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MASS TORTS—MESSY ETHICS

Charles W. Wolfram†

Do ethics matter in mass tort class actions? Which legal ethics rules should apply? The same ethical rules that constrain lawyers in non-class actions? If the same, why? If different, why? What is distinctive about a massive class action that makes the general ethical rules ill suited? Are they equally ill suited for defense lawyers as for plaintiffs' lawyers?

It is questions such as these that Professors Carrie Menkel-Meadow¹ and Susan P. Koniak² grapple with in the two papers that are the focus of my comments. The papers could serve as bookends in the growing academic and professional debate over ethics in class-action litigation. I gather from these writings that their answers to the questions I posed above would run somewhat as follows:

Menkel-Meadow. Class actions (and perhaps other forms of complex litigation) involving mass torts simply cannot be understood as a variation of run-of-the-mill litigation. When lawsuits reach a certain size and level of complexity (and perhaps when they involve differ-

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Georgine v. Amchem Products, Inc., 157 F.R.D. 256 (E.D. Pa. 1994), is the object of much comment in this Symposium and in my own commentary. Thus, I should record at the outset that I, along with Professor Carrie J. Menkel-Meadow, *see* Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159 n.† (1995)—perhaps alone among American legal ethicists—did not play a public role in the case. I also did not sign the amicus brief prepared by Professor John Leubsdorf, *see* John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222 (1995), and signed by 37 law professors who teach and write about legal ethics. *See* Brief of Law Teachers as Amici Curiae, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) (submitted Apr. 1, 1994). In my case, silence was purchased, not principled. When the original agreement between the settling defendants and plaintiffs' class counsel Ronald L. Motley and Joseph F. Rice (of Ness, Motley, Loadholt, Richardson & Poole in Charleston, S.C.) was first made public, I was retained as (and remain) a nondisclosed expert on legal ethics for a companion case to *Georgine* concerning the legal ethics issues the *Georgine* settlement raised. Although the issues the *Georgine* fairness hearing raised did not immediately affect that case, the matter was still too unsettled to permit me to sign the Leubsdorf amicus brief. It does not, I think, offend my nondisclosed status to say here that my views on the ethical merits of the settlement arrangements are much closer to those of Professors Leubsdorf and Koniak, *see* Leubsdorf, *supra*; Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995), than those of Professor Menkel-Meadow. That will, in any event, be clear enough shortly.

¹ *See* Menkel-Meadow, *supra* note †.

² *See* Koniak, *supra* note †.

ent substantive realms), we may find ourselves in a universe with more than three fundamental ethical dimensions. Interests of the judicial system and the public interest require more flexible, more individuated ethical rules in such cases. Although some of the behavior by lawyers in the *Georgine* case was regrettable, in the context of compromising a massive piece of litigation, the settlement was within the acceptable range.³

Koniak: I emphatically disagree. The fundamental precepts of the profession spelled out in lawyer codes are bedrock and apply in the *Georgine* case as in any other class action. The bureaucratic need of a judicial system to manage a large and intimidating caseload is an inadequate justification for winking at or entirely ignoring the traditional and appropriate ethical constraints that bind lawyers. Size and complexity may make certain ethical decisions more difficult or more important; they certainly do not diminish the regard that both lawyers and judges should have for doing the right thing.⁴

With respect to *Georgine* itself, the ultimate appraisal of these scholars runs from Menkel-Meadow's rather tepid and conditional "OK" to Koniak's passionate denunciation. Perhaps the most dramatic difference between the two papers is in their "voice." Menkel-Meadow is a quintessential academic—cool, rational, sometimes maddeningly Socratic where one would have preferred a declaratory thought. Hers is also the view of the insider, one who has viewed the same scene so many times from the same operating perspective that she has become inured to the disturbing quality of class actions. In that limited milieu, Menkel-Meadow's approach is rather nontraditional, even mildly iconoclastic. She suggests a special, discrete set of ethical norms unlike those that would be applied to lawyers litigating in non-mass actions.⁵ Although those norms are not fleshed out in her paper, they evidently would be more tolerant of traditionally unacceptable activities, including representing clients with conflicting interests.⁶

Koniak's paper, by stark contrast, denounces what she perceives as injustice in *Georgine* with a passion that is both arresting and quite unusual in academic writing.⁷ Among a confusion of thoughts assailing the reader of Koniak's article, one may wonder at first whether hers is not simply the over-wrought fulminating of a wounded gladiator who has reeled from the courtroom scene of her defeat to rail against the injustice that she vainly sought to prevent. Even applying a fairly significant wound-licking discount, I find far more in the Koniak

3 See Menkel-Meadow, *supra* note †.

4 See Koniak, *supra* note †.

5 See Menkel-Meadow, *supra* note †, at 1170-73, 1213-19.

6 *Id.*

7 See Koniak, *supra* note †.

paper than mere ego frustration. Each reader must judge for herself. I find much in her paper that has the solid ring of honest emotion and justified rage. In the end, I have nothing but admiration for Koniak's moral courage and her willingness to take the risk of sharing her outrage. Our general culture is one in which public policy and semipublic views far too often follow the polls. Legal academia too often lacks any sense of injustice, much less any display of emotion about it. It is heartening to encounter a clearly and forcefully stated view of what a legal-academic author finds compellingly wrong with a specific instance of the operation of an important public institution.

In the end, however, I think that railing against perceived sell-out ethics of the plaintiffs' lawyers in *Georgine* might miss a more important point. Portrayal and condemnation of the ethics of the lawyering in *Georgine* assuredly serve the useful purpose of revealing and recording a searing perception of what occurred in that case.⁸ Koniak has contributed a significant addition to the detailed chronicling of what, I agree, was an injustice.

Where we part company is in the lessons to draw from *Georgine*. Are we to learn that bad lawyers and a bad judge can produce a bad result in a class-action settlement? Is the corrective merely having better lawyers and better judges in future cases with no significant alteration of the system in which these cases are brought and settled? How is the corrective of moral outrage to be administered? Will it be enough to exhort class-action lawyers to be more aware of the need to avoid ethical temptations that arise in class actions? To exhort judges to be more vigilant in preventing breaches of fiduciary duty by class counsel? Should external agencies—perhaps bar disciplinary counsel—play a corrective role? Is *Georgine* thus to be understood as aberrant but manageably so, allowing us to assure ourselves that future *Georgines* can be avoided by the exercise of stronger will by all involved?

Koniak is assuredly correct, in the first place, to focus on what can usefully be thought of as the "second set of players"⁹—the plaintiffs' lawyers in class actions. Under existing structural arrangements, those lawyers, more than any named or absent class members, control the direction of the action and ultimately determine whether the class will

⁸ Koniak is also rough, and deservedly, on a judicial system that permits ethical violations to occur unchecked. See, e.g., *id.* at 1147-50.

⁹ See *id. passim*. In an earlier life as a proceduralist, I attempted to describe and assess the activities of lawyers in a large class action. See Charles W. Wolfram, *The Antibiotics Class Action*, 1976 AM. B. FOUND. RES. J. 253. Somewhat more recently, I also attempted to analyze the ethics of the mechanism of fee shifting, given the sometimes divergent incentives that operate for fee-award lawyers and their clients. See Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 293 (1984).

accept or fight a settlement proposal. But do consuming greed and judicial default sufficiently explain the result in *Georgine*? Do we deal here, only or primarily, with renegade lawyers and an inept judge, so that exorcising one and arousing the other will rid the class-action institution of the grasping hands of lawyers seeking only large fees instead of a decent result for their clients and class members?

Reflecting on what went wrong in *Georgine*, I am reminded of what one of the most notorious of gangsters of the thirties, Willie Sutton, is supposed to have replied when asked why he robbed banks, "Because that's where the money is." We can demonize Sutton, and we can demonize sell-out lawyers who, for millions in fees, are willing to sign away the rights of tens of thousands of faceless and lawyerless class members. But there are reasons (I will suggest, irreducible under the present state of law) why fees, rather than favorable class outcome, drive too much of the thinking of too many class-action lawyers. Given the opportunities, surely it cannot be surprising that in a legal profession of almost one million members there is a sizable number of lawyers who are attracted to the big-money rewards of morally compromised (but legal) professional work.

As fervently as we may wish it, I doubt that the solution to the low state of ethical practice in class actions lies in the hope that class-action plaintiffs' lawyers will appreciate the error of their ways. I doubt whether righteous ethical fulminating alone will cause them to abandon the short cuts, the lack of industry in genuinely effective pretrial preparation for realistically contemplated trials, and the endless maneuvering of class claims toward a maximum-fee award.

Those outcomes are as likely to occur as scorched-earth litigators mending their ways because bar associations pass resolutions condemning incivility. The class-action plaintiffs' bar is driven by an inexorable mechanism that passionate academic oratory is unlikely to alter in a large scale way. The prize is easy money—a great deal of it. The legal skills required to achieve it are rather ordinary, even minimal.¹⁰ Indeed, the actual amount and quality of classical lawyering work the typical class action requires is probably low. Instead, what one needs to succeed in the field of class-action plaintiff lawyering are: (1) a plaintiff; (2) capital; (3) political skills; and (4) luck.

The plaintiff is easily come by, particularly in mass tort cases where alleged victims abound. In other litigation (securities work, for example), it may be necessary to maintain a stable of contacts with clients (or nominal clients) who are willing to have their names placed on lawyer-inspired litigation. Thereafter, the named plaintiff

¹⁰ One would never guess this from the encomia of judges applauding the incredible legal skill and tenacity of class counsel when justifying exorbitant fee awards as part of class-action settlements.

must be willing to recede from sight and sound, and certainly should not be one of those unusual people who have a continuing interest in actively consulting with the lawyer and advising at important points (to be met either with condescension or a warning that only one person can drive a car). Almost without exception, a class-action plaintiff has little, if anything, at risk. Thus, the incentives to meddle with the class-action lawyer are extremely weak.

Capital is probably what prevents entry by lawyers who might otherwise join the hunt for enormous fee awards. The capital needed to maintain a law office and to finance even a modest level of paperwork, travel, and lawyer lifestyle in a massive piece of litigation can be sizable. Lawyers generally must self-finance class action suits as banks and other commercial lenders are loathe to lend against something as unpredictable as a future settlement of a class claim. Moreover, given the laws against champerty, there is nothing to offer for security to a potential lender. It helps to have other recent large fee recoveries that can be rolled over to finance additional class-action ventures.

What separates plebe from noble among class-action plaintiffs' lawyers is possession of the political skills to negotiate effectively with the opposing lawyers and, perhaps of greater importance, to work the sometimes Byzantine personal politics of the plaintiffs' class-action bar. In the relatively small world of plaintiffs' class-action lawyers, a familiar road to success is to parlay the small favors and back scratching of a series of class-action cases into a position of influence and sizable fees in a future class action of one's own.

Luck is also critical. And by all measures, the most critical element of luck is having the case end up before the right judge. Successful class-action fee awards require either a judge who is decidedly proplaintiff or one who is emphatically prosettlement. Either will do, and a combination of the two is optimal. The chances for judge-shopping are significant (although hardly infinite), particularly when dealing with a class with membership in many states. The chance that a class-action lawyer representing the plaintiff can select the right judge and then consolidate other cases with her own are decently favorable.

In short, the current system encourages the kind of lawyering that Koniak tells us occurred in *Georgine*. So long as the field on which plaintiffs' class-action lawyers play remains essentially unchanged, the combination of opportunities and rewards will lead to more of the same.

Professor Menkel-Meadow would disagree strongly that there are any, or many, Willie Suttons out there. We simply read reality quite differently. Professor Koniak thinks Willie Sutton could become a public-spirited citizen if shown a way to make honest money. I

wouldn't bet on it. That class actions are working so badly is not because the actors in class actions are making irrational choices. To the contrary, one can readily understand why everyone acts as they do. What is badly broken, and what badly needs mending, is the basic class action and mass-litigation system of litigation. The only effective way to rid the judicial system of Willie Suttons is to take the profit out of robbing banks.

How might that be done? If it is correct that it is not bad lawyers (alone) but bad institutions that have caused the present level of discontent about class actions and other mass tort litigation, what alterations in the institutions might be attempted? It would be useful to sketch the possible points of alteration by canvassing the players in class actions and offering some tentative thoughts about possible structural changes.

Judges may be one of the serious problems with class actions, but they are not a likely point of entry in achieving class-action justice. Particularly in the federal system, the wholly laudable institutions of life tenure and a ratcheted salary place judges safely beyond structural reform. The lazy or overworked judge will, whatever is done, feel powerful pressure to approve a class-action settlement skewed toward rewarding the lawyers and not the class, despite restive feelings that a better allocation might have been achieved. It is probably also true that judges whose biases are suppressed only sufficiently to avoid outright recusal will continue to sit on the bench, distorting settlement prospects and giving hope to other faint causes. Among other things, such judges give fuel to the charge that the claims of typical class actions lack justice, that they are only contrivances to reward lawyers at the cost of customers, shareholders, and taxpayers. Judges, then, are probably irreducible costs of a judicial system. No imaginable policy could achieve the desired reform by manipulating the set of judges that will try these class actions and other mass cases.

Lawyers in class actions are beyond reform for reasons similar to those making judges immune from effective correction. No system of professional ethics could assuredly keep a lawyer's conduct within acceptable realms when the riches of Croesus are held out as the reward to any lawyer with the client, money, skill, and pluck to try. As with judges, the central problem is the absence of an effective and tolerable policing mechanism. In the class action itself, for reasons already indicated, the judge (who in large part will have been selected precisely because the judge is trustworthy on this score) is not a likely source of truly effective restraint. Nor is external correction likely. Appellate review to arrest overly generous fee awards and correspondingly inadequate class compensation is a clumsy tool, which appellate deference to the fact-finding and perspective of the trial judge dulls.

Furthermore, appellate judges have their own limitations of agenda ordering and motivation.

Professional discipline of class-action lawyers who have been suspiciously generous with themselves at the expense of the class is out of the question. Most disciplinary staffs are overworked and underfinanced and can rather readily be out-lawyered if the stakes are sufficiently high. Moreover, disciplinary counsel would have to take on the class-action bar in a matter already decided by the judge adversely to a possible prosecution. A legal malpractice action by a class of class members who consider themselves sold short is a long shot for the same reasons.

Defendants are among the most rational of actors in class actions, at least if they are doing their risk-benefit calculations accurately. Presumably defendants need no encouragement to take optimal steps in their own defense.

Claimants and their motivational structure may be the most fertile ground for improvement. The concept, suggested by Professor Peter Schuck¹¹ and others,¹² of a market in tort claims may do much to bring more sophisticated claimants-by-purchase into the class-action realm. That, in turn, could improve the level of information, sophistication, and brute clout of the only group that might be sufficiently informed,¹³ sufficiently motivated, and rightly empowered and situated to supervise the activities of class-action lawyers.

The alternative to effective reform of the structure of class actions may be that class actions will succumb to the rising political appetite to suppress the claims that are brought together in class actions. That response may be as unreasoned and inappropriate as any. The excessive awards to class counsel compared to the undercompensation of class members shows nothing about either the justice of the underlying substantive claims or, overall, the appropriateness of the class-ac-

¹¹ See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 982-85 (1995).

¹² See *id.* at 982 n.188 (citing Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987) and Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in NEW DIRECTIONS IN LIABILITY LAW 174 (Walter Olson ed., 1988)).

¹³ It is correct to require that class-action lawyers, as fiduciaries to the class, fully inform the class of information relevant to assess the adequacy of a proposed settlement, including the relative take of lawyers and class members. See *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 435-36 (Tex. Ct. App. 1994) (disapproving settlement providing for \$1,000 certificates to class members for use in a full-price purchase of defendant's truck within 15 months, which majority of class would not use, while providing for fee payments to class lawyers in amounts not justified by results). But it is unrealistic to suppose that all but heroically motivated small stakeholders or, under a free market in class-action interests, sophisticated syndicators of claimant interests, would be motivated and equipped to monitor the action and react knowledgeably and effectively to such information when discovered or revealed.

tion vehicle for recovery. The anecdotal information *Georgine* and similar cases supply suggests that lawyers are the problem, and that replacing ineffectual control of anonymous classes with meaningful control by class-action investors may significantly improve the level of funds class members obtain.