

THE AMERICAN LAW INSTITUTE'S NEW *PRINCIPLES OF
AGGREGATE LITIGATION*

*Sam Issacharoff, Judge Carolyn Kuhl, Francis McGovern, Stephanie
Middleton
Moderator: John Beisner.*

JOHN BEISNER: We have an extremely distinguished group of panelists here for our next discussion. I'm going to introduce Stephanie Middleton, who's going to introduce the panel. Stephanie is the deputy director of the American Law Institute. I'm going to turn it over to you, Stephanie. Take it away.

STEPHANIE MIDDLETON: I want to thank Henry and Linda for inviting us to participate today. I've been a fan of Henry's for many years and I'm glad he's not in Kansas anymore. It's a lot easier to get here. No offense to Kansas. It's just hard to get there. So I want to talk for a minute about the American Law Institute (ALI).

I practiced law for many years and used restatements from time to time. But it never dawned on me to wonder where they came from. So I'll talk about the ALI for a minute and then I will introduce this panel in a little more detail. Henry said you could read about it but they're such an amazing group of people that I will say a word about each of them before I turn it over to them for the program.

So, the American Law Institute is the source of the restatements, the Restatement of Courts, Foreign Relations, Law of the U.S., Restatement of Contracts. Also, more recently, the ALI has produced *Principles of Law*, *Principles of Local Governance*, and *Principles of Aggregate Litigation* which we're going to hear about today. We do the UCC in partnership with the Uniform Law Commission. Also, the Model Penal Code is ours. During WWII, the ALI worked on the Statement of Essential Human Rights which was relied upon by the United Nations along with other sources in adopting the Universal Declaration Rights in 1948. And that was all in response to atrocities in WWII.

So who is the American Law Institute? Who writes these things? It's a group of about 3,000 elected members. We also have life, honorary, and ex-officio members. It is judges, academics, and practitioners who are at the top of their field. Somebody referred earlier to sausages and law. If you care about either, you don't want to see how it's made.

But actually, the process at ALI is a wonderful process. It's the process they've had since 1923. I want to talk about that a little bit. I'll mention that my previous job, before I came to ALI, was working for the Senate Judiciary Committee.

So, I can't tell you how much of a pleasure it is to work at ALI with the process that's there which is very transparent and collegial and civil and quite interesting. The first step on a project is to find a reporter. It's usually a law professor, or a team of them, who is not only well known in the field but will be able to listen to diverse views and somehow get it right, like we saw in the previous panel. Sam Issacharoff was our reporter on the *Aggregate Litigation Principles* who was able to get people who are on opposite ends of the spectrum, as our two speakers were earlier this morning, and get them to agree—this is the way it should be.

This is the statement of ALI—these are the rules we want to have and these are the explanations. That's not always easy, in this project in particular. We have others where you really do have, sort of, two sides and they have to be brought together. So the reporter is selected and approved by our council and then begins drafting chapters and then brings these chapters to the advisor's group. Judge Kuhl was an advisor on the *Aggregate Litigation Principles* project. There is also the Members Consultant Group, which is any ALI member who is interested in the project. They can read the draft and either come to the meetings or send comments to the reporter. After the advisor meeting, the reporter may revise the draft. Then, he takes it to our council, which is our board of sixty members, and gets beaten up by our council a little bit; makes further changes, and brings the draft to our annual meeting of our membership, which has several hundred members usually.

At our annual meeting you sit around and look at drafts and restatements and you go live online. After the draft has gone through the council, and approval by the membership, it becomes the official position at ALI. It may be in draft form and called a draft. If you go to our website it will say draft, but it is the official position of the ALI because some of these projects take a long time, we just finished one that took twenty-one years. It was the Wills project and they did away with the rule against perpetuities. I guess some of the projects take a long time. Fortunately for the *Aggregate Litigation* project, it was done in a record amount of time, four or five years.

So we're trying to get to these shorter projects. A little history of the ALI, it was founded in 1923. The first director was the dean at the University of Pennsylvania Law School and he had a wealthy wife and she funded this. Somehow we ended up in Philadelphia at the edge of the Penn Campus and we've been there ever since. But we do have people all over the place—our director is a Professor at Columbia Law School, and our President is a lawyer out in New Mexico. So, although our offices are in Philadelphia, we are spread out throughout the country.

The group of legal giants who started the ALI in 1923 decided that they needed a perpetual society to improve the law and the administration of justice in a scholarly and scientific manner. They were responding to what they saw in the early 20th century: American law as just a mess of

uncertainty and complexity. Jurisdictions varied within each other and within jurisdictions and amongst each other in terms of just agreement on fundamental principles of common law. So that's what the ALI does.

It doesn't just restate—the restatements aren't just a compilation of what different cases have said. There's a lot of work going into coming up with the principles that people can agree on as underlying some of these common law principles. As we increasingly get into more statutes, and more regulations, there's still a lot of gaps and room for common law, even in interpreting statutes. There was consideration, when they finished the first restatement, right before the beginning of WWII, of whether ALI should shut down. We've restated the law once but they decided it needed to keep being restated.

So we're now in our third, Restatement (Third) is our series and we may be about to start our first Restatement (Fourth). We usually have about ten or fifteen projects at any time. We've recently finished Aggregate Litigation. We have a couple of torch projects going on at any one time. We just finished a wonderful—and I commend your work on—Restitution and Unjust Enrichment that I would think would be useful across all—lots of disciplines and areas.

We're trying to get it out to practitioners and judges because it's something that's not taught in law school anymore and a lot of practitioners—it just doesn't occur to them that the answers may be in this book. So that's for another day, but it's a wonderful book. We have a project on sentencing and employment. We may start something on Indian law. We have a project on liability insurance and nonprofits. We're about to come out with something called the application of the UCC to mortgage notes. And we have international projects, we have one on the world trade organization, and we have some on transnational civil procedures.

So we're all over the place. If you are interested in ALI, I left some materials in the back of the room and my business card. I'd be happy to hear from any of you. So with that, I'm going to introduce the panel.

One more thing I need to mention. One of our members, Judge Hornby, from Maine, asked me to mention to you—I don't know how many of you have cross-border, Canada–United States class actions, but in the back of the room, are protocols for court-to-court communications when you have a class action involving Canadian and American plaintiffs. So that's in the back of the room. It's been adopted. It's from the CBA but it's been adopted by relevant bodies in Canada and by the CBA.

Our moderator for this panel is John Beisner. I think many of you know John. He's on the ALI council. He was an advisor on this project, the *Aggregate Litigation* Project. He's the co-head at Skadden Arps's mass torts and insurance litigation group. He has argued cases in the Supreme Court. He's handled more than 600 reported class actions at the trial or appellate level in federal and state courts. These have been RICO cases,

fraud, security, employment discrimination, environmental, and securities litigations.

So, he's got a wealth of practical experience. He's handled MDLs, worked on the Vioxx matter. He's worked on the settlement of the Countrywide Financial matter with the state attorneys general. One thing I enjoy about ALI is you have these reporters who are brilliant academics and they come out with these drafts, but the judges and the practitioners are always raising their hands saying "that's really interesting professor but in real life this is what would happen," or "help us out with how this would happen in real life." So the nice thing about this group is that they all really have a lot of practical experience, trial level, and appellate level.

Judge Kuhl is a graduate of Princeton and Duke Law. She clerked for Justice Anthony Kennedy when he was on the Ninth Circuit. She held a high level in the Department of Justice and practiced at a law firm in Los Angeles and then has been on the bench in California at the Superior Court for the county of L.A. since 1995. And she was an advisor on this project as well.

Sam Issacharoff was the reporter on this project. We had a couple of reporters but Sam really led the effort. He managed to somehow get this right even though he had people on the left and the right screaming at him. He managed to get it right, and it's a work that's already very quickly being cited by the courts and very influential in this area.

Finally, Professor Francis McGovern, who's at Duke Law, brings practical experience, as well as abstract thinking, and really sophisticated thought, to the area of ADR in this kind of case. He's currently the special master on the BP litigation—we didn't have in the bio but he's worked as a neutral expert or special master in most of the really big mass or class action cases in the U.S. including DDT toxic exposure, Dalkon Shields, and silicone breast implants.

One thing he does, is he comes up with computerized models, sophisticated models, to help the parties put values on these mass claims so that you can narrow what these claims may be worth. This lets the parties figure out how to settle them. And I'm going to tell you other tricks of the trade, but that's why he is sought out by the courts in the U.S. and he's also working on the international scene. He's working with the U.N. Compensation Commission which was set up to ensure that Iraq compensates citizens and businesses for losses suffered in the Persian Gulf War. And he's working on some transnational ADR projects with entities in Europe.

So I'm going to turn it over to our wonderful panel. And I thank them for coming to talk to you today.

JOHN BEISNER: Well thanks very much, Stephanie. I would like to start this morning by noting that my mentors at the bar taught me that when you go into court, candor is extremely important. You should try to get everything out on the table. I was also told that courts don't like surprises. And

so, particularly given the audience this morning, I think some disclosures are important.

First of all I need to tell you that we are all here today to shamelessly promote this book, the *ALI Principles of Aggregate Litigation*. And I should note today that our pitch may strike you as being a little unusual, because our primary purpose isn't to urge you to buy the book. That wouldn't be bad but that's not our main goal. Our main goal—

STEPHANIE MIDDLETON: Coupons in the back.

JOHN BEISNER: There are coupons in the back. That demonstrates my point. But our main purpose is to urge that the book be used. I also need to note what Stephanie alluded to, we are not third-party endorsers of this book.

We all played varying roles in drafting it. I hope that during the presentation you'll hear some very concrete reasons for that recommendation. But, I'd like to start by noting a few things that you should be on the lookout for. First, the subject matter of this book, I think, is extremely important. It addresses cutting edge issues on class actions and mass torts.

It's one of the most challenging arenas that our judicial system is being asked to address—perhaps indicated by the extent to which our first two speakers this morning, who were looking at an overview of hot issues, talked about those two subject areas. Second, I think the book is important because it offers a conceptual framework for analyzing the difficult issues that arise in the aggregation context every day. It's an area that I practice in, and I have to tell you, you can never say you've seen everything under the sun. Every day there are new issues being presented by the types of claims that are being asserted and by the different approaches that council take.

I have to say, you're not going to find the answers necessarily in this book. What you're going to find is a framework to think about these issues. What's important, what isn't so important. I think that's the contribution that it makes.

The third observation that I'd like to make about the book is that it has already been quite influential. We'll be spending a fair amount of time in our discussion talking about areas in which we believe the book may advance thinking in this area, but for present purposes, let me note that in the last term of the United States Supreme Court, the *Principles* volume was cited extensively by the Court in one of the cases that the prior panel spent a fair amount of time on. That's the *Smith v. Bayer Corporation*¹ case.

That was a case out of the Eighth Circuit that considered the priority of a federal district court invoking the Anti-Injunction Act to enjoin state courts from, as the Court put it, relitigating issues and class certification. The Supreme Court in ruling in that case, and in reversing the Eighth Circuit's decision, relied extensively on the analysis in the *Principles* that sug-

gested a preferable approach. And this context would be the principles of comity, that it made more sense for courts to embrace comity principles, that if one court denied class certification, then subsequent courts certifying that issue ought to give due consideration to their earlier decision even if the governing principles of class certification differ. Although somewhat less explicitly, the effects of the Principle's monograph can also be seen in the Supreme Court's ruling in the *Wal-Mart Stores, Inc. v. Dukes*² case that you've also heard about this morning.

The writings of the late Professor Richard Nagareda, who joined Sam as one of the reporters on this project, are highlighted throughout the *Dukes* decision and the Court's analysis tracks the analysis of the *Principles* document on the distinction on (b)(2) and (b)(3) classes.³ The list doesn't end there. There are many other decisions, both federal and state court, which have embraced the *Principles* or at least cited the book. We'll be talking in more detail about those. But let's get into our discussion.

We'll reserve a fair amount of time for questions at the end. I thought a place to start would be to turn to you, Sam, for some initial thoughts, first of all on the difference between this *Principles* document versus the restatements that I'm sure all of you have been exposed to in the past, and how this book came into being.

SAM ISSACHAROFF: Okay. Thanks, John. The restatements had a central core insight, which was that the law was developed quickly at the turn of the 19th century to the 20th century in many states. The reporting system was inadequate.

There was a lot of common law being developed without a centralizing body of thought to how it should be integrated, what principles were emerging, or which ones were being disfavored. The restatement took as its ambition the effort to capture what the doctrinal decisions were, of primarily state courts, in the United States and tried to lend in some coherence. The term "restatement" was always, more or less, a misnomer because these are done with the heavy hand of advocacy, that is, of a sense that there was a right way and a wrong way emerging from the court decisions. The genesis of the idea was primarily bottom up, from the experiences of the courts. The problem in this area of law, the mass litigation area is twofold.

One is that for most judges the experience of a truly mass case has a one off quality to it. That is, judges will handle—come across one, two, maybe three in their career. In some sense you will have to confront the questions of aggregation all the time. As soon as you have three people injured in a car accident and there's one insurance policy on the other side, you have an aggregate claim and you have the ethical issues that confront the lawyers. You have the aggregate settlement problems. All of that is presented. It's just that the complexity mounts just as the number of parties grows, as the amount in controversy grows, and as the potential different sources of law begin to assert themselves.

So, the one-off quality means that there's less of a systematic body of thought here than there is, for example, in tort cases or contract cases where you're likely to see a repeated pattern of cases across any individual judge's traditional career. The second feature of this area is that there is rarely a front to back resolution of the case. That is, these are mass cases that we're talking about: they almost never go to trial as such.

Pieces of them will be tried; there will be judicial resolutions of discrete issues. But if you look at the mass cases that formed the corpus of our understanding of how to handle aggregate proceedings, they are resolved sometimes on class certification, sometimes a jurisdictional issue, sometimes a statute of limitations issue. All these sorts of things are testing the waters by the parties who then have to try to work out a mass settlement in the shadow of a couple of decisions, but decisions which rarely address the merits and certainly never provide a complete, comprehensive picture for appellate review in these cases. In this circumstance, there is law out there, but the law doesn't have a robust feel to it, the way it does in common law areas where there is routine presentation, front to back, in one proceeding.

So the idea of the *Principles* is to try to derive, from the lived experiences, the courts, and the way that the practitioners handle these cases in the day-to-day application—including the way that the supervising courts handle them—a way to think about this overall area of law. That's the genesis of a *Principles* project. The idea is that you get the right people in the room as advisors, and as consultants, and as reporters, and you figure out what the practice has actually already figured out, what the principles of law should be, and you can provide guidance from that. Carolyn, you have, as one of the members of this panel, I think, obviously the best perspective on the value of this book for jurists, our audience this morning. I thought it might be useful for you to give your perspectives on that point.

JUDGE KUHL: Why is the *Aggregate Litigation* Project important? Let me say one thing. From a very general perspective, I have been noticing, and I think colleagues have been noticing, that what is done in the academy—that is, what the best and brightest minds in our legal profession do—those people who have Supreme Court clerkships and then go to the law schools—what they do, increasingly, is more and more disconnected from what those of us in the courtroom do—from a judging and from the lawyering perspective.

The American Law Institute is a place where the academy and the real practicing part of the profession come together. And to me, it has been a very valuable, legal, professional experience to reconnect with those brilliant minds in the academy to try to help solve the problems that we're grappling with day-to-day. So I really have to add to what Stephanie said, and just endorse this experience of the American Law Institute, which has historically brought these two groups together. From the standpoint of the *Principles* project, as has just already been mentioned, this is an area of the

intersection of class actions and mass torts that is of great importance. I think the remainder of the agenda for this meeting lends credence to that. But many of us, as Sam has mentioned, may only encounter these cases once in a great while.

So, it's important to know that there is a source that provides a perspective on these problems where, if they crop up on your docket once in a while, you can turn to some conceptual guidance, as John has said. A second reason why this project is so important, I think, to the trial judges, is that it addresses areas where trial courts are frequently opulent. Why do I say, as trial judges we would be on our own in these areas? I think we are most comfortable in the adversary process. I think we are most comfortable where you have a plaintiff arguing every case and every perspective for the plaintiff's position. You have the defendant arguing every case and every perspective and every factor of that defendant's position. We feel comfortable, that's our job. We make decisions in that environment.

In the area of class actions there are times when we do not have the benefit of the adversarial process. How does that come about? We are asked, for example, to decide whether the plaintiff's proposed class counsel is adequate. How do you think about adequacy of representation? You're not ordinarily going to have an adversary process to guide you on that. The *Principles* project addresses this in § 1.05. So you have, as a judge, a situation there without the adversarial process.

Another area where trial judges end up being on their own is in approval of settlements. Usually the dismissal that comes in is a great day for trial judges. The dismissal comes in: the case is off your docket. It's a wonderful thing. But when it's a class settlement we're asked to do something that's really different from our usual experience. I was thinking of analogous areas, minors compromises perhaps also presents us with a situation where we have to stand, really by ourselves, without an adversarial process, and make judgments.

When we are deciding when a settlement is fair and reasonable and properly protects the class, we are really on our own. Again, the *Principles* project has placed great emphasis on some areas, to give courts guidance, in an area where we are without the benefit of the adversary process. In addition, the appellate process, I've really not kept up with what's going on in the trial courts to a great extent, both in class action and mass torts. So again the *Principles* project has drawn not just on the appellate case law. It's not a summary of case law. I look at what's going on, on the ground in the trial courts, in an attempt to put some sense around that and to derive general principles that ought to guide what's going on in the courts.

So again, to take, as an example, class action settlement, lots of times those are not appealed. It's not much to have an objector, which in California; you can't have any objectors in state court. It's not much to have an objector and an objector who's not somehow bought out in the process, and who can persist to the appellate level, which makes you have really little

guidance around the process of approval of the settlements. So again, we don't have a lot of guidance and this is the place to look.

One final point, if I may. I think that this work gives us not just answers, but it gives us solutions. I'm going to try to make that distinction by again referring to the *Smith v. Bayer*⁴ case that's been mentioned. And again, briefly, the Supreme Court gave me an answer. They said if you have a federal class action and a state class action and the federal court said that the class cannot be certified, that doesn't bar the state client, or that doesn't bar the state class action from trying to proceed. That's an answer, but it's not really a solution because you still have this problem of what you do with overlapping litigation in the class action area.

The Supreme Court mentions this principle of comity, which they suggest ought to help. But if you look at the *Principles* project, it really puts some meat on the bones of that. Just to give you a bit of an idea of the conceptual scope, this problem is actually addressed in § 2.11 that says a judicial decision to deny aggregate treatment, in other words to deny class certification for a common issue, or related claims, raises a rebuttable presumption against the same aggregate in other courts as a manner of comity. Then the commentary behind that gives further meat of the solution, on what I could call the bones of the problem, and says that, for example, in comment B, that even where the court's respective class actions rules are not identical, even if there's divergence of the state law from Rule 23, the state court really ought to consider, as a matter of comity, the denial of certification in the federal case or any other state case.

So many of these problems are anticipated and treated in a way that gives a more holistic solution than what you will find as a result of any particular case.

JOHN BEISNER: Thank you. I think if you look at the areas in which the *Principles* book has been cited, it's been most frequently cited in an area that Carolyn alluded to, and that is the area of seeking resolution of class actions and mass torts. Francis, that's one of your many stock and trades. It would be interesting to get your perspectives on how the *Principles* book is useful in that context.

FRANCIS MCGOVERN: In a way, I feel like a presidential candidate, because I'm not going to answer that question quite yet.

JOHN BEISNER: But there are three parts.

FRANCIS MCGOVERN: And the third is the Department of Energy. Let me back up a little bit. If you go to the history of managing complex litigation, in the '50s and '60s, the federal courts developed multidistrict litigation and there was a Manual on Multidistrict Litigation that had a series of very precise rules, very much like the Federal Rules of Civil Procedure.

Wave one of discovery, you do this. Wave two, you do that, and so on down the line. And then, in the late '70s and early '80s, judges reacted negatively to these precise rules and decided that there should be a manual for complex litigation which was basically a laundry list of things that judges could do to manage complex litigation. So, instead of precise guidance, it gave the general background you can use. This rule or that rule or you can do it this way or you can do it that way.

The current Manual,⁵ which is in its fourth edition, has that same kind of "laundry list" approach. And so, judges who have been involved in complex litigation have been trying to develop some way of deciding, among those possible items on the menu, how to manage these cases. You can have bottom up reform. It's been talked up before or top down reform. The true value of the *Principles* is a conceptual format to assist you in deciding what pieces from the menu to choose in managing cases. And now, let me answer the question more specifically.

In the settlement context, the *Principles* both address class action settlements and non-class action aggregate settlements. We can talk some more about definitions of that and go in more detail. In the class action context, there is a tremendous amount of lore there, not in opinions but common practices that are used. These principles really crystallize the essence of those common practices. So, for example, in § 3.06, there's identification of the role of the court in class action settlements. It gives you a principle of what your role should be. And then in § 3.18, what the role of the court should be in a non-class aggregate settlement, not just for approval of the settlement, but also for continuing over the supervision of the implementation of the settlements.

I'm sure all of you have had problems where the settlements occur, the lawyers come in, it's great, thank you very much, goodbye, I don't need to deal with this, and then something goes wrong in the implementation. The *Principles* give you some guidance in that regard. Use of court ancillaries in § 3.09, there's a nice list of how you can use special masters or magistrates or adjuncts or court appointed experts to assist both in the approval and in the implementation process because, it turns out, in a large number of these cases, having your own state's rules for the appointment or the equivalent of Rule 53 of the Federal Rules of Civil Procedure. A special master might be a great aide, but how do you use it, how do you pay for it, issues such as that.

Another issue that's addressed specifically, that's helpful, is in § 3.10 on future cases. How do you cope with the problem, if you've got current injuries and in which you may have future injuries? As has been mentioned, the class action divide simply doesn't work very well anymore in the context of personal injury cases. You're going to have aggregate settlements. And typically you're going to have some problems as far as the future is concerned.

The fourth point I'll mention. Just in terms of how you create an aggregate settlement when you have multiple plaintiffs, and you'd like to bind everybody, but it can't be a class. Are there some vehicles to deal with this group of folks? In § 3.17, there is some real guidance. Later on, if you're interested we can talk about some specifics, where those principles come to apply to assist you in trying to understand how you can tailor the rules of civil procedure in the context of a complex settlement.

JOHN BEISNER: Let me add a few perspectives from a practitioner's viewpoint. One thing that has not been mentioned, which is a very pragmatic feature of this document, is that there's a wealth of just basic information about case law in this arena. Sam and the other reporters did a masterful job of compiling a lot of different judicial perspectives in this volume, particularly from the appellate court level. This will be maintained with updates over time, as the volume itself is referenced by courts along the way. But in terms of just going to find a place where the case law is all stacked up, categorized, and analyzed, the footnotes of the volume are a particularly marvelous resource. So, particularly for practitioners, but also for everyone else involved in litigation of these cases, particularly the courts, it's a marvelous resource in that regard.

The other practitioner's perspective I would bring—and this may reflect a little bit of my wearing my defense counsel hat—is that, as Carolyn was saying, it is a source of solutions. I think one of the more frustrating experiences one can have as a defense counsel walking into one of these mass litigation situations, a mass tort, 20,000 claims have been filed and you have your first appearance before the court. And the court is quite understandably throwing up its hands and says to the defendant, “The first thing we ought to do is call Francis and bring him to get this case settled because there's no other way to deal with this.” I'll be 190 years old if I have to try all these cases *seriatim*.

So that's the only solution. Of course, as defense counsel, you want to say under your breath, “Well, your honor, the other thing, is they could voluntarily dismiss all these claims. That would also be a solution,” but you can't say that. I think one of the comforting things about the book is it does lay out, and I think gives everyone involved some confidence, that there is a way to actually litigate these cases—to at least get the case far enough along to understand what's right and what's wrong about the allegations, what are strong contentions, what are weak contentions in the case, so that Francis can come along and meaningfully talk with the parties about whether there is a way to get the matter resolved.

FRANCIS MCGOVERN: One of the things that's coming across, and it's what we're going to turn to now, it's really the central point, I think, for you all, it is what differentiates this area of law from ordinary bi-party disputes, in that the courts have to play a completely different role. From the mo-

ment the case is filed, your role is managerial. And you have to start thinking about how to organize the litigation, something that normally is a simple, one-on-one contest you can entrust more or less to the parties to figure that part of it out or to present initially a proposal on how the case is going to proceed.

That fact takes courts away from the normal comfort zone of presiding over a predominantly adversarial process. It brings the American courts much closer to a European-style model, where you are the administrative body that is going to run the litigation. And it turns out, perhaps not surprisingly, that the formal rules of court organization do not lend themselves particularly well to that role. And that design, to address that, they don't provide meaningful guidance in that area. So, I think what all the speakers are stressing, is that from the court's perspective you are without the usual benchmarks for how to proceed in this area.

Just pushing on that point a little bit, one of the concepts of judging is that there's been an evolution from the judge as umpire, calling the balls and strikes, to managers, managing the litigation, telling the lawyers what to do. But then in some instance it involves the player. Soon the judge, if the judge is particularly activist, the judge can be the most important player on the field, tipping the scales. That balance of the role of the judge that Sam is talking about is absolutely critical in the context of these kinds of cases.

JOHN BEISNER: I turn at this point to talk about some of the specific sections that we haven't talked about already, to an extent, and look at some of the sections of the *Principles* book that we think might be quite influential going forward. First, is the subject of issue classes. Federal Rule of Civil Procedure 23(c)(4), of which similar versions can be found in many of the state procedural rules as well, is a one sentence provision that says, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues." There are probably some competitors, but I always thought that was probably one of the least noted sentences in the Federal Rules of Civil Procedure. It has gone for many years without much usage, but it got a fair amount of attention in the *Principles* volume and in turn has gotten a lot of attention from the courts. What's the perspective that's being conveyed about issue classes? Examples?

FRANCIS MCGOVERN: Well, let me give you a concrete case that poses the question. There was a lot of litigation a few years back over contaminated blood products and HIV exposure. There were suits brought against the manufacturers of blood products for negligence in the treatment of the blood supply that led a class of hemophiliacs to be exposed to the HIV virus. There was a controlling legal issue at the time and the controlling legal issue was whether or not the blood manufacturers had been negligent.

They had not tested the blood supply. This was prior to the knowledge about HIV and the availability of specific HIV tests. They had not tested the blood supply for certain kinds of hepatitis exposure. Had they filtered out the hepatitis contaminated blood, it turns out there was a huge overlap with the blood donor population that was HIV positive. So it was something that Judge Posner of the Seventh Circuit would refer to as “the serendipity theory of negligence liability.”

So a class action was proposed in which the central dominant issue in the case was “Is this a viable theory under negligence?” That was a problem because there were fifty state laws involved. I want to put that problem to the side for a second. Assume with me that the critical issue in the case was whether or not a negligence action would lie in the context of this kind of serendipitous exposure. The serendipity point makes it clear that courts thought it was unlikely. That’s an action lying in negligence.

The problem in the case was that, even if you were to get a determination in some unified proceeding that, in fact, it was negligence, this would go all over the country to be appealed piecemeal once you found the determinations with regard to any individual as to whether or not his or her HIV positive status was caused by the negligent blood product or not. One of the problems was that you could not get any kind of unified determination. So that’s an administrative point, from the vantage point of the courts. There had to be some way to get this resolved because maybe you could then settle these cases.

From the vantage point of the plaintiff, issue classes—this section of Rule 23(c)(4)—the different plaintiffs, this was a way of circumventing the Supreme Court cases expressing skepticism on class action for mass torts, because you can just say, “we just want to certify an issue, and by certifying an issue we would have a class.” So it seemed to be a shortcut around the protections of Rule 23. From the defense perspective, this also looked like a terrible idea—the same reason it looked like a terrible idea, because it created this monster of a huge class action without the procedural protection of Rule 23.

So we looked at this problem and whether or not there was any utility to Rule 23(c)(4), and its state court equivalents. Our conclusion was that, under certain circumstances, it could actually be useful. Our approach was to look at it from the vantage point of whether or not you could generate issue preclusion. To generate issue preclusion means to take something off the table in a dispositive way that would be dispositive not just against the defendant who’s a common party in all of the cases and therefore, under *Parklain Hosiery*⁶ could be bound by issue preclusion, but also dispositive as to the entire group of plaintiffs.

Our proposal was that a trial court that certifies a class for issue class determination has to do two things. It has to identify the specific issue with precision, including the jury instructions that will follow from the trial, if it’s a jury trial, from the trial of that specific issue, so that the issue preclu-

sion outcome is clear. Second, it has to be consistent with federal or state practice, certifying that class for immediate appeal. Now the beauty of this proposal was that the defense lawyers disliked it intensely because it seemed to bring some new life into issue preclusion.

The plaintiffs' lawyers disliked it intensely because it seemed to guarantee delay, because it would automatically be an appellate process before you can take this ruling to the bank, as it were. The trial judges disliked it intensely because of the noted irresponsibility of appellate judges and setting up things for too long and not doing their jobs. Who knows what they do? They don't manage the docket. They just sit there at conferences and stuff. And appellate judges disliked it intensely because it seemed to put too much power in the hands of the district court judges to determine the appellate docket and allow for further interlocutory appeals.

When every constituency dislikes something intensely you're probably on to something. It's probably a positive. So this went through unanimously, based upon the finding, this attempt to get something of value in a way that didn't give obvious, strategic advantage to either of the parties, the plaintiffs or the defendant, and also it seemed to be a rational use of court resources.

JOHN BEISNER: Let me ask whether this discussion in the book about the possible use of "issues classes" is going to increase the use, Francis, from your perspective. Do you think it's going to increase?

FRANCIS MCGOVERN: There's no question in my mind that the plaintiff's bar will try to push in that direction. Let me just mention, just on the side, there are other ways to accomplish the same goal as well, that is to say, one of the beauties of complex litigation is that it has complex solutions as well. In the silicone gel breast implant cases, for example, Judge Pointer used Federal Evidence Rule 706 and court-appointed experts to create a panel which addressed the issues related to an implant, a silicone gel based implant, capable of causing certain kinds of harm, which for all practical purposes, is the general causation issue in the case, because that was really the gravamen of all that litigation. No question, if the breast implant ruptures, it causes harm, but that's more specific. This was the general question and one could have done that in the context of a single issue trial or a 706 panel, which he did. And then de facto for all practical purposes resolved the issue as well.

So this concept of isolating an issue and trying to resolve it, I don't think is limited to just Rule 23. But I think you'll see more and more of this also from the defense perspective, because it's a free screening at home play, that is to say, if you win the general causation issue you've won the case. If you lose it, generally speaking, it still has specific causation that you can rely on.

JUDGE KUHL: One of the things I liked about the approach taken in the *Principles* project is that it's not as though a solution is defined. Now let's all go use that solution, a solution that's realistically presented in the context of alternatives, as Francis was saying. So in § 2.02, how should the court look at this? The court should authorize an issue class if doing so would materially advance resolution of multiple claims in a manner superior to other realistic procedural alternatives.

So you're asked to look at what the alternatives are, as Francis was just suggesting, and there's a handy little list right there in § 2.02(b), coordinated discovery. It might not work on this one, but for other issues coordinated discovery is going to bring you on the path. Pre-trial rulings, as on summary judgment or concerning admissibility of evidence, trial of an individual issue or fabricated trial or maybe another class action that's pending someplace else. So, I like the practicality of that which treats an issue class, not as some kind of a solution for all problems, but rather as one of a group of procedural alternatives that a court, managing mass litigation, ought to think about.

JOHN BEISNER: I think this is a good example of this notion of concepts that we talked about earlier. I don't think we've mentioned that last November, in the Third Circuit, a case came up on appeal where an issues class was proposed, a rare circumstance, that I think has actually bubbled up to the appellate level. This was in the context of environmental case and I won't go into a lot of details, but it had to do with the pollution of the water supply in a particular area. The key point is when the court came to the question of "Did the district court appropriately deny an issues class here?" the court pulled out the book and basically quoted the verse that Carolyn just mentioned and said, "This is the law now of the Third Circuit. These are the factors that our district courts should consider in addressing the issue."

I think the reason why, as Sam said, this is an extremely contentious issue among practitioners and others who have been in this area that have gotten involved in this very thoughtful list, is that there are lots of factors to be considered. As I said at the outset, if you are the judge dealing with this, it doesn't give you an answer by any stretch of the imagination, because both sides are going to have lots of things to say about the various factors. But it's a framework for finding a solution, as Carolyn put it earlier. I think that's the reason why the various people who were working, and the other reporters in drafting the document, ultimately got comfortable, because the reporters listened very carefully to the various voices of what was important to them.

It's not an issue—I want to come back to something. You said something earlier, Francis—it's not an issue that is plaintiff versus defendant. It's a controversy on both sides of the case. If I have a lawsuit that alleges

there's something in this water, that my client is told that maybe in some instance—

FRANCIS MCGOVERN: It would be in here, isn't it?

JOHN BEISNER: That's a little close to home. But anyway, if you're the defendant in the case and you're confident that whatever's alleged to be in here will not, in any circumstance, cause what plaintiffs allege, you may well, and in some cases people have, as defendants said, let's bring that on. Today it's normally been brought as a summary judgment motion with lots of experts in support of it, but it can also be brought as an issue struggle. And if you win, the case is over. If you lose as a defendant, you've lost general causation, but that might not be hard to prove in most cases anyway, so it gets cut both ways.

If you're the plaintiff, in a case like that especially, if it's a mass tort where there are 150 different law firms involved, the idea that your claims could be foreclosed by some other lawyers taking the case to trial and maybe you will or won't have much influence over how that trial goes into the jury, there's a reason why plaintiffs may not be very interested in going that direction either.

SAM ISSACHAROFF: It's controversial on both sides.

FRANCIS MCGOVERN: But keep in mind the kind of problem that this is intended for. The first time the U.S. Supreme Court confronted a mass tort case was in a very odd posture. It was an interpleader action but it's a case called *State Farm v. Tashire*⁷ and this is an accident between a Greyhound bus and a pick-up truck in California.

Routine accident on the highway, nothing special except four people were killed, couple of dozen injured, there were forty people, forty plaintiffs, involved and the truck driver had no assets. The only question in the case that was significant was "Was Greyhound negligent or not?" Greyhound was desperate to figure out some mechanism to put that issue before a trier of fact and resolve it once and for all, because its claim was that it was not going to be negligent, it was not negligent, but it was facing the prospect of forty or more individual actions that could yield forty or more different resolutions of the question of "Was Greyhound negligent, and, if so, how much?"

The U.S. Supreme Court looked at this case and said interpleader is the wrong way to do this, but somehow there has to be a mechanism to get that issue resolved and we just don't know—this is back in the 1960s—we just don't know what it is. Well, fifty years later the Supreme Court has informed us that Rule 23 may not be the way to do it, but we still don't know what the way is yet.

Bankruptcy may not be the way to do it, but we don't know what the way is yet. So at some point, the genesis of this is, well, you know there has to be some other body that is capable of looking at this and coming up with proposals.

Because if you go back to the Greyhound accident case—when I teach this to some of my students I tell them it's like the movie *Speed*, if you recall the Keanu Reeves movie. One of the great things about the movie *Speed*, it's about a bus, out of control in L.A., driving very fast through the city. The great thing about the movie is that it is about Keanu Reeves and Sandra Bullock and there is about forty or so passengers on the bus and the movie never tells us anything about that and it does so because they don't really matter; it's all about the bus driving really fast and Dennis Hopper being a really bad guy.

These cases on the liability question, like on the liability of Greyhound, no individual passenger had anything to contribute to the resolution of the case of negligence or not, and so you needed some mechanism to get that resolved and then everything else would fall into place. What seemed irrational, systemically, was that we hoped that there would be private settlements, but we had no way of putting that question before a single court, in a single instance, and MDL now gives us the mechanism to do that on some of the issues, some other MDL practices do, but this is an attempt to give one more tool.

SAM ISSACHAROFF: Let me just mention one other, from the judicial perspective often times, as both of you suggested, there is an issue, if you get that issue resolved you can resolve all the rest of the cases—you could run the board in BP right now. One of the fundamental issues is how much liability does BP, as opposed to TransOcean, as opposed to Halliburton, as opposed to Cameron, and the vehicle the court is using under admiralty law is a limitation action, which you don't think of very much. Of course, I am not certain how many of you have admiralty cases, but that's yet another vehicle by which you can bring this gut-cutter issue to the fore and get it resolved, and then hopefully the rest of the cases will fall like dominoes.

FRANCIS MCGOVERN: In Kansas, right, you use the admiralty thing. [Laughter].

SAM ISSACHAROFF: Another area I thought we might touch on some months ago went off with one of the other attorneys in my office to look at on Lexis what section of the *Principles* document had been cited most frequently by courts, and somewhat to our surprise, by some distance, the most popular section was the discussion of *cy pres* settlements. Why? Why would this have been found to be perhaps the most useful section?

FRANCIS MCGOVERN: This was a complete shock to me. We had a little section on *cy pres* which said basically the money belongs—in *cy pres* you have a class action and the question is what to do with the funds and we wrote a principle that said, basically, the money belongs to the class, you should give it to the class. It's not money to be given to your favorite charity, your favorite golf event or what have you.

This seemed to us to be sort of inconsequential and obvious. This generated huge controversies. People would get up at these big membership meetings and say we used the money left over from our class action or we took money from the class action settlement, and only because the name brand was already taken would I not be recognized as the Mother Teresa of this particular jurisdiction. And my reaction was, that's great, that you want to set up a charitable foundation, you know you want to do these good works, that's wonderful. Just do it with your own money, not with other people's money.

It turns out this was hugely controversial and the people who gravitated toward this and this was also a shock to me because I had no idea this was going on with the judges. The judges said you have no idea that as soon as we have a big case assigned to our court, institutions, particularly charitable institutions in the area, will retain counsel to come and lobby us on behalf of the distribution of funds to their preferred charity.

I have to confess this was one where I just had no knowledge that this was going on and the judges needed some protection. Our basic principle was that the money belongs to the class, you should give it to them and you should not use it for your own purposes, no matter how admirable. If you can't give it to the class because of distributional matters give it to something that looks like a class.

Now the strangest case, where somebody decided to do something that looks like the class, and we discussed it, is a case out of New York where there was an antitrust action and it was against the modeling agency—the agency that pays models for commercial shoots. There was some money left over and the court decided that it had to do something proximate, so it gave it to a foundation for anorexic women. That was a little questionable.

JUDGE KUHL: Well, I think this is one where instinctively, as judges, we again feel sort of uncomfortable and I really think it's fundamentally a matter of the public's trust in the integrity of the judiciary. The *Principles* project, as Sam says, comes out in favor of, if there is a pot of money created, it should go to the class members, but only if you get down to the small pennies where you couldn't send out another notice, so you couldn't mail another check for the cost of the money, do you then have something that's left over that you might think about giving to charity and then the charity should attempt to mirror the interest of the class.

I think an important comment to § 3.07 is that the charity should not have a connection to the judge and it should not have a connection to either

side. In the early days of our complex litigation program, when we saw a lot of these settlements coming in at some point and a lot of them had *cy pres* at some point, I became very uncomfortable that I was going to end up approving a distribution to some charity and then six months later I'd find out that that charity was honoring the general counsel for the defendant corporation.

I mean, how do you know these things? So I think there's great wisdom in the recommendation that we kind of stick to business here and the idea of a class action is to better fit the class members and we stay as close to that as possible.

FRANCIS MCGOVERN: Two thoughts for those of us in toil in the vineyard of distributions. Number one, there's always money left over, which I think is one of the reasons why this has been cited so much. You will always have three to four percent un-cashed checks in every single one of these distributions, so this is a problem that's absolutely universal. The second thought, and my favorite one, is when a federal district judge created a new foundation and put his favorite chef as the head of the foundation.

The abuses have occurred over time, so this is not a one of a kind problem. You will always have some money and the reason folks haven't focused on it a whole lot is that usually the distribution phase of any settlement is kind of under everybody's radar screen; it kind of goes under the rug. Most of the fund administrators try their best to get down to the last hour and then they try to low-key any problems that come along and so shining a light on this tail end, the end game of the distribution, I think, Sam, really is the primary virtue of that section. Not so much *cy pres*, but putting the light of day on how that distribution is conducted at the end is really achieved.

SAM ISSACHAROFF: I think one other feature of the *cy pres* discussion we've been talking about in terms of its impact on settlements—it's also—I've seen the principle cited for the fundamental proposition that, if you have a class action, the purpose ought to be to obtain money and get it to the persons who were allegedly injured.

There have been, I think, in recent years, some proposed classes where counsel has said "Well, we shouldn't worry about who was really injured, we shouldn't worry about identifying the class members, we should just figure out what the loss was in the aggregate and get that money out of the hands of the defendant" and sort of say, "we should do what an Attorney General action might do, but we should do that privately in a class action."

I think that, without directly addressing the issue, there is a notion here that a private class action may not be achievable in all instances, but first and foremost it's supposed to be, as with all civil litigation, somebody who claims they've been injured and needs recovery of some sort. The main purpose should be to get recovery to that individual and not be creating

anorexia foundations or whatever other things or maybe circumstance where —

FRANCIS MCGOVERN: There's also bulimia.

SAM ISSACHAROFF: Okay, well, you might have to divide between several important causes, but you know that may be necessary in some circumstances where you have residual out there, but it also serves as the other purpose.

JUDGE KUHL: There's another part of the settlement provisions of the *Principles* project that also goes in this same direction. That is the provision saying that an award of attorney fees made based on the percentage of recovery ought to be on the basis of the percentage of the benefit that actually goes to the class.

So frequently we see these settlements come in that are claims-made settlements and you may or may not want to prove those. I know Sam has some thoughts on that, but at a minimum the percentage of the attorneys' fees ought to be based on the percentage of what the class actually benefits from, not based on some theoretical amount that could be paid out, because nobody ever really believes that it's all going to be paid out.

SAM ISSACHAROFF: This is one of the areas; there's a handful where we recommend reversing a Supreme Court decision on this issue, and we say that not out of the arrogance of, you know, we can say anything we want, but I think that the Supreme Court, when it first addressed this issue thirty years ago had little practical experience with what we developed in this area of law. So, the Supreme Court authorized a percentage to be made available based upon what the class counsel in turn had made available to the class.

The problem as practices evolved, over thirty years, is that a lot of the work in class actions or mass cases takes place after the putative resolution of the case, and so, you have to incentivize the proper attention to be paid on the end stages that Francis was just talking about.

FRANCIS MCGOVERN: Sticking with the subject of settlements, there's a substantial section of the book that talks about non-class aggregate settlements and what we mean by that is you don't have a class action; you have a lot of, usually vast court claims that have been asserted individually. And it comes time for Francis to get involved, to get a settlement, and the plaintiffs will make clear what they would like to achieve with the settlement, which is compensation at certain levels for certain parties. Typically what the defendant will say is we want a global settlement. We don't want to just pay off the claims here that we would least like to get rid of. We are going to be spending a lot of money to resolve all of these claims. We

would like this to be over so we want everyone to participate if at all possible.

Well, in class action you've got opt-outs and so on that need to be used as a matter of due process, but in the mass tort arena it's a little fuzzier about what has to happen. What does this volume contribute to the approach that should be used in trying to achieve the interest of both sides in obtaining a settlement in this contest?

SAM ISSACHAROFF: If you imagine that in any settlement, in reality, that you have a fixed amount of money that's going to be spent on it, the defendant is always going to say this is, not publicly, but this is worth so much to me to get rid of and if we get rid of it entirely there is a premium available for that. That premium would be lost if it can't be harnessed into one proceeding. Now our legal system has two fundamental ways of creating that harnessing effect. One is through the class action, which, although there are opt-out rights available, has tremendous capacity to coerce participation against anybody who does not opt out, including over their objection. An objection does not kill a class action resolution and doesn't even kill settlement. The court can impose it.

The other mechanism we have is bankruptcy which has the clamp down mechanisms that just because you want to hold out doesn't mean you can. But increasingly we can't use bankruptcy before class actions for the mass harm cases, for the mass harm cases involving personal injury. But you need some kind of coordination mechanism nonetheless, that's what the MDL process does for the California Complex Litigation Project of the court system. That's a coordination mechanism. But what about the fact that there is a premium available to everybody for global peace? How can you realize that?

Well, the problem is that the ABA's Aggregate Settlement Rule says, in effect, that nobody can be crammed down. Nobody can be compelled to accept a settlement that he or she does not wish to accept. There is an individual entitlement to control of one's own legal claim.

So there's a case out of New Jersey that poses a problem. There were people who were franchisees of a tax service and as franchisee they had an identical dispute with the franchisor. The contract, the franchising agreement, prohibited class action. So they brought the mass action of several hundred of these franchisees and these are people who are professionals, who run a service, who handle tax returns, so they are competent to make economic decisions and they agreed among themselves that they would get a premium from the franchisor if they could all settle together, and that they would bring all their claims together. So they created, in fact, a *de facto* corporation, and the corporation was, that they all had an interest, and they all had an interest depending upon their economic state as franchisees. Three-quarters of them were to vote to approve a settlement, they could represent to the defendant that the settlement would go forward.

This was what happened and there was a settlement and more than three-quarters voted and there was a hold-out. The hold-out said I'm not going along. I have a right to say no even though I contracted into this. The New Jersey Supreme Court said, "We are uncomfortable about this because it violates the Aggregate Principal Rule of the ABA, but we are going to let it go through this time on the basis of the facts presented. We are not sure what to do about it prospectively."

We looked at this and we thought that this was the right outcome. The right outcome was that people should be able to create a limited partnership, a limited corporation, basically, and to commit themselves ex ante to a mechanism, not that the lawyer would decide, but that they would decide collectively and that they would effectively assign their rights into this common pool. So we are distancing ourselves from the ABA's approach to the Aggregate Settlement Rule. This is a very big issue in mass representation cases because of a case out of the Texas Supreme Court called *Burrow v. Arce*⁸ in which the Texas Supreme Court said if you get the Aggregate Settlement Rule wrong, the remedy is not at law but the remedy is in restitution. The remedy is disgorgement of all legal fees, not how much you harmed the client as result of getting the Aggregate Settlement Rule wrong.

There are other courts that have looked at this and have said that a defendant who joins in an improper aggregate settlement is jointly liable for the wrongs committed there. So everybody is very skittish on this particular question, and we think that there is a communization necessary between these individual claims and the ability to contract into something meaningful. We chose as our model, Rule 524(g) of the Bankruptcy Code, which is the asbestos mass work out where all claimants have a vote and there is a certain threshold of three-quarters to participate.

JUDGE KUHL: I would answer that there is a statute drafted right in the back of the volume that would implement this. I mean, it's more than just a roadmap and you can take it to your local legislature and say pass this. We think it's a balanced approach. I thought that was pretty unique.

JOHN BEISNER: This was hugely controversial.

FRANCIS MCGOVERN: It is controversial. I will give you three concrete examples and one was a federal case, but it could have been a state case. The other two were state cases. We would love to have a statute, but sometimes you can't wait for the statute. The first involved, some of you may remember, a night club fire in Rhode Island. There were a hundred people who died by virtue of the fire and 200 others who had personal injuries, and the defendants were saying, "We are settling with you but we have to settle with everybody." How do you deal with that? And what we did in that circumstance was, we had a series of meetings with all of the 300 families, really, and we got them to agree on a formula before the settlement amount

was determined. So actually, they agreed in writing on the way in which the settlement would be divided, which is basically a point system that we have used in a number of different contexts. There was a positive vote for the formula and everybody agreed. One hundred percent agreement on the formula and then there had to be agreement on the various settlement amounts, which in the abstract was a little bit easier to obtain.

The second case involved a dam failure in Kauai where there was a dam up in the mountains of Kauai that broke and it went down into, of all places Bette Midler's pond, which was a beautiful place where you could go swimming in the Pacific and swim in Bette Midler's pond and get all the salt off your skin after swimming in the ocean. Eight people killed and a huge amount of property damage.

There, in draft form, we knew about the *Principles* and the lawyers decided to have a meeting and we did a 75% rule on the property damage cases. We were doing 75% on the personal injury and all of them agreed to it, so for all practical purposes everyone agreed ex ante to be bound by that particular kind of vote when the settlement came in. There was no appeal, so I don't know exactly how Hawaii would go on that if it were a controversy.

Third, was a case in Idaho involving a hundred and ten potato farmers and there had been some herbicide from the Bureau of Land Management land that had blown onto their land and destroyed a potato crop, to the tune of several hundred million dollars. The issue was that the defendants, the manufacturers of the herbicide, had said, "We will settle, but only with everybody." How do you deal with that one? With that, one of the lawyers was concerned about the ethical aspects of aggregate litigation and so we had a lump sum and ex post we got everybody's agreement to participate in it. The dynamic is a little bit different, because if all your neighbors are settling, and you are the only person who is not willing to settle, there is a tremendous amount of peer pressure that comes. That could be just as unfair, I would argue, as any other kind of pressure ex ante. So, the problem doesn't go away if you waive it for the end. But currently people are using all of those different techniques to try to resolve, in aggregate form, settlements that seem to maximize the value of money that the group as a whole would get.

JOHN BEISNER: We should turn to questions in a few moments, but before doing so, I had one closing question to pose to both of you and Sam. I will start with you. We've talked about a lot of different sections in the Volume today, but on this core issue of class certification, there's a substantial discussion of that subject here that we have not touched on a great deal. And I'm curious to get your thoughts, as this is a somewhat more traveled area in both federal and state courts, as to how you think the Volume may influence the courts going forward. Let's ask the question of whether class treatment should be afforded in certain circumstances.

SAM ISSACHAROFF: Well, I think this takes us to the *Wal-Mart* case.⁹ The person who did the primary drafting in Chapter II, which deals with class actions, was my late colleague, Richard Alvarado, from Vanderbilt University. Where there is a unified injunction being sought, or there is only one pot of money that is going to be divided up in some fashion, the claims are divisible where individuals could bring their claims individually. But we want to bring them together for efficiency reasons, or we want to bring them together because they are small value claims or there is something of that sort and the rules have to be adjusted for that insight.

Our second concern was that the formalism of Rule 23 had given rise to quite artificial questions. Are their comments refused or not, and do they predominate? So what happens in practice is that the plaintiffs would have a list of common questions. And the questions would be very high levels of generalities, such as, “Are we not at the end of the day all God’s children?” The defendants would counter with specific questions. “Yes, but is it not true that some of us were born on Tuesday and others were born on Wednesday?” So you could have endless lists of the common questions and the distinct questions and the real issue for us was, “Would common adjudication generate common answers?” We pushed this very hard and then Richard pushed it hard in some articles that he wrote and I pushed it in some pieces that I wrote in an academic capacity.

I think what you see in the *Wal-Mart* case is that all nine justices of the court are trying to grapple with this issue. And I think that *Wal-Mart Stores, Inc. v. Dukes* is actually flip sides of the same general problem of: How do you get reasonable and constitutional conclusion of common issues in these aggregated proceedings?

FRANCIS MCGOVERN: From the settlement perspective, one of the more notable challenges to the U.S. Supreme Court relates to Rule 23(a) prerequisites and predominance and Rule 23(b)(3) predominance, superiority, and commonality and all kinds of issues. In a settlement, it is common to relax those because you’ve got a settlement rather than a trial. In *Amchem*¹⁰ and *Ortiz*¹¹ the U.S. Supreme Court indicated that for settlement you would have to have a class that would be certifiable for trial as well.

Judge A.D. Becker wrote the opinion and in *Amchem* in the Third Circuit¹² and at the conference at NYU he was asked, “Why didn’t you allow the settlement to be certified, because it was really different and it was a settlement?” Judge Becker said that it just didn’t rise. The elements of 23(a), one could argue, aren’t really quite as important in the context of a settlement, and the *Principles* suggest that it is okay to relax those in the context of a settlement. I think it underscores a point that Sam has made earlier, and that is the U.S. Supreme Court, in my opinion, does not really understand mass cases. They have never had the experience with them, so now they are reacting against this bottom-up kind of push.

We know how to solve these kinds of cases at the trial level but they are saying no, no these are one-on-one cases. And the concept that Sam is talking about, and the issue they are grappling with, is going to go for a period of time. But to my mind this provision that allows relaxing 23(a) criteria in the context of class action settlements is a very positive move.

JOHN BEISNER: We have about ten minutes left in this segment and we would pause at this point to take any questions that any of you may have to pose on class actions, the book, or any other topics that we have covered this morning.

AUDIENCE MEMBER: If I can add, in your reading materials, there was a Table of Contents from this book that everybody is talking about, the section on objectors. You can see what it looks like. Paper copies are in the back on that, but I thought the Table of Contents would give you a sense of what's in there.

AUDIENCE MEMBER: Many jurisdictions have a statutory requirement that the courts agree to the settlement and approve the settlement. At the same time in many class actions you have known objectors sometimes sought out by an attorney who travels state-to-state you know, and they elicit someone to become an objector. Someone who maybe in discovery doesn't know much about the case at all, but was solicited to become an objector.

And then when there is a resolution at the trial level and it is approved sometimes that case is settled and there is an approved court settlement below. There are sometimes questions like: "What happened with regard to the settlement?" You have every party, say that you will have the objector, say I want to dismiss my appeal, which in most jurisdictions they have a right to do that unless there are some counter appeals or something like that, and you've got the other parties saying that we agree let them dismiss the case. You don't know what's behind all of that and are there guidelines in your settlements or proposals dealing with those kinds of situations. Because it appeals, like at the appellate level, if someone wants to dismiss the case and you did have a judicial approval of a settlement before it's dismissed.

FRANCES MCGOVERN: This is an artifact of what happened in 2003 in the amendment of Federal Rule 23. Before that, the settlement with the objectors—and there's different kinds of objectors—there are people like publicists and serious folks who come in and then there are various other people who go by various names—and we use the term extortion settlers for this as just a descriptive matter, not in a majority of it at all but just as a descriptive. And so they used to come in at the district court level and get bought out and that's what they are seeking to do.

In 2003, the Federal Rules were changed so you couldn't settle with anybody in a class action settlement without disclosing everything. Then the practice changed and you filed a notice and you file an objection. Some of these objections are great because they say, "I object because I believe that the settlement is not fair, adequate, and reasonable and that the fees are too high. And that's it. I do not intend to appear at the class level." They don't appear.

Then they file a notice of appeal and then it goes away. What happens, as somebody refers to in recent litigation, is as the hole in the rules gang because they appear where there is a vacuum in court supervision so now they can get out at that point.

We had a lot of discussion about this and our proposal is that the district courts have to set a better record—that the district courts actually start using sanction authority against these kinds of objectors. We also propose that the district courts tax the parties to reward objectors who successfully object on material grounds. So we go both ways. We want to recognize that judges are at a disadvantage of the settlement process precisely because everybody who is there is a friend of the deal and so you want people like Public Citizens or other such groups to scrutinize it and at the same time you want to stop this business model that has developed and I think it is dirty for everybody involved.

AUDIENCE MEMBER: When you talk about [inaudible], I can see maybe why with that record, why the settlement [inaudible] in appeal. But there's no way to monitor and they wanted to dismiss the lawsuit in most jurisdictions. They have a right to dismiss a lawsuit as long as there is nobody and no counter appeals or stuff like that.

FRANCIS MCGOVERN: But, there are some powers you have and you can impose some appellate bonds and if they are holding stuff up in some jurisdictions you can even use a supersedeas bond in this regard. You can create the record more clearly for appeal but this person did not appear. This person did not file a meaningful settlement proposal. This person did not engage in the merits. This person filed a document which talked about the objections to the antitrust settlement, but this is actually a securities case and this happens frequently and you can do that but you are right this is an ongoing problem.

AUDIENCE MEMBER: And in essence you are talking about the trial before it goes up.

FRANCIS MCGOVERN: Yes.

AUDIENCE MEMBER: I have a question and I'll start out with something a little bit humorous here. I have had a couple of class action cases

and a couple of years ago it was a silicone breast implant case and currently I have an asbestos case. Both cases are basically California cases that were filed in Nevada. As far as I am, kind of suspecting, it's because plaintiff's counsel figured out a way in which they could shelter income from the California income tax. I am hoping that Judge Vargas from San Diego won't bench slap me for making an expulsion against California taxes as he threatened last night.

STEPHANIE MIDDLETON: Also in Nevada juries have been more favorable to the silicone gel breast implant plaintiffs.

AUDIENCE MEMBER: Well, we did have one case in Reno where they won, but the basic question come down to asbestos. A couple of years ago I went to a—I think Henry Butler organized—class on toxic torts and at the end of the class we had a whole panel on asbestos. It seemed to be that they were in the federal court system and I asked the people about that when we had a pretrial conference with a whole room full of lawyers. “Whatever happened to that” and they indicated their case had been in the federal courts in Phoenix. Some kind of a processing but now it's out of the federal courts. So maybe you could comment about all of us and I think most of us are state court judges. Whatever happened to asbestos resolution in federal courts?

FRANCIS MCGOVERN: Six or seven times, various lawyers attempted to get the judicial panel on multi-district litigation to consolidate, for pretrial purposes, all the asbestos cases. Finally, a group of federal judges, about eight of them actually, wrote the letter—wrote a letter to the panel—to please use MDL treatment for all the asbestos cases in federal court and give them to Judge Weiner in Philadelphia. And, correct me on the time frame, this was probably mid-'80s or late-'80s, and they are still there. And the judge who has them is Judge Rubino and he is slowly sending the cases back.

So during that period of time the plaintiff's lawyers, if they could possibly file in state court, they would file in state court, because it went to Never-Never-Land in Philadelphia. Some of you may remember the *Amchem* case that came out of Philadelphia and went up to the Supreme Court was reversed. So there was a big attempt to have a national settlement that didn't work out. So Judge Rubino still has a huge number of federal cases.

They are slowly being sent back. Some of them, that had been removed, are now being remanded to state court. So you can anticipate the pleasure of getting more and more asbestos cases over time. There are a variety of approaches that states are using right now to deal with them, but that's sort of the history of the case in Phoenix that went to Philadelphia, that if it hasn't been resolved, will be coming back.

AUDIENCE MEMBER: As a matter of fact, in the early '80s there were certain key defendants in the asbestos cases. Of course, there is a common bar of clean-up defense and go around trying these cases. Now we should have that, because when these cases come up and we can't solve them. The target people have been bankrupt for a long time and there is no money there. So now you are going to people in the early '80s and so forth.

FRANCIS MCGOVERN: It's actually a little more interesting. There's about twenty billion dollars in asbestos trusts from those bankrupt images. Generally speaking, plaintiffs never heard of any of those manufacturers, but they have heard of solvent manufacturers and can identify the products quite readily.

AUDIENCE MEMBER: My turn?

JOHN BEISNER: Yes, your turn.

AUDIENCE MEMBER: I like the idea of a single issue class certification. And it leaks out when you tell the story of the Greyhound bus and the truck accident. I am wondering if you think it works as well in a constitutional context. So that you don't have to have all the plaintiffs that have been affected by a First Amendment claim or an Eighth Amendment claim or a Fourteenth Amendment claim, you can just extract the issue and create a class around that so that you can speak to whether or not it's a constitutional violation. Have you seen any cases like that?

SAM ISSACHAROFF: I have not, but I have seen the problems. So, there was a Supreme Court cases two years ago or three years ago called *Taylor v. Sturgill*¹³ and it involved people who liked to reassemble World War II vintage airplanes. They didn't have the plans for them and so the President of the vintage air club of this particular kind of plane from World War II; F-45 I think it was, sued under the Freedom of Information Act to get this information out of a Federal Agency. The FAA, I guess, is the one who had the plans. It went up to the Eighth Circuit and the Eighth Circuit ruled that Fairchild and it's successors in interest could still claim that these were vital business secrets; how to build a small engine plane in World War II, which may say something about the state of business development in the United States if this is still critical to their fortunes.

His best friend then sues in D.C. for the same planes and they are working on the restoration of the same plane. And it goes all the way to the U.S. Supreme Court in a case called *Taylor v. Sturgill*. And the Supreme Court says there can be no virtual representation preclusion, because it's a new case and he wasn't bound by the prior case. It seems to me that a court handling a case like that should insist to the plaintiff, "Okay, you be class

representative on an issue class because otherwise you can't get the two-sided preclusion if it goes up." Because, if the government had lost, or Fairchild had lost, everybody would get the plans; on the other hand, because the claimant lost there was no preclusion at all. So I think courts have been grappling with this but they haven't started to try to use it intelligently.

JOHN BEISNER: Okay. We have time for one more question.

AUDIENCE MEMBER: It's an easy one. Some of us are at the point in life where we ponder life after the bench. I notice that there are only four pages dedicated to special appointees of the courts, special masters. My question is: Are there other areas in which special masters may be appointed? You have only in the settlement area and I would be personally and some of us would be interested in how masters come about and can they be utilized, let's say, in discovery?

FRANCIS MCGOVERN: Well, I've been a special master. I don't know eighty or a hundred times probably for fifty federal judges or maybe state judges. The roles have varied. I get a call about once a month from judges about to retire asking me how to do it. So this is not an unfamiliar question. Managing discovery, absolutely—e-discovery right now is the hot one; so managing e-discovery.

Ruling on privileged matters, we have huge volumes of discovery material. Settlement issues, as you have mentioned. One of the things I do is coordination between federal judges and state judges in silicone breast implant and now in BP where you have cases all over the country. How do you make sure the judges are all working together?

Implementation of a decree, if you've got a resolution and it needs to be implemented—overseeing the distribution of a settlement fund. I could go on and on and on. It's really based on the inventiveness of the judge and the felt need for assistance from a third party.

JOHN BEISNER: Yeah, and I would like to add to that the limits to the reference in this Volume shouldn't be viewed as any comment on the usefulness. I think, the thought was to address the special roles that special masters can play in the aggregate litigation context doesn't mean that the more traditional use of, just as Francis referenced, in part appropriate.

One note I would make though, is that in the federal MDA law proceedings that I am in that are relatively new, I have been surprised to notice that the use of special masters has become increasingly controversial among counsel. I have been in several cases where the judge took the matters aside that it has on the agenda to start with. So, let's get a special master. Both sides, with greater frequency, are objecting to that, saying we need a role. We need to define what this person is doing. Are they going to be in charge of e-discovery? They are going to be in charge of coordination

around all the proceedings. There are two or three special masters and each with a particular role.

But I think the concern has been, in some cases in which special masters have been appointed to be, sort of the assistant judge, dealing with everything. They have been paid in some instances two or three million dollars in fees over time.

AUDIENCE MEMBER: That's all?

JOHN BEISNER: No comment. But there is a concern on the part of parties of making sure there is a mission and mission creed that's involved. I think the role is safe and it's going to be there and I think as long as there are constraints on judicial budgets and so on and I think they are going to be important.

FRANCIS MCGOVERN: Rule number one, if you are going to do it, I think the best piece of advice you will ever get is make sure it is well defined, as to what you are supposed to do. Because otherwise you will be in trouble.

JOHN BEISNER: And to close, the name of the book once again is *Principles of Law: Aggregate Litigation*. Get it while you still can.

¹ 131 S. Ct. 2368 (2011).

² 131 S. Ct. 2541 (2011).

³ Fed. R. Civ. P. 23(b).

⁴ 131 S. Ct. 61 (2010).

⁵ Manual for Complex Litigation (Fourth) (2004).

⁶ Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

⁷ 386 U.S. 523 (1967).

⁸ 997 S.W.2d 229 (Tex. 1999).

⁹ Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

¹⁰ Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

¹¹ Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

¹² Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996).

¹³ 553 U.S. 880 (2008).