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FOREWORD

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Two developments since the 1950s—the migration of the best and the brightest into the field of law and the commercialization of the legal profession—have provided scholars with an exquisite landscape for critical analysis. One of the most fascinating sites has been the area of complex litigation. The traditional model of one-on-one litigation has expanded into a new wonder of the western world, a transformation that has induced a cycle of reform and counter reform.

This issue of *Law and Contemporary Problems* treats an eclectic series of complex litigation topics involving status, rules of civil procedure, rules of evidence, common law, judicial management, litigator management, and their interstices. The contexts may be novel, but the overriding issues are timeless. These themes include balancing the interests of over- and under- deterrence, rules and discretions, plaintiffs and defendants, legislatures and courts, judges

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All of the papers contained in this issue were presented at the Complex Litigation conference held at Naples, Florida, on April 14-15, 2000. This conference was co-sponsored by the Institute for Law & Economic Policy (“ILEP”). The organizing committee for ILEP did an outstanding job of identifying both critical issues and eminent scholars to write these papers. In particular, great thanks are due to the members of the Steering Committee, including Ed Labaton, Sandra Stein, and Laura Stern. Much appreciation is also due to Jim Cox of the Duke Law School faculty, for his unending efforts to ensure that the program and this issue were of the highest caliber. Brad Bodager, also of Duke Law School, was instrumental in ensuring that the conference was timely and successful. Finally, the conference papers could never have been transformed into this issue of *Law and Contemporary Problems* without the diligent and thoughtful input and editing of the *Law and Contemporary Problems* staff—in particular, Amy Pope, Jessie Fontenot, Kenneth Craycraft, and Kathryn Ratté.

and lawyers, the informal and the formal, and most important, efficiency and fairness. The articles in this volume deal with the tradeoffs among these interests, some of the most pressing dilemmas facing our system of justice.

In *Pleading Securities Fraud*, Elliott J. Weiss applauds recent decisions by the United States Courts of Appeals for the First and Ninth Circuits involving the Private Securities Litigation Reform Act (“PSLRA”), focusing on the policy issue of how to prevent over- and under-deterrence of securities fraud.

Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA by Jill Fisch addresses another aspect of the PSLRA and its collateral litigation—the lead plaintiff provisions. By considering the use of aggregation to unite large numbers of unrelated investors into a lead plaintiff group and the appointment of lead counsel through sealed bid auctions, she confronts the tension between courts and litigants and concludes that these trends enhance judicial empowerment at the expense of client control.

Joel Seligman, in *The Nontrial Adversarial Model*, considers the effects of the PSLRA and suggests that serious study of the implications of the implementation of the 1995 statute is overdue.

A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation, by Michael Barclay and Frank C. Torchio, advances an analysis of the remedy aspects of fraud in the securities markets. Their conclusions support the proportional single-trader model as a valid scientific method to estimate the number of damaged shares in securities litigation.

Deborah R. Hensler and Thomas D. Rowe, Jr., examine the policy issues related to over- and under-deterrence in a more global context in *Beyond “It Just Ain’t Worth It”: Alternative Strategies for Damage Class Action Reform*. They explore the radical—loser-pays fee shifting for damage class actions—and the mundane—increased judicial regulation—approaches to this dilemma.

Marc I. Gross writes that the Hensler-Rowe proposal of a loser-pays rule would create a “no fault” rule for unsuccessful counsel. In *Loser-pays—or Whose ‘Fault’ Is It Anyway: A Response to Hensler-Rowe’s “Beyond It Just Ain’t Worth It,”* he concludes that this proposal is unwise.

Contingent Fees and Tort Reform: A Reassessment and Reality Check by Elihu Inselbuch takes the tort reform movement to task for criticism of contingent fees for plaintiffs’ attorneys. He analyzes the relationship of fees paid to both plaintiffs’ and defense counsel and concludes by asking what could be fairer than the existing regimen in which the cost of the personal injury system for plaintiffs’ lawyers is equivalent or less than the cost for the defendants’ lawyers.

Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform” by Jeffrey W. Stempel considers recent developments in the Federal Rules of Civil Procedure. He characterizes the 2000 Amendments as a continuation of the recent trend toward limiting the availability of information and tilting the litigation balance toward defendants over plaintiffs.

Richard L. Marcus describes the relevance of the Federal Rules of Civil

Procedure in an era of electronic material in *Confronting the Future: Coping With Discovery of Electronic Material*. He places discovery problems that arise with new technology high on our Information Age radar screens and considers a wide range of formal and informal approaches to meeting the future that is, in reality, now.

In *A Modest Reform For Federal Procedural Rule Making*, Carl Tobias advocates the 1991 Proposed Amendment to Federal Rule of Civil Procedure 83, authorizing experimentation and testing of new rules in federal district court.

Margaret A. Berger focuses on the Federal Rules of Evidence in *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*. She examines *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *General Electric Co. v. Joiner*, and *Kumho Tire Co. v. Carmichael* in light of Justice Jackson's admonition that changes in evidentiary rules may alter the balance between plaintiffs and defendants. She examines the ability of judges to enhance the interests of efficiency and economy and the risk that other values will emerge in the area of toxic torts.

Scientific Misconceptions Among Daubert Gatekeepers: The Need of Reform of Expert Review Procedures by Jan Beyea and Daniel Berger addresses their concern that the Supreme Court's recent trilogy of cases embody inconsistent views of science—the imperfect “process” approach versus the “formal logic” of universal knowledge. They propose a reconciliation of these two views of science for a superior test for the admissibility of expert testimony.

Joseph Sanders concentrates on the *Kumho* decision regarding non-scientific expert evidence from a different perspective. In *Kumho and How We Know*, after analyzing the relevant legal standards, he turns to psychological research and our methods of processing information—“rational processing” and “experiential processing.” Arguing in support of “rational processing,” he suggests its applicability to a variety of admissibility decisions.