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# PANEL 4: ROUNDTABLE DISCUSSION: CONSUMER CLASS ACTIONS AND THE FUTURE OF THE CLASS ACTION

2014 CONFERENCE:
THE FUTURE OF CLASS ACTION LITIGATION:
A VIEW FROM THE CONSUMER CLASS
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MODERATOR: *Arthur R. Miller*
PANELISTS: *Sheila L. Birnbaum, Elizabeth J. Cabraser, Charles Delbaum, Andrew J. Pincus, The Honorable Lee H. Rosenthal*

PROFESSOR ARTHUR R. MILLER: Good afternoon, panelists. Nice to see you all. I don't know what this panel is, frankly. I could say it's a panel of graybeards, but that would insult certain members. Not Charles; Charles would qualify as a graybeard. Or maybe we're the panel to occupy time until Judge Kozinski gets here. But what we do have up here, I suppose, is an enormous wealth of experience. Unlike prior panels, we actually have people on this panel with gray hair. We have now talked, and loosely speaking, this is a bull session. That's what it is. It's a bull session. So you're all contributors, all the time. No bashfulness now. We've been here since early morning. We've heard a lot of talk about the class action in consumer cases in particular. I'd like each of your reactions.

Does anybody know what the hell is going on? The world, once again—despite protestations to the contrary by several panelists against anecdotes—by and large it has been another day of anecdotes. I don't know about you folks, but since

I worked, as some of you know, with Ben Kaplan back in 1962 and 1963 to bring us the Rule we now are so disparaging of, I have been hearing these damn anecdotes for over fifty years.

I don't know what truth is. Liz, you're on the firing line, primarily as a lawyer, but of course as a member of the Advisory Committee, and in particular a member of the Special Subcommittee on Class Actions. If anybody can tell us what the hell is going on, you can, so do it in the next five minutes and we'll declare a break.

MS. ELIZABETH J. CABRASER: We don't know either, I think it's fair to say.

PROFESSOR MILLER: That fills me with great confidence.

MS. CABRASER: What we do know is that there are a few topics that are our concern in terms of the practical functioning of Rule 23 as we know it today. And there are even a few areas in which there seems to be some consensus, at least among practitioners on opposing sides, as to areas in which the Rule could be more functional. Not surprising, those have to do with class action settlements and settlement classes.

Should we have a specific subset of Rule 23 to address the criteria for a settlement class? Are there things that can be done to solve the so-called serial objector or professional objector problem that would be consistent with due process? Are there ways in which notice can be approved in which it can be made clear to judges that they have great discretion with respect to modes of notice? Can we improve the communication efficiency of notice? We haven't heard from the U.S. Postal Service on this yet. I assume we will, but is mail notice still the best practicable notice, and the default solution?

Those might not seem like very profound issues. I think there are more profound issues, but we're really in listening mode to try to figure out what those who practice in the area and preside over cases in the area think is most lacking with respect to the Rule.

PROFESSOR MILLER: That's what the grapevine says are on the front burner so-called. Now, we all know that settlement classes were before the Committee in the late 1990s, and with the rest of the proposals, suffered an ignominious demise.

Notice is a good thing. A serial objector? Well, I guess I believe in capital punishment. How far, realistically, is that going to advance the ball? Let's assume all three come in.

Ms. CABRASER: Well, it really depends on what you think the ball is, and whether or not it's in play. That is where there isn't consensus because I think we're still in reacting mode to recent Supreme Court decisions. This is in part what happened to the settlement class action provision—*Amchem* happened. And then that Rule subset kind of subsided.

It's hard to know whether the Committee should lead, follow, or studiously ignore what's going on in the Supreme Court, at least until the lower courts have had an opportunity to use that wisdom in real cases.

PROFESSOR MILLER: We're now talking really about the rulemaking process—and beyond the trilogy you articulated. Isn't it perfectly clear that anything that really goes to the guts of the discussion we've had here today will produce a blood bath? I don't mean to state things graphically, but I believe in staying awake.

Ms. CABRASER: Yes. This is the big question. It's a much bigger question than Rule 23. It's a question that relates to the entire rulemaking process and the Federal Rules in their entirety, which is: Is this the time to bring out the clean slate, to make profound and far-reaching changes, or is this the era of minor adjustments to improve practical functioning? It may be just a function of the maturity of the rulemaking process itself.

PROFESSOR MILLER: I think the rulemaking process is mature; it's the rest of the world that troubles me. The amendments, as you know—and Lee, you were part of the process—we just sent a group of amendments up that are trivial in a sense compared to this, and you had the biggest onslaught of submissions.

HON. LEE H. ROSENTHAL: Twenty-three hundred comments, plus another 100-plus live witnesses.

PROFESSOR MILLER: And that's worse than reading examination papers, immense amount of stuff.

HON. ROSENTHAL: A lot more repetition among those than one would hope to find.

PROFESSOR MILLER: You haven't read enough examination papers. What's your take, Lee, as to where we are and what's feasible?

HON. ROSENTHAL: What's feasible and what's wise—I think they are related, but not the same question. In a way, you are asking a question that has been framed in the past as: Have the Rules Enabling Act and the Rules themselves essen-

tially gone the way of the French monarchy? Utterly useless? Soon to be headless? I think the answer to that is not yet. Not yet at all.

The question about whether the rulemaking process can usefully or wisely continue to make marginal adjustments—and call that enough—is a very difficult and interesting question. There are really two parts to it. One is the feasibility part. I think that for the foreseeable future, for the stuff that really will shift power, shift institutionalized access to both control and money in major ways. That includes discovery; it certainly includes class actions just because of the amounts of money involved. Those will resist any kind of significant overhaul or fundamental change of the sort that occurred last in class actions in 1966, and last in discovery probably 1974. Those are gone, and you can question whether at the time they were put into place they were truly viewed as revolutionary. I give the drafters in the 1960s a lot more credit for understanding the significance of what they were doing than others might.

We rulemakers, and I am now a proud alum of that group, don't view that as anything that we can even approximate. In those areas, the political—both small- and capital-P—partisan political and nonpartisan political forces will keep the effect, the scope of what's even attempted, pretty limited.

Second question is: Is that bad? I think that's a more interesting question because in a way being forced to achieve consensus, or something approximating it—from a wide range of views and perspectives and players, public and private—requires that you really figure out what will be workable for many, not unduly put a thumb on any scale that matters. Those are good disciplines. Those are good constraints—the fact that you have to make sure that the effect as much as you can. The Rule 11 experience taught rulemakers a pretty painful lesson.

PROFESSOR MILLER: You know how to hurt somebody.

HON. ROSENTHAL: I'm sorry, I didn't even think—

PROFESSOR MILLER: It's an inside joke. I was the reporter when Rule 11 went through in 1983.

HON. ROSENTHAL: I give you full credit for triumphs as well. Granted, 1960s was a long time ago—even for those of us up here.

PROFESSOR MILLER: Lee, those were good days. The Committee met privately.

HON. ROSENTHAL: That's right. There was no transparency. In fact, that's an important point. When you have any effort at change and you immediately—at least quickly, by rulemaking pace, within six months—get over 2,000 comments and more than 100 people willing to spend their own money to come, and in addition, talk to the Committee, you have the results of meaningful transparency compared to what the committees used to enjoy, which was the ability to work stuff up without having to defend it against attacks from all sides.

MS. CABRASER: There are two phenomena going on right now that really constrain what rulemaking can do. The motto now is: first, do no harm, which tells you where the process is.

There's not only greatly increased transparency, but there's palpable mistrust. Paradoxically, those two things coexist at the same time, so that the very people who are most concerned, and, we all hope, most engaged with the rulemaking process in terms of comments, proposals, participation, are very, very cynical about the process, and I have been told over and over again that it's rigged. There is no point in anybody coming and speaking or writing because it's rigged. And it's rigged in favor of some ruler of the universe who has already decided how everything is going to be.

MS. SHEILA L. BIRNBAUM: I'm another alum of this August Advisory Committee, and was on the Committee at the same time that Lee was on the Committee, when the various class action rules were at least being debated and proposed, and were shot down.

I think the players—here to a large extent the judiciary has no real interest in any big changes—are very conservative. They do not want a lot of change. They like to deal with what they have, and you're going to only be able to push at the margins. That's what I think the Committee is getting back to. All of the issues we discussed and had "at least some changes to make" are back on the table: settlement class, objectors. These were exactly what we spent five years discussing.

There's too much at stake for the big players here to have any big changes, and they're just not going to happen—and I'm not sure it's necessary. Because, where are you going to find the changes? It's going to be in the courts, and it's happening now. Just what the Sixth and Seventh Circuit has done in the last couple of months with regard to the *Whirlpool* cases, etc., has changed the approach of how other courts may effect

this, and will eventually have to be decided by the Supreme Court.

To me, one of the biggest issues that are now on the table are issue classes. We fought this battle twenty years ago to get issue classes off the table from the defense perspective because we thought that it was going to be very bad for defendants to just try the issue of the defendant's conduct by itself in a little vacuum.

Was there a failure to warn? Well, there's a lot to that, that question by itself, and if you try it in a vacuum, you're often going to lose where you wouldn't lose if you tried it in a full trial. Whirlpool then goes out and tries it and wins, and everyone says, "Maybe we should be trying more class actions. Maybe this isn't so terrible. Maybe we can really win."

It keeps shifting, and it keeps moving. These issues that you thought were dead twenty years ago are back right on the front burner.

PROFESSOR MILLER: What you've seen, loosely speaking, is the proverbial sine curve in which you have peaks, you have valleys. That's been true since 1966. Tremendous peaks in the early 1970s. Then, under the influence of Chief Justice Burger, you had valleys. Then a resurrection and peaks again. And here we are: up and down, and up and down.

Does it make any difference what the Rule says anymore? My buddy Sam Issacharoff goes and talks to the MDL judges. An image he has brought back to me is that the four words that you never hear MDL judges talk about in their meetings are: Federal Rules Civil Procedure. Maybe it's five words—there's an "of" in there.

It doesn't matter anymore what the Rule says. We know (c)(4) is the issue class. I was there.

MS. BIRNBAUM: It's been there from the beginning.

PROFESSOR MILLER: It's been there since 1966. Nobody really thought about it. Legislative history? Forget about it. You might as well just take the Scalia approach because you can use originalism on it. But it's a vacuum. What (c)(4) means doesn't matter anymore if the rulemakers come through.

HON. ROSENTHAL: Doesn't matter to whom? Does it matter to judges? Sure. Is that the only thing that matters? Of course not. I think that part of the maturation, if you will, of the Rules process is recognition that what the Rule says as a way to achieve a particular set of goals is certainly a necessary

part of understanding the path. It is not a sufficient guarantee that you'll get there.

What else do you need? You need a way of implementing, of applying, of giving flesh to the skeleton of the words. Whether you call that common law, whether you call that case management, or whether you call it both, they are all critical.

Does it matter what the Rules say? I think it can be—not always—it can be critical. When the case law, or the practice, becomes divorced from the Rules, that does say something about the Rules, and that has happened. That creates an incentive, and indeed has triggered, rulemaking response to try to bring back the rule, or redirect the rule, so that at least it's not removed from the way the practice has evolved.

Benjamin Kaplan famously said that nobody expects of a rule, or should, that it will solve all problems forever. Pointing out that indeed if the problems are real ones, and everything we've been talking about today grows out of real problems, they can never be solved, fundamentally. But what is the rulemaking commitment?

The quote is, "We are merely under the duty of trying continually to solve them, those real problems."

PROFESSOR MILLER: Benjamin Kaplan was a wise man.

HON. ROSENTHAL: He was a brilliant man, and he's right. I think that's the laudable spirit of those tasked with monitoring and improving the Rules, and the modesty that that requires.

PROFESSOR MILLER: My guess is, if you left the words as is, you sort of winked at the ambiguities, and the fact the legislative history takes you nowhere. Over time, judges would work it out, I think.

MS. BIRNBAUM: I think they have. For example, we don't have a settlement class provision. We haven't had one ever. After *Ortiz* and *Amchem*, there was some issue as to whether you could have settlement classes. We have settlement classes all the time that get approved, that are found to be reasonable. Some of them are sent back; some of them judges find unreasonable. The system is working with what we have. Would it work better if we had a rule that spelled things out in a way that would provide some guidance to judges and practitioners? Probably.

PROFESSOR MILLER: For a while.

Ms. BIRNBAUM: Then around the edges, things would change there too.

HON. ROSENTHAL: And we're not even through using everything that is in existing Rule 23, much of which is completely unused. Rule 23(c) says that the court in a certification order has to describe the claims and issues that are being certified for class treatment, the functional version of 23(c)(4), or just common sense. You've got to decide which claims or questions are common and which aren't.

You do that for purposes of preclusion, and notice, and due process, etc. It's amazing to me how often I see a class certification order, which does not do that. So somebody isn't reading the words that are already there, which could solve—not completely—but some of these problems.

PROFESSOR MILLER: Andy, you look edgy.

MR. ANDREW J. PINCUS: I don't know if I'm edgy. It's seems to me that it's nice to have a process like the Rules process that can deal with some of these problems that can be solved via consensus. But there are other problems that we've been talking about that it would be good for somebody to work on because they do seem to be real. It may be that the conclusion of whoever those people are is roadblock; there's no way to slice the onion in a way that's fair. The current system is the best we can do. Sorry.

Myriam and I both see terrible flaws in it, but that's too bad. It's the best that you can do, and we'll muddle on. But that doesn't seem right to me. It may be that the answer is the Rules Committee is not the right place to do that.

I hate to say this as a Washingtonian and a Democrat, but I think often transparency, from the beginning of a process, is not the best way to solve problems because people have to be in their corners from the very beginning of a discussion as opposed to trying to think creatively about ways to find common ground, etc.

Maybe it is that the Rules Committee isn't the answer. I'm not sure that the House and Senate Judiciary Committees are the answer. I'm pretty sure they're *not* the answer. But it does seem to me that these problems are significant enough that they're worth some group of people spending some time on thinking about whether they can be solved.

PROFESSOR MILLER: Do you want to leave it to academics?

MR. PINCUS: No. I think one of the things this day demonstrates and other days where we've been together at various places is: I think there's a lot of good thinking in academia, but I also think there's a lot of good thinking in people like Sheila, Elizabeth, and I, Lee, who are in the real world. And I think you probably need both kinds of people at the table in order to figure out whether there's something that can be done.

PROFESSOR MILLER: We may be in a moment in which the rulemaking process is under heavy criticism. Whether that's good or bad, right or wrong, I don't know. It's just a fact: more and more of the secondary literature is negative.

MR. PINCUS: I wasn't there in the beginning, and I'm not there now, but it just seems to me, for better or for worse, it's become maybe not in the decisionmakers' mind, but in the mind of the environment, just another sort of political—small-P-political—process to be influenced and dealt with the way all the other processes are dealt with. Maybe that's the right answer because it's a rulemaking institution, but it doesn't really facilitate the kind of deep thought that's necessary.

And I do think, just to add to what I was saying before, I do think one of the reasons you want some other place to have these thoughts is there has been a lot of change out there in the real world, technology, but lots of other things. I do think efficiency, and trying to make our system work in a quicker and less costly way, has become increasingly important for litigants, but also frankly for the economy.

It's not good for claimants who have a very hard time getting their claims heard. It's not particularly good for defendants. So, thinking about moving away from a very small incremental approach, which I agree with Sheila, judges and lawyers to some extent, we're trained on incrementalism by all you people.

PROFESSOR MILLER: I haven't trained anybody in fifty years. Do you want to blow it all up and start from scratch?

MR. PINCUS: It certainly would be worth talking about. I don't know. As I say, maybe the answer is either there's no better system, or the various people and groups that would have to agree can't possibly agree that something's better.

If you look at business, lots of other government functions, a lot of things get blown up after fifty years because you've learned a lot and there may be a better way to do them,

and the legal system really doesn't take part in that, and maybe that's not such a good thing.

PROFESSOR MILLER: Charles, you've been very patient.

MR. CHARLES DELBAUM: It's largely because I have virtually nothing to say on the subject.

PROFESSOR MILLER: But say it anyway.

MR. DELBAUM: I haven't been part of this process. My organization, the National Consumer Law Center, has not been part of this process at all.

MS. CABRASER: Why not?

MR. DELBAUM: Well, we haven't been invited.

HON. ROSENTHAL: Everybody's invited, all the time.

MR. DELBAUM: All right. There goes that excuse. We need to do better.

I would add from the practitioner's perspective one aspect of settlement that I find troubling in settlement classes—and that if there were going to be any rule changes—I would like to see this changed, is that when a judge mediates a class action settlement, that judge should not sit and decide whether that settlement is fair, adequate, and reasonable for the class.

I've been in a situation where I had to file objections to that, take it up to the Court of Appeals. I got the judge to reverse, not on those grounds, but on the grounds that the settlement was not fair and adequate to the class. The class shouldn't have been certified. I believe the judge was blinded by the fact that he had gotten involved in the negotiations. That is one change I would definitely like to see.

MS. BIRNBAUM: I'm really surprised because most judges that would do that, if they got involved in the process, they would not—usually they would send the case to another judge—

MR. DELBAUM: As they should.

MS. BIRNBAUM: —to mediate it, and then decide whether it was fair under those circumstances. That's a very unusual circumstance.

PROFESSOR MILLER: Liz, you look puzzled.

MS. CABRASER: You hit at the crux of the problem. We have distrust for the process of rulemaking and lawmaking and legal development because groups on every side of the issue feel that other people have undue influence, feel that they are

either excluded from the process or not invited, or that it is somehow going on without them.

The process is going on in many different places. It's going on in conferences like this, it's going on in the Federal Rules Committee, and by the way, every Federal Rules Committee meeting is a public meeting. Transparency has its discontents, but it is a public meeting, and anyone can participate at every stage of the process.

Not many people know that. Not everyone that needs to know it knows it, and that's a problem. Maybe that's a PR problem of the Rules Committee. But the Rules is not a code. We don't have a Code of Civil Procedure. We have a common law system, and the sources of the law on class actions and everything else come not only from the Rules, but they come from judicial decisions at every level. They come from scholarly commentary, they come from conferences like this, they come from projects like the ALI's Principles of Aggregate Litigation which is a parallel system for aggregate litigation, including class actions, which by the way is influential in these other sources.

It's an interactive process. We had the Manual for Complex Litigation not updated, but the Federal Judicial Center keeps writing things. MDL judges keep meeting and keep writing things. Most of us practice every day under some sort of ongoing dispensation from the Rules of Civil Procedure because we get to do more depositions than the presumptive limits, because maybe we're doing settlements or class actions that are different from the normal view. It's everywhere, and it's interactive, and it's participatory. It's intended, I think, to be inclusive.

I always do wonder if things are really happening in that room to which I haven't been invited. I haven't found it yet because I haven't been invited, but my belief is, and this is where I'm naïve, my belief is that in our legal system, that room doesn't exist, or if it does exist, we can break in any time we want.

Ms. Birnbaum: I agree with you. I don't think it exists. I think this process is a very open, transparent process. We've been on the opposite side of the fence for years, but as we've gotten older, we find that we have more commonality, and we agree on more than we don't agree on.

Ms. CABRASER: But we don't have predominant commonality.

HON. ROSENTHAL: But you are very superior.

Ms. BIRNBAUM: I do agree that this system that we all work under, we learn from all these varied sources. It isn't one thing, and that's good. There's a lot of experimentation that goes on. There's a lot of change that goes on. There's a lot of interaction that goes on, and that's all good because hopefully we get to the better answers. There are no right or wrong answers.

But don't forget this is a very political process now, and with good reason. There are huge amounts of money at stake. Whenever there are huge amounts of money at stake, when it comes to class actions, there are interests and there are important interests on both sides of the "v." that want to influence the practice.

Ms. CABRASER: It's so simple. Those interests just have to give the money back to the people it belongs to.

Ms. BIRNBAUM: That's the plaintiffs' lawyers, don't forget that. This is not a free system. Plaintiffs' lawyers make a lot of money out off this system, and that's what motivates this system. People don't do it for nothing, nor should they, but don't let's lose track of that.

There are good class actions and there are terrible class actions. And yes, sometimes the banks overcharge and should be beaten back and should pay back. A lot of these class actions are silly and shouldn't be there. There is really very little that's right or wrong. It's really in the eyes of the beholder.

PROFESSOR MILLER: What does one derive from the proposition that there is little that is right or wrong? Are those words to live by, Sheila?

Ms. BIRNBAUM: In the class action context, I think that you have to look at individual cases, individual situations. There's nothing right with class actions or wrong as a whole, it's how it gets applied. From the eyes of the beholder, sometimes it's being applied correctly, and sometimes it isn't.

PROFESSOR MILLER: Let me throw another cliché in that's close to that cliché: One size does not fit all.

Ms. BIRNBAUM: I think that's true.

PROFESSOR MILLER: Good. We agree on it. One of the things that's bemused me all day is that this endless discussion, what is the purpose of the class action? Is it compensation or is

it deterrence? Myriam versus Andy, right? The rest of us can just go home; it's Myriam versus Andy.

What bemuses me about that is that's the discussion that's been going on for fifty years. I have yet to understand why I have to pick between the two.

ALL PANELISTS: You don't.

PROFESSOR MILLER: But the debate is you're supposed to make a judgment, and that's what one of the debates was on Rule 11. Was it compensation or deterrence?

Having sat in that room in the 1960s, there were two other thoughts that were being discussed that I haven't heard much about today. One was: It's good for the efficiency of the system; try like things together; get more judicial bang for the judicial buck.

Remember Rule 23 was revised in concert with the revision of Rules 19 through 24 to achieve efficiency. Maybe you achieve some efficiency even without that much compensation or without much deterrence. But quite clearly in those days that committee was focused on the Civil Rights Movement. All this talk about money. Money, money, money, money. That's all you people have been talking about all day long. How about civil rights?

HON. ROSENTHAL: Well you guys put in that (b)(3) thing.

MS. CABRASER: That's right. Why not get rid of the difference between (b)(1), (b)(2), and (b)(3), and just do right thing in the right case?

PROFESSOR MILLER: Because even with no transparency in the good old days of proceeding behind locked doors, there were internal debates between John Frank and Charlie Wright and Ben Kaplan. Indeed, it was touch-and-go as to whether there would be a (b)(3) because there was a strong argument that (b)(2) would cover everything. Because they believed the money element would just come in on the (b)(2).

HON. ROSENTHAL: Those debates are wonderful reading.

PROFESSOR MILLER: But there was so much talk about efficiency, the Civil Rights Movement being a paradigm of enforcement of public policy. There was a full recognition of the negative-value case, and the need to provide an aggregation tool that would make certain things economically viable.

Keep in mind that was at a time before the great upsurge in federal substantive law. Those debates preceded the Civil Rights Movement or the civil rights legislation.

Ms. BIRNBAUM: When they didn't have the statutes. The statutes weren't there.

HON. ROSENTHAL: You're saying we're being misled by this false choice between compensation and deterrence when the real issue—

PROFESSOR MILLER: I'm just the moderator. I'm not saying anything.

HON. ROSENTHAL: It's a fair point because really it masks—and you're talking about judicial efficiency and judicial economy. For judges from an institutional standpoint that's great. I think when people think of that, and their lawyers think of that, they think about access. The genius of the Rules of Civil Procedure, including the joinder mechanisms and representative actions, are to guarantee access to a public adjudicative process, which—and not just for consumers—originally if you don't have voting rights, if you don't have civil rights, if you don't have basic human rights, the one institution in this country that you have to be able to believe in and have access to at all times is the courts. That changed the lives of a lot of us, that there was access to the courts.

The marriage equality litigation of today, that's vindicated or recognized or protected rights that are very important to many people in this country, and the courts are the only way really to get that. Legislation can follow or lead in the instance, but that's what we learned from the Civil Rights Movement.

PROFESSOR MILLER: That was an era in which there was some level of popular faith in the courts. Liz, you're right, there is distrust in the rulemaking process, and I suspect there is also distrust of the courts today.

MR. PINCUS: But also there's some lack of confidence that the system is working as it should, and I don't think there's a choice between compensation and deterrence. But if you have a claim where there isn't in the real world any opportunity for compensation, then it seems to be you better be pretty darn sure that you're having some real deterrent effect, otherwise what are you doing entertaining that kind of claim.

I think the fact is we have cases now where there are real questions about that. I'm certainly not saying get rid of all class actions, but I do think going to your other point, one size doesn't fit all. There are clearly some areas where there are real problems. There may be other areas where there are fewer problems.

I also think, and maybe this was all foreseen in the 1960s, but the fact is, as I said this morning, aggregation combined with other aspects of the Federal Rules changes the leverage equation in litigation. Maybe that's right. Maybe it means everything's working out.

It seems to me, with fifty years of experience, it's worth looking at that effect and saying, "It's great across the board, no change is needed," or, what I more suspect might be the truth, "In some areas it's working fine; in other areas, there does seem to be a problem. And maybe if you can't do it through the Rules process, you can do it in another way." If you're going to have aggregation, there need to be some other changes for those categories of cases to make it a sensible playing field.

PROFESSOR MILLER: Why are you smiling Lee?

HON. ROSENTHAL: Because I think that everybody who has said anything so far is pretty much right, but I want to resist one thing that Andrew said, and then agree with him wholeheartedly on another.

Choosing between compensation and deterrence. Globally we don't have to, but that doesn't mean that those don't play out differently in relation to each other in two broad categories of class actions. One is, of course, the negative-value consumer class action as opposed to the personal injury, mass tort, significant claim class action in which positive values provide a different set of incentives.

The compensation deterrence balance is different, and when there was an effort made to build that into the way the Rule was itself written, it went the way of the other proposed amendments in the late 1990s. It did not survive in part because of the way in which it was framed; the so-called "just ain't worth it" test for the consumer class action foundered, and it probably was framed in a way that guaranteed that result. That was the effort made, to make the Rules themselves reflect that.

As things played out, the case law did it. The Rules didn't have to. Whether they did it consistently or effectively is certainly open to question. It's a fascinating example of the interplay of the Rules process and the case law process.

I do want to push back on one thing that Andrew said, and that is that there's a sort of timidity on the part of the Rules process to look at the big questions, to step back and ask: Is there something fundamental here that needs to be ad-

dressed either within the Rules or in a different way, and if so, by whom and how? Because there's this lack of effectiveness, lack of efficiency or lack of fairness.

I think that's wrong. The Rules Committees have in different ways made concerted efforts to ask those more fundamental, broader, more searching questions. So far the answers have been produced through that process with its limits and benefits that there isn't a Rule problem that is—and by Rules problem, I mean a problem that can be addressed within the Rules structure, either effectively or feasibly or wisely by tossing it and starting over.

That has been a concern from the start. Efforts were made to rewrite Rule 23. Imagine how it would look if we were starting over much as you did in the 1960s. Those have foundered. Whether they have foundered because of lack of consensus, or the pressures that people have identified, or because we ended up concluding that the problems were better addressed by changing the existing rules structure within that, or by looking to other actors, players, sources, both occurred.

Final point though, who else would do all these things? We are in a golden age of efforts by public entities, private entities, think tanks, empirical data-gatherers who are all in different ways asking these questions and trying to find out these answers, running pilot projects, experiments. If you were looking for a sign of hope that people were thinking about these, I think you should be a vastly reassured man.

MS. BIRNBAUM: Can I just add two things? First of all, this system is totally inefficient. The civil justice system is not efficient. The Federal Rules did not increase the efficiency. The whole disclosure of how we do discovery is expensive, time-consuming, and much of it is useless.

Be that as it may, there have been attempts to try to limit it. I don't think we should be looking at class actions as deterrents because it isn't a deterrent in practical life. No corporation, no chief executive, no board of directors is sitting there and saying, "Well, if we do this, we're going to get hit with a class action." That's not what's motivating their conduct, or that's not going to stop it.

What will stop it is the regulators, and any regulated industry that they have to deal with, and the potential of criminal liability onto some of these new statutes. That's a deterrent. This is not a deterrent because they can't perceive of this

in advance in any meaningful way, nor does it change behavior in corporate America. Believe me, I've represented more corporations than I can think of. Nobody ever had a conversation that we should do or not do something because it's going to lead to a class action. So I think we should look at class actions as they are—it's a basis of compensation.

In these kinds of situations where you have small amounts at stake, maybe a class action works well to get some money into the hands of people. We've already given up on the thought that we could have class actions and personal injuries or mass torts. It doesn't work, it won't work, and it shouldn't work.

So, this is where class actions can work, but let's not think of it as deterring anything. It's compensation, and maybe that's exactly what it should be.

PROFESSOR MILLER: We're back on that kick. Sheila, I pass to one side the fact that you have told me quite clearly that I have wasted my entire life—

MS. BIRNBAUM: Oh, I doubt that.

PROFESSOR MILLER: —teaching this inefficient system.

MS. BIRNBAUM: That is true.

PROFESSOR MILLER: My mother was right. I should have been an engineer.

MS. BIRNBAUM: Probably a plumber, you would have made more money.

MR. DELBAUM: Can I say something about deterrence? I'm sure that Sheila is largely right about corporate boardrooms, but there are other contexts to consider. For example, in the world of fair debt collection litigation, which I do a fair amount of, debt collectors have cleaned up their acts in very significant ways in terms of what they say in their dunning letters, in terms of generic practices of filing beyond the statute of limitations, because they've been sued altogether too often.

We run a fair debt conference that lasts two days every year. We get hundreds of lawyers from around the country who come and want to be trained about that, and the numbers are diminishing because the violations are diminishing, and that is in part because of the class actions.

PROFESSOR MILLER: Also, class actions may be a useful deterrent to governmental misconduct where we're not talking about your clients.

MS. BIRNBAUM: Right. I thought we were talking about consumer class actions, and that's not against the government.

PROFESSOR MILLER: I'll accept that.

MS. BIRNBAUM: If you want to go a little further, that's fine.

PROFESSOR MILLER: I'm in the wrong church.

MS. BIRNBAUM: By the way, is it your suits against these people or attorney generals going after these guys, and all the other regulatory piece of all these debt collectors that have changed their conduct. And their conduct should be changed. What they do is outrageous.

MR. DELBAUM: There have been a few good suits by attorney generals. For example, here in New York there have been a couple of good ones. But they are few and far between, unfortunately, for two reasons: One, there's a question of resources, and then sometimes there's simply a question of lobbying.

*The New York Times* had an article just last week about several state attorney generals backing off from pursuing prosecution of wrongdoers because they were getting lobbied by the corporations. That's an unfortunate reality.

PROFESSOR MILLER: What I hear Charles suggesting, Sheila, is that your throw-up of the regulatory system is a straw person.

MS. BIRNBAUM: I doubt that.

PROFESSOR MILLER: Am I supposed to rely on the SEC, the folks that brought us Madoff?

MS. BIRNBAUM: I'm not sure they brought him to you. They didn't stop—

PROFESSOR MILLER: Or the FDA who do nothing about tobacco, alcohol, the pharmaceutical industry? This isn't Norway or Sweden where the regulatory system seems to work.

MS. BIRNBAUM: You don't even know that. Do you?

PROFESSOR MILLER: Some of my best friends are Norwegian.

MS. BIRNBAUM: There's nothing to do in Norway.

MS. CABRASER: So they regulate.

PROFESSOR MILLER: We're reaching a point in the discussion where we're really saying nobody's any good.

HON. ROSENTHAL: No. I want to resist that.

MS. CABRASER: No. We don't rely on any single institution or branch of government to do it for us, and we shouldn't. We

shouldn't because the one time that there's one room where all the decisions are made, somebody's going to go try to buy it or rent it or influence it.

That happens with regulatory agencies. Of course it happens in the legislative process, and to the credit of this country, we have managed for all its inefficiencies to have a court system that cannot be predictably and regularly bought, or corrupted, or even rented.

The reason that we're so nervous about class actions, it's not just the scale, it's that when you get in the courtroom and you're asking representatives of the community, the jury, that's a representative process too. You're asking the community to say thumbs up or thumbs down on conduct or a defect.

That's the essence of our democracy. It's scary. We have to be able to do that. We're not going to pay enough taxes to have an efficient regulatory system that's all-powerful, somebody's going to figure out how to get into it. You can't buy a jury, you can't even rent a jury, and you can't buy a judge.

If everybody's scared because their conduct is going to be weighed in that balance, yes, we should all be scared. That's a tremendous deterrent. People are going to bring class actions and win them and lose them and settle them. And the courts, I hope, are going to continue to improve the process so that people can get to trial or can be the beneficiaries of fair settlements, and by the way can regulate the attorneys' fee problem and make sure that most of the money—

Ms. Birnbaum: Goes.

Ms. Cabraser: Those are the easy problems: increasing claims rate, regulating attorneys' fees. Those are the easy problems. The hard problem is that there are people and institutions—I'm sorry, I'm on a soapbox now—that just don't want to be effectively regulated, don't want to be accountable to society or to the community, and want to have all the benefits and none of the responsibilities of a free market economy.

Class actions are one way to help level that playing field. It's something consumers can do for themselves through their representatives. Yes, it creates a lot of problems of enforcement and regulation and making sure that the system works, but we have the courts for that, and we have public opinion for that, too.

Mr. Pincus: There is the problem on the other side, just to be clear, that some lawsuits that are brought are no good.

The question is: Can we have a system that much more effectively sorts them out, and eliminates the incentive to bring them at the outset?

I don't think anyone's talking about getting rid of all class actions—I'm certainly not. But I do think that there is a fundamental question about whether the system that we have right now is creating the right incentives. I'm not trashing the Rules Committee, but one problem with the incremental decision-making is that it leads to procedural hurdles as a sort of surrogate for merits-based rough decisions.

Ms. CABRASER: How are you going to sort out the sheep from the goats? You can't do it by making it more expensive to bring all of the cases; then you'll just have fewer cases, fewer good ones and fewer bad ones. We're facing the problem with objectors. It's the same situation. Everybody doesn't like some class action objectors. Everybody doesn't agree on which class action objectors they don't like. Nobody comes in with a nametag saying "good objector" or "bad objector." Consistent with due process, how do you disincentivize the bad objections without disincentivizing the objections that are necessary to have the process work the way it should?

MR. PINCUS: My own view is there's a fundamental problem with asking a judge to approve a settlement without having any kind of adversary presentation. I think it is very difficult often for a judge to figure out whether or not this is a good settlement.

It's interesting to me because in a totally different context, the FISA Court, there are a lot of people saying, "Gee, this is terrible. Only the government gets to appear before the FISA Court to argue what the right rules are on the use of the various statutory authorities." There should be someone else there.

Ms. BIRNBAUM: Maybe we should get a public objector.

MR. PINCUS: I'm serious. I don't know that that's a crazy system because I do think there are a number of settlements that I think all of us would agree are sort of shocking. We need a system to take care of them, and I do think it's very hard for judges.

More fundamentally, it may be, Elizabeth, you're totally right: we've got the best system we've got and we should swallow the flaws and move on down the road. I'm not convinced that with at least some claims it wouldn't be possible to do

something like say, "We're going to give you X discovery, right after the motions are dismissed, very targeted, plaintiff, and then I want both parties to come in and give me their best presentation about the merits of the case."

MS. CABRASER: That's happening already.

MR. DELBAUM: What about appointment of an expert to the court to review the settlement?

MR. PINCUS: Absolutely.

HON. ROSENTHAL: Let's bureaucratize this further—a judge can do that. If a judge feels unable effectively to review it because there are no effective opponents or for some other reason, I can do precisely what you suggested. The Rules do not, at all, preclude that, and it's clearly permissible. I have lots of discretion.

MR. DELBAUM: At the party's expense or at the court's expense?

HON. ROSENTHAL: It depends. I know that's not helpful, but that's the right answer.

MS. BIRNBAUM: Usually the court doesn't have the money to do it.

MR. PINCUS: The problem with the current process is sure you can have targeted discovery and one issue, and if the summary judgment standard is met, it's—but what if the summary judgment standard isn't met but it seems pretty likely that this is not a great claim. Do we then let the whole apparatus—

PROFESSOR MILLER: Let's get rid of the jury trial guarantee. You've become a fascist. We'll grant summary judgment when we get within a half light-year of summary judgment?

MR. PINCUS: Let me finish. I'm not saying grant summary judgment, but maybe there should be some rules about cost of discovery being shared.

PROFESSOR MILLER: There are.

HON. ROSENTHAL: There are. And there are tools available under the existing Rules for those that are not explicitly spelled out, and some of the added explicit detail has been included or reframed in the current package that the judicial conference just passed—that if it goes through the next hoops, and perhaps as a result of what happened on Tuesday night those—

PROFESSOR MILLER: Causing many of the 2,300 submissions to the Committee.

HON. ROSENTHAL: December 1st of 2015, the details of this conversation will be slightly different, but not hugely different.

I think the answer to your question, Andrew, is that a lot of those opportunities exist now, which does not answer the questions: Why aren't they used more? Why aren't they used more effectively? And why isn't their existence and the opportunities that they present more widely understood by important players?

I think those are very good questions.

MR. PINCUS: Also, I would say, why aren't, to the extent they exist, it seems to me these are the kinds of cases for which they are most appropriate. So maybe some very targeted—I know in the last package of rules, presumptions and incentivizing was a dangerous game—but something that requires a judge to get involved.

It seems to me one of the geniuses of the Rules proposal was to try and require affirmative action by judges, and if there's a class of cases for which that is most critical, it seems to me it's this class.

PROFESSOR MILLER: What do you think I put in in 1983, and now I'm being crucified for having put it in?

MS. CABRASER: I think the Rules reading process is a very good process too. There's the rulemaking process, and then there's the Rules reading process, and I plead guilty to not always reading all of the Federal Rules or understanding them, or reading all the committee notes. It's amazing what's in there, and we often forget about it, and then sometimes we find out that the wonderful ideas we have about improvements to the Rules are in there.

PROFESSOR MILLER: Liz, you don't have to read any of that stuff. Just read my treatise.

MS. CABRASER: It's much larger than the Rules. It's very long.

PROFESSOR MILLER: We really put management into the Rules in 1983, and you won't crucify me for that.

HON. ROSENTHAL: No. I celebrate you.

PROFESSOR MILLER: The problem is, and I think you two were verging on it, is that some judges don't manage. Even among those who do manage, it's quite differential, it's quite ad hoc as to what it is you're going to get. What do we do

about that? I suppose in part, this is a fundamental education question.

HON. ROSENTHAL: It is a huge education question. I think there is a growing recognition that litigation of these mass claims has changed to the point that existing education and training is no longer adequate. It needs to catch up as well.

There is also an increased recognition that in part because of the growth of electronic discovery, and the problems that creates for discovery costs, and burdens, and delays, that judges are increasingly involved in management in ways that they weren't before. Is that institutional? Is that consistently to be found? No.

To the frustration of lawyers who need that and want that more than anything, when in fact the Civil Rules Committee held the Duke Conference in 2010, four years ago, that was the overall theme: Judges show your faces when and as needed, and do your jobs. Get involved.

We heard it. Efforts have been made through rewriting the Benchbook which judges use. It did not have a section on pre-trial civil case management. What do we spend 90% of our time doing in some jurisdictions? Nothing in the book. Now it does, and it's detailed, and it has a thumb on the finger of judges get involved.

All of that speaks in agreement with what you are saying. On the other hand, should there be specific direction to judges not only when to get involved, which will vary from case to case, how to get involved, same point, and what will fit their docket mix, their local culture, their individual style, their access to technology, all the other variables, not to mention that little pesky thing that we refer to as judicial independence.

That's much dicier, and the answer to that is not in the Rules. Whether you want to be more directive or more forceful in good-practice summaries, in education, in different kinds of protocols, it's a different issue. In the Rules, I don't think you can get that prescriptive on a sufficiently detailed level to both be helpful and cover all the different circumstances you're going to see.

PROFESSOR MILLER: To Lee's point, there was a moment in time when I think five corporate general counsels in sequence got up and begged for more judicial involvement.

We will stop this raveled conversation. You have extraordinary experience and talent up here, so questions? Observations? Criticisms? Yes.

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Editor's Note: The additional Q&A session with the audience members is not reflected in this transcript, and is available on the *NYU Journal of Law & Business* website. This Conference transcript has been edited for clarity.