Introduction

Class Actions and Access to Justice

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Introduction

The law of class actions has been in a rapid period of change over the last ten years. Rule 23 has been amended,[1] Congress has passed important legislation expanding federal court jurisdiction over class

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1 In June 2002, the U.S. Judicial Conference's Committee on Rules of Practice and Procedure approved amendments to two subdivisions of Rule 23, as well as the addition of two new subsections. Comm. on Rules of Practice and Procedure, Minutes 10–18 (June 10–11, 2002),

actions,[2] and the Supreme Court has decided a series of cases affecting how and when class actions may be brought.[3] Additional changes may be in the offing. The U.S. Judicial Conference's Advisory Committee on Civil Rules has appointed a subcommittee to study possible additional amendments to Rule 23.[4] Mindful of all of this, the James F. Humphreys Complex Litigation Center, in partnership with the Public Justice Foundation and the Committee to Support Antitrust Laws, elected to host a Class Action Symposium at The George Washington University Law School on March 7 and 8, 2013.[5] Twenty-eight of the leading class action scholars and class action practitioners in the nation participated on five panels discussing five discrete topics: (1) *The Proper Process to Follow Before a Certification Decision Is Made*; (2) *Common Questions: The Proper Relationship of 23(a)(2), 23(b)(3), and 23(c)(4)*; (3) *Class Actions and Remedies*; (4) *Settlement Class Actions and Settlement Approval*; and (5) *Arbitration and Class Actions*.[6] This Foreword summarizes both the principle theses advanced in each of the symposium papers that follow[7] and the key points that emerged in the panel discussions of these papers.

available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2002-min.pdf. These amendments took effect on December 1, 2003. *See* FED. R. CIV. P. 23.

2 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

3 *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 555 U.S. 393 (2010); Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005).

4 *See* Memorandum from David G. Campbell, Chair, U.S. Judicial Conference Advisory Comm. on Fed. Rules of Civil Procedure, to Mark R. Kravitz, Chair, U.S. Judicial Conference Standing Comm. on Rules of Practice & Procedure 14–15 (Dec. 2, 2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2011.pdf.

5 To view the agenda for the symposium and full video recordings of the five panel discussions, see *Class Action Symposium*, GW LAW (March 7–8, 2013), http://www.law.gwu.edu/News/2012-2013Events/Pages/ClassActionSymposium.aspx.

6 *Id.*

7 A majority of the symposium papers are found in this issue of *The George Washington Law Review*, but additional papers may be found in *Arguendo*, the online publication of *The George Washington Law Review*. The papers first appearing in *Arguendo* will later be reprinted in print form in a special seventh issue of the traditional volume of *The George Washington Law Review*.

I. Panel One

Though differing perspectives on the various meanings of *Wal-Mart Stores, Inc. v. Dukes*[8] abound, all participants agreed that *Dukes* called for a more "rigorous analysis" of the requirements of Rule 23 at the certification stage.[9] But how rigorous? What discovery should be allowed before the certification hearing? And what rules govern the use of evidence during the certification hearing? In an era where class certification decisions often may require at least some inquiry into the merits of a case, how is this process to be managed?

As Gerson Smoger and David Arbogast point out in their paper, *Dukes* has a significant effect on the pretrial process.[10] They underscore the importance of judges' thinking carefully before bifurcating discovery on the merits and certification, as such a strict bifurcation may prevent a "rigorous analysis" of the class certification issues.[11] To facilitate an efficient discovery plan, they recommend that the parties and the trial court clearly frame certification issues at the outset of discovery and allow merits discovery to the extent needed to address all certification issues.[12]

In their paper, George Gordon and Irene Ayzenberg-Lyman discuss the use of evidence at certification hearings, addressing in particular the present uncertainty surrounding whether a court must use a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[13] analysis to screen expert testimony.[14] Their paper traces the development of the "rigorous analysis" requirement and analyzes the implications of such an analysis.[15] The paper notes that although the Supreme Court in *Comcast*

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

9 *Id.* at 2551.

10 Gerson H. Smoger & David M. Arbogast, *The Post-*Dukes *"Rigorous Analysis" and Pre-Certification*, 82 Geo. Wash. L. Rev. Arguendo (forthcoming 2014) ("[F]ollowing *Dukes*, plaintiffs seeking to certify a class can expect that defense counsel will take every opportunity to show that there is no glue beyond the similarities of the plaintiffs to support class certification, thereby requiring plaintiffs to present merits evidence of defendants' actions, policies, and procedures in order to show commonality." (internal quotation marks and footnote omitted)). Dr. Gerson Smoger is a partner at the law firm of Smoger & Associates, P.C. in Dallas, Texas. David Arbogast was an associate at that firm at the time of the symposium and is now a managing partner at Arbogast Brown, LLP in Los Angeles.

11 *Id.*

12 *Id.*

13 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

14 George G. Gordon & Irene Ayzenberg-Lyman, *The Role of* Daubert *in Scrutinizing Expert Testimony in Class Certification*, 82 Geo. Wash. L. Rev. Arguendo (forthcoming 2014). George Gordon is a partner in Dechert LLP's antitrust practice group and Irene Ayzenberg-Lyman is an associate.

15 *See id.*

Corp. v. Behrend[16] granted certiorari to decide whether a *Daubert* analysis must precede a certification decision based on expert witness testimony, the Court decided the case on other grounds without reaching this issue.[17]

Professor Linda Mullenix's paper examines related issues, but it proposes to take implementation of the "rigorous analysis" requirement a step further by applying the Federal Rules of Evidence at certification hearings.[18] In her view, given the courts of appeals' endorsement of the use of *Daubert* hearings to screen expert testimony at certification hearings, the Federal Rules of Evidence should be applied in order to ensure the reliability of evidence and the integrity of the hearing.[19] This view has its critics, however, including Eric Cramer and Dr. Smoger. In the panel discussion that followed the presentation of these papers, Mr. Cramer disagreed with Professor Mullinex, saying that application of the Federal Rules of Evidence at certification hearings is inefficient, expensive, and improper.[20] He argued that the focus of a class certification hearing is to determine only if classwide evidence is *capable* of showing plaintiffs' case on a classwide basis, and application of the Federal Rules of Evidence would effectively lead to two trials on the merits.[21] Dr. Smoger voiced the concern that application of the Federal Rules of Evidence would lead to one-sided appellate review.[22]

Professor Geoffrey Hazard, Jr.'s concise comment responds to the concern that factual findings by a judge related to the merits in certification hearings may trespass on the Seventh Amendment's guarantee of a jury trial on merits issues.[23] He questions the common

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16 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

17 Gordon & Ayzenberg-Lyman, *supra* note 14; *see Comcast*, 133 S. Ct. at 1432–33.

18 Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 611–12 (2014). Linda Mullenix holds the Morris and Rita Atlas Chair in Advocacy at the University of Texas School of Law.

19 *Id.* at 635–37.

20 Eric L. Cramer, Managing S'holder, Berger & Montague, P.C., The George Washington University Law School Class Action Symposium: The Proper Process to Follow Before a Certification Decision is Made Panel Discussion (Mar. 7, 2013), *available at* http://vimeo.com/user 9108723/review/62611957/d03e92968a).

21 *Id.*

22 Gerson H. Smoger, Smoger & Assocs., P.C., Remarks at The George Washington University Law School Class Action Symposium: The Proper Process to Follow Before a Certification Decision Is Made Panel Discussion (Mar. 7, 2013), *available at* http://vimeo.com/user 9108723/review/62611957/d03e92968a).

23 Geoffrey C. Hazard, Jr., *Fact Determination in Rule 23 Class Actions*, 82 GEO. WASH. L. REV. 990 (2014). Professor Hazard is the Emeritus Thomas E. Miller Distinguished Professor of Law at the University of California Hastings College of the Law.

assumption that *Beacon Theatres, Inc. v. Westover*[24] was correct in holding that legal claims must be resolved by a jury before a judge may make findings of fact on the equity claims.[25] He challenges that assumption and recommends a modified interpretation of the meaning of *Beacon Theatres*.[26]

II. PANEL TWO

Professor Robert Bone's paper explores the difference between the "internal" and "external" view of a class and how these views connect to the outcome-based as opposed to process-based model of the class action doctrine.[27] In exploring these competing ideas of class actions, Professor Bone makes two recommendations in order to promote progress in class actions: first, due process and adjudicative legitimacy must receive heightened attention, and second, problems with class actions call for a direct response rather than indirect solutions crafted into interpretations of the cohesiveness requirement.[28]

Theodore Boutrous, Jr., who represented Wal-Mart at the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, and his associate, Bradley Hamburger, write to discredit three prevalent notions about the import of *Dukes*: (1) that the relevance of *Dukes* is confined to huge, nationwide class actions; (2) that "trial by formula" methods of adjudication remain valid; and (3) that the majority in *Dukes* conflated Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s predominance requirement.[29] Tackling these myths, this paper argues that *Dukes* applies to all types of class actions and that the holding operates as a death knell for trial-by-formula.[30] The authors further explain that rather than conflate commonality and predominance, the majority in *Dukes* narrowed the meaning of "common questions," which can affect both commonality and predominance, to include only those common questions that also have common answers.[31]

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24 Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

25 Hazard, Jr., *supra* note 23, at 990.

26 *Id.* at 990–93.

27 Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651 (2014). Professor Bone holds the G. Rollie White Teaching Excellence Chair in Law at the University of Texas School of Law.

28 *Id.*

29 Theodore J. Boutrous, Jr. & Bradley J. Hamburger, *Three Myths About* Wal-Mart Stores, Inc. v. Dukes, 82 GEO. WASH. L. REV. ARGUENDO 45 (2014). Ted Boutrous is a partner at the law firm of Gibson, Dunn & Crutcher LLP and Brad Hamburger is an associate.

30 *Id.*

31 *Id.*

In her paper, Professor Laura Hines addresses the "issue class action" provided for in Rule 23(c)(4) and its role in complex litigation.[32] She contends that the practice of using a class action to adjudicate specific issues is at odds with both the language of Rule 23 and developing Supreme Court jurisprudence.[33] She recommends that the idea of "issue class actions" should be assessed in a formal rulemaking process to determine if such actions are indeed legitimate and appropriate.[34]

III. Panel Three

One vexing issue in modern class action law concerns cases in which some class members have not, and will not, suffer any harm, i.e., uninjured class members. In their article, Eric Cramer, Joshua Davis, and Caitlin May contend that Rule 23 condones certifying classes with uninjured members.[35] Their article explores the ramifications that such an understanding of Rule 23 would have on standing, due process, and the Rules Enabling Act.[36] First, they conclude that a class should have standing when both the named plaintiff makes a showing in support of his claims and absent class members are part of a group that potentially has viable claims.[37] Second, they advocate a more flexible application of the due process balancing test, as neither uninjured class members nor classwide recoveries to classes with uninjured members necessarily interferes with due process.[38] Finally, they argue that certification of classes with uninjured members does not violate the Rules Enabling Act of 1934.[39] Professor Joshua Davis also writes separately to demonstrate why concerns about uninjured plaintiffs affecting damages calculations may be unfounded.[40] His novel approach to classwide damages illustrates the usefulness of classwide

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32 Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718, 719–24 (2014). Professor Hines is a Professor at the University of Kansas School of Law.

33 *Id.*

34 *See id.* at 766.

35 Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014). Josh Davis serves as Associate Dean for Faculty Research, Professor, and Director of the Center for Law and Ethics at the University of San Francisco Law School. Eric Cramer is a Managing Shareholder with the Philadelphia law firm of Berger & Montague, P.C. Caitlin May was a third-year law student at the University of San Francisco School of Law at the time of the symposium and is now an associate at Morgan, Lewis & Bockius LLP in the labor and employment practice group.

36 *Id.*

37 *Id.* at 861–67.

38 *See id.* at 868–81.

39 *Id.* at 881–88; Rules Enabling Act of 1934, 28 U.S.C. §§ 2071–2077 (2012).

40 Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014).

damages calculations in ensuring that the right amount of damages is awarded.[41] This is especially true, he explains, when an unidentifiable portion of the class is uninjured.[42]

Professor Edward Sherman's paper addresses what courts should do when a class includes members with no present injury, but who may show injury in the future.[43] He analyzes cases involving such claimants and then applies the various "injury-in-fact" tests to cases without apparent present injury.[44]

An article by Dean Robert Klonoff addresses the impact of *Dukes* on the types of remedies available in various types of class actions.[45] He responds to dictum in *Dukes* that indicates the Due Process Clause in the U.S. Constitution requires notice and opt-out rights to absent class members in suits for money damages.[46] Surveying the history and purpose of Rule 23(b)(1)(A) and 23(b)(1)(B), Dean Klonoff concludes that the Due Process Clause requires notice but not opt-out rights and that money damages may properly be awarded in these types of class actions.[47]

Cy pres awards are a pressing and controversial topic in modern class action practice. Some have called for them to be prohibited or rarely allowed.[48] Professor Jay Tidmarsh's paper looks at cy pres awards with the goal of choosing the remedy or the settlement that yields the greatest expected net social welfare.[49] He concludes that although providing class counsel with a net percentage of recovery is the best means to optimize the number of class members and claims, there is a place in litigation for a properly structured cy pres award.[50]

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41 *Id.* at 894–95.

42 *Id.* at 927–28.

43 Edward Sherman, *"No Injury" Plaintiffs and Class Actions*, 82 GEO. WASH. L. REV. 834 (2014). Ed Sherman is the W. R. Irby Chair and Moise F. Steeg, Jr. Professor of Law at the Tulane University School of Law, and earlier served as Dean of that law school for five years.

44 *Id.*

45 Robert H. Klonoff, *Class Actions for Monetary Relief Under Rule 23(b)(1)(A) and (b)(1)(B): Does Due Process Require Notice and Opt-Out Rights?*, 82 GEO. WASH. L. REV. 798 (2014). Robert Klonoff is Dean and the Jordan D. Schnitzer Professor of Law at the Lewis & Clark Law School. He also serves as the academic member of the U.S. Judicial Conference Advisory Committee on Rules of Civil Procedure.

46 *Id.*

47 *Id.* at 833.

48 *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07 (2009).

49 Jay H. Tidmarsh, *Cy Pres Relief and the Optimal Class Action*, 82 GEO. WASH. L. REV. 767 (2014). Jay Tidmarsh is the Diane and M.O. Miller, II Research Professor of Law at Notre Dame Law School.

50 *Id.*

IV. Panel Four

The Supreme Court in *Amchem Products, Inc. v. Windsor*[51] held that, at least in certain circumstances, a settlement class action can be certified even though the same class cannot be certified for litigation purposes.[52] In his paper, Professor Howard Erichson criticizes the actual and potential abuse of settlement-only class actions, i.e., those that are certified for the purposes of settlement only.[53] He describes and deplores the risks associated with settlement-only class actions and recommends that settlement class actions be used only where a litigation class action could be certified.[54]

In the panel discussion that followed, Professor Trangsrud and Elizabeth Cabraser both argued that settlement-only class actions can be an enormously valuable tool for equitably settling large numbers of factually related claims even when the trial of such claims might not be manageable in a class action.[55] Professor Trangsrud argued, however, that the current procedures for reviewing and approving settlement class actions are fundamentally flawed.[56] The usual adversary process is entirely lacking because both class counsel and defense counsel are urging the court that the settlement is fair and reasonable.[57] Unlike the inquisitorial system where trial judges are fully informed of the factual and legal issues of the case, the modern American trial judge is not in a strong position to make a careful assessment of the relative strength of the various parties' cases.[58] Objectors to the settlement may be well intended or they may be extortionate, but in either event they are also in a poor position to assess the factual and legal issues underlying the settlement.[59] Profes-

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51 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

52 *Id.* at 609–12.

53 Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 Geo. Wash. L. Rev. 951 (2014). Howard Erichson is a Professor of Law at the Fordham University School of Law.

54 *Id.*

55 Roger H. Trangsrud, James F. Humphreys Professor of Complex Litig. and Civil Procedure, The George Washington Univ. Law Sch. & Elizabeth J. Cabraser, Founding Partner, Lieff Cabraser Heimann & Bernstein, LLP, Remarks at The George Washington University Law School Class Action Symposium: Settlement Class Actions and Settlement Approval Panel Discussion (Mar. 8, 2013), *available at* http://vimeo.com/user9108723/review/62626003/2ce3d7dfcd).

56 Roger H. Trangsrud, James F. Humphreys Professor of Complex Litig. and Civil Procedure, The George Washington Univ. Law Sch., Remarks at The George Washington University Law School Class Action Symposium: Settlement Class Actions and Settlement Approval Panel Discussion (Mar. 8, 2013), *available at* http://vimeo.com/user9108723/review/62626003/2ce3d7dfcd).

57 *Id.*

58 *Id.*

59 *Id.*

sor Trangsrud argued that the best remedy for this problem would be to amend Rule 23 to expressly allow the trial court to appoint a judicial adjunct—a settlement master—to undertake a comprehensive review of the terms of the settlement and the negotiation process that leads to the settlement.[60] In appropriate circumstances, the settlement master could seek trial court approval to review attorney-client and work-product material on a confidential basis.[61] Professor Trangsrud asserted that such a procedure would discourage collusive settlements, unmask extortion objectors, and expose reverse auctions or other settlement misconduct.[62]

Elizabeth Cabraser's paper, which was presented at the symposium as a keynote luncheon address, describes how Judge Posner's jurisprudence on the law of class actions has evolved over time and how he has developed a practical test for predominance that balances the assertedly inequitable pressure on defendants to settle certified class actions with the needed judicial economy and litigation efficiency that class actions allow.[63] She asserts that his focus on practicality and efficiency in making certification decisions solves "rationally and undramatically" the question of when to allow a class action as an effective group remedy.[64]

V. Panel Five

Arbitration has become an increasingly common alternative to litigation, and the Supreme Court has entered the debate in general support of arbitration.[65] Courts struggle, however, to apply the vindication-of-rights doctrine, which allows the invalidation of an arbitration agreement where the rights of the parties cannot be properly vindicated in arbitration.[66] In their paper, Jonathan Cuneo, Joel Davidow, and Victoria Romanenko survey the history of the Federal Ar-

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60 *Id.*

61 *Id.*

62 *Id.*

63 Elizabeth J. Cabraser, *The Rational Class: Richard Posner and Efficiency as Due Process*, 82 Geo. Wash. L. Rev. Arguendo (forthcoming 2014). Elizabeth Cabraser is a founding partner of Lieff Cabraser Heimann & Bernstein, LLP, a San Francisco-based law firm.

64 *Id.*

65 *See, e.g.*, CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 672–73 (2012) (enforcing an arbitration agreement between consumers and credit repair organizations and precluding consumers from bringing an action in court).

66 *See* David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. Kan. L. Rev. 723, 733–745 (2012) (describing how courts have implemented the vindication-of-rights doctrine inconsistently).

bitration Act[67] and the establishment of the vindication-of-rights doctrine.[68] They then explore the application of that doctrine in the courts of appeals and explain why, in some instances, a class action is necessary to achieve full remediation and deterrence.[69]

In the panel discussion that followed, Myriam Gilles discussed a case then pending in the Supreme Court, *American Express Co. v. Italian Colors Restaurant*,[70] and argued that no matter how the case was decided, the vindication-of-rights doctrine would offer no consequential limitation to the ability of corporate defendants to limit their exposure to group litigation through arbitration clauses.[71] It would either strictly curtail the application of the doctrine or operate as guidance to the drafting of arbitration clauses that rendered vindication-of-rights challenges impossible.[72] Later, Paul Bland questioned whether the Supreme Court's apparently unbridled support of arbitration risks delegitimizing the institution of arbitration should it allow arbitration clauses to thwart the vindication of statutory rights.[73] Professor Deborah Hensler pointed out during the panel discussion that although the Supreme Court may support arbitration in general, it will likely deal the death knell to class arbitration in the near future.[74] She noted that, ironically, class arbitration has received greater acceptance in international arbitral forums and in jurisdictions outside of the United States.[75]

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67 Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

68 Jonathan W. Cuneo, Joel Davidow & Victoria Romanenko, *Remediation and Deterrence: The Real Requirements of the Vindication Doctrine*, 82 GEO. WASH. L. REV. ARGUENDO 59 (2014). Jon Cuneo is a founding member of the Cuneo Gilbert & LaDuca, LLP law firm where Joel Davidow is also a partner and Victoria Romanenko is an associate.

69 *Id.*

70 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

71 Myriam E. Gilles, Professor of Law, Benjamin N. Cardozo Sch. of Law, Remarks at The George Washington University Law School Class Action Symposium: Arbitration and Class Action Panel Discussion (Mar. 8, 2013), *available at* http://vimeo.com/user9108723/review/62629477/3edff07e13).

72 *Id.*

73 F. Paul Bland, Jr., Senior Att'y, Pub. Justice, Remarks at The George Washington University Law School Class Action Symposium: Arbitration and Class Action Panel Discussion (Mar. 8, 2013), *available at* http://vimeo.com/user9108723/review/62629477/3edff07e13).

74 Deborah R. Hensler, Judge John W. Ford Professor of Dispute Resolution and Assoc. Dean for Graduate Studies, Stanford Law Sch., Remarks at The George Washington University Law School Class Action Symposium: Arbitration and Class Action Panel Discussion (Mar. 8, 2013), *available at* http://vimeo.com/user9108723/review/62629477/3edff07e13).

75 *Id.*

Conclusion

Class actions serve a vital role: they facilitate the adjudication of rights that would never see the inside of a courtroom if there were not an effective mechanism to aggregate small-value claims. However, the power of the class action also leads to important questions about fairness, procedure, and the proper use of this device. The many articles in this symposium expound on the promise of, and also the difficulties with, the current class action. In so doing, they inform a debate that is of continuing importance to plaintiffs, defendants, and the American legal system.