecting to certification of this Class. Doc. ##: 1949 at 17; 1949-2 at 16–17. The Court finds that this situation does not disqualify these entities from serving as Class Representatives.[7] The Class Representatives themselves have no conflict and, as generally large governmental units, they have the capacity to balance advice they might get from their individual

[7] Defendants' citation to the Seventh Circuit decision in *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002), on this point is inapposite. Doc. #: 1949 at 18. That case did not deal with the question of a class representative's separate lawyer, but rather with the class representative's lawyer as (former) class counsel. *Culver*, 277 F.3d at 913.

lawyers against their responsibilities to the whole Class. The Court's conclusion is buttressed by the fact that there are both dozens of other Class Representatives and a set of experienced Class Counsel, each of whom represents only counties and cities, not States.

Like the putative Class Members, the 49 proposed Class Representatives have allegedly been adversely impacted by the Defendants' actions with regard to the manufacturing and distribution of opioids and they seek to be compensated for their losses. The Court finds that the Class Representatives, individually and as a group, will adequately represent the interests of the class members, as to the specified claims and issues, with respect to each Defendant.

H. Rule 23(g): Class Counsel Are Adequate

Rule 23(g) states that "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g). In undertaking this appointment, the Rule directs the Court to consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *Id.*

Movants propose the "the appointment of Jayne Conroy and Christopher Seeger as Co-Lead Negotiation Class Counsel and Gerard Stranch, Louise Renne, Zachary Carter, and Mark Flessner as Negotiation Class counsel," Doc. #: 1820 at 2, and have submitted Declarations from five of these lawyers, and a letter from one other, attesting to their experience, knowledge of the case, and willingness to commit resources. Doc. ##: 1820-1, Ex. A; 1821. As this Court has already held in appointing Interim Class Counsel:

> These documents demonstrate that Seeger is a very experienced and successful class action attorney, fully qualified to represent the Class. Two of the remaining five (Conroy and Stranch) have significant and impressive experience in leadership roles in mass tort MDLs in particular, Doc. #: 1820-1, Ex. A, while the remaining

> three are or were legal counsel for large cities (Renne/San Francisco; Carter/New York; and Flessner/Chicago), Doc. #: 1820-1 at 52. All have been involved in opioid-related litigation. Applying Rule 23(g)'s four factor test, the Court finds that these lawyers are well-situated to represent the Class.

Doc. #: 2490 at 3.

In its Orders regarding appointment of Interim Class Counsel, Doc. ##: 2490, 2493, the Court acknowledged the significant contributions to date of the MDL Negotiation Committee, the members of which are identified in Doc. #: 118. While most of these lawyers will not serve as Class Counsel for the Negotiation Class, their depth of knowledge about this case and their general expertise can continue to provide significant benefit for the Class. Accordingly, the Court's Order will clarify that there is no bar to Class Counsel working with the MDL Negotiation Committee members in negotiating with Defendants, nor is there any bar to these MDL lawyers applying to share Class Counsel duties in the future should their representational situations change. However, as the Court's order appointing interim Class Counsel clarified, only Class Counsel will "(a) represent the Class in settlement negotiations with Defendants; (b) sign any filings with this or any other Court made on behalf of the Class; (c) assist the Court with functions relevant to a class action, such as but not limited to maintaining the Class website and executing a satisfactory notice program; and (d) speak on behalf of the Class in Court." Doc. #: 2490 at 5. Thus, only Class Counsel can bind the Class and Class Counsel must independently approve all final decisions concerning any Class-based settlement and be the sole signatories on behalf of the Class of all Class-based term sheets, settlement agreements, or similar documents.

With these clarifications in the final certification order, the Court finds that the proposed Class Counsel will alone act for the Class and will fairly and adequately represent the interests of the class.

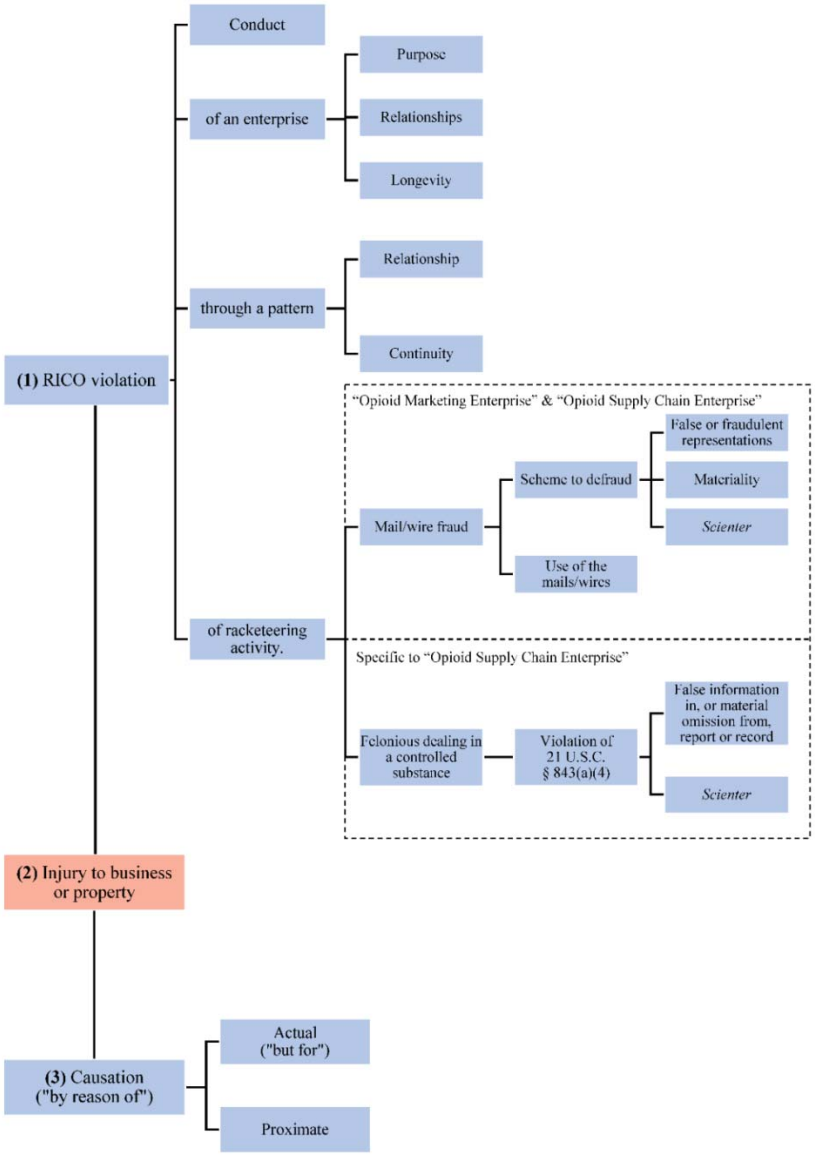
I. Rule 23(b)(3): Common Questions of Law or Fact Predominate

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry consists of two steps: "[a] court must first characterize the issues in the case as common or individual and then weigh which predominate." *Martin v. Behr Dayton Thermal Products LLC*, 896 F.3d 405, 413 (6th Cir. 2018) (alteration in original) (quoting 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50 (5th ed. 2010)). Common questions are those where "the same evidence will suffice for each member to make a prima facie showing." *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 468 (6th Cir. 2017) (citation and internal quotation marks omitted).

1. *RICO Claims*

To prevail on their federal civil RICO claims, the Plaintiffs will have to establish that (1) the defendants committed a RICO violation, (2) there was an injury to the Plaintiffs' businesses or properties, and (3) said injury occurred "by reason of" the RICO violation. *See Aces High Coal Sales, Inc. v. Cmty. Bank & Tr. of W. Georgia*, 768 F. App'x 446, 453 (6th Cir. 2019). In turn, the elements of a RICO violation are "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 483 (6th Cir. 2013) (citation omitted). Each of these prongs then breaks down into various elements. In the diagram below, the Court sets forth these elements and sub-elements and characterizes each as either common (blue) or individual (orange).

RICO ELEMENTS: COMMON (BLUE) vs INDIVIDUAL (ORANGE)



As is visually evident, there are a host of issues and sub-issues within the RICO claims. As applied to Plaintiffs' allegations concerning the existence of two national enterprises that disseminated a set of standard falsehoods in marketing and distributing opioids, all of the elements except injuries are common, not individual. Many courts have so held in similar circumstances. *See, e.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1121 n.3 (9th Cir. 2017) (noting that the issues involved in proving a RICO violation "are appropriate for classwide litigation because they focus on" the defendants' conduct); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) ("[F]raud claims based on uniform misrepresentations . . . are appropriate subjects for class certification.") (citation and internal quotation marks omitted); *McMahon Books, Inc. v. Willow Grove Assocs.*, 108 F.R.D. 32, 39 (E.D. Pa. 1985).

Defendants argue that causation should be characterized as an individual issue, Doc. #: 1949 at 37, but in this case – as to these RICO claims – the characterization of causation as common, not individualized, is supported by law and fact. Legally, plaintiffs alleging RICO claims predicated on mail and wire fraud may show third-party reliance and "need not show, either as an element of [their] claim or as a prerequisite to establishing proximate causation, that [***they***] relied on the defendant's alleged misrepresentations." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 661 (2008); *see also Brown v. Cassens Transp. Co.*, 546 F.3d 347, 357 (6th Cir. 2008). Factually, this Court has already held that the "[p]laintiffs have alleged sufficient facts to support a . . . direct chain of causation" involving third-party reliance. Doc. #: 1203 at 9–10 (listing steps in chain). Specifically, the Plaintiffs argue they suffered injuries because others (doctors, patients, etc.) relied on the Defendants' misrepresentations, enabling the Defendants to sell more opioids than the legitimate medical market could support. Whether there was such third-party reliance is a question susceptible to class-wide proof, justifying characterization of this issue as common.

The numerous common issues obviously predominate. The fact that the "injury" prong alone is plausibly individualized does not alter this conclusion. Predominance does not require that *every* element can be established by class-wide proof, *see Sandusky*, 863 F.3d at 468, and the predominance requirement is satisfied "when liability can be determined on a class-wide basis, even when there are some individualized damage issues," *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (citation and internal quotation marks omitted). Similarly, the fact that affirmative defenses may arise, and apply only to some class members, "does not compel a finding that individual issues predominate over common ones." *Bridging Communities Inc. v. Top Flite Fin. Inc.*, 843 F.3d 1119, 1125 (6th Cir. 2016) (citations and internal quotation marks omitted).

Given this analysis, it is not surprising that many courts within this Circuit have found that common issues predominate in the adjudication of specific RICO claims. *See Williams v. Duke Energy Corp.*, No. 1:08-CV-46, 2014 WL 12652315 at *14 (S.D. Ohio Mar. 13, 2014); *Lauber v. Belford High Sch.*, No. 09-CV-14345, 2012 WL 5822243 at *9 (E.D. Mich. Jan. 23, 2012) (bifurcating issues of liability and damages); *Gokare v. Fed. Express Corp.*, No. 2:11-CV-2131-JTF-CGC, 2013 WL 12094870 at *14 (W.D. Tenn. Nov. 22, 2013) (for settlement purposes). This Court also so concludes.

2. *CSA Issues*

The pleadings in this case, as discussed above, raise several specific issues arising out of the Controlled Substance Act for which movants seek certification: the nature of each Defendant's obligations under the Act and the question of whether each Defendant complied with those obligations. Doc. #: 1820-1 at 84. These issues may arise in the adjudication of a federal (RICO) claim and of various state-law claims. The Court finds that common issues predominate in the resolution of these two specific issues, standing alone. Applying the Sixth Circuit's holding in

Martin, the Court finds that both issues are "capable of resolution with generalized, class-wide proof" and "need only be answered once because the answers apply in the same way" across the Class. *Martin*, 896 F.3d at 414. The fact that these issues may be relevant to the pursuit of state-based legal claims that vary across the class, or to legal claims that entail the resolution of individualized issues of causation or damages, "does not mean that [these] individualized inquiries taint the certified issues." *Id.* On the contrary, the certified issues can be addressed without overlapping with other issues that may or may not be common. For example, the Summit County complaint sets forth that the CSA issues are relevant to, *inter alia*, its common law absolute public nuisance claim, Doc. #: 513 at ¶ 1010, and its negligence claim, *id.* at ¶¶ 1042, 1045, 1060. Resolution of the certified issues would speak to the duty and breach elements of a negligence claim, for example, without pretermitting non-class resolution of the causation and damage elements. Moreover, since the Court is certifying for classwide treatment only the specific issues identified, there are no "individualized inquiries that outweigh the common questions prevalent *within each issue*." *Martin*, 896 F.3d. at 414 (emphasis added).[8]

In sum, the Court finds that common issues predominate over individualized issues with respect to both the RICO claims and the CSA issues, with respect to each specifically-identified Defendant.

[8] Heeding the Sixth Circuit's guidance, the Court is aware of the potential Seventh Amendment concerns raised by issue class certification and "will take care to conduct any subsequent proceedings in accordance with the Reexamination Clause." *Id*. at 416–17. Of course, since the Court is certifying the class solely for purposes of negotiation, these concerns are not present. Nonetheless, the Court notes the Sixth Circuit's conclusion that, "if done properly, bifurcation will not raise any constitutional issues." *Id*. at 417 (citations and internal quotation marks omitted).

J. Rule 23(b)(3): A Class Action is a Superior Method of Adjudication

For a class action to be maintained, Rule 23(b)(3) requires the Court to determine that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This requirement "is designed to achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Michigan*, 654 F.3d 618, 630 (6th Cir. 2011) (alteration in original) (internal quotation marks omitted) (quoting *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). Rule 23(b)(3) itself further enumerates four specific factors speaking to the desirability of a class suit. Fed. R. Civ. P. 23(b)(3)(A)–(D). Here, all cut in favor of certification of both the two RICO claims and two CSA issues as against all Defendants:

1. *The class members' interests in individually controlling the prosecution or defense of separate actions*. This MDL consists of nearly 2,000 individual actions by class members. That would appear to cut against class certification, as it seems that many class members are capable of, and are, litigating individually. However, the proposed class consists of more than 34,000 entities, meaning that a small fraction of them (fewer than 6% here in federal court) are litigating individually. The vast bulk of class members are not actively involved in opioid litigation. This factor cuts in favor of certifying a nationwide class. This is particularly true in the negotiation class certification context for two reasons: (a) any litigant interested in individually controlling its action can opt out and the proposed procedure will in no way interfere with that individual litigation, yet (b) negotiation class certification simultaneously engages absent class members in the negotiation and voting process. To the extent this factor favors individual control and involvement, the Court finds that the negotiation class will further that end, not impede it.

2. *The extent and nature of any litigation concerning the controversy already begun by or against class members*. As just noted, there are about 2,000 individual cases within this federal MDL and many more filed in state courts. Among those in coordinated pre-trial proceedings in this forum, a few have advanced toward bellwether trials, but all others are at earlier litigation phases. The proposed negotiation class will not displace or interfere with any of this on-going litigation. At the same time, this on-going litigation will resolve only a small quantity of the class's claims, as noted above, meaning that the extent of the on-going litigation is limited compared to the size of the class. This factor cuts in favor of certifying a nationwide negotiation class.

3. *The desirability or undesirability of concentrating the litigation of the claims in the particular forum*. The JPML has already coordinated the many pending cases in this forum. This factor therefore cuts in favor of certifying a negotiation class, as a class approach is an efficient means of handling the 2,000 individual matters that are here.

4. *The likely difficulties in managing a class action.* This prong is inapplicable to the proposed negotiation class, as the proposal is not for litigation or trial, but simply for settlement negotiations. *Amchem*, 521 U.S. at 620 (holding that where the plaintiffs' class certification "proposal is that there be no trial," it is unnecessary to "inquire whether the case, if tried, would present intractable management problems").

The Attorney General of the State of Ohio argues that a class action is not a superior form of adjudication because the claims are more properly the province of the States, not the cities and counties. Doc. #: 1973 at 4. The letter joined by roughly 40 Attorneys General implies the same point without explicitly saying so. Doc. #: 1951 at 3–4. If the Attorneys General believe they control their local governments' litigation, then they can attempt to foreclose it directly. To date,

they have made no effort in this Court to shut down their constituent entities' cases. Until they do so, this Court remains vested with more than 2,000 separate actions by cities and counties from throughout the United States. The Court cannot pretend these cases do not exist. The Judicial Panel on Multidistrict Litigation has ordered it to coordinate pretrial litigation in most of these cases and Article III requires it to resolve those directly filed here.

* * *

For the foregoing reasons, the Court finds that all of the class certification requirements are met with respect to the two RICO claims and two CSA issues, as to each relevant Defendant on each claim or issue. In reaching these conclusions, the Court makes clear that it has not certified these claims or issues for trial. Because of the limited nature of negotiation class certification, including the fact that no defendant is required to utilize this process, many Defendants in this MDL did not even file opposition briefs. The analysis in this Memorandum Opinion is in no way meant to foreclose any Defendant from making any argument in opposition to a later motion for class certification, if such a motion is ever made here or in another forum. The Court's Order will so hold.

IV. THE COURT WILL LIKELY BE ABLE TO FIND THAT THE ALLOCATION AND VOTING PLAN TREAT CLASS MEMBERS EQUITABLY RELATIVE TO EACH OTHER

Rule 23 requires judicial approval of any proposed class action settlement. Fed. R. Civ. P. 23(e). The Rule sets forth a two-step process whereby the Court first ascertains whether the settlement is sufficiently likely to be approved as to warrant sending notice of it to the class, Fed. R. Civ. P. 23(e)(1)(B)(i), and then, after a notice and objection period, the Court makes a final determination of whether the settlement is "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2). One of the factors the Court must consider in making these assessments is whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). This means that if a monetary settlement is reached, this Court will be required to find that the money is being allocated fairly among the class members.

At this stage in the case, no settlement has been reached. However, with the negotiation class certification proposal, the movants have identified the settlement allocation and voting plans up front. They have done so to provide information to each class member about its relative share of any settlements reached and its relative enfranchisement under this proposal, so as to make the class member's current opt-out opportunity as meaningful as possible. The allocation and voting plans are therefore fixed – class members will make opt-out decisions based on them – and they will not change if a settlement is reached. Given that this class certification order could set in motion an elaborate negotiation and settlement process, the Court has stated that it should make a preliminary determination of the equity of these plans, given that it "would be perverse – and an enormous waste of judicial and social resources – to launch this whole negotiation class only to later hold that the allocation scheme, identified at the outset, was inequitable *ab initio*." Doc. #: 2529 at 3.

The Court specifically focused on the fact that both the voting and allocation plans distinguish between: (1) putative class members that filed litigation arising out of the opioid epidemic by June 14, 2019 ("litigating entities"), Doc. #: 1820-1 at 52, and (2) those class members that had not filed such litigation ("non-litigating entities"). As noted above, 10% of any settlement achieved for the Class will be set aside to help defray the legal fees of the litigating entities alone, with any unused portion flowing back into the full class's recovery fund, Doc. #: 1820-1 at 95–96; another 15% of any settlement is set aside for two purposes, one of which is to help defray the litigation expenses of the litigating entities alone, with, again, any unused portion flowing back into the full class's recovery fund, *id*. at 96; the proposed voting structure requires separate supermajority approvals from different sets of litigating class members and non-litigating class members, *id*. at 53-55; and litigating entities primarily drafted the proposal. To assist the Court in evaluating these distinctions, and in lieu of sending notice to and seeking reactions from the whole class at this stage in the proceedings, the Court asked Special Master Cathy Yanni to file a report analyzing whether the proposed allocation and voting plans treat the non-litigating class members equitably. Doc. #: 2529.

On September 10, 2019, Special Master Yanni filed a 17-page report in response to the Court's request. Doc. #: 2579. The Court has carefully reviewed Special Master Yanni's thoughtful and thorough report and adopts her findings. As to the allocation plan, the Court agrees with Special Master Yanni's conclusion that the method for allocating the core class recovery (75% of the fund) reflects a lot of hard work and is a significant and eminently fair step toward resolution of these many cases. Nothing in the allocation model appears to skew toward any group other than those hardest hit by the opioid epidemic. The Attorney General of Ohio argues that the model favors large cities (many of which serve as Class Representatives), as opposed to smaller

hard-hit counties he identifies by name, Doc. #: 1973 at 5, but his understanding is incorrect. A review of the allocations to the counties he identifies demonstrates that the smaller, hard-hit counties appropriately receive more recovery per capita than larger counties that have been less-severely impacted.[9] Similarly, a handful of counties filed an objection to the plan, arguing that the counties hardest hit by the epidemic, as measured by the allocation tool, are not necessarily the same counties that have been forced to expend the most resources combatting the epidemic. Doc. #: 1958 at 6–7. The model sets aside 15% of the class's recovery in its Special Needs Fund to, *inter alia,* address precisely these sorts of possible problems. There are a variety of intricacies of the model – how counties and cities will divide their county's recovery; how to deal with cities with recoveries so small as to be impractical to distribute; how the model works when a county opts out but its cities do not, etc. – but despite opponents' contentions, Doc. #: 1949 at 19–23, none of these is fatal and the movants' approach to each – as reflected in the updated notice and FAQ documents – is thoughtful and defensible.

Separate from the fairness of the allocation tool governing 75% of the class's recovery, the Court agrees with Special Master Yanni's conclusions that there is no inequity created by setting aside funds to address the litigation costs and legal fees of the parties that filed the early cases. As she notes, the "litigating class members are responsible for, *inter alia*, launching this litigation in state and federal courts, generating the establishment of this MDL, pursuing bellwether cases, uncovering critical facts through the discovery process, and creating significant negotiating

[9] Application of the allocation tool at the case website shows that the large counties the Ohio Attorney General identifies have per capita settlement values of $2.79 (Cuyahoga); $4.46 (Franklin); and $3.43 (Summit), for an average of $3.56; the smaller counties on whose behalf the Attorney General protests have settlement values of $4.64 (Adams); $6.08 (Jackson); $2.65 (Perry); $6.15 (Ross); $5.68 (Scioto) and $3.01 (Vinton), for an average of $4.70, or 32% greater than the large counties.

leverage." Doc. #: 2579 at 7. Given these facts, if a settlement is reached, these early champions of the class will likely be able to demonstrate that they are eligible for fees and costs from a common fund and, indeed, it may be unfair to them to force them to bear these costs alone. *Id.* at 7–8. Additionally, as Special Master Yanni notes, all fees and costs in a class action must be adjudicated according to the procedures set forth in Rule 23(h) and this Court will carefully scrutinize each fee request, as well as the total amount of fees paid from the class's recovery to all of the many attorneys involved here – Class Counsel, the MDL leadership, litigating-entity lawyers, etc. – to ensure that the Class is not unduly taxed. *Id.* at 8. Importantly, the model clarifies that any monies in these separate pools that are not distributed to litigating entities would revert to the entire class.

The Court also accepts Special Master Yanni's conclusion that the voting plan – requiring separate sets of votes from litigating entities and non-litigating entities – does not treat the non-litigating counties unfairly. As she concluded:

> (1) all class members have the same franchise (one vote); (2) the vote-counting mechanism understandably ensures that any settlement is approved by a majority of the class, counted by head, by population, and by impact; (3) the vote-counting mechanism further ensures against the non-litigating class members approving a low settlement unacceptable to the litigating class members; (4) that assurance is defensible on the grounds that the litigating entities are the most knowledgeable about the value of the class's claims; and (5) the fact that nonlitigating entities must separately approve the settlement tempers concerns that the litigating entities will settle low to recover their costs, as does the fact that the litigating entities are likely to be able to spread their costs across the whole class as described above.

Id. at 13.

Finally, having found that neither the allocation nor voting mechanisms enshrine any fundamental intra-class conflict between litigating and non-litigating entities, Special Master Yanni concluded that a single set of class representatives and class counsel could represent the whole class, without the need for sub-classes. *Id.* at 13–17. The Court agrees.

V. THE NOTICE AND EXCLUSION PLANS ARE SUFFICENT

A. Notice

The moving parties submitted proposed notices and a notice plan, Doc. #: 1820-2, Ex. A, and Interim Class Counsel subsequently submitted updated versions of these documents. Doc. ##: 2583, 2583-1, 2583-2. The Court has carefully reviewed these documents and finds that they comply with the requirements of Rule 23 and that, as due process requires, they are "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections [or otherwise safeguard their interests]." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir. 2013) (citation and internal quotation marks omitted).

Rule 23(c) requires the Court in a class action under Rule 23(b)(3) to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," and notes that such notice may be "by one or more of the following: United States mail, electronic means, or other appropriate means." Fed. R. Civ. P. 23(c)(2)(B). Here the notice will be sent by first-class United States mail to all class members. Doc. #: 2583 at 3–4. It will also be posted at the class website. *Id.* at 4. The notice will also be emailed to that sub-set of the class for which the notice administrator has email addresses. *Id*. at 4 n.1. The *method* requirements of Rule 23(c)(2)(B) are met.

The Rule further requires that the notice "clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect

of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B)(i)–(vii). The notice packet contains a two-page notice along with a 13-page set of Frequently Asked Questions (FAQs), Doc. #: 2583-1, in a format recommended by the Federal Judicial Center, *see* Fed. Judicial Ctr., *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* 8–9 (2010), https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf. The two-page notice alone contains each of the seven pieces of information required by Rule 23 and the FAQs provide even more detailed information as to most. The *content* requirements of Rule 23(c)(2)(B) are met.

Beyond the basics, the Court notes, as discussed above, that the moving parties have gone to great lengths to make transparent the various aspects of this unique procedure – the allocation formula and its underlying components, the voting plans, etc. A class website, active since June, has provided a wealth of information to the putative class members and will continue to do so following certification. The moving parties have done a commendable job making transparent all of the moving parts of this novel procedure. The Court finds that the class members have been provided a wealth of pertinent information that will enable them to make informed decisions about whether to remain in or opt out of this Negotiation Class.

B. Exclusion

Rule 23(c)(2)(B) requires, for any class certified under Rule 23(b)(3), that the district court send notice to class members informing them "that the court will exclude from the class any member who requests exclusion," Fed. R. Civ. P. 23(c)(2)(B)(v), and specifying "the time and manner for requesting exclusion," Fed. R. Civ. P. 23(c)(2)(B)(vi). The Federal Judicial Center recommends that a form be provided to class members, *see Manual for Complex Litigation* (*Fourth*) §§ 21.311–21.312 (2004) [hereinafter *Manual for Complex Litigation*], and instructs that the form should "clearly and concisely explain the available alternatives and their consequences,"

id. at § 21.321. Exclusion notices should require "that class members (1) mail a letter or post card; (2) by a date certain; (3) to a specific address; (4) clearly identifying themselves and/or some information demonstrating their membership in the class" but "[c]lass members are not required to give reasons for opting out." 3 *Newberg on Class Actions* § 9:46. Rule 23 does not mandate a time period within which class members must exercise their exclusion right, but the *Manual for Complex Litigation* suggests that class members be given a "reasonable time" and states that courts "usually establish a period of thirty to sixty days (or longer if appropriate) following mailing or publication of the notice for class members to opt out." *Manual for Complex Litigation* § 21.321.

The movants propose that Class Members be required to fill out a designated Exclusion Request Form, Doc. #: 2583-2, and be given 60 days (until a date certain – November 22, 2019) to do so. Doc. #: 2583 at 5. The movants explain that the "form can be submitted to the Notice Administrator via either first-class mail or email." Doc. #: 2583 at 3. The Exclusion Request Form is part of the Notice packet and will be posted and distributed in the same manner as the Notice packet. *Id.* The movants further explain that:

> Exclusion Request Forms would not have to be notarized but, instead, would have to be executed with an averment, pursuant to 28 U.S.C. § 1746, that the city or county official has the authority to submit the exclusion request. Also, the form would contain an express acknowledgment of the consequences of opting out (including that the city or county will not share in any recovery achieved by the Class and that it may not be afforded an opportunity at a later date to revoke its opt-out request). Mandating use of a specific form for opting out should sharply reduce, if not eliminate altogether, both disputes as to whether opt-out requests comported Court-directed requirements as well as potential arguments about whether optouts genuinely understood the ramifications of their exclusion requests.

Id.

The Court has reviewed the Exclusion Request Form and finds that it meets the requirements of Rule 23. It clearly explains the ramifications of exclusion, and it provides exact

instructions about how and when to execute and return the form. The plan sufficiently protects the absent-class members' right to exclude themselves from this Class.

CONCLUSION

For the foregoing reasons, the Court certifies a Negotiation Class on the claims and issues identified, against the Defendants identified, and appoints Class Counsel. The Negotiation Class is authorized to negotiate settlements with any of the 13 sets of Defendants identified herein, on any of the claims or issues identified here, or those arising out of a common factual predicate. *See Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009) ("The question [of whether a subsequent claim is barred] is not whether the definition of the claim in the complaint and the definition of the claim in the release overlap perfectly; it is whether the released claims share a 'factual predicate' with 'the claims pled in the complaint.'" (quoting *Olden v. Gardner*, 294 F. App'x 210, 220 (6th Cir. 2008))). *See generally* 6 *Newberg on Class Actions* § 18:19. If Class Counsel seek to utilize the Negotiation Class to negotiate against any other Defendants, they may later make a formal motion to amend the class certification order accordingly. As set forth in an accompanying Order, this Court does ***not*** authorize the Negotiation Class to negotiate on behalf of cities and counties against their State governments, as its proponents suggested. Doc. #: 1820-1 at 53. This puts to rest a concern raised by the Attorneys General. Doc. #: 1951 at 3.

As noted throughout, an Order accompanies this Memorandum Opinion.

/s/ Dan Aaron Polster
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE

Dated: September 11, 2019

Outgunned No More? Reviving a Firearms Mass Tort Litigation

Professor Linda S. Mullenix
University of Texas School of Law

Precipitating Event

- U.S. Supreme Court, certiorari denied, *Remington Arms Co., L.L.C. v. Soto*
  - ___S.Ct. ___, 2019 WL 5875142(Mem.)(Nov. 12, 2019)
- On appeal from Connecticut Supreme Court:
  - *Soto v. Bushmaster Firearms Int'l LLC*
  - 331 Conn. 53, 202 Atl. Rptr. 3d 262 (March 19, 2019)
- Trial court: *Soto v. Bushmaster Firearms Int'l LLC*
  - No. FBT-CV-15-6048103-S (Conn. Super Ct. 2016)

Significance of Supreme Court Cert. Denial

- (1) Signaled non-engagement by Supreme Court in Second Amendment gun-related litigation
- (2) Allowed Connecticut *Sandy Hook* litigation to proceed
- (3) Exposed narrow ground upon which victims of gun violence might pursue relief
- (4) Resuscitated possibility of a mass tort litigation against the firearms industry

The Sandy Hook Litigation: Trial Court

- 2014 litigation by estate administrators of Sandy Hook elementary school massacre
- Wrongful death claims
- Seeking damages and injunctive relief
- Defendants: various Bushmaster Firearms and Remington Arms entities
  - Manufacturers, distributors, and retailers of Bushmaster XM15-E2S semiautomatic rifle used in the shooting
- Defendants invoked preemption immunity under the Protection of Lawful Commerce in Arms Act (PLCCA)

The Sandy Hook Litigation: Trial Court

- ***Ps claimed two exceptions under PLCCA***:
  - Negligent entrustment of a firearm to a civilian consumer an AR-15 style assault weapon suitable for use only by military or law enforcement personnel
  - Knowing violation of a predicate statute:
    - Connecticut Unfair Trade Practices Act (CUTPA)
    - Remington defendants knowingly marketed, advertised, and promoted the XM15-E2S for civilians to carry out military-style actions against perceived enemies
    - Offending marketing materials unethical, immoral, oppressive, unscrupulous

The Sandy Hook Litigation: Trial Court

- ***Granted defendants' motion to strike Ps' allegations***:
  - Allegations did not fit within common law theory of negligent entrustment
  - PLCCA barred Ps' claims sounding in negligent entrustment
  - Ps lacked standing to bring wrongful death claims predicated on CUPTA violations
    - Ps never entered into business relationship with Ds

The Sandy Hook Litigation: Connecticut Supreme Court

- ***Holdings***:
- 4 -3 decision, affirming in part and reversing in part (88 page opinion)
- Rejected Ps' theories resting on negligent entrustment
- Ps' claims generally precluded by Connecticut and PLCCA
- Ps had standing to prosecute claims under Connecticut law (CUPTA):
  - Connecticut law did not permit advertisements that promote or encourage violent criminal behavior
  - Legislature did not intend to bar Ps from recovering damages for personal injuries resulting from unfair trade practices

The Sandy Hook Litigation: Connecticut Supreme Court

- ***Connecticut Supreme Court on PLCCA preemption:***
  - PLCCA did not bar Ps' claims
  - Text and legislative history: no Congressional intent to extinguish traditional authority of Connecticut legislature or its courts
  - Core exercise of state police power: regulation of advertising that threatens public health, safety, and morals
  - CUPTA qualified as a "predicate statute" under PLCCA's third exception to blanket immunity
  - CUPTA general unfair trade practices statute of broad scope

Implications

- Expansive reading of PLCCA's "predicate statute" exception
- Opened the possibility of similar gun lawsuits based on state consumer protection and unfair trade practices statutes
- "Because all states have analogous unfair trade practices laws, the decision below threatens to unleash a flood of lawsuits nationwide that would subject lawful business practices to crippling litigation burdens"
  - Remington Arms, Petition for a Writ of Certiorari, No. 19-168, *Remington Arms Co., LLC v. Soto* (Aug. 1, 2019) at 4.

Firearms Litigation in Context

First Wave Gun Litigation 1990s-2005

- Suits by individuals and municipalities
- ***Claims***:
  - negligent distribution or marketing
  - making and selling defective firearms
  - deceptive advertising
  - contributing to a public nuisance
- ***Track record***:
  - Dismissals prior to trial
  - Few favorable jury verdicts
  - All but one overturned on appeal

Impact of the Big Tobacco Settlement (1998)

- State AG multistate settlement with Big Tobacco Ds in 1998
- Inspired filing of firearms litigation by 30+ municipalities against firearm Ds
- Growing concern by firearms industry re vulnerability to litigation
- Forecast of "next big mass torts":
  - Fast industry
  - Lead paint manufacturers
  - Firearms industry

Industry Reaction to Increasing Gun Litigation: Statutory Immunity from Suit

- Congressional enactment of Protection of Lawful Commerce in Arms Act (2005)(PLCCA)
  - Pub. L. No. 109-2, 119 Stat. 2095 (2005), codified at 15 U.S.C. § 7903
  - Broad protection to firearms Ds from liability to suit for crimes committed with their products
- 34 states enacted statutes providing blanket immunity to gun industry, in ways similar to PLCCA

PLCCA's Six Exceptions to Immunity

- **15 U.S.C. § 70903(5)(i)-(vi):**
- (1) knowing transfer of a firearm to be used in a crime of violence;
- (2) negligent entrustment or negligence per se by a seller;
- (3) knowingly violation a state or federal statute applicable to the sale or marketing of a product, manufacturer or seller of a product;
- (4) breach of contract or warranty in connection with purchase of the product;
- (5) defect in design of manufacture of the product;
- (6) Attorney General action to enforce the Gun Control Act or the National Firearms Act

Post-PLCCA Gun Litigation

- **<u>Plaintiff unsuccessful invocation of PLCCA exceptions, post-2005:</u>**
  - Negligent entrustment
  - Negligence per se
  - Design defects
  - Failure to warn
  - Breach of implied warranty of merchantability

PLCCA's Third "Predicate Statute" Exception

- **15 U.S.C. § 70903(5)(iii):**
- Permits actions "in which a manufacturer or seller of a [firearm or ammunition] knowingly violated a State or Federal statute *applicable* to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought."
- P must present cognizable claim with knowing violation of a predicate statute: that is, statute that is *applicable* to the sale or marketing of firearms

Circuit Conflict in Interpretation of "Predicate Statute" Requirement

- **Broad interpretation: Second Circuit**
  - *City of New York v. Beretta*, 524 F.3d 384 (2d Cir.2008), *cert. denied*, 129 S. Ct. 1579 (2009)
  - Upheld constitutionality of PLCCA
  - PLCCA's predicate statute exception did not apply to New York Penal Law § 240.45
  - ***However***: nothing in PLCCA required any express language regarding firearms to be included in a statute in order for that statute to fall within the predicate exception
- **Connecticut Supreme Court reliance on *Beretta* in *Soto***

Circuit Conflict in Interpretation of "Predicate Statute" Requirement

- **Narrow Interpretation: Ninth Circuit**
  - *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009)
  - PLCCA preempts general tort theories of liability, regardless of whether such theories are codified
  - Predicate exception did not apply to claims under Cal. Civil Code pertaining to nuisance, public nuisance, and negligence
  - "Applicable statute" language in PLCCA should be given narrow construction
- **Connecticut Supreme Court on *Ileto*:**
  - Rejected Ds' reliance on Ileto as dispositive of predicate exception issue in *Soto*
  - Ninth Circuit recognized that other statutes that regulate sale and manufacturing activities could qualify as predicate statutes

Modeling Mass Tort Litigation

Will Soto v. Remington Arms Revive the Possibility of a Firearms Mass Tort Litigation?

Sign-Posts of a Developing Mass Tort Litigation

- (1) Developments or changes in the law
- (2) Regulatory alerts, notices, or product recalls
- (3) Establishment of a winning track record of litigation and settlement awards
- (4) Increase in interest among the plaintiffs' bar in pursuing litigation
- (5) Emergence of a critical mass of similarly-situated claimants
- (6) Docket congestion

Sign-Posts of a Developing Mass Tort Litigation

- (7) Judicial receptivity towards aggregating and managing multiple claims litigation
- (8) Discovery of underlying facts and public dissemination of discovery materials
- (9) Development or maturation of underlying scientific or expert testimony in support of claims
- (10) Interest of state attorneys generals in pursuing relief on behalf of their citizenry
- (11) Agile strategic lawyering in response to changing litigation developments
- (12) Willingness of putative defendants and their insurers to come to the negotiation table

Modeling Mass Tort Litigation

Will Soto v. Remington Arms Revive the Possibility of a Firearms Mass Tort Litigation?

Factors Supporting Emergence of a Firearms Mass Tort

- (1) Developments and Changes in the Law
  - Liberal interpretation of PLCCA's predicate statute exception
  - Application to Connecticut consumer and unfair trade practices statute
- (2) Agile Strategic Lawyering in Response to Changing Litigation Developments

Factors Militating Against Emergence of a Firearms Mass Tort

- (1) Absence of Regulatory Alerts, Notices, or Recalls of a Defective or Harmful Product
- (2) Lack of a Winning Track Record of Firearms Litigation and Settlements
- (3) Absence of Docket Congestion
- (4) Absence of Judicial Interest in Aggregating and Managing Multiple Gun Litigation Claims
- (5) Unwillingness of Putative Defendants and Insurers to Come to the Negotiation Table

Factors Not Relevant or Not Yet Relevant

- (1) Questionable Interest of the Plaintiffs' Bar in Pursuing Gun Litigation
- (2) Absence of a Critical Mass of Similarly-Situated Claimants
- (3) Absence of Public Dissemination of Discovery Materials
- (4) Lack of Development of Probative Scientific or Expert Testimony in Support of Claims
- (5) Lack of Interest of States' Attorney Generals in Pursuing Relief on Behalf of their Citizenry

Conclusions

Will Soto v. Remington Arms Revive the Possibility of a Firearms Mass Tort Litigation?

- Curb your enthusiasm – at best, a very nascent (embryonic) mass tort litigation
- Connecticut has led the way to overcoming PLCCA's broad immunity to the firearms industry under PLCCA's third exception to blanket immunity
- Expansive application of predicate statute exception may open door to similar lawsuits under state consumer protection and unfair trade practice statutes
- Mass torts take a long time to develop
- Watch for settlement with municipalities in the Opiate MDL: a model for reviving municipal lawsuits against the firearms industry?

The End (Or Not)

Nos. 19-16636, 19-16708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWIN HARDEMAN,
Plaintiff-Appellee/Cross-Appellant,

v.

MONSANTO COMPANY,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court for the Northern District of California, Nos. 16-cv-00525 & 16-md-02741 (Chhabria, J.)

BRIEF OF *AMICI CURIAE* STATES OF NEBRASKA, IDAHO, LOUISIANA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, AND UTAH IN SUPPORT OF DEFENDANT-APPELLANT/CROSS-APPELLEE MONSANTO COMPANY SEEKING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

The States of Nebraska, Idaho, Louisiana, North Dakota, South Dakota, Texas, and Utah ("*amici* States") file this *amicus curiae* brief in support of Defendant-Appellant/Cross-Appellee Monsanto Company seeking reversal of the judgment of the U.S. District Court for the Northern District of California. In particular, the *amici* States' brief focuses on the district court's Pretrial Orders Denying Monsanto Company's Summary Judgment and *Daubert* Motions on General Causation (ER49) and Motion for Summary Judgment on Specific Causation (ER33).[1]

IDENTITY AND INTEREST OF THE *AMICI* STATES

Amici are the States of Nebraska, Idaho, Louisiana, North Dakota, South Dakota, Texas, and Utah. Agriculture is important in these States. The *amici* States are home to over 400,000 farms and ranches covering over 280 million acres. Last year, their farmers produced more than three billion bushels of corn and over 800 million bushels of soybeans adding billions to the economy. These farmers and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the *amici* States are permitted to file an amicus brief without consent of the parties to the appeal or leave of the Court. All citations to the record are designated by "ER" and pertain to the Excerpts of Record filed by Monsanto Company in this appeal.

the crops they grow help feed a growing population, contribute to rural, state, and national economies, and directly and indirectly employ millions of people. The herbicide at issue in this case—glyphosate—helped farmers in these States, and across the country, accomplish these feats.

Glyphosate is an essential herbicide for farmers in the *amici* States. Glyphosate can control 300 different weeds and can be applied directly to growing crops engineered to be resistant to it. With glyphosate, farmers can manage weeds more effectively in less time and for less money. Better weed management also positively impacts crop yields by allowing the growing crops to reach yield potential. Producing higher yields with fewer costs not only benefits farmers in the *amici* States, but also related industries and downstream consumers. The *amici* States benefit because of the impact of agriculture on their economies and, especially, the economies in their rural areas.

Glyphosate also benefits the environment in the *amici* States. Glyphosate paired with glyphosate-resistant crops encourages the adoption of conservation tillage by farmers. The *amici* States benefit from conservation tillage because there is less soil erosion and runoff

from fields into surface waters of the States. Glyphosate is also less toxic and harmful than many other herbicides. Simply, glyphosate greatly benefits agriculture in the *amici* States and, in turn, the economies, environment, and people in those States.

Glyphosate has been used safely and effectively as a weed management tool in agriculture for over forty years. The overwhelming consensus from research and regulatory bodies is that glyphosate does not cause cancer or non-Hodgkins lymphoma ("NHL") in humans. The U.S. Environmental Protection Agency ("EPA") has repeatedly determined glyphosate is not likely to be carcinogenic to humans and is in the process of again renewing that determination. Regulatory bodies in other countries have reached similar determinations. But in 2015, the International Agency for Research on Cancer ("IARC")—seemingly out of nowhere—classified glyphosate as "probably carcinogenic to humans" and precipitated this case and thousands like it.

In this case, the plaintiff, Hardeman, presented experts who opined that glyphosate not only causes NHL in humans, but specifically caused Hardeman's NHL. The district court was skeptical and called these opinions "rather weak" and "shaky" but nonetheless found them

admissible under Federal Rule of Evidence 702 and the *Daubert* standard. The jury heard this expert evidence and, ultimately, rendered a verdict for Hardeman and against Monsanto Company.

Although the overwhelming evidence from national and international research and regulatory bodies shows glyphosate is not carcinogenic to humans, the judgment in this case threatens to undermine that evidence and curtail glyphosate from agricultural use in the *amici* States and the Nation. In response, farmers may have to resort to less effective, more expensive, and more toxic herbicides. This could impact crop yields, the economy, and the environment in the *amici* States. For these reasons, the *amici* States request this Court reverse the district court's judgment.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT MISAPPLIED THE *DAUBERT* STANDARD AND ALLOWED THE JURY TO HEAR UNRELIABLE EXPERT OPINIONS.

Production agriculture makes up the vast majority of glyphosate usage because of the economic, environmental, and time-saving benefits. If glyphosate were curtailed, agriculture in the *amici* States would be adversely impacted. The district court's decisions on the

admissibility of expert testimony on glyphosate being carcinogenic go beyond just this case because other users, like farmers in the *amici* States, greatly rely on glyphosate.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) ("*Daubert I*"). Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. District courts play an important role in analyzing the relevancy and reliability of expert evidence before a jury hears the evidence at trial. *See Daubert I*, 509 U.S. at 589, 595.

In the case below, the district court engaged in two *Daubert* analyses at the general causation and specific causation phases. The district court repeatedly recognized the uphill battle Hardeman faced given the substantial evidence showing glyphosate was not carcinogenic to humans. Yet, each time, the district court opened the door for

Hardeman to present "shaky" and "rather weak" expert opinions to the jury. As demonstrated below, the district court erred at the general and specific causation phases based on the misapplication of the *Daubert* standard in this Circuit. If the district court's erroneous decisions admitting unreliable expert evidence are allowed to stand, then agriculture in the *amici* States will bear the brunt of these errors.

A. The District Court Erroneously Admitted "Shaky" And "Rather Weak" Expert Evidence On General Causation.

To determine the admissibility of expert testimony, the district court analyzes whether the expert testimony is sufficiently relevant and reliable under Federal Rule of Evidence 702 and the *Daubert* standard. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) ("*Daubert II*"). Although Federal Rule of Evidence 702 "*should* be applied with a 'liberal thrust' favoring admission", it "*requires*" that expert testimony "be both relevant and reliable." *Messick v. Novartis Pharmaceuticals Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014) (internal quotations omitted) (all emphasis added). Determining whether expert evidence is both relevant and reliable is key because "[e]xpert evidence can be both powerful and quite misleading because of

the difficulty in evaluating it." *Daubert I*, 509 U.S. at 595 (internal quotations omitted). In this regard, the district court "act[s] as a gatekeeper to exclude junk science that does not meet Federal Rule of Evidence 702's reliability standards." *Messick*, 747 F.3d at 1197.

This Circuit recognizes the importance of the task a district court confronts in determining whether scientific expert testimony is relevant and reliable. *See Daubert II*, 43 F.3d at 1315. Reliability requires the district court to "determine … whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'" *Id.* (quoting *Daubert I*, 509 U.S. at 590). This task may be more difficult when "the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability." *Daubert II*, 43 F.3d at 1316. Nonetheless, this Court explained:

> Our responsibility … is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method."

Id. In a post-*Daubert* world, a federal judge's duty to act as a gatekeeper is essential.

This case, however, does not present a difficult dispute over a matter at the "very cutting edge of scientific research" or without "scientific consensus." Glyphosate has been "commercially available" since 1974 and is "widely used across the United States and much of the world." ER52. There have been a large number of scientific studies on the carcinogenicity of glyphosate—from case-control studies and meta-analyses to laboratory studies to a large cohort study. *See* ER62-ER73. The most recently published studies, the 2005 study and 2018 update to the Agricultural Health Study ("AHS"), which was a cohort study of more than 57,000 licensed pesticide applicators, found no association between glyphosate and NHL. *See* ER73 & ER88-ER89. The EPA also "does not currently consider glyphosate likely to cause cancer" and neither do other regulatory bodies, including those in Canada and parts of Europe.[2] The overwhelming majority of studies and regulators have found glyphosate is not carcinogenic to humans.

[2] *See* U.S. Environmental Protection Agency, *Glyphosate—Human Health*, https://www.epa.gov/ingredients-used-pesticide-products/glyphosate (last visited Dec. 20, 2019).

Yet, the IARC classified glyphosate as "probably carcinogenic to humans" in 2015, which spawned the current litigation and thousands of other cases. *See* ER52-ER53. In this case, Hardeman relied "heavily" on this IARC classification and the district court recognized such reliance as problematic. ER49 & ER57. The district court explained IARC's classification of glyphosate as "probably carcinogenic to humans" meant there was only "limited" evidence that glyphosate causes cancer in humans and "sufficient" evidence in animals. ER58-ER59. Given the IARC classification was "too limited" and "too abstract," the district court correctly closed the gate to Hardeman's experts who only parroted the IARC's examination. ER60-ER61. The district court, however, further analyzed Hardeman's three remaining experts on the basis that these experts "went beyond" the IARC classification. ER51.

After the expert reports were exchanged but a few months before the *Daubert* hearing on general causation, the 2018 update to the AHS was published. *See* ER74. With this update, the district court had even greater evidence of "scientific consensus." As the district court stated, the update showed glyphosate was not likely causing NHL in humans:

> There is one large cohort study (the AHS), with results recently published in a well-regarded scientific journal, suggesting no association between glyphosate use and NHL. There is a series of case-control studies arguably suggesting an association, but a fairly weak one. There are limited data indicating that the association strengthens with greater exposure to glyphosate, but also data to the contrary. And there are legitimate concerns about the reliability of the data from all the studies. *Under these circumstances, all one might expect an expert to conclude is that glyphosate exposure is cause for concern, but not that glyphosate is likely causing NHL at realistic human exposure levels.*

ER88-ER89 (emphasis added). With regard to the evidence as a whole, the district court stated "the evidence of a causal link between glyphosate exposure and NHL in the human population seems rather weak" and "[t]he evidence, viewed in its totality, seems too equivocal to support any firm conclusion that glyphosate causes NHL." ER50. Because of this, the district court correctly described Hardeman's expert evidence as "shaky" and "rather weak". ER50, ER88-ER89, ER115.

The district court further described Hardeman's experts' opinions as being based on their identification of "at least a few statistically significant elevated odds ratios from case-control studies and meta-analyses" and "what they deem to a be a pattern of odds ratios above 1.0 from the case-control studies, even if not all are statistically significant[.]" ER116. Yet somehow, the district court called

admissibility a "close question" and admitted the expert testimony because Federal Rule of Evidence 702 "should be applied with a liberal thrust." *Messick*, 747 F.3d at 1196 (internal quotations omitted); ER56-ER57, ER115.

The district court misapplied this Court's *Daubert* standard, thereby lowering the bar for reliability. When there is only a "scintilla of evidence" or "a few statistically significant" studies that support a position, a district court should, as a gatekeeper, exclude those expert opinions as junk science—especially when the district court finds such opinions to be rather weak and shaky. *See Daubert I*, 509 U.S. at 596 ("[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment … and likewise grant summary judgment …."); Fed. R. Evid. 702 (requiring expert testimony to be based on "sufficient" data). The district court should have excluded all of Hardeman's expert testimony at the general causation phase as unreliable based on the overwhelming evidence showing no association between glyphosate and NHL. The district court's error gave credibility

to these unreliable expert opinions thereby threatening the agricultural use of glyphosate in the *amici* States.

B. The District Court Erroneously Admitted Expert Opinions On Specific Causation By Wrongly Elevating Art Over Science.

By opening the gate for junk science on glyphosate at the general causation phase, Hardeman's experts were able to "rule-in" glyphosate as a potential cause of his NHL at the specific causation phase. ER34-ER35. The district court, then, lowered the reliability bar even more at the specific causation phase.

At the specific causation phase, the district court again voiced skepticism and called it a close question that glyphosate caused Hardeman's NHL. ER33, ER38. And yet again the district court concluded the expert testimony was admissible:

> The Court may be skeptical of [Hardeman's experts'] conclusions, and *in particular of the assumption built into their opinions from the general causation phase about the strength of the epidemiological evidence*. But their core opinions—that [Hardeman has] no other significant risk factors and w[as] exposed to enough glyphosate to conclude that it was a substantial factor in causing [his] NHL—are admissible.

ER38 (emphasis added). The district court relied on *Messick* and *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227 (9th Cir. 2017) as the

basis for admitting the expert evidence. ER36-ER37. The district court explained that while Hardeman presented "borderline expert opinions" such opinions were admissible in the Ninth Circuit because of a tolerance for specific causation opinions that "lean strongly toward the 'art' side of the spectrum" rather than the science side. ER37. The district court, however, misapplied *Messick* and *Wendell*.

Messick and *Wendell* dealt with different scenarios than the case at hand. In *Messick*, the expert relied "on his extensive clinical experience[,]" as well as "examination of the [plaintiff's] records, treatment, and history" to determine whether the plaintiff's condition met the "unique features" defining that particular medical condition. 747 F.3d at 1196-98. In reversing the district court's exclusion of this expert's testimony, this Court stated "[m]edicine partakes of art as well as science, and there is nothing wrong with a doctor relying on extensive clinical experience when making a differential diagnosis." *Id.* at 1198.

In *Wendell*, the plaintiff had "an exceedingly rare cancer, with only 100 to 200 cases reported since it was first recognized." 858 F.3d at 1236. Moreover, this type of cancer was not widely studied. *Id.* ("It

is not surprising that the scientific community has not invested substantial time or resources into investigating the causes of such a rare disease."). In reversing the district court, this Court explained that sometimes there may not be "a plethora of peer reviewed evidence" especially with a "rare disease" and, thus, *Daubert* should not bar the testimony of "two doctors who stand at or near the top of their field and have extensive clinical experience with the rare disease or class of disease at issue …." *Id.* at 1238.

Unlike the scenarios in *Messick* and *Wendell*, NHL is not a rare disease—there were over 74,000 new cases in 2019.[3] NHL is, unfortunately, a common type of cancer and has a number of known risk factors.[4] Moreover, unlike *Wendell*, glyphosate is a well-studied herbicide and there is a "plethora of peer reviewed evidence" that glyphosate does not cause cancer or NHL. *See* ER65-ER82, ER88-ER89.

The district court misapplied this Circuit's *Daubert* standard at both phases. The district court was not presented with a case where the

[3] American Cancer Society, *Key Statistics for Non-Hodgkin Lymphoma*, https://www.cancer.org/cancer/non-hodgkin-lymphoma/about/key-statistics.html (last visited Dec. 20, 2019).

[4] *Id.*

disease was unique or rare or did not have a number of peer reviewed studies finding no association between glyphosate and NHL and, in turn, Hardeman's NHL. There was no reason for an expert's "art" to take precedence over "science" or "scientific consensus". The district court should have excluded Hardeman's expert testimony instead of opening the gate to shaky, weak, and unreliable opinions that glyphosate causes NHL and, more specifically, caused Hardeman's NHL. By admitting this unreliable expert testimony, the district court failed to protect the jury from misleading expert evidence and, thus, has adversely affected agriculture and farmers in the *amici* States.

II. THE DISTRICT COURT'S MISAPPLICATION OF THIS COURT'S *DAUBERT* STANDARD WILL HAVE REAL WORLD IMPACTS ON AGRICULTURE.

The district court's errors in admitting unreliable expert evidence that glyphosate causes cancer in humans has real world effects. The use of glyphosate paired with glyphosate-resistant crops is critically important as a weed control tool in agriculture. As demonstrated below, agriculture is vital to the country and the *amici* States. Because the district court let the jury be misled by unreliable expert testimony that

glyphosate causes cancer, agriculture and farmers in the *amici* States will bear the costs of the district court's erroneous evidentiary decisions.

A. Agriculture Is Important To The *Amici* States And Abroad.

From coast to coast, America's farmers and ranchers produce and raise crops and livestock on over 2 million farms covering more than 900 million acres.[5] Every person living in the United States benefits from agriculture and the industries related to it. The benefits of agriculture are many and far-reaching—from the economy to the kitchen table.

Agriculture significantly contributes to the national economy. In 2017, America's farmers contributed $132.8 billion to the United States' gross domestic product.[6] This number, however, does not include related industries. Related industries range from food and beverage manufacturers, retailers, and restaurants to textiles and apparel

[5] U.S. Dep't of Agric., 2017 Census of Agriculture, 7 (Table 1).

[6] U.S. Dep't of Agric., Econ. Research Serv., *Ag and Food Sectors and the Economy*, https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/ (last visited Dec. 20, 2019).

manufacturers and stores.[7] If these related industries are included, the overall contribution of the agricultural sector is higher—$1.053 trillion in 2017.[8] In turn, if America's farmers and ranchers are doing well, then the downstream consumers and their pocketbooks benefit.[9]

Likewise, agriculture benefits the global economy. In 2018, the United States exported $140 billion in agricultural products.[10] These exports resulted in a trade surplus, which has been ongoing since 1960.[11] The majority of agricultural goods exported are grains/feed, soybeans, livestock products, and horticulture products.[12]

There is also room for increases in agricultural exports. The world's population is expected to continue to increase from 7.7 billion

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[7] *Id.*

[8] *Id.*

[9] In 2018, Americans spent 12.9% of their household expenditures on food. *See id.*

[10] U.S. Dep't of Agric., Econ. Research Serv., *Agricultural Trade*, https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/agricultural-trade (last visited Dec. 20, 2019).

[11] *Id.*; U.S. Congress, Joint Econ. Comm., *The Economic Contribution of America's Farmers and the Importance of Agricultural Exports*, 1 (Sept. 2013).

[12] *Supra* note 10.

persons today to 9.7 billion persons in 2050.[13] Due to the increases, there will likely be a larger demand for agricultural products and, thus, an increase in exports to those growing countries.[14]

Agriculture also creates and supports millions of employment opportunities in many different areas. These areas include insurance, transportation, technology, engineering, sales, repairs, and the food industry. In 2017, 21.6 million jobs were related to the agriculture and food sectors, which amounted to 11.0% of all employment in the United States.[15] This number includes approximately 2.6 million on-farm jobs.[16]

States also depend on agriculture for their economies. Every state has some type of agricultural production. Crop production, however, is

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[13] Press Release, Dep't of Econ. & Soc. Affairs, Growing at a slower pace, world population is expected to reach 9.7 billion in 2050 and could peak at nearly 11 billion around 2100, U.N. Press Release (June 17, 2019).

[14] *Supra* note 11 at 1 ("Ninety-five percent of the world's potential consumers live outside of the United States, and population growth in the decades ahead will be concentrated in developing countries. As these countries grow and their citizens' incomes rise, their demand for meat, dairy and other agricultural products will increase.").

[15] *Supra* note 6.

[16] *Id.*

mostly centered in the Midwest.[17] The top five States with the most crop sales are California, Iowa, Illinois, Minnesota, and Nebraska.[18] California's crop sales mostly come from horticulture, while the Midwest's crop sales mostly come from grains and oilseeds—corn and soybeans.[19] These crops also support livestock and poultry production by providing feed.[20] The top five States with the most livestock sales are Texas, Iowa, California, Nebraska, and Kansas.[21]

Agriculture is particularly important in the *amici* States. Nebraska, known as the Cornhusker State and the Beef State, is defined by agriculture.[22] Nebraska is home to 47,400 farms and ranches covering 91% of the State's total land area.[23] In 2017, Nebraska farmers and ranchers contributed $21 billion to the state's

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[17] U.S. Dep't of Agric., Econ. Research Serv., *Agricultural Production and Prices*, https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/agricultural-production-and-prices/ (last visited Dec. 20, 2019).

[18] *Id.*

[19] *Id.*

[20] Nebraska Dep't of Agric., Nebraska Ag Facts Brochure, 17, https://nda.nebraska.gov/publications/ne_ag_facts_brochure.pdf.

[21] *Supra* note 17.

[22] *Supra* note 20 at 14.

[23] Nebraska Dep't of Agric., Nebraska Agriculture Fact Card (Feb. 2019), https://nda.nebraska.gov/facts.pdf.

economy, which was 5.7% of the United States' total.[24] Nebraska also had $6.4 billion in agricultural exports, which translated into $8.9 billion in additional economic activity.[25] Nebraska agriculture also supports 1 in 4 jobs in the state.[26]

Nebraska's top agricultural commodities are corn and cattle, which go hand in hand—corn is used as feed for many cattle operations.[27] Corn is an important feed for finishing cattle before processing because it improves the final beef product.[28] Iowa, Illinois, Nebraska, Minnesota, Kansas, and Indiana had the largest corn area forecasted to be planted and harvested in 2019.[29]

Like corn and cattle, soybeans are an important commodity. For 2019, Illinois, Iowa, Minnesota, North Dakota, Indiana, and Missouri had the largest soybean area forecasted to be planted and harvested.[30]

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Supra* note 20 at 12.
[29] U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., Acreage (June 2019), 6 (June 28, 2019).
[30] *Id.* at 15.

Soybeans are not only used in human food products, but also as feed for livestock and poultry.[31]

Another important crop is sugar beets. Sugar beets are used for sugar production.[32] Over half of the sugar produced in the United States comes from sugar beets.[33] Minnesota, North Dakota, Idaho, Michigan, Nebraska, and Montana are the largest sugar beet producers in the country producing millions of tons of sugar beets every year to be used in a wide range of products.[34]

Agriculture plays not only an important role in our country's history, but is essential to our country's and the *amici* States' futures. Agriculture and related industries in the *amici* States put food on the table, employ millions, and significantly contribute to the economy at all levels. It is imperative that agriculture and the inputs that fuel it be protected.

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[31] *Supra* note 20 at 18.
[32] *Supra* note 20 at 24.
[33] *Id.*
[34] *Supra* note 29 at 23.

B. Glyphosate Provides Numerous Benefits To Agriculture In The *Amici* States.

Glyphosate benefits agriculture in a substantial number of ways. Glyphosate was commercially introduced in 1974 and is now the most widely used herbicide in the world.[35] Part of its success has been the development of transgenic, glyphosate-resistant crops, which were introduced in 1996.[36] Glyphosate-resistant crops include alfalfa, canola, corn, cotton, soybeans, and sugar beet varieties.[37] Glyphosate-resistant crops allow a farmer to spray glyphosate on his or her fields to manage weeds without damaging the crops.[38] Weed management is essential to good and sustainable agriculture because pests, like weeds, "can reduce

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[35] Stephen O. Duke & Stephen B. Powles, *Mini-review Glyphosate: a once-in-a-century herbicide*, 64 Pest Mgmt. Sci. 319, 319 (2008).

[36] *Id.*

[37] U.S. Dep't of Agric., ERR-184, The Economics of Glyphosate Resistance Management in Corn and Soybean Production, 1 (April 2015).

[38] U.S. Dep't of Agric., EIB-208, Agricultural Resources and Environmental Indicators, 2019, 30 (May 2019) ("Herbicide-tolerant … crops are not damaged when they are sprayed with broad-spectrum herbicides (such as glyphosate or glufosinate) that damage most conventional varieties. Planting [herbicide-tolerant] crops allows farmers to use nonselective, broad-spectrum herbicides throughout the growing season (even after crop emergence).").

crop yields or the quality of production ...."[39] Weeds reduce crop yields or quality by competing with crops for the same resources of water, nutrients, sunlight, and space. The development of glyphosate-resistant crops "made weed management easy, efficient, economical and environmentally compatible—exactly what growers wanted."[40] Due to these benefits, the vast majority of the corn and soybeans planted are glyphosate-resistant.[41] For example, Nebraska farmers used some form of glyphosate on 85% of the area planted with corn and 92% of the area planted with soybeans in 2018.[42] And, most if not all, sugar beets planted are glyphosate-resistant.[43]

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[39] *Id.* at 35.

[40] Jerry M. Green, *The benefits of herbicide-resistant crops*, 68 Pesticide Mgmt. Sci. 1323, 1323 (May 2012).

[41] *Supra* note 38 at v & 30.

[42] U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Quick Stats for Nebraska Soybeans-Treated, Measured in Percentage of Area Planted, Average (2018)*, https://quickstats.nass.usda.gov/data/printable/3496DCDD-6C83-3E4F-A4E1-AAF41FC5DC78 (last visited Dec. 20, 2019); *see also* U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Quick Stats for Nebraska Corn-Treated, Measured in Percentage of Area Planted, Average (2018)*, https://quickstats.nass.usda.gov/data/printable/A18FA0E1-F27F-350E-B3B7-3B52B69B4B0C (last visited Dec. 20, 2019).

[43] Memorandum from Caleb Hawkins, Charmaine Hanson, & Dexter Sellers, EPA, to Khue Nguyen, EPA, 7 (Apr. 18, 2019), https://www.epa.gov/sites/production/files/2019-04/documents

Glyphosate paired with glyphosate-resistant crops has helped increase yields and lower production costs. The use of glyphosate-resistant crops allowed for easy, effective weed control and, in turn, resulted in better yields.[44] For example, Nebraska farmers harvested 111 bushels/acre of corn and 33 bushels/acre of soybeans in 1995 (prior to glyphosate-resistant crop introduction) compared to 182 bushels/acre of corn and 57 bushels/acre of soybeans in 2019, which is attributable to glyphosate and other variables.[45] Sugar beet yield increased 30% since glyphosate-resistant sugar beets were introduced.[46] These yield increases support more livestock and poultry to feed a growing world and, also, are used to make other human food products.

/glyphosate-response-comments-usage-benefits-final.pdf.

[44] U.S. Dep't of Agric., ERR-162, Genetically Engineered Crops in the United States, 12 (Feb. 2014) ("[B]y protecting the plant from certain pests, [genetically engineered] crops can prevent yield losses to pests, allowing the plant to approach its yield potential."); *supra* note 38 at 32.

[45] U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Quick Stats for Nebraska Corn, Grain & Soybeans-Yield, Measured in Bushels/Acre (1995)*, https://quickstats.nass.usda.gov/results/A3BAB75C-BEFF-3665-8DEF-8D0CBB7674D4 (last visited Dec. 20, 2019); U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Quick Stats for Nebraska Corn, Grain & Soybeans-Yield, Measured in Bushels/Acre (2019)*, https://quickstats.nass.usda.gov/results/A490EBB2-26AD-383A-87F2-0944B690543B (last visited Dec. 20, 2019).

[46] *Supra* note 43 at 7.

Prior to glyphosate-resistant crops, glyphosate could not be directly sprayed onto growing crops because it would not only kill the weeds, but the crops.[47] Direct spraying of glyphosate onto glyphosate-resistant crops enabled farmers to better control weeds in an economical and environmentally-friendly way.[48] Farmers using this method saved money and time because glyphosate could be applied to control "essentially all weeds—300 weed species—at a wide range of growth stages with no recropping restrictions."[49] When the patent for glyphosate expired, the price fell as generics came on the market thereby resulting in more savings for farmers.[50]

Moreover, farmers saved on fuel and equipment. Because glyphosate covers a broad spectrum of weeds, farmers were able to

[47] *Supra* note 40 at 1324.

[48] For example, farmers are able to use spraying equipment to apply glyphosate after the crop has emerged from the soil instead of only being able to spray prior to crop emergence or having to use row cultivators after crop emergence.

[49] *Supra* note 40 at 1325.

[50] *Supra* note 38 at 38; *supra* note 37 at 1.

control weeds with "a single timely application …."[51] As such, the use of glyphosate may save passes over a field,[52] but even if:

> [Glyphosate-resistant] crops do not necessarily save passes over a field, … they do substitute herbicide applications for more expensive and more fuel intensive methods of weed management, such as intensive tillage practices or the use of herbicides that require physical incorporation into the soil. Also, with potentially fewer passes over the field, tractor and spraying equipment lasts longer, and this results in savings in machinery and equipment costs over the long term.[53]

These cost-savings are, in turn, passed down to other consumers and users. For example, "[l]ivestock producers constitute a large percentage of corn and soybean buyers and therefore are major beneficiaries of any downward pressure on crop price due to adoption of [genetically-engineered] crops."[54] If farmers have cost-savings, then those cost-savings are passed on to livestock producers and consumers.

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[51] Nat'l Research Council, The Impact of Genetically Engineered Crops on Farm Sustainability in the United States, 32 (The National Academies Press, 2010).

[52] Passes over a field refers to the number of times a farmer uses machinery—whether spraying or tilling—to accomplish a task. For example, spraying machinery may cover more ground than cultivators (spray booms versus cultivator wings), which means fewer passes over a field and less soil compaction or a farmer may have to be in the field fewer times to manage weeds.

[53] *Supra* note 51 at 151-52.

[54] *Supra* note 51 at 11, 166.

This is particularly important because, on average, Americans spend 12.9% of their household expenditures on food.[55]

The use of glyphosate-resistant crops has also benefited the environment. Glyphosate-resistant crops "have had fewer adverse effects on the environment than non-[glyphosate-resistant] crops produced conventionally."[56] By being able to spray glyphosate directly on glyphosate-resistant crops, farmers are able to eliminate the use of row cultivators to control weeds during the growing season and reduce the use of intensive cultivation practices after harvest or before planting.[57] Rather, farmers can engage in conservation tillage:

> Conservation tillage maintains a soil cover with crop residues, which has many positive environmental benefits, including reduced soil erosion and water pollution from nutrient and sediment run-off, protection from wind erosion and improved habitat for birds, mammals and microorganisms, as well as less consumption of fossil fuels and lower carbon dioxide emissions.[58]

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[55] *Supra* note 6.

[56] *Supra* note 51 at 3.

[57] Supra note 51 at 64 ("[T]he use of glyphosate allowed weeds to be controlled after crop emergence without the need for tillage to disrupt weed development before or after planting."). If a farmer could not directly spray crops after emergence, then row cultivators would be used to break up the soil between the rows of crops thereby uprooting weeds.

[58] *Supra* note 40 at 1326.

One form of conservation tillage is no-till, where "the soil and surface residue from the previously harvested crop are left undisturbed as the next crop is seeded directly into the soil without tillage."[59] The crop residue leftover, by conservation tilling, "builds organic matter, and there is less soil compaction because [herbicide-resistant] crop growers make fewer passes through the field with tractors than non-[herbicide-resistant] crop growers."[60] Conservation tillage "reduces soil loss from erosion, increases water filtration, and can improve soil quality and moisture retention …."[61] By increasing water filtration, conservation tillage reduces the amount of sediment and chemicals that runoff into surface waters.[62] Conservation tillage is used on 70% of soybean acres and 65% of corn acres.[63] Glyphosate and glyphosate-resistant crops have helped increase the use of conservation tillage, as well as crop production.[64]

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[59] *Supra* note 51 at 63.
[60] *Supra* note 40 at 1326.
[61] *Supra* note 51 at 68.
[62] *Supra* note 51 at 69.
[63] *Supra* note 38 at VI.
[64] *Supra* note 40 at 1326.

An added benefit of less tilling is using less fuel resulting in fewer emissions.[65] For example, moldboard plowing may use 5.29 gallons per acre of fuel whereas no-till practices may use 1.40 gallons per acre of fuel.[66] On a 120-acre field, moldboard plowing may use 635 gallons of fuel and no-till practices may use 168 gallons.

Glyphosate has other environmental benefits. Glyphosate is "more environmentally benign than the herbicides that it has replaced …."[67] It has "very low toxicity to mammals, birds, and fish" because "they do not have a shikimate pathway for protein synthesis …."[68] Glyphosate also "has low soil and water contamination potential because it binds readily to soil particles and has a relatively short half-life in soil …."[69]

Glyphosate is an important tool as part of an integrated and diverse weed management system.[70] Even with the emergence of

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[65] *Id.*

[66] *Id.*; *see also supra* note 51 at 151. A moldboard plow is a piece of equipment with curved metal plates pulled by a tractor to turn over the soil.

[67] *Supra* note 51 at 62.

[68] *Supra* note 51 at 29, 62.

[69] *Supra* note 51 at 29 & 70.

[70] *Supra* note 40 at 1328.

relatively few glyphosate-resistant weeds, glyphosate-resistant crops will be a mainstay because "[w]eeds that have evolved resistance to glyphosate have not eliminated the ability of glyphosate to control other weeds."[71] Because of its effectiveness on a broad spectrum of weeds, glyphosate will continue to be an herbicide that is part of a weed management system where resistance can be slowed or removed for the remaining 200+ weeds that glyphosate covers.[72] It is also cheaper and environmentally safer. Glyphosate will remain an important and effective weed management tool for farmers in the *amici* States.

Glyphosate has a beneficial impact on farmers, the economy, the environment, and the way of life in the *amici* States. If glyphosate were curtailed as a result of this case and the thousands of cases like it, there would be a palpable and adverse effect on agriculture in the *amici* States and abroad.

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[71] *Supra* note 40 at 1329.

[72] *Supra* note 44 at 32; Univ. of Nebraska-Lincoln, Inst. of Agric. & Nat. Res., *Multiple Herbicide Resistant Weeds and Challenges Ahead*, https://cropwatch.unl.edu/multiple-herbicide-resistant-weeds-and-challenges-ahead#:~:targetText=By%202014%2C%2029%20weed%20species,species%20in%20the%20United%20States (last visited Dec. 20, 2019) (providing there were 15 weed species resistant to glyphosate in the United States in 2014).

C. The District Court's Erroneous Evidentiary Decisions Threaten To Curtail The Important Use Of Glyphosate In Agriculture.

The importance of glyphosate in agriculture is undeniable. The beneficial impacts of glyphosate not only accrue to farmers and the *amici* States, but to the country and the world as a whole. The shelf life of glyphosate, however, may be limited if the district court's decisions to open the gate to unreliable and misleading expert testimony on the carcinogenicity of glyphosate on humans is left standing. As demonstrated below, the curtailment of glyphosate from agriculture will have real impacts not only to farmers and agriculture in the *amici* States, but the ripple effects of these impacts will be felt by every person.

Glyphosate is the most widely used herbicide in the country and the *amici* States. Because of its broad applicability, effectiveness, price, and environmental benefits, it is the herbicide of choice for most farmers in the United States. In 2018, farmers used some form of glyphosate on the vast majority of the areas planted with corn and soybeans.[73]

[73] *E.g.*, *supra* note 42.

Many herbicide-resistant crops, like corn and soybeans, are engineered to be resistant to only glyphosate.[74] Without glyphosate as a weed management tool, farmers in the *amici* States will have to resort to another herbicide or more likely a mixture of herbicides. These herbicides may be less environmentally-friendly and less effective on a broad spectrum of weeds, meaning farmers may need to use more herbicides to fill the gap left by glyphosate or make additional passes in the field. These other herbicides may also be more expensive and more difficult to use than glyphosate. This is because choosing "[glyphosate] often means reducing the use of less effective, more costly, and possibly more toxic herbicides although exceptions occur …. That substitution effect can produce cost savings as well as reductions in environmental and human health risks associated with chemical applications …."[75]

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[74] *Supra* note 51 at 29; *but see supra* note 38 at 33 ("Recently, new varieties of [genetically engineered] seeds that are tolerant of the herbicidal active ingredients dicamba and 2,4-D have been commercialized. It remains to be seen how the introduction of these technologies will affect the herbicide use and weed control decisions of U.S. farmers.").

[75] *Supra* note 51 at 149; *see also, supra* note 44 at 25 ("[G]lyphosate is significantly less toxic and less persistent than traditional herbicides …."); U.S. Dep't of Agric., AER-801, Adoption of Bioengineered Crops, 28 (May 2002) ("The herbicides that glyphosate replaces are 3.4 to 16.8 times more toxic" and "glyphosate has a half-life in the environment of

Additionally, farmers will have to change up their weed management program, which may take additional time and cost additional money.

The change to other herbicides may not only impact the environment, but also the economy. Farmers would likely need to spend more on herbicides for weed management, which in turn impacts downstream consumers of agricultural products, such as livestock and poultry producers, manufacturers, and supermarkets. In the alternative, if the market would not adjust to the increased costs of farmers' inputs, then the economies in the *amici* States—especially in the rural areas—may suffer.

Agriculture in this country, and the *amici* States, plays a prominent role in feeding the world and conserving the environment. "Agriculture must take advantage of any technology that provides more food to a hungry world by enabling better control of weeds and does not hurt the environment or human health."[76] Glyphosate is a jack of all trades in that regard—yields have increased since the introduction of glyphosate-resistant crops, the environment has benefitted, the

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47 days … compared with 60-90 days for the herbicides it commonly replaces.").

[76] *Supra* note 40 at 1330.

economy has benefited, and it is safer than other herbicides. All of these benefits are important to the *amici* States where agriculture is a valuable component of their identities.

Glyphosate is one of the most studied herbicides. It has repeatedly been found not likely to be carcinogenic to humans by the EPA, other regulatory bodies, and many scientific researchers. Tens of thousands of farmers have been using glyphosate as their herbicide of choice for over twenty years and maybe longer. Farmers in the *amici* States should not have to worry that glyphosate will disappear because the district court and the jury in this case bought into junk science. The district court's erroneous evidentiary decisions threaten the continued vitality of agriculture in the *amici* States. This Court should reverse the district court's judgment and exclude Hardeman's expert testimony on general and specific causation.

CONCLUSION

The district court's judgment should be reversed.

Dated: December 20, 2019.

Respectfully submitted,

STATE OF NEBRASKA, *Amicus Curiae*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 19-16636

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Monsanto Company,
Defendant/Appellant,

v.

Edwin Hardeman,
Plaintiff/Appellee.

Appeal from the United States District Court
for the Northern District of California
Nos. 3:16-cv-00525 (Hon. Vince Chhabria)

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF MONSANTO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Regulations

Other Authorities

INTRODUCTION

The district court in this case erred. When regulating pesticides under the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), EPA has long declared, "The label is the law."[1] For "[i]t is a violation of Federal law to use [a pesticide] in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). *See also* 40 C.F.R. § 156.10(i)(2)(ii). Every time EPA reviews and approves the label for a registered pesticide, it is making federal law. EPA's decisions must also run a gauntlet of judicial review. And the outcome of that administrative law and judicial-review process then applies to a pesticide's users. It also applies to a pesticide's manufacturer and sellers. It is unlawful for manufacturers and sellers to make claims on their labels that differ from what EPA approves. 7 U.S.C. § 136j(a)(1)(B).

States can generally restrict the sale or use of pesticides. But they cannot "impose or continue in effect any requirements ***for labeling*** or packaging ***in addition to or different from*** those required under this subchapter." 7 U.S.C. § 136v(a), (b) (emphasis added). Through its application of state common law, Plaintiff did exactly that. He claimed that Monsanto failed a legal duty to make additional statements on the label about alleged cancer risks associated with Monsanto's glyphosate

[1] *See, e.g.*, *EPA, Pesticide Registration Manual* (last updated April 2017), *available at* https://www.epa.gov/pesticide-registration/pesticide-registration-manual.

pesticide—cancer risks that EPA has for decades concluded science does not support.

EPA reviewed and approved Monsanto's glyphosate pesticide label. That approved label was the law tailored to Monsanto's product. Yet Plaintiff asserted safety labeling requirements exist under California law in addition to and different from that required, reviewed, and approved by EPA. Plaintiff is wrong and his lawyers sailed directly into preempted territory in how they opted to try this case.

INTEREST OF THE UNITED STATES

The United States, through the Environmental Protection Agency (EPA), has responsibility for implementing and enforcing the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. FIFRA generally requires that EPA must register a pesticide and approve its label before that pesticide may be distributed, sold, or used in any State. 7 U.S.C. § 136a. That label, once reviewed and approved by EPA, is controlling. States retain the power to restrict the sale, or use of pesticides within their borders, but they cannot "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(a), (b).

Plaintiff here sued the manufacturer of the pesticide Roundup®. This pesticide contains an active ingredient called glyphosate, which Plaintiff alleges

causes cancer. Plaintiff alleged state law causes of action relating to the manufacturer's failure of the common law legal duty to warn of the alleged risk.

Roundup is registered under FIFRA and its EPA-approved label does not contain a cancer warning. The United States has a strong interest in preserving Congress's express delineation of federal versus state authority, which ensures that the federal government can establish and maintain nationally uniform requirements for the labeling and packaging of pesticides.

The United States files this brief as of right pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE CASE

A. FIFRA

Congress created FIFRA through a series of enactments to regulate the labeling, sale, and use of pesticides, including herbicides. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 601 (1991). As originally enacted in 1947, *see* ch. 125, 61 Stat. 163, FIFRA "was primarily a licensing and labeling statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)). In 1972, Congress "significantly strengthened FIFRA's registration and labeling standards" in response to "environmental and safety concerns." *Id.*; *see also* Federal Environmental Pesticide Control Act of 1972 (1972 Amendments), Pub. L. No. 92-516, 86 Stat. 973. The 1972 Amendments effectively "transformed FIFRA

from a labeling law into a comprehensive regulatory statute." *Mortier*, 501 U.S. at 601 (quoting *Ruckelshaus*, 467 U.S. at 991). Congress has continued to amend FIFRA in response to experience gained in regulating pesticides. *See, e.g.*, Federal Pesticide Act of 1978 (1978 Amendments), Pub. L. No. 95-396, 92 Stat. 819; Food Quality Protection Act of 1996 (1996 Amendments), Pub. L. No. 104-170, Tit. II, 110 Stat. 1489.

Section 136a(c)(5) of FIFRA provides that EPA "shall register a pesticide" if the agency determines, in light of any restrictions placed on the pesticide's use, that:

> (A) its composition is such as to warrant the proposed claims for it;
>
> (B) its labeling and other material required to be submitted comply with the requirements of this subchapter;
>
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
>
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(5). EPA has promulgated FIFRA regulations establishing the registration process. *See* 40 C.F.R. § 152 et seq. As part of that process, EPA must and does review and approve of the statements manufacturers propose to make on a label. *See* 40 §§ C.F.R 152.40-152.55. If EPA has reason to believe a pesticide product violates FIFRA's provisions, EPA may issue "stop sale, use, or removal" orders, 7 U.S.C. § 136k(a), the offending products may be seized and condemned, 7 U.S.C. § 136k(b), and the pesticide manufacturer may be subject to civil and

criminal penalties, 7 U.S.C. § 136l. *See* 7 U.S.C. 136j (identifying "[u]nlawful acts").

EPA is required to review each pesticide registration every fifteen years to ensure that each registration continues to satisfy FIFRA's standards. 40 C.F.R. § 155.40(a). EPA also must review and approve any significant change to the labeling or packaging of a FIFRA-registered product. *See* 7 U.S.C. § 136a(c); 40 C.F.R. § 152.44(a).

FIFRA establishes a program for federal-state cooperation in regulating pesticides. *See Mortier*, 501 U.S. at 601-602. Section 136v, captioned "Authority of States," sets forth key principles of that relationship. *See* 7 U.S.C. § 136v. Section 136v(a) recognizes that, as a general matter, States retain their historic authority to regulate pesticide sale or use, provided that a State does not permit a sale or use that FIFRA, or EPA's implementing regulations, prohibit:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. § 136v(a).

Nevertheless, to ensure a uniform nationwide regulation of pesticide labeling, Section 136v(b) forbids a State from imposing any additional or different requirements on pesticide labeling or packaging than those imposed by FIFRA:

> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(b). Sections 136v(c)(1) through (c)(4) set out additional limitations on state-issued registrations. 7 U.S.C. § 136v(c)(2)-(4). In short, Section 136v provides that a State may prohibit the sale or use of any pesticide within its borders. Under specified conditions, a State may also allow a pesticide to be used within its borders for purposes other than those provided in the federal registration.

FIFRA defines the term "label" as "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." *Id.* § 136(p)(1). FIFRA defines "labeling" more broadly as:

> [A]ll labels ***and all other written, printed, or graphic matter***: (A) ***accompanying the pesticide or device at any time***; ***or*** (B) to which reference is made on the label or ***in literature accompanying the pesticide*** or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, and the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

Id. § 136(p)(2) (emphasis added).

FIFRA prohibits the sale and distribution of misbranded, unregistered, or adulterated pesticides and the use of any registered pesticide in a manner inconsistent

with its labeling. 7 U.S.C. § 136j(a)(1). One way a pesticide may be misbranded is if its label bears a statement that "is false or misleading." 7 U.S.C. § 136(q)(1)(A).

B. California's Proposition 65

Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.5–25249.14, known as Proposition 65, the Governor of California is required to publish a list of chemicals said to be known to the State to cause cancer. The contents are determined by certain identified entities, including EPA and the International Agency for Research on Cancer. Proposition 65 also prohibits any person in the course of doing business from knowingly and intentionally exposing anyone to the listed chemicals without a prior "clear and reasonable" warning. Cal. Health & Safety Code § 25249.6. This means that the warning must: (1) clearly say that the chemical involved is known to the State of California to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. 27 Cal. Code Regs. § 25601. California recognizes several ways to provide the mandated warning. Cal. Code Regs. § 25602.

C. History of Glyphosate Review and California's Glyphosate Listing[2]

EPA first reviewed the potential carcinogenic effects of glyphosate in 1985.[3] The reviewing panel concluded that glyphosate, was "possibly carcinogenic to humans," though this conclusion was subsequently amended to a lower risk category after the original data was reassessed. *Id.* at 1. In 1991, EPA reviewed additional glyphosate studies and concluded that the substance should be classified as having "non-carcinogenicity for humans." This designation supported EPA's re-registration of glyphosate in 1993.[4] EPA relied on this 1991 review in a series of glyphosate tolerance rulemakings occurring from 1997 to 2008. *See i.e.*, 62 Fed. Reg. 17,723 (1997); 67 Fed. Reg. 60,936 (2002); 69 Fed. Reg. 65,083 (2004).

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[2] In recounting the history of EPA's glyphosate review the United States cites to government reports and records. This Court may take judicial notice of such reports and records. *See Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (recognizing that government records and reports are generally appropriate for judicial notice); Fed. R. Evid. 201(b)(2) (The court may judicially notice a fact that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.").

[3] *See* EPA Office of Pesticides & Toxic Substances, "Second Peer Review of Glyphosate," at 3 (Oct. 30, 1991), available at https://archive.epa.gov/pesticides/chemicalsearch/chemical/foia/web/pdf/103601/417300-1991-10-30a.pdf.

[4] EPA Office of Pesticides and Toxic Substances, "Reregistration Eligibility Decision Glyphosate," (September 1993), available at https://www3.epa.gov/pesticides/chem_search/reg_actions/reregistration/red_PC-417300_1-Sep-93.pdf.

EPA revised its carcinogen risk assessment guidelines in 2005. The lowest risk category under the 2005 guidelines is "not likely to be carcinogenic to humans."[5] In 2015, during the last Administration, EPA's Cancer Assessment Review Committee reevaluated available glyphosate data, and classified glyphosate as "not likely to be carcinogenic to humans."[6] On December 12, 2017, EPA's Office of Pesticide Programs issued a paper entitled "Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential."[7] EPA undertook this evaluation as part of its 15-year registration review. *Id.* at 12. The 2017 evaluation includes review of existing studies that registrants had not previously submitted to the Agency, as well as a comprehensive literature review. *Id.* at 20-22. In 2017, EPA concluded that "the strongest support" was for a conclusion that glyphosate is "not likely to be carcinogenic in humans." *Id.* at 143. This 2017 paper is part of EPA's glyphosate registration review process—a process that remains ongoing.

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[5] EPA Risk Assessment Forum, "Guidelines for Carcinogen Risk Assessment," at 2-57 (March 2005), available at https://www.epa.gov/risk/guidelines-carcinogen-risk-assessment.

[6] EPA Office of Chemical Safety & Pollution Prevention, "Glyphosate: Report of the Cancer Assessment Review Committee," at 10 (October 1, 2015), available at https://www.biologicaldiversity.org/campaigns/pesticides_reduction/pdfs/EPA-HQ-OPP-2009-0361-0057.pdf.

[7] EPA Office of Pesticide Programs, "Revised Glyphosate Issue Paper: Evaluation of Carcinogenic Potential," (Dec. 12, 2017), available at https://cfpub.epa.gov/si/si_public_record_Report.cfm?Lab=OPP&dirEntryId=337935.

On July 7, 2017, California listed glyphosate as a substance regulated under Proposition 65, based on the International Agency for Research on Cancer's classification of the pesticide as "probably carcinogenic to humans." Because this listing triggered Proposition 65's warning requirements, many manufacturers that had been registered to use glyphosate reached out to EPA for guidance. Some specifically sought EPA's approval to amend their product labels to satisfy Proposition 65. EPA did approve a limited number of applications allowing the addition of a Proposition 65 glyphosate cancer warning to pesticide labels when requested. EPA did not, however, consider these statements to be "Human Hazard and Precautionary Statements" as administered in 40 C.F.R. § 152.156 Subpart D (156.60 *et seq.*). Because the statement was not a FIFRA required statement, and because it was framed as a statement about California's assessment, it did not receive the same level or review as other parts of the label. These label-change approvals, however, were erroneous because the proposed edits warned of a cancer risk that, according to EPA's assessment, does not exist.[8]

As a result, such a warning instead constituted prohibited misbranding. *See* 7 U.S.C. § 136(q)(1)(A) (defining "misbranded" to include representations that are "false or misleading in any particular"); § 136j(a)(1)(E) (establishing that it is illegal to sell a misbranded pesticide). *See generally* 40 C.F.R. § 152.112(f) (allowing EPA

[8] *See* n.6, *supra*.

approval of an application under FIFRA Section 3(c)(5), 7 U.S.C. § 136a(c)(5), only where "[t]he Agency has determined that the product is not misbranded").

In an August 7, 2019 letter, EPA informed all glyphosate registrants that EPA had concluded glyphosate is "not likely to be carcinogenic to humans."[9] EPA then stated that products bearing a Proposition 65 warning statement due to the presence of glyphosate are misbranded under FIFRA because such a statement is "false and misleading." *See* EPA August 7 Letter at 1. In support of the representation that glyphosate is "not likely to be carcinogenic," EPA cited to its 2017 glyphosate evaluation. *Id.*

D. Facts and District Court Proceedings

Plaintiff, Edwin Hardeman, who regularly used Roundup for many years beginning in the 1980's, was diagnosed with cancer in 2015. ER2294.[10] In 2016, Mr. Hardeman filed a complaint against Monsanto seeking compensatory, economic, and punitive damages. Mr. Hardeman brought common law claims based on Monsanto's alleged negligent and wrongful conduct in connection with the design, development, manufacture, testing, packaging, promoting, marketing,

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[9] EPA Office of Chemical Safety & Pollution Prevention, Letter from Michael L. Goodis, Director, Registration Division to registrants of glyphosate (Aug. 7, 2019), available at https://www.epa.gov/sites/production/files/2019-08/documents/glyphosate_registrant_letter_-_8-7-19_-_signed.pdf (EPA August 7 Letter).

[10] ER refers to the Excerpts of Record filed with Monsanto's Opening Brief. SER refers to the Supplemental Excerpts of Record filed with this brief.

advertising, distribution, labeling, and sale of Roundup. ER2280; ER2294. Plaintiff filed claims for (1) negligence; (2) design defect; (3) failure to warn; and (4) breach of implied warranty. ER2296-2306.

Monsanto filed a motion to dismiss, arguing that the first three claims were essentially "warnings-based" claims that were expressly preempted by FIFRA. *See Hardeman v. Monsanto Co.*, 216 F. Supp. 3d 1037, 1037-39 (N.D. Cal. 2016), ER117. Monsanto argued that Plaintiff's state-law claims sought to compel a labeling requirement that differed from the label approved by EPA. *Id.* The District Court denied the motion to dismiss, holding that none of the claims were preempted. The district court reasoned that Plaintiff's claims were not preempted because they were consistent with FIFRA. Because FIFRA requires a pesticide label to contain warnings adequate to protect health and the environment, California law similarly requiring warnings of risks is permissible. *Id.*

The district court then conducted a 19-day jury trial. Plaintiff dropped his implied warranty claim prior to trial and tried only his negligence, design defect, and failure to warn claims. During the course of trial, the Court held that Plaintiff's design defect claim relied solely on a consumer expectations test. *See* SER001. This had the effect of converting the design claim to a "warnings-based" claim. *Id.* As a result, all three claims that went to trial were based on a failure to warn theory.

Phase I of the trial concluded with the jury finding that Plaintiff had proved that his exposure to Roundup was a substantial factor in causing his cancer. Phase II concluded with the jury finding that Plaintiff proved "that Roundup's design was defective"; "that Roundup lacked sufficient warnings of the risk of [cancer]," and that "Monsanto was negligent by not using reasonable care to warn about Roundup's [cancer] risk." ER1680-1681. The jury awarded $5,267,634.10 in compensatory damages and $75,000,000 in punitive damages. *Id.* The Court subsequently reduced the punitive damages award to $20,000,000. ER10.

SUMMARY OF ARGUMENT

FIFRA prohibits States from imposing "any requirements" for pesticide labeling that are "in addition to or different from" those required under FIFRA. 7 U.S.C. § 136v(b). Federal law can preempt not only state statutes and regulations, but state common law claims based on duties sounding in tort. The plain terms of FIFRA's prohibition expressly preempt state pesticide labeling requirements, regardless of whether those requirements are expressed through positive enactments or common-law duties.

Under FIFRA, the label is the law. EPA approved the label for the pesticide/herbicide at issue here, Roundup, through a registration process that did not require a cancer warning. In fact, EPA has never required a labeling warning of a cancer risk posed by Roundup, and such a warning would be inconsistent with the

agency's scientific assessments of the carcinogenic potential of the product. Mr. Hardeman nevertheless sought damages under California common law, alleging that Monsanto had failed to adequately warn consumers of cancer risks posed by the active ingredient in Roundup. FIFRA therefore preempts Mr. Hardeman's claims to the extent that they are based on the lack of a warning on Roundup's labeling.

ARGUMENT

FIFRA preempts state tort claims that would subject pesticide manufacturers to inconsistent and additional product labeling requirements.

A. Section 136v(b) preempts State common-law duties that would impose requirements for labeling "in addition to or different from" those required under FIFRA.

Section 136v(b) broadly and expressly prohibits "any requirements for labeling" that are "in addition to or different from" those that FIFRA imposes. 7 U.S.C. 136v(b). Section 136v(b)'s plain text does not distinguish among state labeling requirements based on their origin in a state legislature's enactment of statutes, a state agency's promulgation of rules, or a state court's articulation of common-law standards of care. *See Bates v. Dow Agrosciences LLC*, 544 U.S., 431, 443 (2005). And thus a court's articulation of common-law standards of care can be preempted just like a legislative or regulatory labeling requirement. *Id.*

Mr. Hardeman's failure to warn claims fall within the express preemptive scope of FIFRA. This scope is defined through a two-part test. *See id.* at 444. ***First***,

the state law "must be a requirement ***'for labeling or packaging'***; rules governing the design of a product, for example, are not preempted." *Id.* (quoting 7 U.S.C. § 136v(b)). ***Second***, the state law "must impose a labeling or packaging requirement that is '***in addition to or different from*** those required under [FIFRA].'" *Id.* (quoting 7 U.S.C. § 136v(b)). Thus, although FIFRA does not prevent a State from making the violation of federal labeling requirements a state offense and imposing separate sanctions, States cannot impose distinct labeling requirements. *See id.* at 442. Mr. Hardeman's nevertheless based his failure to warn claims on the existence of just such preempted requirements.

First, Monsanto notes that Mr. Hardeman argued to the jury throughout the District Court trial that Monsanto's common law duty included labeling obligations. Monsanto Opening Br. at 25-26. This representation comports with the United States' review of the closing arguments.[11] During his closing statement, counsel declared:

> And one of those requests for admission is that Monsanto says - - they admit, they have never warned that Roundup causes cancer. It's not on the label, Ladies and Gentlemen.

SER28. During his recitation of the scientific evidence counsel followed with:

> Let's go to the animal [studies]. We heard - - remember Dr. Portier testified in Phase One about the mice and rats? The first one, *Knezevich*

[11] The United States has not reviewed all 21 volumes of the trial transcript but our spot review of the record has revealed nothing that would seem to undermine the basic parameters sketched above as to how this case was tried.

> *& Hogan*, 1983 - - this is before Mr. Hardeman ever started spraying Roundup - - when that study came out originally in 1983, if Monsanto had done the right thing and put a warning on the label, we wouldn't be here. We wouldn't be here. Instead, they didn't.

SER30. And finally, when discussing how Monsanto should react to those studies counsel said:

> What is Monsanto's response when they are told that it is - - it is a Category C oncogene[12]? A responsible company would first say, should we take this off the market? Or should we test it? Or should we put a warning on it that it is an oncogene? It is going to cause cancer. They don't do anything.

SER35.

Second, FIFRA defines "label" to include "written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." 7 U.S.C. § 136(p). This definition clearly includes the warnings that counsel referenced at trial. Indeed, in its closing argument, Mr. Hardeman's counsel did not advance any specific examples, ***other than a label warning***, to illustrate how Monsanto could have warned Mr. Hardeman of the cancer risk allegedly posed by Roundup. *See* SER28, 30, 35; https://iaspub.epa.gov/apex/pesticides/f?p=PPLS:1.

Third, even if Mr. Hardeman did raise an argument that Monsanto might have provided a warning someplace other than Roundup's labeling, that does not save Mr.

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[12] An "oncogene" is "a gene found in the chromosomes of tumor cells whose activation is associated with the initial and continuing conversion of normal cells into cancer cells." https://medical-dictionary.thefreedictionary.com/oncogene.

Hardeman's case from preemption. Where a claim relies, even in part, on a prohibited argument, this raises questions of whether the trial record was so infected that the case must be remanded for retrial. *See Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 733 (9th Cir. 1999) (remanding jury award of damages for tortious interference where two of the three statements Plaintiff relied upon could not violate the Lanham Act or state defamation standards as a matter of law, and damages based on the third statement could not be isolated in the record), *overruled on other ground by Lexmark, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Even if alternate, non-"label" or non-"labeling" warnings could satisfy Monsanto's common-law duties, remand and retrial is still appropriate. Plaintiff's label theory is inextricably intertwined with the evidence relied on by the jury to establish the elements of Plaintiff's claims.

Notably, Mr. Hardeman did not merely seek a label warning that is "different from" EPA's labeling requirements for glyphosate. He added a glyphosate cancer warning to Roundup that EPA rejects. Following California's Proposition 65 listing in 2017, certain companies that were registered to sell and distribute glyphosate sought EPA's approval to amend the labels of their products to include a Proposition 65 cancer warning. Though there were implementation mistakes at an earlier stage, EPA ultimately rejected those warnings. On August 7, 2019, EPA sent a letter to all glyphosate registrants reiterating its disagreement with the International Agency for

Research on Cancer's assessment. A 2017 evaluation of glyphosate by EPA scientists continues to conclude it is "not likely to be carcinogenic to humans." *See* August 7, 2019 letter.

In the 2017 evaluation, EPA specifically considered and rejected the International Agency for Research on Cancer's assessment.[13] Thus, in its August 7 letter, EPA warned that any pesticide products with labels ***bearing*** the Proposition 65 warning due to the presence of glyphosate ***would be deemed misbranded*** pursuant to section 2(q)(1)(A) of FIFRA. The Proposition 65 warning therefore makes a product misbranded because it is misleading.

Mr. Hardeman's alleged legal duty to warn nevertheless required a glyphosate cancer warning on a Roundup label. That not only required a different label (a requirement preempted by FIFRA)—it would almost certainly compel Monsanto to produce a misleading label warning very much at odds with EPA's scientific assessment of the carcinogenic potential of glyphosate, similar to the Proposition 65 warning already rejected by EPA.[14] There is no dispute—nor could there be any

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[13] *See* n.7, *supra*; 2017 study at 13, 23, 32-33, 63-64, and 146.

[14] Distinct from express preemption, implied preemption occurs where "it is impossible for a private party to comply with both state and federal law." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372–373 (2000) (internal quotation marks omitted). Implied preemption would also bar Mr. Hardeman's tort theory, to the extent his theory is based on a labeling requirement. *See Wyeth v. Levine*, 555 U.S. 555, 571 (2009) (discussing implied preemption standard). We acknowledge, however, that even in the face of EPA's consistent historic assessment of the cancer

dispute—that FIFRA does not require a warning on Roundup's label that glyphosate causes cancer. To the extent that Mr. Hardeman's theory at trial was tied to Monsanto's failure to include a mandatory state-law-based glyphosate cancer warning on Roundup labels, such a warning is different from the requirements that FIFRA imposed for the labeling and packaging of this product and therefore a legal nullity.

B. The District Court's analysis is erroneous.

In denying Monsanto's motion to dismiss, the District Court held that a state-required glyphosate cancer warning was essentially no different from FIFRA's requirement that label warnings are "adequate to protect health and the environment." *Hardeman v. Monsanto Co.*, 216 F.Supp.3d 1037, 1038 (N.D. Cal.). The District Court compared this general FIFRA standard to California's general strict liability and negligence standards that require a manufacturer to warn of known risks. *Id.* This comparison misses the thrust and full import of FIFRA's preemption provision. It also ignored the fact that EPA had many times addressed the carcinogenic potential of glyphosate ***in particular*** and determined that glyphosate is not likely to be carcinogenic to humans.

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risk posed by glyphosate, EPA mistakenly approved glyphosate cancer warnings on at least two prior occasions. This Court does not need to reach implied preemption, however, because the claims as to labeling and packaging are expressly preempted.

First, in order to avoid federal preemption under FIFRA, it is not enough for a state law merely to be advancing ***similar*** policies or interests. 7 U.S.C. § 136v. Instead, where California general common-law standards impose any inconsistent labeling or packaging requirement, the California common-law claims are be preempted, ***even if the standard supporting those claims is phrased similarly to the standard imposed by Congress through FIFRA***.

Moreover, the potential that glyphosate is carcinogenic to humans is not something that EPA has ignored. EPA has studied and expressly addressed the carcinogenic potential of glyphosate a number of times over the past three decades, *see supra* Statement of the Case § C. And EPA continues to assess it. *See* Glyphosate Proposed Interim Registration Review Decision; Notice of Availability, 84 Fed. Reg. 19782 (May 6, 2019). Through FIFRA, Congress determined that EPA should make these scientific judgments for the nation as a whole. States may, of course, restrict or prohibit the sale or use of pesticides in the State if they disagree with EPA's assessment. But States are prohibited from second-guessing EPA's determination of what risks should be reflected on pesticide labeling. 7 U.S.C. § 136v(a), (b).

Second, the District Court also suggested that EPA's actions under FIFRA were insufficiently formal to trigger preemption. *Hardeman*, 216 F.Supp.3d at 1038-39. That is incorrect. The EPA approved label is a very formal affair that is

the foundation of any FIFRA preemption argument, and that label (and the associated registration process) establishes "requirements" sufficient to support a preemption analysis. The process of registering a pesticide is a scientific, legal, and administrative procedure through which EPA examines the ingredients of the pesticide, where it will be used, the amount, frequency, and timing of its use and storage-related issues. *See* 40 C.F.R. § 152.40-152.55 (Registration Procedures). This process includes evaluation of human health risks, including review of aggregated risks through food, water and residential exposure as well as occupational risks. *See* 40 C.F.R. § 152.112; Pesticide Registration Evaluation Process available at https://www.epa.gov/pesticide-registration/about-pesticide-registration#label; *see also* EPA Pesticide Registration Manual available at https://www.epa.gov/pesticide-registration/pesticide-registration-manual.

Every pesticide product label, including the Roundup label, is reviewed, and must be approved, as part of this process. And EPA seeks to ensure that labels provide clear directions for effective product performance while minimizing risk to human health and the environment. Once a product is registered, EPA posts the approved labels. *See* https://www.epa.gov/pesticide-labels/pesticide-product-label-system-ppls-more-information. Thereafter, "[t]he label is the law." *See, e.g., Introduction to EPA, Pesticide Registration Manual* (last updated April 2017), *available at* https://www.epa.gov/pesticide-registration/pesticide-registration-

manual. And the Supreme Court has recognized that such premarket agency approvals are sufficient to trigger preemption. *See generally Riegel v. Medtronic, Inc.*, 552 U.S. 320, 323 (2008) (holding that premarket approval of individual medical devices were "requirements" sufficient to trigger preemption under the Federal Food, Drug, and Cosmetic Act (FDCA).

Third, the District Court incorrectly stated that Mr. Hardeman's complaint was based on "Monsanto's alleged violation of FIFRA." *Hardeman*, 216 F.Supp.3d at 1038. This is incorrect, too. Mr. Hardeman alleged neither a FIFRA claim nor a claim under the Food, Drug, and Cosmetic Act.

Congress provides for such challenges to the EPA-approved tolerance levels and labels of any Roundup ingredient. For example, individuals may file a petition challenging a pesticide registration action in federal district court. 7 U.S.C. § 136n(a). The label approval is part of such a registration action. EPA must determine that the human dietary risk from pesticide residues in food is consistent with safety standards from the FDCA. *See* 7 U.S.C. 136(bb)(2). And the tolerance is the maximum residue of a pesticide that can legally be present in food or feed. 21 U.S.C. § 346a(a). At the conclusion of these processes, glyphosate labels could have been challenged through FIFRA's judicial review process. Individuals might also petition to request amendment of a tolerance level. *See* 21 U.S.C. § 346a(d); 40

C.F.R. § 180.7. But Mr. Hardeman did not allege either a FIFRA or an FDCA violation regarding glyphosate—neither before EPA nor the district court.

C. FIFRA's preemption of state-law labeling requirements is broad and no exception applies here that would allow Mr. Hardeman's claims to proceed.

With respect to registered product labels, the FIFRA preemption provision is sweeping. It preempts any state law that "would impose a labeling requirement inconsistent with those established by FIFRA." *Worm v. American Cyanimid Co.*, 970 F.2d 1301, 1308 (4th Cir. 1992). A state may impose different or additional ***remedies—or bar or restrict a pesticide use entirely***—but it may not impose different or additional labeling requirements. *Bates*, 544 U.S. at 448.

Despite this broad scope, the Supreme Court has recognized that the FIFRA preemption provision is not unlimited. It did not reach state-law design-defect claims where the particular claim "was not a 'requirement for labeling or packaging' for purposes of FIFRA and thus fell outside the class of claims covered by the express pre-emption provision at issue in that case." *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 491 (2013), citing *Bates*, 544 U.S. at 431, 443–444. But that is inapplicable here.

In *Bates*, a group of farmers brought claims under Texas law. They alleged that a pesticide had damaged their crop. On that issue, Congress's 1978 FIFRA amendment had allowed EPA to ***waive*** data requirements pertaining to efficacy and

so approve labels without examining efficacy claims. *Bates*, 544 U.S. at 440. *See also* 7 U.S.C. § 136a(c)(5). EPA invoked this authority, and announced it was waiving efficacy review. *See* 44 Fed. Reg. 27,932 (1979); 40 C.F.R. § 158.640(b) (2004).

When reaching its decision, the Court recognized that FIFRA did not preempt the state-law claims seeking an efficacy-based warning, in part, because EPA did not evaluate the efficacy of the product at issue. *Id.* at 450. So EPA had not—by its non-review of the pesticides' efficacy claims—established a legal standard for state law to conflict with. Here, by contrast, Mr. Hardeman seeks to apply state law to impose a human-health warning. And carcinogenicity is a risk that EPA indisputably ***does (and did)*** evaluate under FIFRA. *See supra* Statement of the Case § C. That is why the farmers' claims were not preempted. *Id.* at 447.

This distinction between efficacy-related label statements and health-related label statements is consistent with other Supreme Court decisions. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 497-498 (1996), the Court considered the reach of a similar preemption provision in part of the FDCA. The FDCA, too, provides that no State may establish any requirement relating to the safety or effectiveness of a medical device "which is different from, or in addition to" a requirement mandated by the FDCA. 21 U.S.C. § 360k(a). In *Lohr*, the Court concluded that "general federal regulations governing the labeling and manufacture of all medical devices"

under the FDCA did not necessarily preempt all state tort claims of general applicability. *Id.* at 497-98. But that state tort requirements would be preempted when inconsistent with the FDA's "'specific counterpart regulations or . . . other specific requirements applicable to a particular device'" and its safety. 518 U.S. at 497-498 (quoting 21 C.F.R. § 808.1(d)).

In another case, the Court applied that rule. It held that the FDCA preempted state claims when the "Federal Government ha[d] established requirements applicable to" the particular medical device in question. *Riegel*, 552 U.S. at 321. Thus, under both statutes, the Court has recognized that where the agency had not established specific standards on point, state law claims were not preempted. Nevertheless, in the sphere of regulation where an agency has acted, states cannot impose additional requirements.

As previously noted, EPA has authority over pesticide labels and packaging. *See* 7 U.S.C. §§ 136a, 136q. EPA is required to ensure that labels are not misbranded, and was required by Congress to protect the public from the dissemination of false or misleading information. *See* 7 U.S.C. § 136(q)(1)(A); 40 C.F.R. § 152.112(f). EPA may not approve a pesticide's introduction into commerce unless the Administrator finds that the pesticide "will not generally cause unreasonable adverse effects on the environment" when used in accordance with any EPA-imposed restrictions and "with widespread and commonly recognized

practice." 7 U.S.C. § 136a(c)(5)(D). "Unreasonable adverse effects on the environment" are defined to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id.* § 136(bb). And there is no exception to the bedrock requirement that EPA assess health impacts during the pesticide registration process—unlike EPA's ability to opt out of efficacy review.

In fact, forty-four versions of the label for the original formulation of Roundup have been accepted by EPA since 1991. EPA most recently approved the Roundup label in 2009.[15] In EPA's August 7, 2019 letter to glyphosate registrants, EPA clearly expressed its position that a strong glyphosate cancer warning on a pesticide label is misbranding.

Finally, legislative history reveals no Congressional intent to preserve tort actions related to labeling requirements that address the health effects of a product. To the contrary, the Committee Reports supporting Congress's 1972 overhaul of FIFRA contain statements expressing an intent to provide for broad preemption of state requirements respecting pesticide labels. The House Committee Reports states, with reference to Section 136v(b), that "the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and

[15] A list of approved labels is available by searching the "Product" field of EPA's Pesticide Product and Label System for "Roundup." *See* https://iaspub.epa.gov/apex/pesticides/f?p=PPLS:1.

packaging." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). The Senate Committee Report expresses a similar intent, stating "[Section 136v(b)] preempts any State labeling or packaging requirements differing from such requirements under the Act." S. Rep. No. 838, 92d Cong., 2d Sess. Pt. 1, at 30 (1972). Those statements suggest that Congress envisioned that all state labeling or packaging "requirements"—whatever the form—would be preempted.

CONCLUSION

For all of the foregoing reasons, Mr. Hardeman's claims of failure to warn in Monsanto labeling are preempted. The judgment of the district court should be reversed and this case should be either dismissed or, in the alternative, remanded.

Respectfully submitted,

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Date December 20, 2019

THE "ANY EXPOSURE" THEORY: AN UNSOUND BASIS FOR ASBESTOS CAUSATION AND EXPERT TESTIMONY

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Over the years asbestos litigation has morphed into a tort world all of its own.[1] Courts developed entire sets of rules in an attempt to manage efficiently their substantial asbestos dockets,[2] in the process dispensing with

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1. *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, BRIEFLY, June 2002, at 1, 4; Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 336-42 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 4-9 (2001).

2. *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 200 (3d Cir. 2004) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits."). The United States Supreme Court has described the litigation as a "crisis." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997). Through 2002, approximately 730,000 claims had been filed. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxiv (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf. "In August 2005, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases pending in state and federal courts." AM. ACAD. OF ACTUARIES' MASS TORTS SUBCOMM., OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 5 (2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf.

many standard venue, discovery, and trial consolidation requirements.[3] The changes almost universally favored plaintiffs and instead of affecting a reduction in congested dockets, the litigation became so malleable and lucrative that plaintiff attorneys have spent the last decade searching for the "next asbestos." Practitioners in this field have come to know these asbestos rules well, whereas newcomers are often astounded to discover that their tort law frame of reference means little in the alternative universe of asbestos litigation.

One of the most substantial departures from black letter tort law is the *any exposure* theory of causation, sometimes referred to as the *any fiber* theory.[4] In a nutshell, the *any exposure* theory contends that because asbestos disease is a cumulative, dose-response process, each and every exposure to asbestos during a person's lifetime, no matter how small or trivial, substantially contributes to the ultimate disease (e.g., asbestosis, lung cancer, or mesothelioma).[5] There is an important caveat, however, in that most proponents of this theory agree that *background* exposures to asbestos, even though they may contribute millions of fibers to an individual's lungs over a lifetime, do *not* contribute to the development of disease.[6] Only occupational or para-occupational (e.g., home remodeling or "shade tree" automotive brake repair) exposures count.[7] The theory allows plaintiffs' counsel to sue thousands of defendants every year whose "contribution" to disease is trivial and far below the type of doses actually known to cause disease, while at the same time excluding from causation another source of millions of fibers (i.e., background exposures).

In the last three years, more than a dozen courts in multiple jurisdictions have excluded or criticized *any exposure* causation testimony, either as unscientific under a *Daubert*[8]/*Frye*[9] analysis or as insufficient to support causation.[10] This pattern of decisions includes:

- the Texas Supreme Court in a mechanic/asbestosis case,

3. *See* Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 542-47 (2001); Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 256-58 (2000).

4. *See, e.g.*, *infra* notes 26, 30-31.

5. *See, e.g.*, *infra* note 50.

6. *See* Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 607-08 (N.D. Ohio 2004), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005).

7. *See, e.g.*, Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 773 (Tex. 2007), *reh'g denied* (Oct. 12, 2007).

8. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

9. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

10. *See, e.g.*, *infra* notes 11-19.

rejecting the testimony of Dr. Barry Castleman and another expert that mere proof of exposure is sufficient for causation;[11]

- a Texas appellate court in a mesothelioma case, rejecting the testimony of Dr. Samuel Hammar that any dry wall exposures above 0.1 fibers/cc year would be a substantial contributing factor;[12]
- the Texas Multi-District Litigation ("MDL") court, rejecting the testimony of Dr. Eugene Mark in a friction product case and other experts in an electrician/dry wall exposure case;[13]
- the Pennsylvania Supreme Court in a mesothelioma case against an auto parts company, rejecting the position espoused in affidavits by Drs. Richard Lemen, James Girard, and Arthur Frank;[14]
- an Ohio federal district court and the Sixth Circuit Court of Appeals in a gasket and packings case, rejecting the testimony of Drs. Arthur Frank and Yasunosuki Suzuki;[15]
- three Pennsylvania state trial courts, rejecting the *any exposure* testimony of Drs. John Maddox, Eugene Mark, William Longo, Jonathan Gelfand, and Arthur Frank in friction product cases and criticizing the theory's application in a pleural disease case;[16]
- a federal bankruptcy court in litigation involving asbestos in vermiculite insulation, rejecting Dr. Henry Anderson's *any exposure* approach;[17]
- a Mississippi appellate court, rejecting a medical monitoring class for persons allegedly exposed in a school building;[18] and
- two Washington State trial court decisions by different judges, rejecting the opinions of Drs. Samuel Hammar and Carl

11. *See Flores*, 232 S.W.3d at 774.

12. *See* Georgia-Pac. Corp. v. Stephens, 239 S.W.3d 304, 320-21 (Tex. App. 2007), *reh'g overruled* (Oct. 13, 2007), *review denied* (Feb. 22, 2008).

13. *See* Letter Ruling, *In re* Asbestos Litig., Cause No. 2004-03964 (Tex. Dist. Ct. Jan. 20, 2004); Letter Ruling, *In re* Asbestos, Cause No. 2004-3,964 (Tex. Dist. Ct. July 18, 2007).

14. *See* Gregg v. V-J. Auto Parts, Inc., 943 A.2d 216, 218, 223, 226-27 (Pa. 2007).

15. *See Bartel*, 316 F. Supp. 2d at 611.

16. *See In re* Toxic Substance Cases, No. A.D. 03-319, 2006 WL 2404008 at *7-8 (Pa. Ct. Com. Pl. Aug. 17, 2006); Basile v. Am. Honda Motor Co., No 11484 CD 2005 (Pa. Ct. Com. Pl. Feb. 22, 2007); *In re* Asbestos Litig., Certain Asbestos Friction Cases Involving Chrysler LLC, No. 0001 Control #084682 (Pa. Ct. Com. Pl. Sept. 24, 2008); Summers order v. Certainteed Corp., 886 A.2d 240, 244 (Pa. Super. Ct. 2005), *appeal granted*, 897 A.2d 460 (Pa. 2006).

17. *See In re* W.R. Grace & Co., 355 B.R. 462, 474, 478 (Bankr. D. Del. 2006), *leave to appeal denied*, No. 07-MC-0005 RLB, 01-1139, 2007 WL 1074094 (D. Del. Mar. 26, 2007).

18. *See* Brooks v. Stone Architecture, P.A., 934 So. 2d 350 (Miss. Ct. App. 2006).

Brodkin in heavy equipment mechanic cases.[19]

These are not insignificant courts—they include two state supreme courts, one federal appellate court, a federal bankruptcy court, and state appellate and trial courts in several jurisdictions.[20] In addition, the breadth of alleged exposures and diseases covered by these cases demonstrates that the *any exposure* theory is failing across the spectrum of asbestos cases, regardless of disease and type of exposure. Perhaps most remarkably, the experts whose testimony is being excluded are veterans in the litigation who have supported plaintiff cases for many years with little or no interference from the judiciary.[21] The rejection of these experts' causation testimony, while a significant departure from past practice, reflects the sound application of standard causation rules to asbestos testimony[22]—something that should have happened years ago and is finally gaining traction. These rulings also likely reflect a growing skepticism of many asbestos claims in the wake of findings of massive fraud in federal court silica litigation.[23]

This Article discusses the underpinnings of the *any exposure* causation theory and why recent courts that have examined the theory more carefully

19. *See* Anderson v. Asbestos Corp., No. 05-2-04551-5SEA, slip op. at 144-45 (Wash. King County Super. Ct. Oct. 31, 2006) (transcript of bench ruling) (Erlick, J.); Free v. Ametek, No. 07-2-04091-9-SEA (Wash. King County Super. Ct. Feb. 29, 2008) (Barnett, J.) (ruling on motion *in limine*).

20. *See supra* notes 11-19 and accompanying text.

21. *See infra* notes 50-53.

22. *See, e.g.*, *Flores*, 232 S.W.3d at 770 (discussing the "substantial factor" test in causation); David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 BROOK. L. REV. 51, 59 (2008) (stating that "[t]he recent, increasingly strict exposure cases . . . reflect a welcome realization by state courts that holding defendants liable for causing asbestos-related disease when their products were responsible for only *de minimis* exposure to asbestos, and other parties were responsible for far greater exposure, is not just, equitable, or consistent with the substantial factor requirements of the *Restatement (Second)* and *Lohrmann* [*v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986)]."); *cf.* Lee S. Siegel, Note, *As the Asbestos Crumbles: A Look at New Evidentiary Issues in Asbestos-Related Property Damage Litigations*, 20 HOFSTRA L. REV. 1139, 1146 (1992) ("There is no merit to the one fiber theory, and the myth is slowly being dispelled.").

23. *See In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005); Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513 (2007); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289 (2006); *see also* Editorial, *Screening for Corruption*, WALL ST. J., Dec. 2, 2005, at A10, *abstract available at* 2005 WLNR 19447615; Editorial, *Silicosis, Inc.*, WALL ST. J., Oct. 27, 2005, at A20, *abstract available at* 2005 WLNR 17413061; Editorial, *The Silicosis Sheriff*, WALL ST. J., July 14, 2005, at A10, *abstract available at* 2005 WLNR 11084626; David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, NAT'L L.J., Feb. 28, 2005, at 1; Roger Parloff, *Diagnosis for Dollars: A Court Battle Over Silicosis Shines a Harsh Light on Mass Medical Screeners–The Same People Whose Diagnoses Have Cost Asbestos Defendants Billions*, FORTUNE, June 13, 2005, at 96, *available at* 2005 WLNR 8694138; Jonathan D. Glater, *Companies Get Weapon in Injury Suits Many Silica-Damage Plaintiffs Also Filed Claims Over Asbestos*, N.Y. TIMES, Feb. 2, 2005, at C1, *available at* 2005 WLNR 1415209.

have decided to reject it. These decisions reflect a proper assessment of the *dose requirement* of toxicology.[24] On the other hand, courts that continue to allow *any exposure* testimony to proceed unchallenged run the risk of encouraging a flood of speculative or trivial claims at a time when the litigation environment for asbestos claims appears to be regaining some semblance of control.[25] Such an outcome would reflect poor science and even poorer public policy.

I. THE TOXICOLOGICAL REQUIREMENT OF DOSE AND ITS APPLICATION IN THE TOXIC TORT CONTEXT

The *any exposure* theory can only be understood against the backdrop of widely accepted tort and medical causation principles because the theory departs so dramatically from those principles. Ordinarily, under long-standing rules of tort law, courts should require asbestos plaintiffs to demonstrate that each defendant's product was either a "but-for" cause or a "substantial factor" in the cause of plaintiff's disease.[26] In the typical tort case, such a showing would require not only proof of exposure to the defendant's product, but also exposure to *enough of a dose* of the defendant's product to actually cause disease.[27] The concept of a necessary dose goes back to the sixteenth century, when the "father of toxicology," physician and philosopher Paracelsus, first articulated the principle that the dose makes the poison: "All substances are poisonous—there is none which is not; the dose differentiates a poison from a remedy."[28] Examples are

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24. *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 28 (2003) ("There is clearly some relationship between asbestos and diseases. The effects of exposure to asbestos on a particular individual, however, depend on the level of exposure and what type of asbestos one was exposed to and for how long.").

25. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477 (2006); James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, MEALEY'S TORT REFORM UPDATE, vol. 3:6, Jan. 18, 2006, at 23; Patti Waldmeir, *The Americas: Asbestos Litigation Declines in Face of US Legal Reforms*, FIN. TIMES, July 24, 2006, at 2, *available at* 2006 WLNR 12719566; Martha Neil, *Backing Away from the Abyss: Courts May Be Starting to Get a Grip on Asbestos Litigation*, A.B.A. J., Sept. 2006, at 26.

26. *See* RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965).

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . rather than in the so-called "philosophical sense," which includes every one of the great number of events without which any happening would not have occurred.

Id. at § 431cmt. a.

27. *See infra* notes 29-31 and accompanying text.

28. David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & POL'Y 5, 11 (2003) (emphasis omitted) (internal quotation marks omitted)

commonplace—alcohol, aspirin, sunlight, even basic substances we eat in food and vitamins like zinc are not harmful at low levels, but can cause harm at higher doses.[29]

This dose concept is widely recognized in both science and courts as the foundation of causation and the basis for many medical tort decisions.[30] Courts around the country, including at least five federal circuit courts, have recognized the necessity of proving an actual toxic dose in medical tort cases.[31] As one leading researcher recently wrote: "Dose is the single most

(quoting CASARETT AND DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS, Chs. 1, 4 (Curtis D. Klaassen ed., McGraw Hill 6th ed. 2001)).

29. A fundamental tenet of toxicology is that "the dose makes the poison." Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology*, *in* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 401, 403 (West Group 2d ed. 2000) (1994) (internal quotation marks omitted). Thus, courts routinely require plaintiffs to demonstrate not just some exposure, but "evidence from which the trier of fact could conclude that the plaintiff was exposed to levels of toxins sufficient to cause the harm complained of." Nelson v. Tenn. Gas Pipeline Co., No. 95-1112, 1998 WL 1297690, slip op. at *6 (W.D. Tenn. Aug. 31, 1998), *aff'd*, 243 F.3d 244 (6th Cir.), *cert. denied*, 534 U.S. 822 (2001) (citing Wintz v. Northrop Corp., 110 F.3d 508, 513 (7th Cir. 1997) (internal citation omitted)); *see also* Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1107 (8th Cir. 1996). This is as true for asbestos as for any other potentially toxic substance. *See Bartel*, 316 F. Supp. 2d at 611 (rejecting "one-fiber" asbestos theory as not supported by medical literature); *In re Toxic Substance Cases*, 2006 WL 2404008 at *7-8 (criticizing plaintiffs' experts for failing to assess the dose for mechanic exposure).

30. *See, e.g.*, McClain v. Metabolife Int'l, Inc., 401 F.3d 1233, 1241 (11th Cir. 2005) ("In toxic tort cases, '[s]cientific *knowledge of the harmful level of exposure* to a chemical, plus knowledge that [the] plaintiff was exposed to *such quantities*[,] are minimal facts necessary to sustain the plaintiff's burden . . . .'") (emphasis added) (quoting Allen v. Pa. Eng'g Corp., 102 F.3d 194, 199 (5th Cir. 1996)).

31. *See, e.g.*, *id.* (explaining that plaintiffs must establish the level at which substance is harmful and that their exposures were of that level); *Nelson*, 1998 WL 1297690 at *6 (excluding opinion of expert who did not assess dose because "[a]n appropriate methodology requires evidence from which the trier of fact could conclude that the plaintiff was exposed to levels of toxin sufficient to cause the harm complained of."); Mitchell v. Gencorp, Inc., 165 F.3d 778, 781 (10th Cir. 1999) ("[A] plaintiff must demonstrate 'the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover.'") (quoting *Wright*, 91 F.3d at 1106); Moore v. Ashland Chem., Inc., 151 F.3d 269, 278 (5th Cir. 1998) ("Because he had no accurate information on the level of Moore's exposure to the fumes, Dr. Jenkins necessarily had no support for the theory that the level of chemicals to which Moore was exposed caused RADS."), *cert. denied*, 526 U.S. 1064 (1999); *Allen*, 102 F.3d at 199 ("Scientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are minimal facts necessary to sustain the plaintiffs' burden in a toxic tort case."); Cano v. Everest Minerals Corp., 362 F. Supp. 2d 814, 825 (W.D. Tex. 2005) (quoting Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997)) ("[A] claimant must not only introduce sufficient epidemiological evidence, he must also show that he is similar to those in the studies."); Nat'l Bank of Commerce v. Dow Chem. Co., 965 F. Supp. 1490, 1524 (E.D. Ark. 1996) (explaining plaintiff must provide evidence of level of exposure and show that the dose was likely to produce harm of the type experienced by plaintiff); Louderback v. Orkin Exterminating Co., Inc., 26 F. Supp. 2d 1298, 1305 (D. Kan. 1998) ("[T]o recover in a toxic tort case, the plaintiff must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of

important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect."[32]

Parker v. Mobil Oil Corp.,[33] a recent non-asbestos case involving benzene, illustrates the point and the reasoned approach of many courts. In *Parker*, a gas station attendant alleged that he developed acute myeloid leukemia ("AML") from low level benzene exposures in gasoline.[34] Epidemiology studies have demonstrated that high exposures to pure benzene, typically in factory settings, can cause AML, but studies have not demonstrated the occurrence of disease from low-exposure gas station work where the exposures involved only a small amount (usually two to five percent) of benzene in gasoline.[35] Plaintiff's experts, Drs. Phil Landrigan and Bernard Goldstein, extrapolated down from the high-dose, factory benzene exposure studies and cited to government regulations and mathematical modeling studies to opine that low level exposures would likewise cause the disease.[36] They did so, however, without any assessment of the actual dose from gas station work; they could not present any evidence that the plaintiff's dose approached those shown to cause disease in the epidemiology studies of high-dose workers.[37] Instead, they expressed their opinions in subjective terms, referring to the plaintiff's exposures as "substantial" or "significant" with no grounding in actual dose calculations or comparisons.[38]

The New York Court of Appeals rejected this methodology as unreliable under New York's general requirements for reliability and proper foundation to support an evidentiary submission.[39] The decision focused on the flawed approach to dose and unsupported assumptions that low doses produce the same effects as high doses:

> The experts, although undoubtedly highly qualified in their respective fields, failed to demonstrate that exposure to benzene as a component of gasoline caused Parker's AML. Dr. Goldstein's general, subjective and

exposure to the toxic substance.") (quoting *Wright*, 91 F.3d at 1106); Mancuso v. Consol. Edison Co., 967 F. Supp. 1437, 1453 (S.D.N.Y. 1997) (explaining that expert's testimony that plaintiffs' ailments were caused by exposure to PCBs was inadmissible because, *inter alia*, expert "did not make sufficient determinations of environmental PCB levels, nor of the extent of the plaintiffs' exposure thereto.").

32. Eaton, *supra* note 28, at 11.

33. 857 N.E.2d 1114 (N.Y. 2006), *reargument denied*, 861 N.E.2d 104 (N.Y. 2007).

34. *Id.* at 1116.

35. *Id.* at 1117.

36. *Id.* at 1122.

37. *Id.*

38. *Id.* at 1121-22.

39. *Id.* at 1120-22.

> conclusory assertion—based on Parker's deposition testimony—that Parker had "far more exposure to benzene than did the refinery workers in the epidemiological studies" is plainly insufficient to establish causation. It neither states the level of the refinery workers' exposure, nor specifies how Parker's exposure exceeded it, thus lacking in epidemiologic evidence to support the claim.[40]

The New York court thus rejected the notion that low level, unquantified exposures to a known harmful substance necessarily suffices as proof of causation of a disease the substance is known to produce at much higher exposure levels.[41] This is classic toxicology, applied properly in the courtroom setting.

Parker has many antecedents similarly rejecting *assumed* causation at low levels, including, for instance, the United States Supreme Court's *General Electric Co. v. Joiner* ruling,[42] which rejected alleged PCB injury without a dose assessment,[43] and the Sixth Circuit's *Nelson v. Tennessee Gas Pipeline Co.* decision,[44] which likewise rejected alleged environmental harm from PCB exposure without any assessment of the actual dose.[45] The concept of a sufficient dose to cause disease is fundamental to both science and tort law, and should not be jettisoned in favor of a mere "exposure only" approach.

II. THE ASBESTOS *ANY EXPOSURE* THEORY

In contrast to the traditional tort approach requiring some assessment of dose, some courts presiding over asbestos cases have permitted plaintiffs to demonstrate merely that they were *exposed* to a defendant's product, rather than require proof that any particular exposure was high enough to cause a plaintiff's disease.[46] The result is that the causation dose requirement—real *exposure*, at *quantities* known to cause disease—was reduced to an exposure test, and a minimal one at that. Some verdicts have stretched the

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40. *Id.* at 1121-22.

41. *Id.* at 1122.

42. 522 U.S. 136 (1997).

43. *Id.* at 144-47.

44. 243 F.3d 244 (6th Cir.), *cert. denied*, 534 U.S. 822 (2001).

45. *Id.* at 252-54.

46. *See, e.g.*, Jones v. John Crane, Inc., 35 Cal. Rptr. 3d 144, 151-52 (Ct. App. 2005) (finding evidence of exposure to defendant's asbestos products, regardless of level of exposure, was sufficient to establish causation); Celotex Corp. v. Tate, 797 S.W.2d 197, 203 (Tex. App. 1990), *writ dismissed by agreement* (Aug. 16, 1996); *see generally* Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?*, 34 PEPP. L. REV. 883, 897-99 (2007) (discussing California cases involving *de minimis* exposures).

concept so far that virtually any exposure, regardless of degree or frequency, suffices.[47]

The foundation for these opinions is the *any exposure* theory, sometimes called the *any fiber* theory.[48] Rather than assess dose, the experts who support this theory simply opine that any occupational or product-related exposure to asbestos fibers is sufficient—there is no minimum.[49] As a result, they regularly opine that every exposure a plaintiff received from any occupational or hobby-related work is a substantial factor in causing disease.[50] The opinions will encompass all such activities,

47. Some examples include a verdict upholding a $4 million judgment against Union Carbide, based on the *any exposure* theory, when plaintiff could not even recall using defendant's product, *see California Court: Conflicting Evidence Could Have Resulted in Verdict for Asbestos-Exposed Man*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 22:22, Dec. 12, 2007, at 4; a $5 million verdict against John Crane based on any exposure to rope and gaskets without any assessment of the dose or fiber release from those products, *see Judge: Daughter's Showing That Father was Exposed, Product was Present Sufficient*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 22:22, Dec. 12, 2007, at 5; a $35 million verdict for "exposure" to Leslie Control's "small pump and valve components" in the Navy, ignoring large-scale exposure to Navy insulation, *see $35.1M Awarded to Couple for Exposure to Asbestos in Navy*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 22:19, Nov. 1, 2007, at 3; and a verdict of $3.92 million against General Electric alleging exposure from brakes in cranes and a mill motor, apparently with no assessment of the minimal dose those exposures likely would produce, *see Maryland Asbestos Jury Awards $3.92 Million to 3 Steelworkers' Families*, MEALEY'S ASBESTOS. BANKR. REP., vol. 7:1, Aug. 1, 2007, at 12. *See also* Flores v. Borg-Warner Corp., 153 S.W.3d 209, 214 (Tex. App. 2004) (finding a product "emitting" dust or "working in the presence of" dust deemed sufficient for causation), *rev'd*, 232 S.W.3d 765 (Tex. 2007), *reh'g denied* (Oct. 12, 2007).

48. Some plaintiff experts have testified that breathing even a single fiber of asbestos could cause disease. When this approach began to be criticized, the theory became more commonly articulated as "every exposure," "any exposure," "every breath," or similar phrases. Some plaintiffs' experts state simply that any exposure above background is sufficient, while others attach a number as a cutoff (e.g., Dr. Samuel Hammar's 0.1 fibers/cc year level, or Dr. John Maddox's 0.0003 fibers/cc single exposure cutoff), but the result is usually the same—most if not all occupational exposures are captured. *See infra* notes 50-51 and accompanying text.

49. *See Gregg*, 943 A.2d at 226 ("We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how small, is a substantial contributing factor in asbestos disease."); *Georgia-Pac. Corp.*, 239 S.W.3d at 308 (stating plaintiffs relied on "expert testimony that any exposure to asbestos contributes to cause mesothelioma"); *Lindstrom*, 424 F.3d at 498 (stating plaintiff experts contended that "[o]nce mesothelioma is diagnosed, it is impossible to rule out any of Mr. Lindstrom's exposures as being substantially contributory.").

50. *See Georgia-Pac. Corp.*, 239 S.W.3d at 315 (stating opinion of plaintiffs' expert Jerry Lauderdale was "that every exposure does contribute to the development of potential to develop mesothelioma."); *Summers*, 886 A.2d at 244 (quoting plaintiffs' expert Dr. Jonathan Gelfand stating, "Each and every exposure to asbestos has been a substantial contributing factor to the abnormalities noted."); *Bartel*, 316 F. Supp. 2d at 611 (criticizing testimony of Drs. Arthur Frank and Yasunosuke Suzuki "that every exposure to asbestos [plaintiff] had during his working career, no matter how small, was a substantial factor in causing his peritoneal mesothelioma"); *In re Toxic Substance Cases*, 2006 WL 2404007 at *1 (rejecting testimony of plaintiffs' experts, Drs. Maddox and Laman, who opined that "every single exposure to every asbestos product is a

regardless of duration or dose—a single backyard brake job, one remodeling job using asbestos-containing joint compound, walking by a gasket repair job on an engine—all have been targeted by plaintiffs' experts as the cause of mesothelioma.[51]

The *any exposure* plaintiffs' experts typically make the following arguments to support their position:

(a) A single fiber of asbestos can generate mesothelioma. The exact mechanism by which asbestos causes cancer, including mesothelioma, is not known, but one theory is that the cancer is believed to be the result of inflammation or other factors that disrupt a cell's DNA and cause the cell to begin replicating out of control.[52] The *any exposure* experts rely on this hypothesis to testify that exposure to a single fiber could, in theory, start the disease.[53] Once an individual has mesothelioma, these experts contend that we do not know and cannot determine which fiber (or more importantly, which *defendant's* fiber) caused the disease, and thus must assume that any and all exposures are the potential cause.[54] The experts exclude,

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proximate cause of a subsequently diagnosed asbestos-related disease.").

51. For instance, Dr. Arthur Frank, a proponent of the *any exposure* theory, has testified that a single brake job should be identified as a substantial factor in causing asbestos disease. *See* Lulich v. Rapid Am. Corp., No. 2005 L004323 (Cir. Ct. Cook County, Ill.) (Deposition of Arthur Frank, Feb. 1, 2005, at 111 ("[S]omeone removing a set of brakes that contain brake dust where there is some percentage of untransformed chrysotile . . . I would say yes, it was a contributing factor to his mesothelioma."). The other examples are representative of allegations and expert testimony in numerous other cases. *See, e.g.*, Chavers v. General Motors Corp., 79 S.W.3d 361, 370 (Ark. 2002) ("The competent medical evidence presented in this case does not support the conclusion that a one-time exposure to asbestos-containing brakes was a substantial cause of Mr. Chaver's mesothelioma."); Wilson v. A.P. Green Indus., Inc., 807 A.2d 922, 926 (Pa. Super. Ct. 2002) (affirming summary judgment for manufacturer where decedent was merely exposed to dust from defendant's product "at one time or another.").

52. *See, e.g.*, Hamilton v. Asbestos Corp., 998 P.2d 403, 407 (Cal. 2000) (describing mesothelioma disease process); Cheryl L. Fattman et al., *Experimental Models of Asbestos-Related Disease*, *in* PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 256, 285 (Victor L. Roggli et al. eds., Springer Sci.+Bus. Media, Inc. 2d ed. 2004) (1992) (citing studies by Moalli).

53. *See, e.g.*, *Bartel*, 316 F. Supp. 2d at 605 (Dr. Arthur Frank testified that a single fiber could cause disease); *Gregg*, 943 A.2d at 223 (stating plaintiffs' expert Dr. Richard Lemen opined that there is no "safe" level of exposure to asbestos and that any level of exposure will place an individual at risk for developing asbestos-related conditions); Bonnette v. Conoco, Inc., 837 So. 2d 1219, 1232 (La. 2003) (stating plaintiff's expert Dr. Richard Lemen "testified that any level of exposure to asbestos will place an individual at risk for developing asbestos-related conditions."); *Basile*, No 11484 CD 2005, slip. op. at 9-12 ("The 'single fiber' theory [presented by plaintiff's expert] holds that exposure to a single asbestos fiber can cause mesothelioma and other disease processes."); *Georgia-Pac. Corp.*, 239 S.W.3d at 320 ("[T]he experts posited that all asbestos fibers cause mesothelioma because all asbestos fibers have the ability to cause cancer-inducing mutations in the cells and it is not possible to pinpoint which particular fibers actually caused the mutations."); *In re Toxic Substance Cases*, 2006 WL 2404008 at *6 (stating plaintiff experts testified that a "single exposure" can cause disease).

54. *See, e.g.*, *Georgia-Pac. Corp.*, 239 S.W.3d at 314-15, 320; *Gregg*, 943 A.2d at 223;

incongruously, background fibers as the potential initiating source, and they do not address or account for the body's defensive mechanisms that actually protect against cancer caused by just one fiber or even many fibers entering the body.[55]

(b) Asbestos is a cumulative dose disease. Asbestos disease is generally believed to result from the cumulative total dose of asbestos received over time rather than from an instantaneous exposure.[56] The *any exposure* proponents rely on the cumulative dose principle to conclude that every occupational exposure contributes to the disease, from the very smallest to the very highest, much like every drop of water contributes to filling a glass.[57] They do not factor in, however, the established differences in fiber potency,[58] any differences in duration of exposure across jobs or the

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Bonnette, 837 So. 2d at 1232; *Basile*, No 11484 CD 2005, slip. op. at 9-12; *In re Toxic Substance Cases*, 2006 WL 2404008 at *6.

55. *See, e.g.*, *Flores*, 232 S.W.3d at 773 (stating expert acknowledged background fibers but did not suggest they were a cause of asbestosis); *Georgia-Pac. Corp.*, 239 S.W.3d at 315 (quoting Dr. Samuel Hammar's testimony that the "level of exposure it takes to cause mesothelioma 'could be any level above what is considered to be background . . . .'"); *In re Toxic Substance Cases*, 2006 WL 2404008 at *3 ("[B]ackground or ambient exposure is simply not sufficient to allow experts to causally attribute asbestos-related disease to it. Everyone, including the plaintiff's experts, agrees that something greater is required."). *Bartel*, 316 F. Supp. 2d at 607-08 (discussing background levels of asbestos).

56. National Cancer Institute, Fact Sheet, Asbestos Exposure: Questions and Answers 3 (Feb. 1, 2007), http://www.cancer.gov/images/Documents/5ac7d2fc-27df-4ecc-839f-dc5bc1909e01 /fs3_21.pdf.

57. *See, e.g.*, *Georgia-Pac. Corp.*, 239 S.W.3d at 320.

58. A great many studies and publications recognize that chrysotile is less potent in causing mesothelioma than the amphibole family of asbestos fibers, including amosite and crocidolite. *See Bartel*, 316 F. Supp. 2d at 606 ("[P]revailing scientific and medical view" supports lower chrysotile potency); Becker v. Baron Bros., Coliseum Auto Parts, Inc., 649 A.2d 613, 620 (N.J. 1994) (holding that trial court erred in instructing jury that all asbestos-containing friction products without warnings are defective as a matter of law: "Our courts have acknowledged that asbestos-containing products are not uniformly dangerous and thus that courts should not treat them all alike."); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1145 (5th Cir. 1985) ("[A]ll asbestos-containing products cannot be lumped together in determining their dangerousness."); Celotex Corp. v. Copeland, 471 So. 2d 533, 538 (Fla. 1985) ("Asbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others."); Charles M. Yarborough, *Chrysotile as a Cause of Mesothelioma: An Assessment Based on Epidemiology*, 36 CRITICAL REV. TOXICOLOGY 165, 165 (2006); U.S. ENVTL. PROT. AGENCY, REPORT ON THE PEER CONSULTATION WORKSHOP TO DISCUSS A PROPOSED PROTOCOL TO ASSESS ASBESTOS RELATED RISK viii (2003), http://www.epa.gov/oswer/riskassessment/asbestos/pdfs/asbestos_report.pdf; Andrew Churg, *Nonneoplastic Disease Caused by Asbestos*, *in* PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 277, 314 (Andrew Churg & Francis H.Y. Green eds., 2d ed. 1998); B.T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 SCIENCE 294, 296, 299 (1990), *available at* 1990 WLNR 2425147. The distinction is important for jobs such as automotive mechanics whose exposure is only to chrysotile fibers, because the difference in potency would indicate the need for a considerably higher dose to cause disease in that occupation.

dose of fiber received from any particular job, the removal of some fibers from the body,[59] or the frequency of exposure on any job. All asbestos types and all exposures are treated the same for purposes of their opinions.

(c) The "no safe dose" or "no threshold" approach. In keeping with the dose principle, virtually every toxin is believed to have a *threshold* level below which injury does not occur.[60] A dose of two aspirin, for instance, is below the threshold of injury for that drug.[61] It is exceedingly difficult, however, to establish with certainty the level at which asbestos exposures do not cause mesothelioma.[62] This is primarily because epidemiology studies—the "gold standard" for establishing causation—cannot easily identify differences in populations at low exposure levels approaching background. Because of the difficulty of proof that low exposures are safe, regulatory agencies such as OSHA have frequently stated that there is no *known* safe level of asbestos exposure and, therefore, set the regulatory limit at the lowest technologically feasible limit.[63]

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59. The body is capable of removing many inhaled fibers through defense mechanisms such as throat mucus, ciliary bodies, coughing and sneezing, the action of macrophage cells, and the lymph system. *See generally* Fattman, *supra* note 52, at 260-65. Chrysotile fibers, in particular, are removed fairly quickly, with a half life (the amount of time required to remove half the resident fibers from the body) of a few months for most fibers. The half life of amphibole fibers in contrast is measured in years or decades. *See* Churg, *supra* note 58, at 284-85; *Free*, No. 07-2-04091-9-SEA, slip op. at 2-3.

The notion that chrysotile fibers cause damage during their brief stay in the human body before their expulsion—known as the "hit and run" theory—is supported by plaintiff experts but rejected by many researchers. *See, e.g.*, Richard A. Lemen, *Asbestos in Brakes: Exposure and Risk of Disease*, 45 AM. J. INDUS. MED. 229, 234 (2004) (stating plaintiff testifying expert Dr. Lemen argued that fast clearance of chrysotile does not eliminate possibility it caused disease before being eliminated); Kelly J. Butnor et al., *Exposure to Brake Dust and Malignant Mesothelioma: A Study of 10 Cases with Mineral Fiber Analyses*, 47 ANNALS OCCUPATIONAL HYGIENE 325, 239 (2000) (explaining why "hit and run" theory is "flimsy" and not plausible); Richard A. Lemen, *Reply to Victor L. Roggli and Arthur M. Langer*, 47 AM. J. INDUS. MED. 278, 278-79 (2005) (criticizing Roggli's rejection of "hit and run" theory).

60. *See* Eaton, *supra* note 28, at 15.

61. Aspirin is a commonly-understood example. Others include alcohol, nitroglycerine, arsenic, and even water. *See In re Toxic Substance Cases*, 2006 WL 2404008 at *7.

62. *Id.* at *8-9; *Free*, No. 07-2-04091-9-SEA, slip op. at 4.

63. *See, e.g.*, NIOSH-OSHA ASBESTOS WORK GROUP, WORKPLACE EXPOSURE TO ASBESTOS: REVIEW AND RECOMMENDATIONS DHHS (NIOSH) Pub. No. 81-103 3 (1980), www.cdc.gov/niosh/topics/asbestos/pdfs/81103.pdf ("Evaluation of all available human data provides no evidence for a threshold or for a 'safe' level of asbestos exposure."); 59 Fed. Reg. 40964-01, 40967 (Aug. 10, 1994) (stating OSHA believes that the regulatory limit of .1 fiber per cubic centimeter of air as an eight-hour time-weighted average is "the practical lower limit of feasibility for measuring asbestos levels reliably."), *available at* 1994 WL 413576 (F.R.).

> The basis for the 1975 proposal's reduction in the permissible exposure limit to 0.5 f/cc was OSHA's then-current policy for carcinogens that assumed that no safe threshold level was demonstrable and therefore that the Act required the Agency to set the PEL at a level as low as technologically and economically feasible.

51 Fed. Reg. 222612-01, 22614 (June 20, 1986), *available at* 1986 WL 103293 (F.R.).

The *any exposure* experts have converted this cautionary approach into an opinion that there *is* no safe dose of asbestos.[64] This conclusion, however, is clearly a non sequitur—the absence of conclusory proof as to *where* the threshold lies does not mean there is no threshold. These experts rely on, and often misstate, this concept to argue that since the safe level is unknown, then every exposure must be considered dangerous and contributory to disease.[65]

(d) The linear non-threshold theory and extrapolation down. The *any exposure* theorists are often confronted with the lack of any epidemiology studies reasonably demonstrating that low levels of asbestos exposure produce any increased incidence of disease.[66] Because the plaintiffs' experts have no such proof at the levels they claim are disease-inducing, they turn to an extrapolation methodology that relies on the assumption that high-dose studies can be used to estimate low-dose disease.[67] In the studies of high-incidence asbestos disease, typically in professions such as insulators, asbestos factory workers, miners, and textile workers, the disease follows a dose-response relationship that approaches, at least at the higher exposure levels experienced by those workers, a somewhat linear relationship between the lifetime fiber burden and the incidence of disease.[68]

That data, however, *does not exist* at lower levels of exposure.[69] The two most likely explanations are: (1) the exposures do not cause disease at

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64. *See In re Toxic Substance Cases*, 2006 WL 2404008 at *11.

> While it may be a valid assertion that: if high dose asbestos exposure is bad for you, then low dose asbestos exposure may potentially be bad for you; it is not a valid assertion that because high dose exposure to asbestos is bad for you, then low dose exposure to asbestos is, in fact, bad for you, or that a specific plaintiff's exposure at an unknown low dose exposure level, in fact, contributed to that plaintiff's asbestos-related disease.

Id. (emphasis omitted).

65. *See In re Toxic Substance Cases*, 2006 WL 2404008 at *11 ("[Drs. John Maddox and David Laman] offer not a shred of independent corroboration of their opinion that each and every fiber causes or contributes to a Plaintiff's disease process."); *Brooks*, 934 So. 2d at 355 (stating plaintiffs' expert Dr. Gaeton Lorino "was unable to cite a single study or publication to support his assertion" that mesothelioma is not a dose-related disease); *In re W.R. Grace*, 355 B.R. at 474-75 (discussing the fallacy of the "no safe dose" position).

66. *See, e.g.*, B.T. Mossman et al., *supra* note 58, at 294 ("There are no available data showing health hazards due to low-level exposure . . . .").

67. The extrapolation-down approach of plaintiff experts was specifically addressed and rejected by the courts in *In re Toxic Substance Cases*, 2006 WL 2404008 at *7-8, and *Free*, No. 07-2-04091-9-SEA, slip op. at 3-4.

68. *See* John T. Hodgson & Andrew Darnton, *The Quantitative Risks of Mesothelioma and Lung Cancer in Relation to Asbestos Exposure*, 44 ANNALS OCCUPATIONAL HYGIENE 565, 578 fig. 6 (2000); *Free*, No. 07-2-04091-9-SEA, slip op. at 3 n.5 (discussing slope in Hodgson article).

69. *See* Hodgson & Darnton, *supra* note 68, at 578 fig. 6, 580 fig. 9 (identifying data points above 10 fibers/ml years).

lower levels and there is, quite plainly, nothing to find, or (2) the exposures may cause very low levels of disease, so low that their occurrence is not distinguishable from other causes of the disease. The *any exposure* experts, relying on a theoretical approach sometimes used by regulators, *assume* that the latter explanation is true.[70] They adopt a linear dose-response curve that extends in a straight line all the way to zero exposure.[71] Most toxins do not follow such a line, but present a curvilinear relationship that drops to zero disease as the exposures approach the threshold (usually well above zero exposures).[72] The assumed linear relationship at low levels produces a *theoretical* level of mesothelioma at extremely low levels of exposure, but these are theoretical and assumed cases only since no study has ever identified real disease at such low levels that is distinguishable from idiopathic or spontaneous mesothelioma.[73] The experts nevertheless testify, through this extrapolation down methodology, that disease must exist at low levels and that their calculated estimates prove that an individual plaintiff's low exposures contributed to his disease.[74]

(e) Reliance on case reports. In some instances, lacking any supporting epidemiology, some *any exposure* experts resort to reliance on case reports of disease in persons exposed to low doses.[75] The most frequent application is in mechanic cases, where the epidemiology has consistently supported a *lack of disease* from chrysotile exposures, even among lifetime mechanics.[76] The experts reject the existing, contradictory epidemiology and rely on case reports instead.[77] "Case reports, by their

70. *See In re Toxic Substance Cases*, 2006 WL 2404008 at *6-7.

71. *Id.* at *7.

72. *Id.* (discussing threshold effect for common substances); Eaton, *supra* note 28, at 15-17.

73. *See In re Toxic Substance Cases*, 2006 WL 2404008 at *6; National Cancer Institute, *supra* note 56, at 3.

74. *See In re Toxic Substance Cases*, 2006 WL 2404008 at *7-8.

75. A case report is nothing more than an occurrence in which a person with a particular exposure also develops a particular disease. If epidemiology has established the link, a case report can potentially reflect a real causative source, for example, a heavy smoker who develops lung cancer. In most instances, however, case reports are at best suggestive of a possible link and frequently represent unrelated incidents. For example, case reports of coffee drinkers incurring pancreatic cancer a few years ago turned out to be false associations when epidemiology studies produced no evidence of a link. *See* American Cancer Society, *Pancreatic Cancer is Not Linked with Drinking Coffee or Alcohol* (July 17, 2001), http://www.cancer.org/docroot/NWS/content/NWS_1_1x_Pancreatic_Cancer_Is_Not_Linked_With_Drinking_Coffee_or_Alcohol.asp.

76. The studies are summarized and discussed in Francine Laden et al., *Lung Cancer and Mesothelioma among Male Automobile Mechanics: A Review*, 19 REV. ON ENVTL. HEALTH 39 (2004); Michael Goodman et al., *Mesothelioma and Lung Cancer among Motor Vehicle Mechanics: A Meta-analysis*, 48 ANNALS OCCUPATIONAL HYGIENE 309, 309 (2004); *see also* Yarborough, *supra* note 58.

77. *See, e.g.*, *In re Toxic Substance Cases*, 2006 WL 2404008 at *4-5.

very nature, can never prove causation."[78] Consequently, some courts routinely reject case reports as proof of causation.[79] Nevertheless, some courts allow experts to rely on case reports as evidence in asbestos courtrooms where these experts are permitted to testify.

The proponents of the *any exposure* theory make little or no attempt to segregate real exposures from trivial or nonexistent exposures. The types of exposures sufficient to name a defendant can involve either a small number of exposure experiences, or a longer series of low dose exposures, such as mechanics doing brake jobs.[80] The lifetime dose from either type of exposure is minimal and far different from the world of known asbestos disease generated typically in dusty trades involving amphibole fibers.

Through this testimony, the *any exposure* experts are helping to extend the asbestos litigation to any entity that had any connection to asbestos.[81] The "new" wave of asbestos cases, relying almost exclusively on the *any exposure* theory, typically involves a mesothelioma victim who, through attorney interviews, has identified any conceivable contact with asbestos in his or her lifetime.[82] The contact can include household members who had direct contact and then allegedly brought fibers home, or "bystander" or "pass-by" exposures allegedly resulting from just being in the same building or vicinity as asbestos-related work.[83] In each case, the attorneys

78. Robert N. Jones, *Asbestos Medicine II*, SJ031 ALI-ABA 29, 29, 35 (Nov. 13-14, 2003).

79. *See* Glastetter v. Novartis Pharms. Corp., 107 F. Supp. 2d 1015 (E.D. Mo. 2000), *aff'd*, 252 F.3d 986 (8th Cir. 2001); Hollander v. Sandoz Pharms. Corp., 95 F. Supp. 2d 1230, 1235-38 (W.D. Okla. 2000), *aff'd in part*, 289 F.3d 1193 (10th Cir.), *cert. denied*, 537 U.S. 1088 (2002); Brumbaugh v. Sandoz Pharm. Corp., 77 F. Supp. 2d 1153, 1157 (D. Mont. 1999); Willert v. Ortho Pharm. Corp., 995 F. Supp. 979, 981 (D. Minn. 1998); Boyles v. Am. Cyanamid Co., 796 F. Supp. 704, 708 (E.D.N.Y. 1992); Casey v. Ohio Med. Prods., 877 F. Supp. 1380, 1385 (N.D. Cal. 1995); *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL 1203, 2001 WL 454586 at *15 (E.D. Pa. Feb. 1, 2001) (memorandum and pretrial order No. 1685) (unreported).

80. *See* Dennis J. Paustenbach et al., *An Evaluation of the Historical Exposures of Mechanics to Asbestos in Brake Dust*, 18 APPLIED OCCUPATIONAL & ENVTL. HYGIENE 786, 786-804 (2003) (stating average lifetime mechanic exposures calculated at 0.04 f/cc or less, below OSHA standard of 0.1 f/cc); Brent L. Finley et al., *Cumulative Asbestos Exposure for US Automobile Mechanics Involved in Brake Repair (circa 1950s-2000)*, 17 J. EXPOSURE SCIENCE & ENVTL. EPIDEMIOLOGY (2007) 644, 644 (stating cumulative lifetime average exposures for automobile mechanics "are all substantially lower than the cumulative exposure of 4.5 f/cm3 year associated with occupational exposure to 0.1 f/cm3 of asbestos for 45 years that is currently permitted under the current occupational exposure limits in the US.").

81. *See* Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, *available at* 2001 WLNR 2021814; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1, *available at* 2003 WLNR 3099209.

82. *See, e.g.*, *Chavers*, 79 S.W.3d at 370.

83. *See, e.g.*, *Georgia-Pac. Corp.*, 239 S.W.3d at 315 (stating plaintiffs' expert Dr. Samuel Hammer expressed opinion that "each and every exposure that an individual has in a bystander

then sue dozens of defendants associated with these contacts, many of whom have never made an asbestos product.[84] One-time contacts or events are treated equally as causes along with long-duration, high level exposures, such as Navy shipyard work.[85] Mesothelioma is particularly vulnerable, because it is readily associated with asbestos and, at least for amphiboles, requires a lower dose than other asbestos diseases.[86] Despite the wide agreement that a significant number (by some estimates, twenty to thirty percent) of mesotheliomas are not asbestos induced,[87] the *any exposure* theory is capable of converting every diagnosis of mesothelioma into an asbestos action. Countless individuals have had some contact with asbestos, either directly or through a family member, in their lifetime sufficient to satisfy the theory's minimal requirements. The *any exposure* cases are heavily weighted toward a handful of jurisdictions that continue to apply the "old" rules to all asbestos cases.[88]

The massive expansion of the number of asbestos defendants brought about by this theory is highly problematic. When asbestos litigation focused on actual producers of asbestos and asbestos-containing products, defendants numbered in the hundreds (in 1982, about 300 such defendant

occupational setting causes their mesothelioma."); *see also* Jackson v. Anchor Packing Co., 994 F.2d 1295 (8th Cir. 1993) (affirming dismissal of claimants who performed general "tireworker" duties and did not directly handle any of the defendant's asbestos products).

84. *See, e.g.*, Chavers v. Gatke Corp., 132 Cal. Rptr. 2d 198, 199 (Ct. App. 2003) (stating plaintiffs' complaint "joined as defendants scores of manufacturers, suppliers and distributors of friction brake products containing asbestos–59 named defendants and 800 'Doe' defendants . . . ."); Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1, *available at* 2000 WLNR 2042486.

85. *See, e.g.*, *$35.1M Awarded to Couple for Exposure to Asbestos in Navy*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 22:19, Nov. 1, 2007, at 3 (stating $35 million verdict for "exposure" to Leslie Control's "small pump and valve components" in the Navy, ignoring large-scale exposure to Navy insulation).

86. *See* 51 Fed. Reg. 22612-01, 22619 (June 20, 1986) (noting cases of mesothelioma, but not lung cancer, in low-exposed populations such as neighborhood and home exposures), *available at* 1986 WL 103293 (F.R.).

87. *See* Mayo Clinic Staff, *Mesothelioma* (Aug. 11, 2006), http://www.mayoclinic.com/health/mesothelioma/DS00779/DSECTION=4 ("Asbestos exposure plays a role in 70 percent to 80 percent of mesothelioma cases, though the actual percentage could be higher."); Lawrence G. Cetrulo, *Asbestos Litigation & Tort Reform: Health Hazards/Diseases*, 3 TOXIC TORTS LITIG. GUIDE § 33:3 (updated Oct. 2007) ("Asbestos exposure is the dominant cause of mesothelioma, and accounts for 70 to 80 percent of all mesothelioma cases."); B.T. Mossman et al., *supra* note 58 ("[A]pproximately 20 to 30% of mestheliomas occur in the general population in adults not exposed occupationally to asbestos."); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 44 n.19 (2003) (stating that approximately twenty percent of malignant mesotheliomas have been attributed to causes other than exposure to asbestos).

88. *See* Wasserman et al., *supra* note 46, at 905-08 (discussing policy reasons why courts should reject *de minimis* and *any exposure* causation theories in asbestos litigation).

companies).[89] Now, over 8,500 defendants have been named,[90] as "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."[91] One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander."[92] Once a company is caught in this net, unless courts are willing to reject *any exposure* testimony prior to trial, it is nearly impossible for a defendant to escape without serious financial consequences.

III. COURT RULINGS REJECTING OR CRITICIZING THE *ANY EXPOSURE* APPROACH

In the last three years, the *any exposure* approach has been criticized or found inadmissible under both the *Frye* and *Daubert* tests, and under general requirements of reliability and foundation, before over a dozen courts in multiple jurisdictions.[93] These courts have recognized the extreme position the plaintiffs' experts are taking, the lack of scientific proof supporting their theory, and the lack of logical or scientific support for their conclusions.[94]

The *any exposure* theory was first criticized in a 2005 Ohio federal court case, *Bartel v. John Crane, Inc.*[95] In *Bartel*, plaintiff's experts attempted to attribute plaintiff's mesothelioma to exposure from handling the defendant's gaskets and packing while in the Navy.[96] The plaintiff, like many Naval workers, had substantial exposure to large amounts of amphibole asbestos in ship insulation, but plaintiff either did not sue or had settled with the entities responsible for those extreme and clearly dangerous exposures.[97] Exposures from gaskets and packing, in contrast, are quite

89. *See* JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (1984).

90. *See* Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, HARRISMARTIN COLUMNS: ASBESTOS, Aug. 2004, at 5.

91. Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, *available at* 2001 WLNR 1993314.

92. *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, MEALEY'S LITIG. REP.: ASBESTOS, vol. 17:3, Mar. 1, 2002, at 5 (quoting Mr. Scruggs); *see also* Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). "Nontraditional [d]efendants [n]ow [a]ccount for [m]ore [t]han [h]alf of [a]sbestos [e]xpenditures." CARROLL ET AL., *supra* note 2, at 94.

93. *See supra* notes 11-19.

94. *See, e.g.*, *Flores*, 232 S.W.3d at 774.

95. 316 F. Supp. 2d at 611.

96. *Id.* at 604-05.

97. *Id.* at 604-06.

low—measured at 0.0062 fibers/cc in trial evidence.[98] Some of plaintiff's experts agreed that exposures approaching or below background, such as those from gasket work, would be insufficient for causation.[99] As to the remaining *any exposure* experts, who relied on this theory to point the finger at the minimal chrysotile exposures rather than plaintiff's insulation exposures, the court found their testimony unpersuasive:

> The two experts who disagreed, Dr. Frank and Dr. Suzuki, testified that every exposure to asbestos Lindstrom had during his working career, no matter how small, was a substantial factor in causing his peritoneal mesothelioma . . . . If an opinion such as [this] . . . would be sufficient for plaintiff to meet his burden, the Sixth Circuit's "substantial factor" test would be meaningless . . . .
>
> In addition, the opinion of Dr. Frank, that every breath Lindstrom took which contained asbestos could have been a substantial factor in causing his disease, is not supported by the medical literature.[100]

This decision was upheld on appeal by the United States Court of Appeals for the Sixth Circuit: "[Plaintiff's expert argument] appears to be that a showing of any level of asbestos exposure attributable to John Crane's products was sufficient for the court to have entered a judgment in their favor. We reject plaintiffs-appellants' argument on this point."[101]

We believe the *Bartel* opinions were the first time that the *any exposure* theory was held insufficient to support causation. *Bartel* itself appears to have received little attention and did not quickly replicate itself in other courts. In the last two years, however, and largely independent of *Bartel*, the flawed *any exposure* approach has produced a raft of decisions that reject the theory as unscientific and/or exclude the expert testimony under *Daubert* or *Frye*.[102]

The first and most influential of these subsequent decisions was that of Judge Colville in a Pennsylvania case, *Betz v. Pneumo-Abex*.[103] *Betz* initially involved a group of automotive mechanic cases in which plaintiffs'

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98. *Id.* at 608. For comparison purposes, this figure is more than ten times *lower* than the current standard (0.1 fibers per cubic centimeter of air as an eight-hour time-weighted average) at which OSHA permits workers to be exposed every day for forty years without requiring any protection. *See* 29 C.F.R. § 1910.1001(c)(1) (2006).

99. *Bartel*, 316 F. Supp. 2d at 604-06.

100. *Id.* at 611.

101. *Lindstrom*, 424 F.3d at 498.

102. *See supra* notes 11-19.

103. The trial court opinion was entitled *In re Toxic Substances Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Aug. 17, 2006). The case has also been referred to as *Simikian* (another plaintiff), but on appeal the title changed to *Betz v. Pneumo Abex LLC*, No. 1058 WDA 2006 (Pa. Super. Ct. Jan. 16, 2007) (Betz is the administrator of the deceased plaintiff Vogelsberger's estate).

experts Drs. John Maddox and David Laman declared that the specific exposure facts of each mechanic were essentially irrelevant because any exposure was sufficient to support causation.[104] The experts thus rebuffed the need for any sort of dose assessment and opined that any level of mechanic work, regardless of duration, was sufficient to cause disease.[105] Judge Colville precluded this testimony, and in the process, addressed the key underpinnings of the theory and found each one illogical and unsupported.[106] We will cover Judge Colville's reasoning in some detail, because it remains today the seminal and best evisceration of the grounds asserted by *any exposure* approach experts. Decisions that followed largely repeated and elaborated on Judge Colville's arguments.

First, Judge Colville addressed the serious discrepancy between the claim that any exposure to an occupational fiber causes disease, and the experts' candid, albeit incongruent, admission that a lifetime of background exposures to asbestos fibers does not cause disease.[107] In modern industrial society, urban and sometimes rural air has historically contained asbestos at low levels (some of this from natural asbestos outcrops), and thus most individuals over fifty will have millions of "background" fibers in their lungs even without any known occupational or other direct exposure to asbestos.[108] These levels have never been known to cause disease, primarily because the human body is capable of ejecting, absorbing, or otherwise dealing with these low exposures.[109] Plaintiff experts almost without exception readily admit this and exclude background exposures from their cumulative dose opinions.[110] (This "admission" has the benefit for plaintiffs of preventing defendants from pointing to background exposures as contributory.) The fibers involved in these two types of exposures, however, are no different—only the dose distinguishes background from occupational exposures, and even then a low occupational exposure (such as the Crane gasket exposure of 0.0062 f/cc in the *Bartel* case above) can easily overlap or not exceed a higher background exposure.[111] Thus, there is no logic that permits these experts to categorically exclude background exposure, yet, at the same time,

104. *In re Toxic Substance Cases*, 2006 WL 2404008 at *1.
105. *Id.*
106. *Id.* at *11-12.
107. *Id.*
108. *Id.* at *3.
109. *Id.*
110. *Id.*
111. *Id.*

categorically include all occupational exposures as causative.[112]

Given the admission by plaintiff's experts that background exposures were not high enough to cause disease, Judge Colville recognized that it was incumbent on the experts to identify exactly *what dose would be sufficient* to cause disease:

> For instance, experts suggest that the average ambient exposure in Pittsburgh is approximately .0001 fibers per milliliter of air . . . . No one, including the plaintiff's experts, proffers an opinion that this level of exposure creates an increased risk of the development of any asbestos-related disease . . . . The argument in this Frye challenge, in part, revolves around the question of how much greater quantity of exposure is necessary to permit the causal attribution of an asbestos-related disease to a particular asbestos-related exposure.[113]

Plaintiff's experts made no attempt to measure or quantify the mechanics' occupational doses or show how they were sufficient to cause disease when background exposures clearly are not.[114] The court rejected the experts' complete failure to quantify or assess the mechanic's dose in any way because the lack of any measurement made it impossible for them to accurately distinguish low level occupational exposures from background exposures.[115]

Second, Judge Colville rejected the experts' attempt to "extrapolate down" from high-dose asbestos studies to prove that occupational exposures at low doses, above background or not, also must cause disease.[116] The amphibole form of asbestos is widely recognized to cause disease at significant doses (e.g., in the shipyard, insulator, and asbestos factory professions), but there are no low-dose response curves for asbestos exposure and no studies demonstrating an increase in actual disease at very low doses, particularly for chrysotile.[117] Drs. Maddox and Laman used the

112. *Id.* at *12.

113. *Id.* at *3 (emphasis added).

114. *Id.* at *6-7.

115. *Id.* at *6, 9, 11-13.

116. *Id.* at *6-7.

117. *Id.* at *6, 8. Whether chrysotile exposures cause mesothelioma at all is the subject of considerable debate currently in the scientific community. *See supra* notes 58-59; J. C. McDonald & A. D. McDonald, *Chrysotile, Tremolite and Carcinogenicity*, 41 ANNALS OCCUPATIONAL HYGIENE 699, 703 (1977); Thomas A. Sporn & Victor L. Roggli, *Mesothelioma*, *in* PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 104, 108 (Victor L. Roggli et al. eds., Springer Sci.+Bus. Media, Inc. 2d ed. 2004) (1992) (stating the capacity of chrysotile to cause mesothelioma is "much debated"). Epidemiology studies have not demonstrated excess mesothelioma among populations exposed only to low levels of chrysotile. *See, e.g.*, *supra* note 58 (vehicle mechanic studies show no increased mesothelioma); Jennifer Pierce et al., *An Evaluation of Reported No-Effect Chrysotile Asbestos Exposures for Lung Cancer and Mesothelioma*, 38 CRITICAL REV. IN

"extrapolate down" methodology to assume, based on high-dose studies, that low-dose studies would also cause disease in a linear fashion.[118] Judge Colville rejected this approach:

> The fallacy of the "extrapolation down" argument is plainly illustrated by common sense and common experience. Large amounts of alcohol can intoxicate, larger amounts can kill; a very small amount, however, can do neither. Large amounts of nitroglycerine or arsenic can injure, larger amounts can kill; small amounts, however, are medicinal. Great volumes of water may be harmful, . . . moderate amounts of water, however, are healthful. In short, the poison is in the dose.[119]

Judge Colville recognized that when experts attempt this kind of extrapolation downward, they are engaged in both a logical falsehood and scientific error:

> [P]laintiffs have not proffered any generally accepted methodology to support the contention that a single exposure or an otherwise vanishingly small exposure has, in fact, in any case, ever caused or contributed to any specific individual's disease, or even less so, that in this case such a small exposure did, in fact, contribute to this specific plaintiff's disease.[120]

Finally, Judge Colville rejected the experts' reliance on the "no safe threshold" position.[121] The court noted the very large difference between stating that the threshold is not known and claiming that *there is no threshold at all*.[122] The court believed that such testimony improperly shifted the burden of proof to defendants when it is plaintiff's burden to establish the known toxic level of a substance and that plaintiff experienced a dose consistent with that level.[123]

Following Judge Colville's ruling, a second Pennsylvania trial judge rejected the *any exposure* testimony of Dr. Maddox on similar reasoning in a case involving heavy equipment mechanic exposures.[124] Judge Colville's decision is currently on appeal before Pennsylvania's intermediate appellate court. The Pennsylvania Supreme Court, however, recently issued a decision in *Gregg v. V.J. Auto Parts, Inc.*[125] that clearly rejects the *any exposure* theory and may well offer a glimpse into how the court would ultimately deal with *Betz*. *Gregg* involved allegations that personal car

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TOXICOLOGY 191 (2008) (identifying likely no-effect level in chrysotile studies).

118. *In re Toxic Substance Cases*, 2006 WL 2404008 at *7.
119. *Id.*
120. *Id.* at *8.
121. *Id.*
122. *Id.* at *8-9.
123. *Id.* at *8.
124. *See Basile*, No. 11484 CD 2005, slip op. at 5.
125. 943 A.2d at 226.

repair work on brakes and gaskets caused plaintiff's mesothelioma, resulting in a lawsuit against the auto parts store that sold Mr. Gregg the parts he used.[126] The primary holding in the case dealt with the application of the "frequency, proximity, and regularity" causation test, but in the course of the discussion the Court majority expressed a clear rejection of the *any exposure* approach:

> We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease. However, we share Judge Klein's perspective, as expressed in the *Summers* [*v. Certainteed Corp.*, 886 A.2d 240 (Pa. Super. 2005), *appeal granted*, 897 A.2d 460 (Pa. 2006)] decision, that such generalized opinions do not suffice to create a jury question in a case where exposure to the defendant's product is *de minimis*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources). As Judge Klein explained, one of the difficulties courts face in the mass tort cases arises on account of a willingness on the part of some experts to offer opinions that are not fairly grounded in a reasonable belief concerning the underlying facts and/or opinions that are not couched within accepted scientific methodology.[127]

While recognizing the occasional difficulty of proving which of plaintiff's exposures contributed to the disease, Pennsylvania's highest court nevertheless rejected the easy way out of simply stating that all exposures are responsible:

> [W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every "direct-evidence" case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.[128]

Thus, it now appears to be the law in Pennsylvania, as expressed by that state's highest court, that asbestos cases will have to follow the same dose and toxicity rules and proof as any other toxic tort case. A blanket assertion that each and every occupational exposure contributes to disease will no longer support an asbestos case in that state.

Pennsylvania's Supreme Court is not the only state supreme court to

126. *Id.* at 217-18.
127. *Id.* at 226 (citation omitted).
128. *Id.* at 226-27.

address this issue. Six months earlier, the Texas Supreme Court in *Borg-Warner Corp. v. Flores* became the first state court of last appeal to reject the *any exposure* theory.[129] The case involved a mechanic who worked most of his life doing brake and clutch jobs and claimed he developed asbestosis as a result of repeated, low-level exposures over a lifetime.[130] Following a line of Texas asbestos cases highly favorable to plaintiffs, the intermediate Corpus Christi appellate court had held that under Texas law it was sufficient for plaintiffs to show mere exposure to take a defendant to trial:

> In the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied any of the asbestos to which the plaintiff was exposed, then the plaintiff has met the burden of proof . . . .
>
> . . . .
>
> [T]he plaintiffs offered evidence that the defendant's products emitted dust containing respirable asbestos fibers, which one of the plaintiffs had inhaled. On appeal, this Court held that the evidence was sufficient to prove the defendant's products injured both plaintiffs.
>
> . . . .
>
> "[W]ork[ing] in the presence of the asbestos-containing product" was "direct evidence" of causation and sufficient to uphold the jury's finding [of liability].[131]

These statements reflect the older, shortcut approach to causation in asbestos cases designed to expedite cases to trial and alleviate plaintiffs of the burden of proving which exposures actually contributed to their disease.[132] The Texas Supreme Court, however, rejected this approach as inconsistent with Texas tort and causation law:

> While science has confirmed the threat posed by asbestos, we have not had the occasion to decide whether a person's exposure to "some" respirable fibers is sufficient to show that a product containing asbestos was a substantial factor in causing asbestosis . . . . [W]e conclude that it is not . . . .[133]

The court's reasoning followed that of Judge Colville in recognizing the importance of dose, the need for a dose quantification, and the necessity of equating the plaintiff's dose to those in the epidemiological literature

129. 232 S.W.3d at 774.
130. *Id.* at 766.
131. *Flores*, 153 S.W.3d at 213-14 (citations omitted).
132. *See supra* notes 1-3 and accompanying text.
133. *Flores*, 232 S.W.3d at 765-66.

documenting disease.[134] Since *Flores*, other Texas courts have rejected the *any exposure* approach, including in mesothelioma cases.[135]

The federal bankruptcy court in Delaware (Judge Judith K. Fitzgerald) also rejected the *any exposure* theory in *In re W.R. Grace & Co.*[136] Plaintiff's experts contended that asbestos contamination in vermiculate attic insulation posed an unreasonable risk of harm to the homeowners because "any exposure to asbestos fibers is an unreasonable risk."[137] Their testimony was excluded under *Daubert*, however, because the experts failed to establish what level of exposure would actually cause disease and could not present any epidemiology studies demonstrating asbestos disease from exposure to vermiculite.[138] The court held, "[t]he use of the no safe level or linear 'no threshold' model for showing unreasonable risk 'flies in the face of the toxicological law of dose-response, that is, that 'the dose makes the poison . . . .'"[139]

Other courts in Mississippi and Washington State have similarly rejected *any exposure* testimony.[140] The Mississippi decision came in the context of an allegation that exposure to asbestos in a school justified a medical monitoring award, but the court of appeals rejected that approach

134. *Id.* at 770-74.

135. *See Georgia-Pac. Corp.*, 239 S.W.3d at 321; Letter Ruling, *In re Asbestos*, No. 2004-3, 964 (Tex. Dist. Ct., July 18, 2007). The Texas MDL judge actually presaged the *Flores* ruling in rejecting similar *any exposure* testimony in 2004. *See* Letter Ruling, *In re Asbestos*, No. 2004-03964 (excluding plaintiff expert Eugene Mark on "any exposure" theory).

136. 355 B.R. at 474-78.

137. *Id.* at 474.

138. *Id.* at 468.

139. *Id.* at 476. A Delaware state judge in charge of asbestos litigation, Judge Joseph R. Slights III, has rejected a broad motion by automotive defendants to dismiss all mechanic cases, filed largely on the ground that the epidemiology did not support such cases. Even in rejecting this argument, however, Judge Slights expressed considerable skepticism that a no threshold, *any fiber* theory would be viable:

> If, in a given case, a plaintiff must rely upon a no threshold theory to establish causation, the [c]ourt can determine the reliability of that testimony on a separate *in limine* motion. Suffice it to say, the testimony will be scrutinized carefully. *See Bartel v. John Crane, Inc.*, 316 F.[ ]Supp.[ ]2d 603, 611 (N.D. Ohio 2004) (finding Dr. Frank's single fiber theory to be inconsistent with prevailing scientific evidence, including the testimony of Drs. Lemen and Hammar).

In re Asbestos Litig., 911 A.2d 1176, 1209 n.202 (Del. Super. Ct.), *cert. denied*, 2006 WL 1579782 (Del. Super. Ct. June 7, 2006), *appeal refused*, 906 A.2d 806 (Del. 2006). The Michigan intermediate appellate court likewise failed to exclude the testimony of plaintiffs' expert Richard Lemen, but the decision turned on the vehicle mechanic epidemiology and not on a purported *any exposure* causation opinion. *See* Chapin v. A & L Parts, 732 N.W.2d 578, 587 (Mich. Ct. App.), *appeal denied*, 733 N.W.2d 23 (Mich. 2007), 733 N.W.2d 29 (Mich. 2007), *and* 733 N.W.2d 35 (Mich. 2007).

140. *See Brooks*, 934 So. 2d at 355-56; *Anderson*, No. 05-2-04551-5SEA, slip op. at 144-45 ("[T]his is not a theory which is generally accepted in the scientific community."); *Free*, No. 07-2-04091-9-SEA.

without some assessment that the dose was high enough to produce disease.[141] In one the Washington decisions, a state trial judge held that Dr. Samuel Hammar's testimony that any occupational exposure was sufficient to cause disease was "not a theory which is generally accepted in the scientific community" and thus prevented him from so testifying.[142] This case illustrates the extremes of the theory, as the case went to trial against Caterpillar, not in regard to plaintiff's extensive Navy exposures, but on the ground that plaintiff walked by Caterpillar engines while gaskets were being removed and thus must have breathed some asbestos fibers.[143] This ruling is believed to be the first substantive limitation on the testimony of Dr. Hammar, one of the most prominent of plaintiffs' testifying experts. Since then, Dr. Hammar's low dose testimony has been excluded by another Washington State trial judge (along with the testimony of another plaintiffs' expert, Dr. Carl Brodkin),[144] and in Texas in the *Georgia-Pacific Corp. v. Stephens*[145] mesothelioma case where Dr. Hammar testified that any exposure above 0.1 fibers/cc years would contribute to cause disease.[146]

One of the opinions criticizing the *any exposure* approach, *Summers v. Certainteed Corp.*,[147] directly addresses the illogic of the cumulative dose approach many of these expert use to include every exposure in causation:

> Dr. [Jonathan] Gelfand used the phrase, "Each and every exposure to asbestos has been a substantial contributing factor to the abnormalities noted." However, suppose an expert said that if one took a bucket of water and dumped it in the ocean, that was a "substantial contributing factor" to the size of the ocean. Dr. Gelfand's statement saying every breath is a "substantial contributing factor" is not accurate. If someone walks past a mechanic changing brakes, he or she is exposed to asbestos. If that person worked for thirty years at an asbestos factory making lagging, it can hardly be said that the one whiff of the asbestos from the brakes is a "substantial" factor in causing disease.[148]

The *Summers* statement proved influential in convincing the Pennsylvania Supreme Court to reject the *any exposure* approach in the recent *Gregg* ruling.[149]

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141. *See Brooks*, 934 So. 2d at 355-56.
142. *See Anderson*, No. 05-2-04551-5SEA, slip op. at 145.
143. *Id.* at 95.
144. *Free*, No. 07-2-04091-9-SEA, slip. op. at 4-5 (ruling on motion *in limine*).
145. 239 S.W.3d at 304.
146. *Id.* at 316.
147. 886 A.2d 240 (Pa. Super. Ct. 2005), *appeal granted*, 897 A.2d 460 (Pa. 2006).
148. *Id.* at 244 (emphasis omitted).
149. *See Gregg*, 943 A.2d at 226.

Experts who continue to assert the *any exposure* basis for medical causation in asbestos cases are carrying a torch that is being extinguished repeatedly in asbestos cases around the country. As courts have held, "each and every exposure" testimony is, at best, an unproven hypothesis that ignores scientific principles and should not suffice for causation in an asbestos case.[150]

IV. HOW THE *ANY EXPOSURE* THEORY FITS INTO THE SCIENTIFIC AND TORT LITIGATION WORLD

Plaintiffs' experts who support the *any exposure* approach to asbestos litigation can speak at great length and cite to many materials to justify their approach. The discussion is a siren song of epidemiology, animal studies, the history of asbestos, fear of cancer, case reports of persons with mesothelioma and a certain exposure, and mathematical predictions of thousands of mesothelioma cases at even the lowest of doses.[151] They can cite to a number of review articles and other published literature that support at least a portion of their approach, much of it written by other plaintiff testifying experts.[152] Government publications also offer tacit support, since regulators take highly conservative approaches and rarely, if ever, declare any form of asbestos exposure to be "safe," even when the literature supports an identifiable no-effect level.[153]

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150. *See, e.g.*, *In re Toxic Substance Cases*, 2006 WL 2404008 at *6; *Bartel*, 316 F. Supp. 2d at 611; *Georgia-Pac. Corp.*, 239 S.W.3d at 320-21.

151. *See, e.g.*, Lemen, *supra* note 59; David Egilman et al., *Exposing the "Myth" of ABC, "Anything But Chrysotile": A Critique of the Canadian Asbestos Mining Industry and McGill University Chrysotile Studies*, 44 AM. J. INDUS. MED. 540 (2003); Laura S. Welch, *Asbestos Exposure Causes Mesothelioma, But Not* This *Exposure: An Amicus Brief to the Michigan Supreme Court*, 13 INTL. J. OCCUPATIONAL & ENVTL. HEALTH 318 (2007).

152. *See, e.g.*, Lemen, *supra* note 59; *see also* Egilman et al., *supra* note 151; *see also* Welch, *supra* note 151; David S. Egilman, *Abuse of Epidemiology: Automobile Manufacturers Manufacture a Defense to Asbestos Liability*, 11 INT. J. OCCUPATIONAL & ENVTL. HEALTH 360 (2005); BARRY I. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 539-80 (Aspen Publishers, Inc. 5th ed. 2005). All of these authors testify on behalf of plaintiffs in asbestos litigation.

153. *See, e.g.*, Pierce et al., *supra* note 117, at 205 (calculating no-effect level for chrysotile exposures). For example, despite the extensive growing evidence that chrysotile is less potent than amphiboles and that short fibers do not cause disease, neither OSHA nor EPA has ever made any distinctions between the different exposures in their regulatory requirements. There are practical reasons for this (the difficulty of separating exposures in a workplace), but the justification is usually, "since we don't know for sure we'll just be cautious and regulate everything the same way." While this approach may have some justification in the regulatory world, it should never serve as a basis for finding legal causation as to any exposure regardless of disease-inducing potency. EPA has announced the creation of a scientific advisory panel to assist

Nevertheless, despite these attempts to support it, the *any exposure* theory does not have any credible foundation in the scientific literature.[154] In fact, the *any exposure* theory is almost entirely a litigation construct and is not widely published or accepted in the peer-reviewed literature. Virtually nothing in the literature expressly states what these experts routinely say in court—that each and every occupational exposure, no matter how small, is a cause of disease.[155] There is great debate over related subjects such as whether chrysotile should be considered a cause of mesothelioma, whether short fibers contribute to disease, or whether occupations like vehicle mechanics are even subject to any asbestos disease at all, despite long-term, low-level exposures.[156] Even the most plaintiff-oriented of these articles, however, do not take the extreme position that there is no minimum. The litigation proponents of the theory themselves rarely, if ever, present the notion that *every occupational exposure is causative* to the general scientific community through publications or

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the agency in deciding whether its asbestos risk assessment process should be modified to reflect the growing literature and findings.

154. *See* cases cited *supra* note 65.

155. Perhaps the closest enunciation is that of the "Helsinki Criteria," a document generated by nineteen scientists in 1997 to develop their version of criteria for attributing lung cancer and mesothelioma to asbestos exposure. *See Asbestos, Asbestosis, and Cancer: The Helsinki Criteria for Diagnosis and Attribution*, 23 SCANDINAVIAN J. WORK ENV'T & HEALTH 311, 312-14 (1997). As to mesothelioma, the Helsinki Criteria states that a "significant occupational exposure" is adequate for attribution, but then later restates (confusingly) that "brief or low level exposures" are also sufficient. *Id.* at 313. There is no definition or even discussion of what would constitute a significant, brief, or low level exposure, and no justification provided for attributing disease to such exposures, particularly for chrysotile. Nor does the Helsinki Criteria document purport to provide any basis for determining *which* occupational exposures should be considered causative—it merely provides criteria for attributing a disease to occupational exposure generally. Even the Helsinki Criteria's extreme approach to mesothelioma attribution does not state that every occupational exposure, or every exposure above background, should be considered disease-inducing. Instead, it clearly implies a universe of occupational exposures that are too low to be included and some judgment about dose and duration must be exercised before attributing a disease to an occupational exposure. *See id.*

156. *Cf., e.g.*, Ronald F. Dodson et al., *Asbestos Fiber Length as Related to Potential Pathogenicity: A Critical Review*, 44 AM. J. INDUS. MED. 291 (2003); Phillip J. Landrigan et al., *The Hazards of Chrysotile Asbestos: A Critical Review*, 37 INDUS. HEALTH 271 (1999); William J. Nicholson, *The Carcinogenicity of Chrysotile Asbestos—A Review*, 39 INDUS. HEALTH 57 (2001); Gunnar Hillerdal, *Mesothelioma: Cases Associated with Non-Occupational and Low Dose Exposures*, 56 OCCUPATIONAL & ENVTL. MED. 505 (1999); *with* Hodgson & Darnton, *supra* note 68 (stating chrysotile far less potent than amphiboles); EASTERN RESEARCH GROUP, INC., REPORT ON THE EXPERT PANEL ON HEALTH EFFECTS OF ASBESTOS AND SYNTHETIC VITREOUS FIBERS: THE INFLUENCE OF FIBER LENGTH vi (2003), http://www.atsdr.cdc.gov/HAC/asbestospanel/final part1.pdf; EASTERN RESEARCH GROUP, INC., REPORT ON THE PEER CONSULTATION WORKSHOP TO DISCUSS A PROPOSED PROTOCOL TO ASSESS ASBESTOS RELATED RISK viii (2003), http://www.epa.gov/oswer/riskassessment/asbestos/pdfs/asbestos_report.pdf; Churg, *supra* note 58, at 314.

scientific conferences where it could be scrutinized and likely debunked. Thus, the theory completely fails the *Daubert* "peer review and publication" test and the "general acceptance" test under either *Daubert* or *Frye*.[157]

The *any exposure* theory also does not fit well in the litigation world. It is largely an asbestos issue because in most toxic tort litigation the notion that any exposure to a toxin satisfies the substantial factor or but-for tests of causation would be considered so extreme that most experts would not have the temerity to present it. In the *Parker* case discussed previously, the plaintiff's experts testified that plaintiff's AML was caused by many years of gas station work exposures, not *any* exposure.[158] Imagine if they had been dealing with a long-time benzene factory worker—the exact population demonstrated by epidemiology to be at risk—but tried to blame the plaintiff's disease on the few times he put gas in his own car and thus breathed miniscule amounts of benzene in gasoline. This is the equivalent of the *any exposure* theory carried over to non-asbestos litigation.

At best, the *any exposure* approach is only a theory, an unproven hypothetical concept. At worst and carried to extremes, it is almost certainly erroneous and misleading, and would never be permitted as a basis for testimony in most toxic tort causation contexts. Only in the world of special asbestos rules can such a theory gain a foothold.

V. ASBESTOS JURISPRUDENCE IN LIGHT OF THE DECISIONS REJECTING THE *ANY EXPOSURE* THEORY

The above decisions rejecting the *any exposure* theory have the potential to affect a sea of change in asbestos litigation causation testimony. The issues they raise will likely come to be litigated at some point in virtually every asbestos jurisdiction.

Many of the courts that will have to address *any exposure* motions have managed asbestos cases for years and have seen some of the plaintiffs' experts testify perhaps hundreds of times without anyone challenging the scientific basis for their testimony. Some of these judges will be quite puzzled to understand why defendants are suddenly raising expert and

157. The *Daubert* test requires that the scientific methodology be reliable, one aspect of which is that the theory/methodology have been subjected to peer review and general acceptance in the scientific community. *See Daubert*, 509 U.S. at 593-94. The *Frye* test is more narrow, requiring simply that the theory be accepted in the scientific community before admission as evidence. *See id.* at 584-85. Both tests are designed to prevent theories from being presented as courtroom evidence before they have run the gauntlet of review and testing in the scientific community. *See id.* at 589-90.

158. *See supra* notes 33-41 and accompanying text.

causation issues not part of the previous asbestos landscape. For several reasons, courts should take a closer look at this causation testimony, even if they have not done so in the past.

A. *Courts Should Begin to Apply Standard Tort Principles and Causation Rules to Asbestos Cases*

For three decades, the special asbestos rules affecting causation created a unique opportunity for plaintiffs to prove their cases merely by identifying a defendant's product and asserting, through plaintiff's or co-workers' testimony, that some fibers from that product were in the plaintiff's breathing zone.[159] In the context of the "old" asbestos litigation, where, for example, an insulator might work with multiple insulation products but could not necessarily prove how much with each one, the rule served to overcome proof obstacles in occupations and industries clearly demonstrated through epidemiology to cause mesothelioma and other asbestos disease.[160]

Whether the relaxation of causation rules was justified in this circumstance or not, the justification no longer exists where most of the defendants are not asbestos companies or insulation suppliers, but are companies that only sold or used products with limited asbestos in them. Often the asbestos in the products used or sold by these defendants was sealed in resins or binders and thus would not ordinarily produce much, if any, exposure. Mechanic exposures, for example, have historically been in the range of half the current OSHA standard of acceptable exposures in the workplace.[161] Gaskets likewise produce very little exposure, as noted in the *Bartel* case.[162] Nevertheless, in the face of allegations that the plaintiff worker or co-worker witnessed visible dust while working with asbestos parts, or disrupted these products through grinding, sanding, cutting, or drilling, it is nearly impossible for such a defendant to claim *zero* fiber exposure—the only defense that could avoid a trial under an *any exposure* attack.

These cases fall squarely into the world of the New York *Parker* case, where the causation theory is highly speculative and theoretical, and is not supported by epidemiology showing disease from these exposures or

159. *See supra* notes 1-3, 46-47 and accompanying text.

160. *See id.*

161. *See* Paustenbach et al., *supra* note 80.

162. *See Bartel*, 316 F. Supp. 2d at 608.

occupations.[163] If plaintiff law firms wish to develop a new wave of asbestos litigation against *de minimis* exposure defendants, based on a theory that is not generally accepted in the scientific community, they should not be permitted to rely on the old rules to do so. Instead, the principles of *Parker* and other traditional toxic tort cases should apply, and the testimony must be tested under *Daubert*, *Frye*, or other state evidentiary and expert requirements before trial. Plaintiffs' experts should be required to assess the dose from an individual defendant's product or workplace and demonstrate that it is the kind of dose shown in established epidemiology studies to be capable of causing disease.

B. *The Expansion of Asbestos Litigation to a Wide Array of Minimal Exposure Defendants is Unjustified*

The effect of the *any exposure* theory can be exceptionally unfair when applied to defendants connected with extremely small exposures, especially when plaintiff experts ignore far more significant exposures that almost certainly caused the disease. The unfairness is only multiplied in jurisdictions that will not permit the defendants remaining at trial to point to the plaintiff's real asbestos exposures from other sources.[164] The courts discussed above have sometimes reacted to the perverse effect of the *any exposure* theory as applied to asbestos cases. The Pennsylvania *Summers* court, for example, noted the incongruity of blaming a single brake job for plaintiff's mesothelioma when he was a lifelong insulator.[165] The *Gregg* court questioned why plaintiffs were trying to take a brake parts supplier to trial when the complaint alleged a forty-year history of occupational exposure.[166] The *Bartel/Lindstrom* cases noted that the claim against the provider of gaskets and packings seemed trivial in comparison to the worker's extensive insulation exposure.[167]

These courts are recognizing that asbestos causation can get out of

163. *See Parker*, 857 N.E.2d at 1121-22.

164. In Illinois, for instance, the bizarre *Lipke v. Celotex Corp.*, 505 N.E.2d 1213 (Ill. App. Ct. 1987), rule, the only one of its kind in the country, prohibits a trial defendant from informing the jury about *any* of plaintiff's other asbestos exposures, even when those exposures were severe (e.g., in the Navy) and far more than sufficient to cause the disease. This rule, and others like it that prohibit references to bankrupt asbestos companies, leave the jury with few or no sources of asbestos to consider as the cause of the plaintiff's disease except for the minimal exposures of the remaining, low dose trial defendants. *See generally* Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235 (2004).

165. *See Summers*, 886 A.2d at 244.

166. *See Gregg*, 943 A.2d at 226.

167. *See Bartel*, 316 F. Supp. 2d at 610-11.

control under the *any exposure* approach. Yet plaintiffs' experts refuse to acknowledge that their theory attaches causation to trivial exposures, nor do they even attempt to separate work experiences that truly cause asbestos disease from those that contribute nothing but isolated or inconsequential exposures. Put bluntly, there is likely to be a credibility issue for courts that allow experts to testify that a single breath of exposure justifies taking that defendant to trial.[168]

C. *The Science Requires More*

As documented in Judge Colville's analysis[169] and others above, the *any exposure* experts do not have epidemiology or other scientific proof that these low exposures cause anything. They are testifying to a theory, a hypothesis, an estimate of disease derived from assumptions that may or may not be true. Courts cannot be in the business of allowing cases to go forward with only theory and speculation to prove causation. Under either *Frye* or *Daubert*, and for that matter under basic evidentiary and reliability principles, there must be more.[170] Traditional industrial hygiene and toxicology principles and methodologies exist under which non-litigation professionals can assess whether past exposures were sufficient to cause disease.[171] The *Parker* opinion noted as much and found no merit to the contention that low dose cases cannot be proven unless plaintiffs are given the advantage of avoiding any dose assessment.[172] The reality is that such cases can and should only be proven if the dose can be reasonably and scientifically assessed and there is credible science supporting causation at such doses. Otherwise, the experts should be excluded and the cases should not go to trial.

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168. Virtually everyone who lives in an industrial society has been exposed to asbestos fibers and could be a potential plaintiff under the *any exposure* theory, even though there is no evidence low-level exposures consistent with background exposures actually cause disease.

> [Because asbestos] is one of the most ubiquitous of the Earth's minerals and in addition, millions of cars still spew thousands of asbestos fibers into the air each time a driver applies the brakes, many if not most adults in the general population have significant numbers of asbestos fibers in their lungs; however, despite breathing in millions of asbestos fibers annually, virtually none of the population thus exposed to ambient concentrations of asbestos fibers thereby suffer adverse effects on their health.

Brickman, *supra* note 87, at 49.

169. *See supra* notes 103-23 and accompanying text.

170. *See Frye*, 293 F. at 1013 (explaining admission of expert testimony depends on general acceptance within the scientific community); *see also Daubert*, 509 U.S. at 579 (explaining admission of expert testimony depends on reliability).

171. *See, e.g.*, *Parker*, 857 N.E.2d at 1114.

172. *See supra* notes 33-41 and accompanying text.

D. *It Is Not Sufficient to Let a Low-dose Case Simply Go to the Jury*

Some courts are proponents of letting expert disputes, such as the level of exposure required, go to the jury in every instance. Similarly, some of the *any exposure* experts, when confronted with their failure to separate significant from insignificant exposures, respond that they are unwilling to deal with differences among defendants and simply expect the jury to figure it all out. This is not an acceptable approach, scientifically or legally. Without any expert testimony separating the exposures likely to have caused the disease from those unlikely to have done so, the jury has no basis to make the decision. The attribution of disease among different fiber types and exposure experiences is not within the province of a lay person but must be supported by expert testimony. Experts who abdicate that exercise should not be permitted to testify that all exposures "contribute" and then hand it over to the jury.

Likewise, the subject of "how much is enough" is without question one that is subject to a *Daubert/Frye* review of the experts' methodology and testimony. Judges cannot abdicate their gatekeeping function on this critical expert issue,[173] but must determine whether the expert testimony and causation evidence pass scientific and legal muster. This is particularly true in complex science cases, in which juries of lay people are singularly ill-equipped to sort through the complex studies and scientific issues and instead often render decisions based on favorable reactions to witnesses, impressive testimony by the experts, and sympathy for a plaintiff who is likely to die soon (or already has) from a disease known to be caused by asbestos.

VI. CONCLUSION

Asbestos has for years held sway as perhaps the most feared of industrial exposures. At the same time, asbestos litigation has also earned a reputation as the most out-of-control of all tort litigation. The history of asbestos is indeed a terrible one, with great loss of life from exposures that predate the institution of OSHA workplace and other regulations. That history is not a basis for blaming every fiber and every breath for asbestos disease in today's litigation environment. Courts must exercise control over the current state of litigation and the assertion of the *any exposure* theory. In light of the array of recent decisions rejecting that theory, courts that do so are clearly in good company and have substantial support from their colleagues in other jurisdictions.

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173. *See, e.g.*, *Daubert*, 509 U.S. at 597.

PANEL 4
New Ventures in Tort Theory

HOLISTIC TORT THEORY

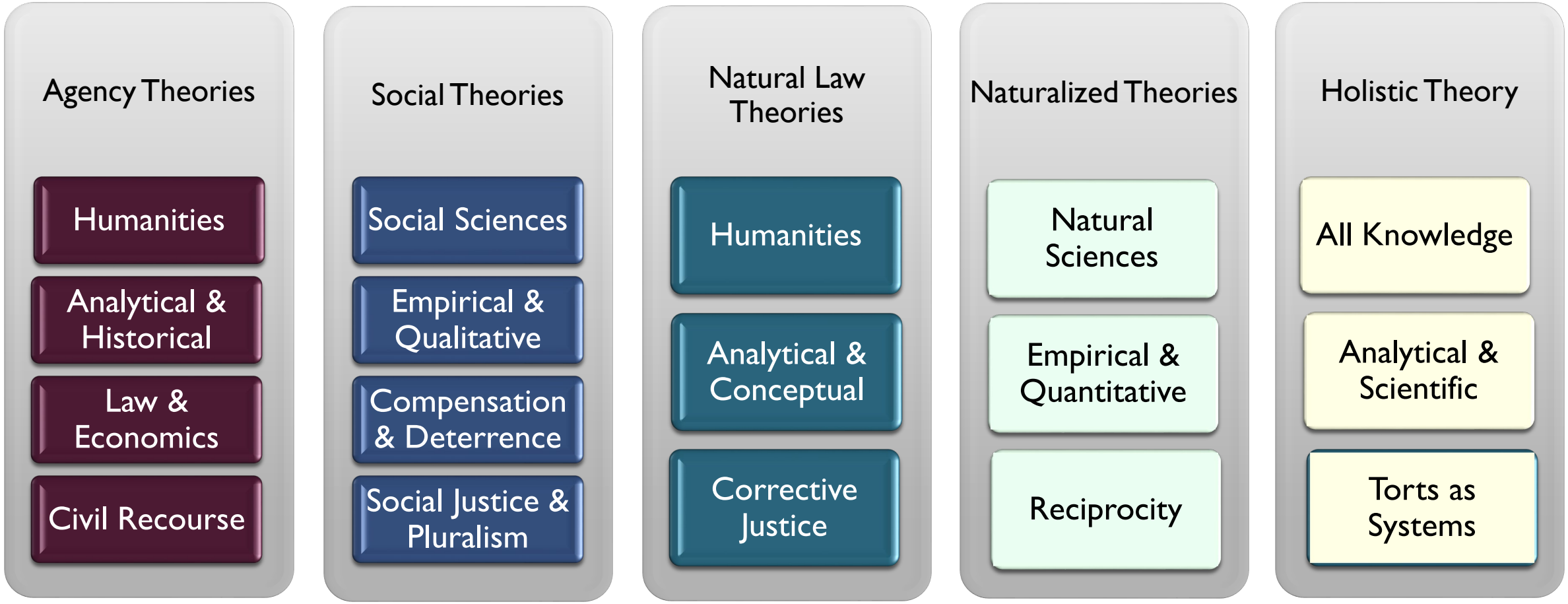
PROFESSOR ALAN CALNAN

FRONTIERS OF TORTS CONFERENCE; FEBRUARY 7, 2020

SUMMARY

- Traditional Tort theories are siloed and restricted
- Legal institutions (like Torts) form and operate holistically
- Many Tort features reflect the law's holism
- Holism exposes anomalies in other Tort features
- Holistic tort theory fills voids in Tort jurisprudence

TRADITIONAL TORT THEORIES & ALTERNATIVES

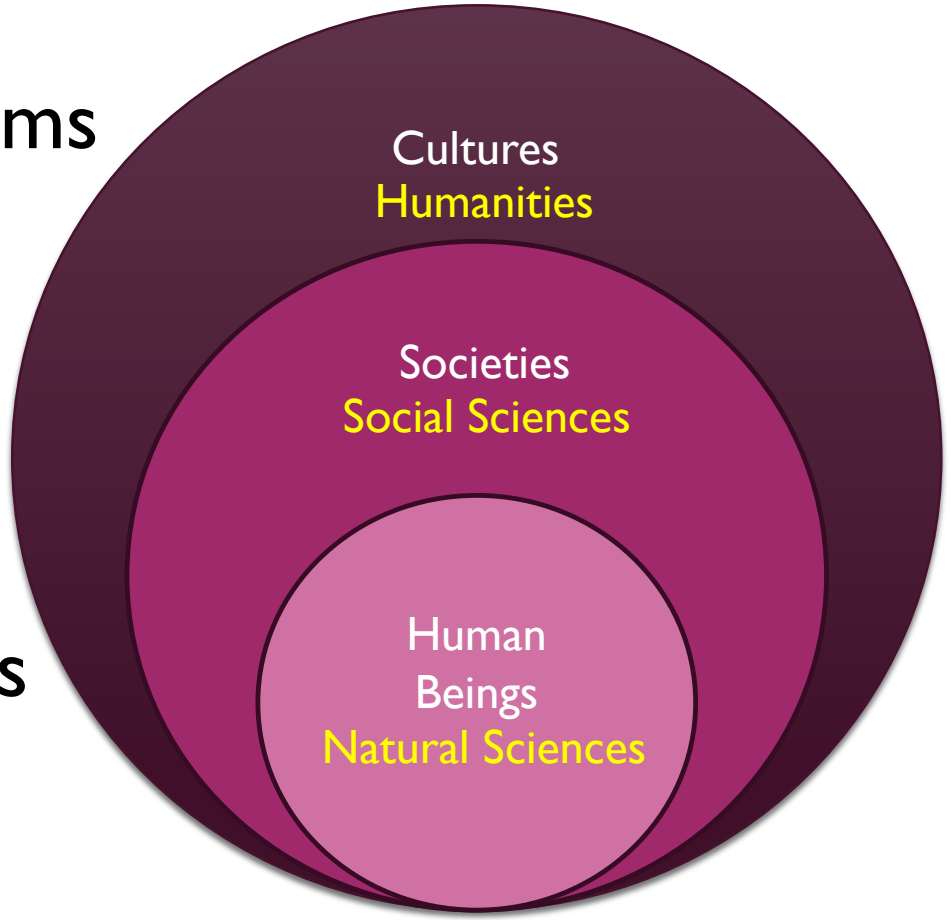


LAW'S HOLISM

Laws & Legal Systems

Norms & Conventions

Values & Concepts



Scalable

Synergetic

Interconnected

TORTS' HOLISTIC FOUNDATIONS

Tort System

- Cooperation & Conflict Reconciliation
- Sociocultural Homeostasis
- Universality

System Structure

- Dispute Resolution + Lawmaking + Social Oversight
- Complex Adaptive Systems
- Coordination Dynamics

Tort Concepts

- Rules, Standards, & Principles
- Instinctive & Conventional Wrongs
- Multifactor Balancing Analyses

TORT ANOMALIES EXPOSED BY HOLISM

Reasonableness

Concept: Rational NOT Emotional

Reality: Emotion and/before Reason

Wrongs

Concept: Wrongs are Mental

Reality: Wrongs ALSO are Personal

Atomism

Concept: Judgment is Atomistic

Reality: Judgment is Holistic

CONCLUSIONS

Methodology

- A holistic approach broadens the knowledge domains informing our Tort theories

Substance

- A holistic theory deepens our understanding of Torts' values, structure, content, and processes

Talk

The Coming Collision

Autonomous Vehicles and Individual Fault Liability

1. *The Allure of Autonomous Vehicles?* The impending emergence of autonomous vehicles will be a shock of seismic proportions for the American automobile liability system. At the moment, it also seems to be a sure thing—a matter of when, not if. Some of this may be marketing hype, but it isn't all hype.

    1.1. *Perfected driverless* cars have an enormous advantage over human drivers—no lapses, no bad moods, no anti-social behavior.

    1.2. *Fully autonomous vehicles* aren't erratic in the way that human beings are; they don't get distracted; they aren't afflicted by road rage or other moods; they don't drink and drive; they don't forget to take their medications or take the wrong ones before getting behind the wheel.

    1.3. *Common sense* tells us that these are huge advantages; the data on existing auto accidents is even more overwhelming.

2. *Eliminating Lapses.* According to the National Highway Traffic Safety Administration (NHTSA), approximately 2.4 million people are injured in auto accidents each year in the United States, and almost 40,000 are killed. Driver error causes an overwhelming majority of these cases. The NHTSA pegs the proportion at 94%. Not everyone agrees with that number but all the statistical estimates I've seen classify driver error as *the* leading cause of auto accidents.

    2.1. But eliminating driver error— and *only* eliminating driver error—is *future promise* not present performance.

    2.2. *Present performance* is quite a different matter.

3. *Are Machine Error Free?* So far machines (autonomous vehicles) are not error free. Indeed, the "transition" may be exceedingly bumpy. So far, autonomous vehicles seem well designed to follow the rules of the road, but to flounder in idiosyncratic situations. They follow algorithms almost flawlessly but struggle with interpreting context.

3.1. *A fender bender.* In one accident, for instance, a truck driver backing up out of loading bay at an airport did not see a self-driving shuttle which had just that very day been put in service circling the airport. The shuttle saw the truck and stopped. But it stayed there immobile—no honking, no backing up; it just sat there. Eventually, the truck driver became aware of the shuttle—by running into it.

3.1.1. This is an instructive accident. On the one hand, the driver was at fault. On the other hand, the autonomous shuttle did not drive defensively. For a human driver avoiding this accident would have been child's play. But for the autonomous vehicle the situation was simply beyond the confines of its known universe. It hadn't been programmed to cope with this kind of situation.

3.1.2. Note, too, that human beings avoid accidents like this pretty regularly. And we have no statistics on that. Driver error is something we track; driver avoidance of accidents that might have occurred had the driver been an AV is not.

3.2. *Generalizing the problem.* When you think about it, interpreting other drivers' behavior is a large part of driving. I'm shuttling back and forth between Los Angeles and Boston this year. I'm also a cyclist. There are discernibly different driving cultures in these two cities. Boston drivers are much more likely to make left turns cutting in front of oncoming traffic the moment a light turns to green, and much more likely to make right turns after lights have changed, again trying to beat the traffic with the right of way.

3.2.1. Boston drivers, like most drivers, norm their conduct around the rules, but they also violate the rules in consistent, predictable ways**.** As a cyclist, I'm on guard for this, and make a habit of trying to catch the eyes of drivers' who I think might be about to do something aggressive in my vicinity. On the one hand, interpreting a driving culture is not something autonomous vehicles seem on track to do. The intelligence involved doesn't seem to lend itself to algorithmic replication. On the other hand, just what will replace "catching their eyes"—if anything—is unclear.

4. *But still no lapses.* Even so, autonomous vehicles will not be lapse-prone. Distracted driving—which now seems to be on the rise thanks to smartphones and other computing technologies—will become a thing of the past.

    4.1. If you eliminate human error as a cause of car crashes, you eliminate the leading cause of car crashes. The kind of safety improvement that seems probable is one that is simply unimaginable as long as people operate cars.

    4.2. Consequently, autonomous vehicles can be afflicted by significant imperfections and still reduce driving deaths and accidents.

5. *Eliminating Fault—and Individual Responsibility.* Autonomous vehicles are on a collision course with the present American liability system for a simple, basic reason. That system is fault-based, and focused on individual conduct. It is a system of individual responsibility and it is utterly obsolete once cars are not driven by individual human beings.

    5.1. *Ordinarily, in law, we wedge new phenomena into pre-existing frameworks.* If someone comes up with a complex "new" kind of real estate arrangement we still determine whether, for say tax purposes, it is a lease or a sale.

        5.1.1. In exceptional circumstances, we concede that a new legal construct is necessary. For example, when creative transactional lawyers created "interest rate swaps" the law struggled mightily to squeeze them into existing boxes, but eventually conceded that they were genuinely novel and treated them accordingly.

        5.1.2. The construction of novel legal categories and regimes, however, rarely happens easily or quickly.

    5.2. *Autonomous vehicles are likely to follow the same path.* Initially, we may treat cars with no drivers as if they had drivers, and judge their conduct accordingly. When pressed to assess the adequacy of some aspect of autonomous vehicle design, we are likely to turn to product liability design defect law.

        5.2.1. And we may be able to wedge some of the issues into design defect law, albeit with considerable difficulty.

        5.2.2. But, in the long run, the negligence law we apply to cars with drivers really won't be able to accommodate autonomous vehicles.

5.3. *Wedging Driverless cars into negligence liability*. Consider the shuttle accident again. If we apply ordinary negligence law to the "conduct" the shuttle we judge the shuttle to be comparatively negligent, assign a percentage to it's culpably responsibility for the collision, and impute that responsibility to the entity that owned the shuttle.

5.3.1. This all "works" in the sense that we can perform the operations involved but it's wrongheaded. The car had no driver. Any "fault" was on the part of the manufacturer of the vehicle. The car didn't take appropriate defensive action because it wasn't programmed to do so.

5.4. *What about holding the manufacturer liable?* This seems to be on the right track, but it's not an easy design defect case. It's anything but obvious what we can expect from autonomous vehicle at this point in time.

5.4.1. The engineering is advanced and doesn't lend itself to evaluation by lay juries, and it is evolving quickly. More on this later.

5.4.2. Right now, we tend to assume that different automobile manufacturers will offer different "products"—maybe. It seems a bit strange to suppose that BMW will offer "ultimate self-driving AVs" or that Volvo will offer especially sedate ones.

5.4.3. Still, we can imagine a situation where some manufacturers produce cars with distinctive defect, just as airplane manufacturers do now.

5.4.4. Down the road, however, AVs may all share a common operating system and be networked into a grid. Individual vehicles may just be nodes where the system operates. They won't have distinctive designs for product liability law to latch onto.

5.4.5. Responsibility will reside in the system as whole. We might still find it useful to hold manufacturers of AVs liable for accidents involving their AVs, but the liability won't be product defect liability. The manufacturer will be a conduit for the imposition of liability on the system as a whole. Responsibility will reside with the collective enterprise of autonomous vehicle operation, not with any individual or firm, but

5.5. *This is a circumstance where you can't successfully force a new technology into the Procrustean bed of existing legal boxes—not ultimately, anyway.* You can squeeze

autonomous vehicles into the product liability box, but only with considerable difficulty and limited success. Eventually, some other legal regime will be needed.

5.6. *Something like this—but less extreme—has happened before.* At the end of the 19th century, workplace accidents precipitated a crisis in the common law of torts by challenging its highly individualistic form of responsibility for avoiding and repairing harm. The result, after a major political struggle, was the displacement of the common law of torts by workers' compensation.

5.7. *The emergence of autonomous vehicles* is an even more acute challenge because individual drivers will, eventually, no longer exist and it will become impossible to continue with our individual responsibility-centered form of liability.

5.8. *In broad terms*, the alternative is to switch to a system of "collective", or "enterprise" responsibility.

6. *The Fracture at the Center of Modern American Tort Law.* Pre-modern tort law was a law of nominate, mostly intentional, wrongs. Modern tort law is mostly a law of accidents that are recurring byproducts of basic activities in an industrial and technological society.

6.1. *Modern tort law* was born out of the emergence of accidental physical harm as a pressing *social* problem. As a prominent legal historian put it, modern American tort law is "a body of law created when the industrial revolution and industrial accidents began to wreak havoc on the bodies of workers and passengers."

6.2. *Oliver Wendell Holmes' famous aphorism* epitomizes the point: "[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like," whereas "the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses . . . railroads, factories, and the like."

7. *Between Individual and Collective Responsibility.* The twin preoccupations that gave birth to modern tort law—with accidental wrongs instead of intentional ones and with a social problem instead of with individual wrongs—had, and continue to have, large implications for torts as a legal field.

7.1. Because the accidents with which modern tort law is preoccupied are characteristically associated with activities, responsibility for those accidents may be lodged *either* with individuals or with activities.

7.2. Negligence liability instantiates the individual liability alternative. Enterprise liability instantiates the collective alternative.

8. *Clinging to Individual Responsibility.* Driving as it exists in our present society is an ongoing, systemic activity, and huge. Consequently, we are able to understand accidents in broad, systemic, ways. We can say, for example, that more than 90% of auto accidents are caused by driver error. Driver error is a systemic problem. That's why autonomous vehicles are so alluring.

    8.1. <u>But our liability system treats auto accidents as instances of individual responsibility</u>. Individual fault liability is the prevailing regime. When an accident happens, we try to determine which driver was responsible—whose lapse caused the crash.

    8.2. <u>Sometimes</u>, of courses, <u>no one is responsible</u>; or a defect in the car is responsible; or a defect in the design of the roadway; and so on. Mostly, though, we find that someone is responsible and their irresponsibility mostly consists of a lapse in attention or concentration.

9. *Collective Responsibility*. Holmes' famous observation points us towards a form of collective responsibility. The assumption is that enterprises engaged in activities on a recurring basis—*not* individuals undertaking isolated risky acts—are the most important source of accidental harm in the modern world. In a modern technological society most tortious wrongs (and most harms) are the predictable byproducts of ongoing activities. Enterprises, therefore, ought to be treated as the *fundamental units of responsibility* for the purposes of attributing accidental harm.

    9.1. *Collective Responsibility as the Road Not Taken*. Even in our world of human operated cars we might have instituted collective responsibility by, say, adopting a New Zealand type scheme and relying on a mix of social insurance and safety regulation to govern accidents. Fundamentally, we didn't. We stuck with individual fault liability. But aspects of our system are mixed.

    9.2. *Just why we stuck with Fault Liability* is a long story, shaped by idiosyncratic events, no doubt. One important reason, though, has to be that individual responsibility tracks our conviction (which itself is now shaped by the

liability system) that cars are inanimate machines. They don't drive themselves, and responsibility for operating them safely lies with their drivers.

9.3. *Our Mixed. System.* Even though the United States has retained individual fault liability as its core system of responsibility for accidents, *it intersects with a products liability regime which is, in part, a regime of enterprise liability.*

ENTERPRISE LIABILITY (A NECESSARY DETOUR)

10. *What is "enterprise liability"?* Enterprise liability is usually explained in short slogans—"activities should bear the costs of those accidents that result from their characteristic risk impositions"; "it is only fair that an industry should pay for the injuries it causes"; "losses should be borne by the doer, the enterprise, rather than distributed on the basis of fault." These slogans are useful ways of epitomizing enterprise liability, but they are too terse to serve as satisfactory explications.

11. *Enterprise Liability as a Tort Regime.* Enterprise liability is constituted as a distinctive regime of tort liability in part because it asserts:

    11.1. Internalization. Internalization prescribes that the costs of those accidents that are characteristic of an enterprise *should be absorbed by the enterprise* as operating expenses, not left on those whose bad luck it is to get in the enterprise's way;

    11.2. Loss-Dispersion. Loss dispersion asserts that the costs of enterprise-related accidents *should not be concentrated* either on the victim who originally suffered the injury, or on the particular agent who inflicted the injury; and

    11.3. Fairness. Fairness prescribes that the costs of accidents that are characteristic of an activity should be *distributed among those who benefit from the imposition of the enterprise's risks.*

    11.4. In the case of private firms, *the costs of enterprise-related harms should be distributed* among customers, employees, suppliers, and shareholders, rather than concentrated either on the victim or on the particular agent responsible for the harm at issue.

12. *Products Liability as Enterprise Liability*. The principal form of "enterprise liability" to emerge in 20th Century America was products liability. When it first arose, products liability was an almost pure incarnation of enterprise liability ideas. Justice Roger Traynor's concurrence in Escola v. Coca-Cola was the products liability as enterprise liability in a grain of sand.

    12.1. The Escola concurrence asserts that the costs of product related accidents should be internalized by product producers and be distributed across all those shareholders, employees and customers who benefit from manufacturing selling and using the defective product.

13. *Why Enterprise Liability?* The *three basic policies* of enterprise liability—accident avoidance; loss-spreading; and fairness—all support strict liability.

    13.1. Accident Avoidance. By placing the responsibility for product safety in the hands of those who manufacture, distribute and market products strict liability secures maximum protection against unsafe products.

        13.1.1. Why is this maximum protection? Because the firms that make up the "enterprise" are in a better position to identify and execute risk reducing measures than courts applying negligence liability are. And because making firms bear the costs of all the physical injuries caused by their defective products provides a stronger incentive to make their products safe than negligence liability does.

    13.2. Loss-Spreading. Those in the chain of distribution—especially the product manufacturer— are in the best position to spread the costs of product accidents.

        13.2.1. Why? Because product users are all exposed to the same product risks. From an insurance perspective, product users form a relatively homogeneous risk pool. The imposition of strict liability is de facto mandatory third-party insurance against product accidents. Because product liability cannot be disclaimed, the insurance that it provides is relatively resistant to adverse selection problems.

    13.3. Fairness. Strict liability will spread the costs of product accidents across all those—consumers, producers, distributors—who benefit from the product.

14. *Reform and Backlash*. Traynor's envisioned regime of near pure "enterprise liability" was only the beginning of modern American product liability law. For such a

young branch of law, product liability has an intense and conflicted history. Its enterprise liability moment gave way to a negligence backlash. The body of law that we now have is a mix of the two.

15. *Where are we now?* The short answer is that the United States has a product liability law that is the product of both an aborted enterprise liability revolution and an incomplete negligence counter-revolution. Consequently, the law of products liability reflects deep structural conflict.

    15.1. The most important effect of this counter-revolution, for our purposes, is on design defect law. There are now two tests for design defect prominent in American law—the "consumer expectation" test and the "risk-utility" test.

    15.2. The risk utility test is quite negligence-like. And the consumer expectation test is not easily applied to complex product features. For reasons I shall try to suggest, neither is likely to be easy to apply to autonomous vehicle accidents.

POSSIBLE LIABILITY REGIMES

16. *The Starting Point.* In the U.S., then, we inherit a world in which there is a regime of individual fault liability for automobile accidents, and a regime of enterprise liability for product accidents.

    16.1. The temptation is to wedge autonomous vehicles into one box or the other.

    16.2. If they won't squeeze into the box of individual fault liability they must be wedged into product liability

    16.3. —Or we must invent something genuinely new.

17. *Under Existing Regimes 1: Fault Liability for Drivers.* At the beginning we will no doubt muddle through, applying fault liability to erratic driving by Autonomous Vehicles (AVs) and products liability to "failures" of AVs to avoid accidents.

    17.1. On the one hand, we can treat AVs as if they were cars with drivers. If they run stop signs, veer out of their lanes, skid onto sidewalks, or otherwise violate the rules of the road, we can hold them liable on a negligence per se basis for not complying with applicable traffic regulations.

17.2. But who, exactly, will we be holding liable? Not the drivers? There are none. The owners? They have control over the car's operation only in the rarest of circumstances. The manufacturers? Some component part manufacturer?

17.2.1. If, for example, autonomous airport shuttles have significant accident rates and the airports that operate them are liable for the accidents where they AVs are "at fault" by human standards, they will have very good reason to avoid autonomous shuttles. Why be responsible for a technology whose risks you are in a poor position to understand, much less control?

17.2.2. Leaving losses on victims—a regime of "no liability"— can't be the best regime. Victims will bear all responsibility for accidents and injuries arising out of the operation of AVs and they will be in a very poor position to control the risks of the enterprise.

17.2.3. Thus, the manufacturer option seems the only really plausible one. Consequently, we will take a step towards enterprise liability even under existing fault liability regimes. We will gravitate towards product liability.

18. *Under Existing Regimes 2: Product Defect Liability*. As I've suggested earlier, when autonomous vehicles "fail" in some way we can apply defect liability. This is the other half of the default framework and it will almost surely be applied in the near future. Its application is likely to be very difficult, however. Recall the shuttle collision at the Las Vegas airport and consider two fatal accidents involving autonomous driving.

19. *Product Defect Liability*. Design defect liability is difficult to begin with.

19.1. Product accidents arise at the intersection of three large activities—(1) the design, manufacture, and marketing of products; (2) the purchase of products by consumers; and (3) the use of products.

19.2. The role of design defect rules is to divide accidents between the activity of the product manufacturer and seller, on the one hand, and the product user, on the other hand.

19.3. This is a challenging task. The activities of product design, manufacture and marketing on the one hand, and product purchase and use on the other, are mutually dependent and mutually aware. Products are

designed with product users in mind and product users are aware of at least some product design choices. Consequently, when design choices are at issue, determining whether a product risk is characteristic of the manufacturer's activity or characteristic of the user's activity is not easy to devise. Just how to do so well is a problem that bedevils products liability law even when we are dealing with designs far less novel and sophisticated than autonomous vehicles.

20. *Let's reconsider the shuttle accident mentioned earlier.*

20.1. *On the one hand*, the accident was the truck driver's fault. *On the other hand,* there was contributory fault on the part of the shuttle. Consequently, the defect analysis and the articulation of the right regime are not straightforward.

20.1.1. *With respect to the defect analysis*: what can we reasonably demand in the way of defensive driving? That seems like a hard question to answer.

20.2. *But this would be an easy case if the driver were human.* The autonomous shuttle couldn't "foresee" an outcome obvious even to a child too young to drive. If this shuttle had been driven by a human being we would have no difficulty concluding that they were contributorily negligent and should bear some responsibility for the accident.

20.2.1. Is it fair to judge an autonomous vehicle by the competencies of a normal human being? It's attractively easy.

20.2.2. The very thing that makes it "unfair"—the problem of "reading context" is, apparently, formidably challenging for designers of AVs also makes it difficult to analyze as a design defect case.

20.2.3. So should we take the legally easy path of judging the shuttle's performance by the standard of a reasonable person or should we take the more difficult route of determining what we can reasonably expect in the way of safe product design?

20.3. *And what about the negligence of the truck driver?* Should we recognize human error as a defense (in the form of contributory negligence)? Perhaps we should, but doing so is a retreat from the ideal of eliminating driver error as a cause of accidents, a transitional retreat at the very least. (Moreover, fitting a defect liability rule together with a defense of contributory negligence is an awkward exercise.)

21. *Fatal Accident 1: The Uber Crash.* An AV with a safety operator in the passenger seat failed to recognize a woman who was (1) walking a bicycle across the street in the dark and, (2) not at an intersection or pedestrian crossing. She may have been under the influence of drugs or alcohol. Unable to classify her correctly, the AV did not stop, and hit and killed her.

    21.1. The product failure (the AV failure) was that the AV's object recognition capacities weren't sufficient to identify the person crossing its path.

        21.1.1. The operating system cycled between different classifications which caused it to constantly re-calculate its path. Unable to classify the "object crossing the street" correctly the AV just kept moving forward until it struck the pedestrian and killed her.

    21.2. The AV was a modified Volvo SUV. One modification had been to disable the vehicle's forward collision warning and avoidance system. Had it been active, the forward collision warning system would have intervened to slow the SUV down and probably would have averted the fatal collision.

    21.3. A separate problem was that the "safety driver" in the car was not paying attention at the time—they were watching a movie on their phone, it seems.

    21.4. Victim conduct was a problem, too. The victim was not crossing at a crosswalk and may have been under the influence of alcohol or drugs. In negligence terms, she may have been at fault in two ways—she chose the wrong place to cross, and she may have failed to recognize the threat posed by the AV and respond appropriately because she was impaired.

22. *What kind of object recognition can we demand?* It's an axiom of product liability law that a non-defective product isn't a perfect product. So what's a reasonable demand?

    22.1. We could hold AVs to human standards. Trouble is, it's anything but obvious that AVs can always meet human standards.

    22.2. Product liability law tests design defect by two tests. One is the consumer expectation test. This test asks what a reasonable consumer would expect

in the way of product performance. The other is the risk-utility test. This test asks whether the advantages of the design justify its risks. The application of this test usually requires comparing the challenged design with a feasible alternative design.

22.3. We don't seem to have any obvious basis to form a reasonable expectation of product performance short of perfection, and applying a risk-utility test is likely to be a dauntingly difficult exercise in second-guessing complex engineering at the edge of existing knowledge.

22.4. And, again, how should we compare any product defectiveness with the victim's carelessness in crossing the street as she did—and the safety operator's failure to intervene?

23. *Fatal Accident 2: The Tesla Crash.* In this instance a Tesla driving on a freeway with its autopilot engaged failed to discern the white side of a tractor-trailer's trailer and ran into it, never adjusting at all for the possibility of collision with an object.

23.1. Again there was a failure of object detection, albeit of a somewhat different sort. The problem seems to have been that the car's sensors couldn't "see" the large white side of the tractor trailer's trailer in the bright light that was shining at that moment.

23.1.1. This happened even though Tesla's auto-pilot was, at the time it was sent out into the world, "state-of-the-art." State-of-the-art, but inferior to alert human eyesight. There are a finite number of vision technologies, all with strengths and weaknesses; none is perfect; and they are not perfect in combination, either.

23.2. And, again, the operator did not intervene. He, too, was watching a movie. But suppose he had been alert and attentive. Would he have recognized the failure of the car's autopilot in time to re-take control of the car and avoid the accident?

23.2.1. Apparently, the evidence from aviation, where automated control systems are quite advanced, indicates that it is very difficult for pilots to monitor automated systems for errors, and correct in time. The recent Boeing 737-Max crashes may be cases in point.

23.3. This case is no easier than the Uber case.

24. *Generalizing*. Both cases are hard and it's not obvious why cases should become easier as technology advances.

    24.1. Technological advance should reduce the frequency of accidents but it may compound the difficulty of determining whether they should have been avoided by an alternative design.

    24.2. "State-of-the-art" design will be a moving target, particularly if the AI systems operating AVs "learn" quickly and significantly.

25. *Muddling Through*. It may help to think, for a moment, *about where we are with safety technology now, and where we will be next.*

    25.1. *At the moment there is quite a bit of technology in cars whose role is correct for human error*. We have antilock brakes, forward collision warning and avoidance systems, automatic braking systems, electronic stability control, blind-spot monitoring, lane-departure warning systems, adaptive cruise control, among others.

    25.2. *These technologies correct for our mistakes.* Transitional autonomous vehicles require us—human beings—to correct for their mistakes.

26. *Transitioning to Full Autonomy*. The technologies of mid-transition—partially autonomous vehicles—invert the relation between driver and technology. Technology does the primary driving and humans intervene when it goes awry.

    26.1. Think again about the Tesla and Arizona accidents. Humans failed to intervene. Seat-of-the-pants empiricism suggests that monitoring complex, automated operating systems for failure; disengaging the system; taking over control; and then averting disaster; is a very demanding task, and an unattractive responsibility for a human driver to assume.

        26.1.1. Experience in the aviation context supports seat-of-the-pants empiricism on this point. Indeed, one knowledgeable writer reports that "it is a strongly-held belief in the aviation community that automation, as distinct from technology more generally, has created new risks of automation dependency that may have offset the reduction in risk attributable to automation." The recent Boeing 737 crashes are sobering cases in point.

26.1.2. And monitoring AVs for mistakes raises another question: Should cars monitor themselves and tell us when to "wake up and have a look" at what's going on?

26.2. When humans fail to intervene correctly, how should we apportion responsibility between human and design failure?

27. *Critical Mass*. At some point where there is a critical mass of autonomous vehicles on the road it will make no sense to apply fault liability to them. They don't have individual drivers. We're doing "enterprise liability" anyway, and the question will be how to do it.

27.1. *Just what counts as "critical mass"* is a question that has only a rough answer. One recent analysis suggests that when 25% of the cars on the road are genuinely autonomous vehicles, we will have a critical mass.

27.2. *And that raises the question* of what counts as a genuinely autonomous vehicle. The Society of Automotive Engineers International (SAE) distinguishes five levels.

27.2.1. **Level O**. Human driver does everything.

27.2.2. **Level 1**. Automated system *sometimes assists* the driver with *some tasks*.

27.2.3. **Level 2**. Automated system can *perform* some tasks subject to monitoring by the human driver and to the human driver performing the other tasks.

27.2.4. **Level 3**. Automated system can *both perform and monitor the driving environment* but the human driver must take back control under some circumstances—per the instructions of the automated system.

27.2.5. **Level 4.** Automated system can do everything but only under *some* conditions.

27.2.6. **Level 5**. Automated system can do everything under *all* conditions.

28. *One plausible trigger* for moving away from our existing regimes is a 25% Level 4 & 5 vehicle threshold.

29. *And what do we move towards?* The most plausible option, I think, is an enterprise liability regime of manufacturer liability for all accidents modeled on Workers' Compensation.

    29.1. *While this seems attractive* in part because *it avoids the formidable difficulties of applying design defect law* it would face its own difficult decisions.

    29.2. The basic liability rule would impute all accidents that "arise out of" the operation of a motor vehicle to the manufacturer. Assume that we adopt this rule, how then should we treat:

        29.2.1. Third-party hacking? (Strict liability for manufacturer?)

        29.2.2. Poor road design?

        29.2.3. Miscommunication among AVs?

    29.3. Terrible weather? Suppose the car "wants" not to drive, but the driver insists?

    29.4. And how should we treat standing still–the shuttle crash?

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Is current tort doctrine adequate to address the emerging opportunities and problems raised by new technology and artificial intelligence?

1. Some emerging opportunities and problems:

AI and machine learning advances are occurring in such areas as medical diagnosis, the internet of things, robots, drones, and autonomous vehicles. These advances may improve safety overall but also create distinctive risks of harm.

The criminal justice system, businesses and private individuals will increasingly use algorithms to assess dangerousness of suspected wrongdoers. The algorithms affect such decisions as whether to take a precaution, or whether to use force, or about the duration of incapacitation in a prison or mental institution.

Tort law itself can be "personalized" based on big data.

2. Recent tort literature:

Scholars offer a wide range of views on the ability of current doctrine to address these issues. Some believe that radical change to tort doctrine is required (such as broader strict liability or, at the other extreme, exemption from any liability). Others believe that tort itself is inadequate to the problems and should be replaced by a different legal regime. But others assert that no significant doctrinal change is needed.

3. My view:

In the short run, current tort doctrine is adequate to address most of the problems. But in the longer run, when autonomous entities and machine learning algorithms play a more dominant role, they will create challenging problems of opacity, justiciability, and bias. Radical revision or replacement of common law tort doctrine might indeed be required, at least in some areas.