FIRST ANNUAL CLASS ACTION CASE LAW AND PRACTICES REVIEW CONFERENCE
JAMES F. HUMPHREYS COMPLEX LITIGATION CENTER
SUMMARIES OF PANELIST REMARKS ON SELECTED SUBTOPICS

Panel 1 – Aftermath of 2018 Rule 23 Class-Action Settlement Amendments

Subtopic 3. Assessment oof Objector' Provisions: Paul Geller

In 2018, Federal Rule of Civil Procedure 23 was amended. This presentation will examine the effect of the amendments on objectors to class action settlements, focusing specifically on the provision requiring judicial approval of any payments made to class members in exchange for withdrawing or forgoing settlements objections. The topics of discussion will include the circumstances leading to the amendments, different categories of objectors and their role in class action settlements, how improper objector behavior can be addressed under Rule 23, whether the amendments' purpose has been achieved, and other practices that can be implemented to deter or mitigate improper objector behavior.

Panel 2 – Aftermath of 2018 Rule 23 Class-Action Settlement Amendments

Subtopic 2. Judicial scrutiny of claims-made settlements; number of claims actually submitted (Rule 23(e)(1); (e)(2)(C): Scott Smith

Recent frontloading amendments to Rule 23(e) require the court, in assessing the fairness of a class action settlement, to consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Mr. Smith will survey recent developments on claims-made settlements under amended Rule 23(e), including leading decisions from federal district courts as well as precedent from the circuit courts of appeals. This segment will also include data from claims administrators on some of the largest claims-made settlements, including take rates, withdrawal or "blow provisions," and the like.

Subtopic 3: Issues unaddressed by amendments: ascertainability, named plaintiff "pick-off" settlements, pre-litigation settlements, negotiated named plaintiff settlements: John Beisner

The 2018 Rule 23 amendments did not address several "hot issues" in the class settlement realm, including the following four:

First, none of the changes directly address the four ascertainability-based grounds for challenging proposed litigation or settlement classes: (1) hard-to-identify classes, (2) subjectively-defined classes, (3) "fail-safe" classes, or (4) overbroad classes. This outcome is not surprising because both district and appellate courts have been extremely prolific in resolving those issues. The ground rules have been evolving and remain somewhat confused. But rulemaking in this area would be difficult because distinct scenarios continue to emerge.

Second, the amended rules do not affect named plaintiff "pick-off" settlements — that is, scenarios in which defendants seek to terminate class actions unilaterally by (a) tendering a Rule 68 offer of judgment promising all relief sought by the named plaintiff and then (b) moving to dismiss the case based on arguments that there remains no controversy to be litigated. The silence on this topic in the revised rules is not surprising because in 2016, the Supreme Court largely shut down that "pick-off" tactic, holding that an unaccepted settlement offer does not moot a plaintiff's class action complaint. *Campbell-Ewald Co. v. Gomez,* 577 U.S. 153 (2016). Very active debate continues at both the district and appellate court levels about whether a named plaintiff's claim may be mooted if the defendant takes the further step of depositing the full amount of the claim in the plaintiff's account, an issue explicitly not addressed by the Court in *Campbell-Ewald.*

Third, the amended Rule 23 does not consider the apparently increasingly frequent practice of class counsel communicating with a defendant about a potential class action and seeking a pre-filing settlement comprised of significant fees and a relatively small payment for the potential named plaintiff. Typically, no compensatory relief is sought for the potential class. In short, counsel request payment in exchange for ***not*** filing the class action. Notably, since this activity occurs before any lawsuit is filed, it is not entirely clear that the Federal Rules of Civil Procedure could address this issue (although a rule precluding counsel engaging in such activity from serving as class counsel if a lawsuit is ultimately filed may be a potential remedy).

Finally, the 2003 amendments to Rule 23(e) made clear that only in class actions where a class has been certified should a district court should review and approve "settlements, voluntary dismissals, or compromises." The 2018 amendments did not change that principle. Some data developed since 2003 suggest that substantial numbers of federal court class actions (upwards of one-third) are voluntarily dismissed. Typically, the reasons for such dismissals cannot be confirmed from record materials, but many may be attributable to named plaintiff-only settlements — that is, an agreement to voluntarily dismiss a class action in return for payment of counsel fees and a small amount to the named plaintiff. One cannot be certain of the details of such scenarios, as there is no transparency about such deals — the named plaintiff simply files a one-page notice of voluntary dismissal. Such dismissals constitute an abandonment of the putative class claims by the named plaintiff and class counsel. However, since the dismissal is public, other putative class members and their counsel may assume the mantle.

Panel 3 – Class Certification

Subtopic 1. "No-Injury" class actions and concrete injury under *Spokeo*: Michael Hausfeld

An emerging issue in class-action litigation is the viability of so-called "no-injury" class actions. In recent years, defendants have increasingly fought to extinguish class action cases on two fronts: *First*, they have argued that certain injuries are not sufficiently concrete to confer Article III standing, and *second*, they have argued that classes containing uninjured class members cannot be certified. While these arguments have not always

carried the day with courts, plaintiffs should be attuned to framing their claims and class definitions to avoid potential "no-injury" class pitfalls.

Over the last several decades, standing has emerged as a potent tool for defendants seeking to scuttle class-action litigation at multiple stages of the case. While the Supreme Court has gradually tightened the requirements for plaintiffs to establish Article III standing over the last 30 years, changes in society, technology, and the law have led to the emergence of cutting-edge consumer-protection and privacy claims that—defendants argue—push the boundaries of what courts have traditionally considered legally cognizable harms. Thus, for example, defendants have had some success in challenging plaintiffs' Article III standing in data breach class actions and cases alleging violations of the Telephone Consumer Protection Act (TCPA).

Most notably, the Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), concluded that the Ninth Circuit had not properly evaluated whether the plaintiff—who alleged that various inaccuracies in an online profile created by the defendant violated the TCPA—had suffered a "concrete" harm as a result of the alleged inaccuracies. The Court reiterated that a plaintiff must show that they "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical" to establish the constitutional minimum of standing under Article III. *Spokeo*, 136 S. Ct. at 1548 (internal citations and quotation marks omitted). The Court held that a "bare procedural violation, divorced from any concrete harm" does not satisfy the injury-in-fact requirement of Article III. *Id.* at 1549.

The Court was quick to point out, however, that a "risk of real harm" can be sufficiently concrete for Article III standing, and that the "law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure," and the "violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* at 1549–50. In the four years since the Court announced its decision in *Spokeo*, it has become clear that the Court's decision has raised as many questions as it answered.

Based in no small part on the questions left open by *Spokeo*, the Courts of Appeals have struggled to sort out whether data-breach victims whose data was stolen but who have not yet suffered fraud have Article III standing. *See, e.g.*, *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017), *cert. denied* 138 S. Ct. 981 (2017); *In re: Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3rd Cir. 2017); *Galaria v. Nationwide Mut. Ins. Co.*, 2016 WL 4728027 (6th Cir. Sept. 12, 2016); *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 693 (7th Cir. 2015); *In re SuperValu, Inc.*, 870 F.3d 763, 771 (8th Cir. 2017); *In re Zappos.com, Inc.*, 888 F.3d 1020, 1024 (9th Cir. 2018), *cert. denied sub nom. Zappos.com, Inc. v. Stevens*, 139 S. Ct. 1373 (2019).

While defendants in these and other cases have claimed that there is a circuit split on the standing of "no-injury" data breach victims, a close inspection of the cases reveals that generally courts have applied the same fact-intensive inquiry focusing on whether the plaintiffs have shown a sufficiently imminent risk of future harm from the theft of their data. Data breach plaintiffs have also successfully argued that data breach victims have

suffered cognizable harms from the loss of value to their personal information and loss of the benefit of their bargain with defendants. *See In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 440 F. Supp. 3d 447, 466 (D. Md. 2020). In finding standing even in the absence of traditional monetary damages from fraud, courts have recognized that so-called "no-injury" plaintiffs often *do* suffer concrete injuries, even if their injuries fall outside conventional legal conceptions of harm. *See id.*; Public Citizen Litig. Fund, *The Fiction of the "No-Injury" Class Action* (Oct. 2015).

In addition to standing issues, there is an emerging trend of defendants challenging class certification on the grounds that the class contains uninjured class members. This trend has been particularly pronounced in the antitrust context. For instance, in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), the First Circuit held that class certification was not appropriate because the plaintiffs there could not show that there was a "reasonable and workable plan" for weeding out uninjured class members, and thus classwide issues did not predominate over individualized issues.

Some defendants and commentators have tried to argue that *Asacol* and cases of its ilk make the presence of potentially uninjured class members a poison pill that defeats class certification. But courts have routinely certified classes despite the presence of potentially uninjured class members. *See* Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 Geo. Wash. L. Rev. 858, 859 & n.1 (May 2014). For instance, the First Circuit has held that class certification was appropriate where the "vast majority of class members were probably injured." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 31 (1st Cir. 2015). The court in *Asacol* distinguished *Nexium* on the grounds that the parties in *Asacol* had not established that there was a reasonable plan for removing uninjured class members prior to judgment. *See Asacol*, 907 F.3d at 53.

Some courts have viewed the issue of uninjured class members through the lens of Article III standing. For instance, the Second Circuit has stated that a class must "be defined in such a way that anyone within it would have standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). While many courts have held that only named plaintiffs need to establish standing, *see Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015), the Ninth Circuit recently concluded that even absent class members "must satisfy the bare minimum of Article III standing at the final judgment stage of a class action in order to recover monetary damages," *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1023 (9th Cir. 2020). The court in *Ramirez* noted, however, that common evidence could be used to establish classwide injury, and the court reiterated that standing for absent class members did not need to be established prior to the final judgment stage.

Although it is unclear whether *Asacol* and *Ramirez* will remain outliers or mark the emergence of a new trend, they offer lessons for class-action plaintiffs bringing cases that may potentially include uninjured class members. While plaintiffs need not remove every potential uninjured class member from the class, from the start class counsel should have a clear and technically feasible plan to remove uninjured class members at or before final judgment, and to the extent possible, plaintiffs should frame their class definition to minimize the presence of potentially uninjured class members.

Subtopic 3. Class Certification: Focus on Timing and Discovery: Daniel C. Girard

1) Bifurcation Retrospective: "*To understand the future, we have to go back in time.*" — Pitbull, from *Men In Black 3,* December 2012
   a) *Eisen* (1974)[1]: no inquiry into the merits at certification stage, "some showing" era
   b) *Falcon* (1982) [2]: Rule 23 requires a "rigorous" analysis and may require the court to "probe beyond the pleadings" to decide if the elements of the rule are satisfied.
   c) 2003 amendment to Rule 23 deletes "as soon as practicable," in favor at "an early practicable time."
   d) *Manual for Complex Litigation* (4th ed. 2004): "courts often bifurcate discovery."
      i) "discovery into certification issues pertains to the requirements of Rule 23 and tests whether the claims and defenses are susceptible to class-wide proof; discovery into the merits pertains to the strength or weaknesses of the claim or defenses and tests whether they are likely to succeed." Manual 4th § 21.14 at p. 256.
   e) *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24 (2d Cir. 2006)*:* Courts charged with making a "Definitive assessment" that Rule 23 requirements have been met, even if that assessment entails the resolution of conflicting proof and happens to overlap with an issue—even a critical one—on the merits.
   f) *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d 305 (3d Cir. 2008)*, as amended* (Jan. 16, 2009): rigorous analysis requires assessment of all relevant facts and arguments, including resolving disputes about competing expert witness testimony, "threshold showing" not enough
   g) *Nagareda*, Class Certification in the Age of Aggregate Proof (2009)[3]
   h) *Wal-Mart v. Dukes* (2011)[4]: Class certification denied on commonality grounds. Rule 23 is not a mere pleading standard, plaintiff bears the burden of proving the certification elements by a preponderance of the evidence.
      i) On an evidentiary level, *Dukes* responds to the reality that proof of injury (or of no injury) in the typical complex class action is often done through economic or statistical evidence. Both the majority and the dissent cited the Nagareda article.
         (1) Title VII case, massive class; statistical evidence of gender-related disparities in Wal-Mart's personnel decisions not enough to justify damages class certification. Majority holds that certification required proof of an overarching policy to discriminate against women since Title VII claims require a showing that gender was the reason for the personnel decision.
   i) *Amgen* (2013)[5]: Plaintiff not required to prove materiality at class certification stage in Rule 10b-5 action. Rule 23 provides "no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites . . . are satisfied." 568 U.S. at 466.

[1] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).
[2] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982).
[3] Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009).
[4] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

[5] *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013).

j) *Halliburton* (2014)[6]: S. Ct. declines to overrule *Basic v. Levenson*[7], presumption of reliance on the "efficient market" remains available in Rule 10b-5 action, but to satisfy reliance element of Rule 10b-5 cause of action, Plaintiff must prove the availability of the presumption at the class certification stage, and defendant must have the opportunity to rebut plaintiff's evidence.

k) *Tyson Foods* (2016)[8]: Common question was whether donning and doffing time is compensable under FLSA. S. Ct. held statistical evidence could be used to prove class-wide damages, because the same evidence "could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy." *Tyson Foods*, 136 S. Ct. at 1048.

2) Implications: Plaintiff's ability to meet the standard set in *Dukes* and its progeny requires access to discovery

   i) Manual for Complex Litigation (4th ed. 2004)—statement that "courts often bifurcate discovery"—is no longer accurate.

      (1) In the post-*Dukes* world, plaintiff must put forward evidence showing that common questions predominate. The same evidence will generally be used to prove the merits of the claims.

      (2) Despite the Manual's distinction, in most cases the common or individual evidence that relates to the strength or weakness of claims is the same evidence that will inform whether common or individual questions predominate in the claims.

3) Bifurcation is Presently Disfavored

   a) Manual for Complex Litigation (4th ed. 2004)—statement that "courts often bifurcate discovery"—is no longer accurate.

   b) Practically as well, bifurcation is now recognized as frequently counterproductive and generally disfavored.

      i) Distinguishing between class and merits discovery gives rise to line drawing disputes.

      ii) Bifurcation tends to impose greater demands on the presiding court, to resolve disputes over the class vs. merits line. Class and merits evidence often overlap and the value of evidence is not always apparent until after production. Most courts conclude that any efficiencies to be gained from bifurcation are likely to be outweighed by the increased supervision and risk of prejudice to plaintiff.

         (1) Further, these judicial resources can be misplaced because they may have the effect of limiting the record that will ultimately help the court decide class certification. As the Manual acknowledges, "Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes." § 21.14.

         (2) Judge Virginia Covington of MD FL wrote that, "if district courts as neutral arbiters of the law find the distinction between merits and class issues to be murky at best, and impossible to discern at worst, the Court cannot imagine

[6] *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014).
[7] *Basic v. Levinson*, 485 U.S. 224 (1988).
[8] *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016).

how parties with an incentive to hold back damaging evidence, can properly draw the line between these categories of evidence during 'phased' discovery." *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC*, 2011 WL 486123, at *2 (M.D. Fla. Feb. 7, 2011).

iii) Bifurcation also tends to require the parties to conduct some discovery twice, once in connection with class certification and in greater depth at the merits stage.

iv) Consciously or not, courts want to see plaintiffs' evidence at class certification stage, Plaintiffs are prejudiced if they can't deliver.

v) Prevailing judicial practice is not to bifurcate class and merits discovery. *See, e.g., Abramson v. Gohealth LLC*, 2020 WL 5209817, at *2 (N.D. Ill. Sept. 1, 2020) ("In the court's experience—and in the experience of many other courts and commentators—bifurcation of discovery breeds yet another layer of contentiousness."); *Bruce Katz, M.D., P.C. v. Gokul Rx LLC*, 2020 WL 210828, at *1 (M.D. Fla. Jan. 14, 2020) (explaining that the decision not to bifurcate discovery into phases was "supported by the likelihood of overlap of individual and class discovery, the likelihood of ensuing discovery motions, the likelihood of prejudice to the nonmovant, the absence of evidence suggesting the claim of the named Plaintiff lacks merit, and the interests of judicial economy."); *Armendariz v. Santa Fe Cty. Bd. of Commn'rs*, 2018 WL 487300, at *1 (D.N.M. Jan. 18, 2018) ("Bifurcating discovery will not significantly narrow or reduce merits discovery, but will instead needlessly delay and complicate the discovery process."); *Keim v. Watches of Switzerland Grp. USA, Inc.*, 391 F. Supp. 3d 1140, 1142 (S.D. Fla. 2019) (agreeing that bifurcation likely would prompt disputes about what is merits or class discovery); *Beezley v. Fenix Parts, Inc.*, 328 F.R.D. 198, 203 (N.D. Ill. 2018) (noting concern with "time-consuming disputes arising over whether particular discovery was class- or merits-based. From this perspective, there is nothing to gain in terms of judicial economy by bifurcating discovery."); *Back v. Chesapeake Operating, LLC*, 2020 WL 2537479, at *5 (E.D. Ky. May 19, 2020) ("[T]he Court is concerned about causing a new source of contention between the parties. Bifurcation could well lead to a spate of disputes about whether information requested during discovery goes to the merits or the class issue. Resolving these disputes will take the time and other resources of the parties and the Court.").

vi) An additional factor counseling against bifurcation is that "even if the class is not certified, the case will still continue and the discovery produced . . . will be relevant and useful for the remainder of the case"—which cuts against bifurcation because the merits evidence is likely to have some utility no matter what. *Ahmed v. HSBC Bank USA, N.A.*, 2018 WL 501413, at *3 (C.D. Cal. Jan. 5, 2018); *see also Denney v. Amphenol Corp.*, 2020 WL 5500276, at *3 (S.D. Ind. Sept. 4, 2020) ("There is nothing to be gained from bifurcation, because irrespective of whether the Court grants or denies the Plaintiffs' certification request, the parties will still need to conduct merits discovery and undertaking it now will not be a waste of time and effort. Proceeding to merits discovery may, in fact, move the case along without duplicating the parties' efforts."); *Hunichen v. Atonomi LLC*, 2020 WL 5759782, at *2 (W.D. Wash. Sept. 28, 2020) ("Judicial economy favors non-bifurcated discovery. . . . Timely discovery on the merits will be relevant whether or not plaintiff succeeds in certifying a class.").

4) Bifurcation remains viable in specific cases:
   a) Plaintiff may be unable to satisfy one of the requirements of Rule 23(a):
      i) Questions surrounding numerosity, adequacy or typicality may preclude certification: *see, e.g., Camacho v. City of New York*, 2020 WL 4014902, at *3-4 (S.D.N.Y. July 16, 2020) (plaintiff could not satisfy numerosity because early discovery showed there were only 16 class members)
      ii) Arguments surrounding commonality and predominance are less likely to succeed
   b) Core issues may not be susceptible to class adjudication, as when the claims depend on individual scenarios and there is no common "glue" to tie them all together: "If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all of the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage." *Brown v. Regents of Univ. of Calif.*, 151 Cal. App. 3d 982, 989 (1984) (medical malpractice class action)
5) Phasing and prioritizing specific types or topics of discovery at the outset is favored
   a) See Rule 26(f)(3)(B), for example, requiring a discovery plan to state whether "discovery should be conducted in phases or be limited to or focused on particular issues"
      i) Focusing early on "class-related" discovery, e.g. class member information, marketing depositions (assuming a marketing case) is kind of the new bifurcation
   b) This goes hand in hand with delivery of early documents requests under Rule 26(d)(2), which per the Advisory Committee Note are "designed to facilitate focused discussion during the Rule 26(f) conference."
   c) Everyone has an interest in starting with the most important or obvious discovery first, with the understanding that more is not always more and going to the heart of the matter first should, in theory, save time and money
6) Practical Comments:
   a) *Twombly*[9], *Iqbal*[10], PSLRA stay in securities cases counterbalance greater discovery demands imposed post-Dukes
   b) Proportionality analysis also applies to require great emphasis on the importance of the discovery to the issues at stake in the action
      i) The most important discovery will often overlap with class certification discovery
      ii) Rule 26(d)(2) "early delivery" provision of document gives requesting party the opportunity to preview in the Rule 26(f) conference and report those topic areas deemed essential to class certification
   c) Rather than bifurcation, parties often agree to *prioritize* some categories of discovery
      i) "Low-hanging fruit:" documents produced in prior litigation or regulatory proceedings
      ii) Data required by expert witnesses
      iii) Relatively non-controversial material such as organizational charts, policies and procedures, technical manuals
      iv) Class representative production and deposition
   d) Use technology to sequence discovery

[9] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[10] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

(1) Consider broad productions from just a handful of key custodians
(2) Agreed search terms

e) Responding party may ask for cost-shifting in contentious cases

As form follows function, most courts allow the need to develop the record to drive timing, rather than vice-versa

Panel 4 – Technology Tools Facilitating Class Action Cases

Subtopic 1. Conducting motion calendar, depositions, in-court proceedings, and mediation sessions remotely by Zoom and other electronic means: Adam Moskowitz

Technology has been an important, evolving aspect to class action litigation in two manners: (1) updating the best manner to provide the best practical notice to the class members (i.e. newsprint is hardly used by class members in today's society) and the processing of claims administration, and (2) during the Covid crisis, the legal profession (as many other professions) have had to utilize new methods of technology (such as Zoom court hearings, meetings and mediations, etc.) which have proven to be so expeditious and efficient, that most members of the bench and bar are now recommending that those same procedures continue post-Covid. Moreover, the CARES Act proposes specific revisions to the federal rules that contemplate possible amendments to the existing rules, in light of these recent events. For example, numerous courts across the country have revised administrative rules so as to allow court reporters to swear in witnesses via Zoom (i.e. not physically being in the same room or even the same city), which has provided counsel with a much more economical and efficient manner to take depositions, which can be very costly with travel time and costs. Moreover, driving to court and waiting to argue on weekly motion calendars, has been revised to be more efficient for the bench and bar by handling them via Zoom vs. the ordinary cost and time to drive to the courthouse, plus the time waiting to argue for just a few minutes before the court. In this manner, judges can also conduct these hearings (and trials) at the most convenient time and location for them.

Subtopic 2. Timing, presentation, and evidence status of "Science Day" tutorials: Christopher Guth

Science Day, most often occurring is mass tort litigations, are relatively rarely seen in the class action certification context. But there are various class action scenarios where Science Day presentations where Science Day presentations may be appropriate and helpful for the court and the litigants. For example, a "tutorial"-style science day may be appropriate and have been utilized in class action proceedings to educate the court and assist in unwinding potentially complicated technical issues in the litigation (ex., pharmaceutical pricing). Science Days have also been conducted where the presentations more directly impact certification issues like commonality and typicality (ex., in design defect cases presentations regarding possible differences or similarities in the product(s) at issue). We will also discuss suggested best practices for Science Day formats (lawyer presentation vs. party witnesses / expert testimony vs. court-appointed witnesses / experts), as well as considerations of timing and evidentiary status.

Subtopic 3. Electronic payment/claims administration: Francesca Castagnola

Ms. Castagnola, senior managing director of Western Alliance Bank's Settlement Services Group, will speak on the topic of digital payments to class members during the settlement process. She will explore various forms of digital payments and trends over recent years, while touching on payment types that are most effective relative to the different types of litigation. She will also provide insight into digital payments and how they can be leveraged as an extension of an electronic notice program.

Panel 5 – Selected Class-Action Litigation Issues

Subtopic 1. Managing MDLs, which include class actions; leadership appointments; selection of bellwethers; and attorney's fee award allocations: Adam Levitt

I. The Prospective Opt-Out Problem

- In many MDLs (or large litigations in general) with a class action component and a mass tort/single event component, the situation often arises wherein counsel seeking to represent individuals (rather than support the class action effort), attempts to get retained by a large number of individual plaintiffs and attempts to prospectively opt them out of the pending class action litigation, so that they can presently pursue their own claims on a direct basis;
- Good recent examples of this are: (a) *In re Syngenta AG MIR162 Corn Litigation*, No. 2:14-md-02591-JWL-JPO (D. Kan.); and (b) *In re Genetically Modified Rice Litigation*, No. 06-md-1811 (E.D. Mo.).
- How and why prospective opt-outs are both disruptive and counterproductive, because, among other reasons, prospective class members (which almost always includes all of the prospective opt-out plaintiffs) can get a "free look" through class certification and make their opt-out decision at a much later stage in the litigation.
    - And, if these are mass opt-outs, the problems endemic in that approach, as several courts have recognized. *See, e.g.*, *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 939 (E.D. La. 2012); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 986 F. Supp.2d 207, 217 (E.D.N.Y. 2013); *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43, 47 (Cal. App. 2008).
- Prospective opt-outs are rarely about the clients and almost always about the lawyers.
- Best practices for judges faced with the simultaneous class action/mass tort issue.

II. Attorneys' Fees

- Recognition of risk premium in considering and ordering plaintiffs' counsel's fee awards;
- Whether the upfront restrictions and requirements imposed on plaintiffs' leadership with respect to fee auditing and reporting has a salutary effect, or whether it's just "make-work" that reduces lawyers' effective hourly rates.

- Whether prospectively capping fees at the outset of a litigation can ever be considered a "best practice" (*see, e.g.*, *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 3:10-md-02143 (N.D. Cal.); *In re Comdisco Secs. Litig.*, No. 01 C 2110 (N.D. Ill.); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 741, 774 (S.D. Tex. 2008) (finding 9.52% recovery in attorneys' fees negotiated at outset of litigation "'best practice[] in [a] class action" due to incentivization of class counsel to assume "enormous risks" over "a potentially indefinite period").

- Fee analyses and determinations in common fund settlements versus claims-made settlements.
  - Valuation of non-monetary relief (*i.e.*, injunctive relief) in the attorneys' fee analysis.

3. Emerging Trends in the Appointment of Lead Counsel: Broadening Diversity in Counsel Selection

- Identifying the Problem

  - Statistics show a lack of diversity in leadership positions in class action and complex litigation.
    - Review of recent studies show that women and minorities are under-represented in leadership roles [Provide links or copies of excerpts to below materials]
      - ABA Women in the Profession: First Chairs at Trial
      - Vying for Leadership in the Boys Club
      - Diversity and Excellence: Guidelines and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class Action Litigation ("Duke Guidelines")
      - [Specific Studies directed to the under-representation of POC?]

    - Why is this a problem?
      - Review of studies that indicate that diversity of leadership teams enhances decision making and the perception of trust in the judicial process.
        - Countervailing views and issues that arise from emphasis on diversity.

Diagnosing the Sources of the Problem

  - Explicit and implicit biases and gender norms impede the advancement of women to senior levels in the profession.
  - Specifically with respect to Class Actions and other complex matters (such as MDL's) the role of private ordering in lead counsel selection reinforces the "old boys' network."

- Mitigating the Problem—focus on Class Action Selection

  - Rule 23(g) Criteria: allows for discretion but may also favor the repeat players and the well-entrenched.

- Judicial Action—changing the private ordering norm
  - Lead counsel selection processes taking diversity into account
  - Best Practices suggestions from Duke Guidelines
- Recent Developments and Progress
  - Recent Orders and judicial initiatives (cite to or excerpt samples from recent standing orders or counsel selection orders).
  - Statistics are improving
- Judicial Comments (Comments from judicial panelists on the emerging trends, appropriate use of diversity in selection, suggested practices to minimize the repeat player issues, etc.)

Panel 6 – Class-Action Challenges

Subtopic 1. Range of claims and liability theories asserted in covid-19 class actions: Peter Prieto

A. COVID--Business Interruption Class Actions

1. Nature of Claims: a claim against insurer for coverage under policies that provide coverage for business interruption or civil authority orders to recover lost business income

2. Initial analysis--is there coverage for the loss, and if coverage, is there an exclusion that excludes coverage

3. Threshold issue for coverage: is there "physical loss or damage to insured property"

B. JPML—Denied Centralization

1. JPML: Panel that determines whether federal cases filed in multiple federal district courts should be centralized in one court before one judge

2. JPML Order number 1: denied centralization but requested additional briefing on potential centralization of cases against largest insurers

3. JPML Order number 2: denied centralization

C. Cases Around the Country

1. Both in state and in federal court
2. Cases at motion to dismiss stage currently
3. A few dozen cases: courts have granted and denied motions to dismiss
4. Key issue: was there "physical loss or damage" to the insured property
   a. Cases, for most part, turn on meaning of "physical loss or damage" phrase
   b. Cases around the country have differed on meaning of this language
   c. Defendants: "physical loss or damage" require a physical or structural alteration to the property, and presence of virus on insured property does not physically alter property
   d. Plaintiffs: "physical loss or damage" phrase is not defined in policies, and such phrase includes inability to use property because of the presence of Covid in or on the insured property. Physical loss includes when insured property is uninhabitable or unsuable

5. Exclusions

a. Virus exclusion: is there an exclusion, which even if there is coverage, excludes viruses such as Covid from coverage

b. After the SARS outbreak in 2006, some insurers added an express virus exclusion to their policies but many policies don't have an express virus exclusion

c. Microorganism exclusion: excludes coverage arising out of or relating to mold, mildew, spores or other microorganisms whose presence poses an actual threat to human health

1/ Defendants: A virus is a microorganism, according to HHS and Nat'l Institutes of Health; therefore, coverage for Covid is excluded

2/ Plaintiffs: A virus is not a microorganism because a microorganism is a living thing, and viruses are not considered living things; NIH has sometimes casually grouped viruses as microorganisms, but they are not, by definition, a microorganism because they are not a living thing

d. Pollution exclusion: policies exclude any loss or damage which arises from any kind of seepage or any kind of pollution or contamination, which is defined as "the presence, existence, or release of anything which endangers or threatens to endanger health and safety or welfare of persons or the environment."

1/ Also excludes discharge, release or escape of "pollutants," which is defined as "any solid, liquid gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes . . . "

2/ Florida law has interpreted pollution exclusion broadly and beyond the pollution context

3/ Plaintiffs and Defendants are arguing over meaning and breadth of language of this exclusion

6. Class action issues

a. do common issues predominate over individual issues; if so, class action is appropriate, but if not, class action is not appropriate

b. same policy with same language, or different policies with different language

d. choice of law—differing state laws depending on applicable law

civil authority orders: language may differ

e. individual coverage defenses

D. Questions & Comments

Subtopic 2. Frequency of litigation financing in class actions; extent of disclosures: Christine Azar

The increased acceptance of legal finance coupled with the massive costs and time delays in the class action process has led to an uptick in the use of outside capital to fund class actions in the US. There are two very different ways in which legal finance is used, however. The first is in consumer cases where funders are fronting the class members a portion (usually in small amounts) of their future recovery in return for a substantial portion of the ultimate outcome. This has raised legitimate concerns about the need to

protect individuals who may be under economic duress and are likely to be unsophisticated in litigation. The use of legal finance in the commercial context (think securities, antitrust and the like) is very different. The funder is typically providing capital to law firms litigating the case. Thus, the concerns are mitigated because both sides of the transaction are business entities with a sophisticated understanding of the issues at hand. Burford is a commercial legal finance provider.

In both the consumer and commercial contexts, the question of disclosure arises although for the reasons stated the analysis of whether disclosure is warranted differs in the consumer v. commercial context. I'll focus on the commercial side because at Burford that is all we do. In that context, any blanket disclosure requirement is really a solution in search of a problem. The premise for disclosure is that it will unearth any control issues that are in conflict with the best interests of the class members. When a funder is supplying counsel with the means to litigate a case it does so as a passive provider of capital with no say in the strategy of the case or the decision making on when or how to settle a case. That remains a client decision with the advice of counsel.

Defendants more and more, though, are making disclosure an issue, really as a distraction from moving forward on the merits. After all, there is no corollary investigation into who is funding the defense side costs. Logically speaking, the fact that a funder has diligenced a case and decided to invest potentially millions of non-recourse dollars behind it means that the merits of the case are likely quite strong. It also means the class can go the distance if need be rather than settle cheaply because the costs of moving forward become too exorbitant for counsel to continue.

Where courts have had concerns in a particular matter, they will frequently allow for an in-camera review of the funding arrangements to ensure that there are no control or conflict issues. This seems to be a balanced approach that fulfills the court's oversight role in cases where it may legitimately be an issue while also protecting the rights of the class to proceed with meritorious claims.