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Welcome all. I’m Dan Polsby. I’m the dean of George Mason Law School of which the Law & Economics Center is a part. Welcome to the law school.

My brief this morning is to be brief, also to be gracious to the extent that those conflict, brief dominates. So I will not detain you any longer other than to wish you a warm welcome and hope that this is a very challenging program and an important program. We’re delighted to have you here, and we trust that you will have a prosperous time learning over the course of the next day and a half of programs. Thank you all again for coming.

Thank you, Dan. I mentioned last night that this has been a very nice move here for us, and we are very happy. I am going to introduce your first panel today. We have Bob Peck and Russell Jackson. Russell is substituting for John Beisner. Bob is President of the Center for Constitutional Litigation. He argues constitutional cases in the U.S. and state supreme courts. He is adjunct law faculty at both American University and George Washington University. Bob is on the Board of Overseers for the RAND Institute, the Lawyers Committee of the National Center for State Courts, and on the First Amendment Advisory Council.

Russell Jackson is a partner at Skadden Arps in New York. He focuses on the defense of companies for their products and advertising, and handles other complex litigation at both the federal and state court level. He’s a member of American Law Institute, chair of the New York City Bar Products Liability Committee, columnist for the *National Law Journal* and he hosts his own blog. So, those are brief introductions. I will turn it over to them.

Thank you, Paige. It’s a real pleasure to be here today. One thing that should not be overlooked as we talk about issues in the civil justice system is that, for all its faults, the civil justice system remains a remarkable achievement. It is there that an individual who is injured, neither wealthy nor well connected, can hail a powerful adversary into court on equal footing and ask the court to hold it accountable for its wrongful conduct.

Only in an American courtroom—not in legislative chambers or executive suites—can an individual seek full redress, standing at the bar on an equal basis with a powerful and influential adversary. The political and
economic advantages that one might enjoy in other arenas dissolve in the courtroom. That’s something that we should not ever look to give up.

There’s a story told about Hugo Black relevant to our discussion today. Before he was a U.S. Supreme Court Justice, before he was a U.S. Senator, he was a trial lawyer. In this instance, he was considered the most famous and successful trial lawyer in his vicinity. One day, according to this story, an individual went to the bar association and said, “I’m looking for your best trial lawyer. I’ve got a case that I want him to try for me.”

They replied, “Well, that would be Hugo Black. He’s trying a case down at the courthouse right now. You could see him in action.” The prospective plaintiff arrived as Black was making his closing argument, describing the terrible injury that befell his client. Tears were streaming down his cheeks, as he related the injury. Black’s own emotions made this a powerful, powerful closing.

Black won the case and obtained a verdict of $25,000, a princely sum in those days. He was, of course, hired by the man looking for a lawyer. Eventually, he tried that case, too. He gave a very perfunctory closing, won the $11,000 that had been claimed by the individual, and the client was happy, but still a little disappointed. He told Black, “You know, I was kind of hoping to get the tears treatment and all that.” And Black’s response was, “Hugo Black does not cry for less than $20,000.”

Now, one of the great dangers and problems that we face in the civil justice system is that we’re pricing ourselves out of reach for too many people. Many people are not going to be able to afford to use the system because their claims are too small yet still cost too much to litigate. So, the first trend I want to discuss today is the expense of litigation. This has been a standard complaint about our litigation system for nearly two centuries. It’s nothing new. But still, we are seeing an increasing number of meritorious cases that are simply too expensive to bring because of the procedural fencing, the expert fees, and the protracted interlocutory appeals that make cases uneconomic to bring.

So, only if there is a large potential compensatory award is there an opportunity to seek justice and have a skilled lawyer see it through much like, as Hugo Black said, when he turned on the tears. Now, with the advent of tort reform, we have enhanced this undesirable trend by placing additional unreasonable obstacles and hurdles before the courthouse door that deter meritorious lawsuits, or with much the same effect, render them more expensive to pursue, make them more difficult to prove and diminish recoveries even when the plaintiffs prevail.

The result is that run-of-the-mill cases are going to be chased out of our system unless we find a way to deal with this, and they will end up having to find other venues or disposition, putting the judiciary much in the same position as the postal service has experienced with the kind of competition that they get from Federal Express and UPS.
The cases that are filed in court will then tend to skew to the higher end, be more complex, more contentious, and draw greater resources from the judiciary, rendering statistics about time to disposition, the number of appeals, and even the average verdict, upward.

Separately, and complementing this undesirable trend, are diminished judicial resources. The dislocating economic conditions of our times place greater demands on the judicial branch as part of the community and social fabric of our lives. Filings related to foreclosures, domestic relations and debts rise during those poor economic times as well. Yet, state budgets cut the level of funding that the courts enjoy in more flush times even as filings go up.

So, courts are facing hiring freezes, salary freezes, layoffs, pay cuts, early retirement, and increased filing fees. Eight states close their courts a certain number of days each month. Nineteen states have instituted furloughs of judicial staff. New Hampshire, for the second time in recent years, suspended jury trials in civil cases for a six-month period of time. The crisis in judicial funding is palpable, and it has broad implications for whether the courts can do the job we ask of them, as well as fulfill the promise of providing a level playing field for the resolution of judiciable disputes.

The third trend I want to mention—contributing to this seemingly perfect storm—is the new politics of judicial elections. Electing judges, which dominates the state landscape as a selection method, were originally an outgrowth of Jacksonian democracy—an attempt to overcome an elitist system that drew judges from only among the well-connected and most privileged. Yet, a selection system that relies on popular sovereignty is falling into a similar trap because of the amounts of money expended in these races continue to rise exponentially. We saw an Illinois retention election this year become the second most expensive judicial race in recent years.

This is unusual for retention, as opposed to a contested, election, and it does not portend well for the assumption that we will continue to have fair and impartial courts, if essentially the courts themselves become political footballs. Add to that development, the judicial decisions in *Citizens United*,\(^1\) which potentially opens up the floodgates to millions in untraceable money; *Republican Party v. White*,\(^2\) which holds that judicial candidates have First Amendment rights to take positions on issues that can come before the courts; the current challenges to the “pledges or promises” canon in the Canons of Judicial Ethics,\(^3\) and the somewhat countering force of the *Caperton* decision,\(^4\) holding that recusal is required as a matter of due process under an appearance of impropriety standard, when a party disproportionately aids a judge’s election.

That combination of developments will create situations—and it has already occurred in several states—where candidates take positions on matters that are likely to come before their courts, are asked to recuse them-
selves, claim that they had a First Amendment right to do so, but then, because of due process, may not sit on those cases so important to their selection. If this becomes commonplace, we’re going to witness a level of dislocation within the judicial branch on the issues that we really expect our courts to resolve. This is clearly not a pretty picture, but this is a picture of the civil justice system as we face it today.

The fourth trend is something that I think is potentially encouraging: the use of technology. Our civil litigation system has yet to embrace a serious use of technology as a factor that can ameliorate some of the expense in the system. I recall that in 1984, I was invited with the then-ABA president to visit a trial courtroom that was being hailed as the courtroom of the future.

We went to this courtroom, curious to see what the courtroom of the future—at least in 1984—looked like, and expected something out of a Hollywood science fiction set. The courtroom looked like any other courtroom you’d ever seen, except that there was a monitor in front of the judge and in front of each counsel on which you could get a real-time version of the transcript that the court reporter was making. That was the courtroom of the future. It didn’t seem very futuristic. The future in that instance stretched no further than the lenses of my glasses from my eyes.

Now, however, we have the ability to use technology to make it less expensive to dispose of cases. For example, cars could be outfitted with black boxes much like airplanes are today. So, with GPS technology and other capabilities, given that car collision cases are still among the most frequent cases brought before courts, we could obtain real-time information about the positions of the cars when they approached, and what exactly happened—who slowed down, who didn’t, and that sort of thing, which may make those cases easy enough to evaluate by simply plugging both black boxes into a computer to get the facts in a case. That’s an example of how, perhaps, technology can help in certain kinds of cases that are now being priced out of the system.

The fifth trend that I want to mention this morning is the use of aggregation. Aggregation of underlying liability issues, separate and apart from the individual remedies available, remains one of the few ways that mass tort cases become affordable for both sides. Using this kind of an approach in 1991, the Judicial Conference Ad Hoc Committee on Asbestos Litigation made a recommendation about the kinds of issues that could be tried in an aggregate manner, leaving individualized issues for other parts of the litigation.

That committee was chaired by the Fifth Circuit’s Judge Thomas Reavley. As a bit of full disclosure, I was the reporter for that committee. It found very little value in re-litigating the same issues of causation over, and over, and over again, for each plaintiff with disparate results. It thereby found that this was a way to narrow the dispute and make sure that it was less tedious and less expensive. Today, however, we are now witnessing a
massive attack on various systems of aggregation and on class action litigation.

If it succeeds, when combined with the other trends I’ve mentioned, the civil justice system may become little more than a historic artifact; a far cry from the system of justice that’s equally available to all, that remains grounds for celebration. So, it is our job to find a way through this forest to make sure that promise of equal access to justice, remains true. Thank you.

J. Russell Jackson: This is my first time addressing this group. I am John Beisner’s partner, and he did ask me to tell you how sorry he is that he is unable to be here. I’ll admit, looking out into this sea of faces, I’m reminded of the joke about the shark family with the papa shark teaching baby shark how to eat a lawyer. There was a lawyer who had fallen off of his jet ski on vacation. Papa shark said, “There he is. You circle him first, once, with just this much of your fin showing. You circle him a second time. Slow down, and show a little bit more of your dorsal fin. The third time you circle him, you let that fin show really large and you go very slowly all the way around him. Then you eat him.”

So, the son shark went out to eat the lawyer. Being an impatient kid, he ended up sneaking up on him and just gobbling him right down. He went back to papa shark who said, “Well, what did you think of the lawyer?” And the kid said, “Well, he was all right.”

Papa shark said, “Well, what do you mean, ‘just all right?’” And the kid said, “Well, I don’t know, he tasted kind of funny.” And papa shark said, “Well, did you do what I told you to do?” And the kid admitted, “No, I was in a hurry, and I just ate him. I was hungry.” And papa shark said, “Don’t you know? Everybody knows! Lawyers are so much better once they’ve had the crap scared out of them.”

I actually do write a blog, and I read a lot of your decisions and on a daily basis I think, perhaps, you’re attempting to do that to me. There are a lot of decisions in the class action civil justice area that leave a lot of room for debate for folks on both sides of the v. I come to you from the defense side of the v. I probably will have a few different ideas about what ought to happen in that arena than Mr. Peck, but we are friends nonetheless. But let me share with you, if I can, a few of the emerging issues that I see from my perspective, both actually litigating and in trying to report on this area for other people on my blog—consumerclassactionsmasstorts.com.

Let me begin by saying that one of the big issues, with respect to class actions generally, is how to preserve fairness for both sides. Clearly, it’s important to have class actions. They’ve been around in one form or another for decades. It is, however, sometimes tempting to allow the desire to have a convenient procedure and to have a procedurally nice hearing, trial, and result, and allow that to get in the way of some fundamental defenses that a defendant might have.
Allow me to at least posit my belief which was, I would argue, echoed in a recent stay opinion by Justice Scalia in the Supreme Court, that there are certain fundamental rights that a litigant has that ought not to be altered just by mere procedure. So, the fact that we aggregate a lot of claims together doesn’t mean that a defendant who has a right to challenge—for instance, causation or reliance—individually, with respect to each class member. It doesn’t mean that that right ought to be in any way taken away just in order to facilitate a trial.

One of the themes in the arguments that you will hear coming from me this morning in these issues is that there are various ways and areas in which I would argue that it is becoming easier for folks to attempt to compromise a defendant’s right to posit individual defenses in class action litigation, and in some instances, the fact that you would be unable to assert those defenses ought to mean, in my view, that there ought not to be a class at all.

But let’s talk, at least in the beginning, about the pleading standards—not even for class actions generally, but just the pleading standards in general. There’s been an awful lot of talk over the last few years about *Dura Pharmaceuticals*, and *Twombly*, and *Iqbal*, and whether or not that has represented a fundamental change in the way that plaintiffs are required to plead their claims, and a fundamental change in the way courts hear claims.

From everything that we can see—first of all, the notion that *Conley* was adhered to strictly, and was in fact the de facto standard that people used to evaluate motions to dismiss, is, I would argue, incorrect. Certainly, there was plenty of scholarship before *Dura* or *Twombly* or *Iqbal* that would have suggested the same. Courts, while they might have quoted *Conley*, would go on to employ some sort of their own plausibility standard, which is what—particularly *Iqbal*—enunciated and said that you have got to have some basis pled in the complaint for connecting the basic elements of the claim.

This is important not just because you need to know what it is you’re trying to defend against, but it’s also important because as a litigator, you understand that folks often attempt to plead claims as generically as possible so as to not hamper their ability later to make class certification arguments. And so, the more you plead about individual reliance, or individual causation, the less likely it may be later on that you would be able to get class certified, because then of course the fundamental individual character of those issues is much more obvious.

As a result of *Twombly* and *Iqbal* and the like, there’s been an awful lot of movement afoot, certainly in Congress, to consider changing the standard that one would employ on motions to dismiss. Some of scholarship that we have seen so far, suggests that there’s not been a huge sea change, at least in the numbers of cases that ultimately get dismissed post, what I’ll call—I’ll mash them together—“Twiqbal,” and “pre-Twiqbal,” and that in fact may be an awful lot of something to do about nothing.
At the end of the day, I think especially after the recent elections, it seems less likely that both houses of Congress would pass some sort of change in the pleading standard and so those issues may take less prominence, at least in the political sphere.

I would like to also look, if we could, at the class certification standards. There certainly had been a notion in years past that a court in considering whether or not to certify a class, shouldn’t dig too deeply, shouldn’t look at the merits; Eisen frequently was cited as the reason for this. Over the course of the years, we have seen courts take kind of an opposite view and indicate that before you certify a class, you darn well better know how it’s going to be tried.

You better look at the elements of the causes of action, the types of proof that are going to be offered, and give it rigorous analysis, as the courts call it, as far as how the case really will be tried, and whether it’s in fact capable of being tried. Even courts that I might not have considered the most likely to have adopted this standard—such as the Ninth Circuit in the Dukes case—have adopted this standard. There’s still a debate between the Ninth Circuit and the Seventh Circuit about whether or not you hear Daubert challenges to expert testimony on those issues and, I would argue, that perhaps may be unique in the Dukes case to the notion of it being a discrimination case where statistical proof is something that is frequently used to prove the elements of the claim there. I think it might be very different if you were considering, for instance, individual claims of consumer fraud or something like that.

But again, the courts generally have been focusing much more seriously on the question of, “How is this case going to be tried?” That too presents a fundamental kind of civil justice issue because it certainly makes an awful lot of difference in the outcome of the case, whether or not the claim ultimately gets certified as a class action. In fact, Judge Posner, on multiple occasions, has written about the ability of a decision on that issue to kind of force a settlement in an action because it’s as if I went to Vegas and decided to put all of my money on red; that might be one decision that I would be unwilling to make, even though I might be willing to gamble individually on certain spins of the wheel—certain smaller amounts of money that might even amount to the same amount of money totally.

But at least I would be able to do it in increments and to pay attention to other factors that might be at the table. One of the issues that is currently before the U.S. Supreme Court and that is a fascinating issue, and one that’s playing out as well in the Seventh Circuit, is the issue of, “What is the preclusive defect of the denial of class certification on absent members of the class?” In the case that’s currently before the Supreme Court, you had folks who were absentee class members; the federal MDL court decided you can’t have a class action here. And they said, “That’s fine.” They went to West Virginia state court, filed a class action, and proceeded to be enjoined by the MDL judge.
So, the fundamental question of whether or not absentees who did not receive notice and an opportunity to opt out at that point in the case—in fact, the court said there’s not going to be a class, so there would be no notice and no opportunity to opt out—could they be bound, in essence, by the decision of the federal court in deciding that there couldn’t be a class? Recently, the Seventh Circuit addressed that issue in a couple of decisions by Judge Posner. There, the court concluded, yes, the absentees could be bound.

The absentees would be parties for the purpose of challenging a decision; they could even intervene on an appeal and to the extent that all you’re doing is holding them to the decision on class certification, and not adjudicating the merits of their claim or keeping them from bringing their claims individually. The Seventh Circuit said those people could be bound to a decision by a federal court on whether or not a case could proceed as a class action. This will be a fascinating decision that we’ll get from the U.S. Supreme Court hopefully later this year.

Another interesting issue, and one that is constantly debated among plaintiff and defense lawyers—and it really goes, again, to the heart of the issue of, “Can you provide a forum to try all of these individual claims fairly in one courtroom?”—is the issue of statistical proof in class actions. Can you, in essence, say to a defendant where the underlying statute or law might require reliance or causation, “We’re going to have an expert who comes up with a model and engages in some statistical proof, and he’ll basically say 80% of the people were deceived in this case, and therefore, recovery ought to be for 80% of the people. We don’t know which ones of those that might be, but it should be 80% of the people”?

The courts have been pretty clear—at least in the circuit courts, particularly in the Second Circuit—on addressing these issues, saying that statistical proof in those types of situations and consumer product cases just really doesn’t cut it. That in fact, individually, the defendant is allowed the challenge the decision to purchase a product, whether that may be called reliance or causation, in a consumer fraud or misrepresentation case, and so in Zyprexa, in the cigarette litigation, in the McLaughlin case, the Eighth Circuit in St. Jude Medical—all of them ended up rejecting this concept of using some form of statistical proof as a substitute for allowing the defendant to have the individual defenses that they ordinarily would have against absentee members of the class.

One of my pet issues, and one that I’ll leave you with here today—that I think is important for us to consider, and often as litigants we fail to consider it, and certainly I think even courts sometimes fail to consider it—is the question of how you define a class in civil litigation. A class, while there are no written requirements in Rule 23 about the class definition per se, certainly the decisions and the case law suggests that a class definition must be objectively identifiable. It must be ascertainable. You must know
who’s in the class and certainly be able to know that before the case is litigated.

It can’t include a bunch of people who aren’t injured. In other words, if you’re suing for a particular kind of defect in a product that might actually manifest in 1% of the products, you can’t just say, “It’s everybody who bought this product,” because of course, most of them don’t have a claim. Most of them have not experienced any sort of problem. And then there is also the issue of a fail-safe class—that being a class where in the class definition, some of the merit issues are kind of folded into the claim: “All people who purchased a product in reliance on these misrepresentations, and thereby suffered damages.” That’s a classic fail-safe class that would require, in essence, a trial of the entire claim before you could decide who was even being bound by the decision.

There have been a host of decisions in the last year, both in state courts—often folks in California have written quite a lot on these issues—but also in federal courts across the country, that have recognized that unless you can actually articulate an identifiable class without including some of the elements of the causes of action to be determined, you haven’t defined a class, and you can stop your analysis right there before you even get to all of the Rule 23 (a) and (b) elements if the class is not objectively identifiable.

John has a couple of pet issues that I think may work into some of what you had talked about, Robert, on the financing side: in particular, the concept of third-party financing of litigation. In fact, he did a monograph for the U.S. Chamber of Commerce which would be available on their website if the issue interests you at all. The root problem, of course, in getting investors in class actions or in civil litigation, is that it introduces a stranger to the attorney–client relationship, whose sole interest in the case is financial, and seeks to maximize the recovery regardless of the underlying merits of the claim.

One jurisdiction that has experimented with third-party litigation financing is Australia. Australia has seen, as a result of such financing, a large increase in the number of claims and attempts by investors to, in essence, exert some sort of control over the litigation that certainly would not have been allowed under what we would have known as champerty or the like. John argues in his monograph, that this type of litigation financing really has a number of problems. First, it encourages frivolous litigation because it’s the ones on the margin that wouldn’t ordinarily be brought by an individual or by a class action lawyer who otherwise makes decisions about cases to file, and what’s strong and likely to recover and what isn’t.

It’s those cases on the margin that end up getting brought and financed by these third-party litigation financing mechanisms that of course raise a host of ethical concerns, because there’s certainly a great danger that clients end up giving control over some portions of the litigation or perhaps even the whole decision of whether or not to settle for money, in order to obtain
financing. The funder, of course, the investor, ends up having loyalties and fiduciary duties to folks other than the litigant, such as to their own investors.

In fact, hedge funds are one of the likely investors in this type of litigation speculation. It also, of course, threatens to impair the attorney’s own judgment and impartiality of judging for their client what’s in the client’s best interest. And because of the disclosures that have to be made to the investor at each stage of the litigation, you endanger the attorney–client privilege and work product doctrine by what it is that you may or may not have to communicate to this investor throughout the course of the litigation.

It also raises a particularly thorny problem in aggregate litigation because there you’ve got the whole problem of the investor. Not only does the investor not have the interest of the named plaintiff as their primary responsibility, but they also have all of the absent class members who have not assented to third-party financing of their claim but who purportedly are being represented—at least up until the time of notice and have an opportunity to opt out knowingly—are being represented by people with these litigation financing obligations.

It also, of course, increases the in terrorem effect, if you will, of some of these cases because again, the cases that these types of investors would want to invest in are the ones that would present a likelihood of a huge recovery. In fact, the fact that the likelihood of success may be lower is usually offset in these folks’ calculus by the size of the potential recovery. They’ll be willing to, in essence, take a ten-to-one shot on recovery over some threshold in order to be able to possibly get that type of return.

So anyway, third-party investing in litigation is another one of the issues that certainly affects us in the civil justice system, and I think one other that I’ll raise—and then we’ll probably throw the floor open for some questions—is the question of class action settlement and what you do with the stinker of a claim. We all recognize that there are some claims that are filed that just are not particularly meritorious, but somebody might need to settle them in order to get rid of them. How do you get rid of them, particularly in a post-Catha world?

One of the ways in which some folks have attempted to extinguish such claims is through the use of site-pray recovery in settlements. And by that, I simply mean that they’ll create a fund against which a class can claim, and when people don’t actually make any claims against the fund, the remainder of the fund goes to the charity of the judge’s choice, or the plaintiff’s lawyer’s choice. It might even create its own charity that gets run by the plaintiff’s lawyers, which is one case that I have been brought in and dealt with in the past after it had gone awry and not hewn to its creating document and the purposes that it was created to achieve.

Site-pray settlements, and of course, if you attempt to even import that concept into litigation—litigation in order to achieve some sort of funding to some charitable purpose—is far afield of the underlying purposes of
class actions which has always been to actually compensate individuals who had claims but who might not be present in court or they might be small enough claims that they didn’t want to litigate in court or couldn’t afford to litigate in court.

These types of site-pray recovery—and again, we’ve begun to at least hear plaintiffs who espouse, in essence, fluid recovery such as Judge Weinstein had proposed in the light cigarette litigation, which ultimately was shot down by the Second Circuit—this concept of, “Let’s get a fund. We’ll have it funded by the amount of bad that the defendant allegedly did, and then we’ll give it to some charitable purpose, perhaps stopping smoking. We’ll either create or there may already be a charity, and we’ll give it to that.”

And while these things may sound laudable in their purposes and certainly charitable, they don’t necessarily sound like litigation as we understand it in the individual one-on-one context, and I would argue it is a fundamental change for the rights of the defendants when you attempt to impose that on a class-wide basis. So, those are some of the issues that I would present to you from the defense perspective. Robert, you may even want to respond to some of those. I don’t know. Or we may have questions.

PAIGE V. BUTLER: Bob, if you would like to respond, and then we’ll open up for questions.

ROBERT S. PECK: Well, I was amused, Russell, that one of your opening examples was Justice Scalia’s stay in the Scott case, because I’m counsel in the Supreme Court for the plaintiffs in that case. A stay is issued on the basis of an application to the Circuit Justice assigned to that Circuit. Here, Justice Scalia serves as the Circuit Justice for the Fifth Circuit. Counsel opposing the stay has a four-day period in which to respond. It was on the first of those four days that I was hired to respond to it, had to review fourteen years of litigation in the Louisiana courts, and write my brief. The complaint that justified the stay was that they did not—the tobacco companies, in this instance—did not have the opportunity to cross examine the named plaintiffs as to whether they were still in need of this remedy, which was a court-administered smoking cessation program.

The question was, after establishing essentially this form of equitable relief, having already certified the class, “Were the named plaintiffs required to continue smoking during the prolonged pendency of the class to remain ‘representative?’” Justice Scalia ruled that there was a good chance the court would want to review that issue and granted a stay.

He also thought irreparable harm would occur if the defendants deposited $240 million into court, which would be put into an interest-bearing account and paid back to the tobacco companies if not used. The certiorari petition in the case was filed this past Thursday.
The essence of the complaint here is that state courts are not requiring individualized reliance in consumer fraud class actions. I think that the argument in the case is overblown. I know that every state consumer fraud statute says it’s the fraud that is the essence of liability, and that reliance becomes a secondary issue for compensatory purposes only. So, I don’t think it as major an issue, or as new a problem as Russell seems to think.

I also would like to talk about the third-party financing issue, simply because although I’m somewhat agnostic about this issue—I don’t have a strong position in favor or against—it strikes me that the definition that John Beisner gives of third-party financing would equally apply to insurance companies that pay for defense costs.

It would also apply to stockholders, whose corporate investments finance corporate litigation designed to achieve a business advantage, as well as avoid liabilities. So, it strikes me that we’re not talking about something very new. We’re just talking about financing a side that hasn’t had that advantage in the past. I also think that it’s not simply helpful to cases that are weaker, but primarily cases that are going to be expensive to litigate. Perhaps one or two law firms in a state can finance this litigation already, but may not be able to finance a third case, no matter how strong it is.

The traditional way to finance such litigation is to seek fellow lawyers as co-counsel who will invest in the case. That third-party financing opens that door to non-lawyers, does not seem troubling. There is a clear trend in Europe to engage in this third-party financing, and it seems like it is probably inevitable in this country. But I don’t think it’s also a major change in the way that litigation is financed, at least on the defense side.

PAIGE V. BUTLER: Okay. Great, thank you. We have time for questions now.

AUDIENCE MEMBER: [Inaudible Question—re: impact of arbitration agreements]

ROBERT S. PECK: It’s hard to say how much arbitration has effected litigation. We saw the ABA report on diminishing jury trials, but how much of that can be ascribed to the fact that arbitration takes place? Arbitration requirements are in the vast majority of credit card agreements, although credit card companies have been cutting back. You buy a new computer, the box has a little slip at the bottom that basically says you’ve agreed to arbitration once you turn on the computer—things like that. It’s clear that for a while it was thought that arbitration was definitely cheaper and less expensive and there was a trend toward it.

More and more, both corporate counsel and plaintiffs are in agreement that it is not cheaper, and that it is taking on all the aspects of litigation in another form. Parties are frustrated by the lack of authority to appeal when an arbitrator seems to not understand the issue. And so, I think that a cer-
ertain amount of displacement of trials can be ascribed to arbitration, but how much of it, I can’t tell. But I also think that there is increased dissatisfaction with arbitration, and the cases that make it up to the U.S. Supreme Court, which seems to generally like arbitration, are testimony to that dissatisfaction.

I think in *AT&T v. Concepcion*, recently argued at the Court, the questions that the court asked the lawyers indicated a certain amount of hesitation in staying on that arbitration bandwagon.

**J. Russell Jackson:** One of the interesting things about arbitration, and certainly the class issue as it relates to arbitration, is for the decisions kind of outside of California that have recognized that you can basically exclude class actions from arbitration if you do some other things like agree to pay for people’s costs of prosecuting the claim and various other types of financial incentives which, again, increase the expense of it for the defendant.

You find less and less people proposing it because it gets so expensive. But the alternative is also not one that companies often are willing to bear either, so it will be very interesting to see what the Supreme Court tells us about the *Concepcion* case and see how that gets folded into a lot of these form arbitration agreements across the country.

**Audience Member:** Some how it seems that in my federal court I’m seeing a sort of deluge of wage-and-hour cases and you when get to pre-certification discovery and you give it to the defendant and the fight starts with, “Who can contact them?” “How can they contact them?” “What can they find out, what’s personal and what’s not?” They sort of have to reinvent the wheel, it seems, in every case with you just fighting as soon as your feet hit the ground. Shouldn’t there be some more regularity to that, don’t you think, so we can at least find out what we need to find out in order to get to the Rule 23 process?

**Robert S. Peck:** I absolutely agree. There ought to be regularity and the fact—it constantly surprises me, despite more experience with litigation—how many issues seem to be unsettled and have to be individualized in that way. That’s, I think, part of the challenge that we have to find a way past, because that’s what makes cases unduly expensive.

**J. Russell Jackson:** I will tell you—and I don’t do wage-and-hour cases, so I’m not intimately familiar with all of those details—I do know from representing a number of defendants in litigation, it’s amazing the different ways in which documents and basic information is kept by various companies across the board, and depending upon your particular companies that may be subject to wage-and-hour claims. I’m just rattling through the number of different ways in which I can imagine my client would tell me even getting the basic information is going to be extraordinarily costly and
burdensome because we have to go through the SAP system or we have to do this, that, or the other.

The bottom line for me is that I understand absolutely; I think we would all agree that it would be nice to have a standardized answer to the question. It may not be as simple as that when it comes to how people actually keep their records in these cases.

AUDIENCE MEMBER: I’m certain you’ve been in my court, because that’s what I hear. This is in Kansas City, that’s electronic in Cerrito, California, this is in Albuquerque; gosh, we just don’t keep everything together. You get kind of a little suspicious about what they’re doing.

J. RUSSELL JACKSON: You may be suspicious about it. I represent a company right now, and I won’t tell you who they are or really even the industry they’re in, other than to say that they had a number of companies under one umbrella. They bought a competitor and took some of their little companies and they’re here, there, and beyond. Everything is in historic legacy systems; none of which communicate with the other. I have no idea how they do any actual business. But when I have to tell a court, “This is really what we have to do in order to get this information, and part of it involves sending somebody on a plane to Orlando to go through file cabinets,” courts look at me like, “Are you crazy?”

Unfortunately, this is really the way the company operates. And particularly, we talk about access to justice and civil justice, and often people like to think about the companies that I represent—big companies. But there are lots of much smaller companies who employ people and who do many other things, and are in fact, subject to these same kinds of suits who don’t have hugely sophisticated systems for record keeping—particularly when it’s not record keeping that’s going to be making them money or moving product from here to there.

And so, it is frustrating, I am absolutely certain, to be the judge faced with someone who comes to you and tells you that. But I wouldn’t necessarily assume that they’re feeding you a line. In many instances, it really is true. Then the question becomes, “How creative can the lawyers be about trying to shortcut, ‘Well what do we really need? What do you really have to have? rather than, ‘I want everything!’”

AUDIENCE MEMBER: Can you talk a little bit more about the issue of e-discovery—the costs in the emerging rules related to e-discovery?

ROBERT S. PECK: Well, sitting right behind you is Judge Rosenthal who is moderating the next panel which will touch on that, so I think we’re going to let them focus on it.
AUDIENCE MEMBER: Well that was my point in getting into the electronically stored information. The oldest and all of the cloud computing, the court is going to have to be much more proactive in proportionality and the other issues, or we’re going to have a disaster.

AUDIENCE MEMBER: If you recognize that the third-party financing is partly due to the fact that a significant number, if not all jurisdictions, you cannot sell the claims. Have you considered why don’t we create a market that allows people to buy and sell the claims? I understand that there are good ethical objections but that also means the defendant can buy claims.

J. RUSSELL JACKSON: The defendant certainly gets an opportunity to buy the claims in a settlement at any—

AUDIENCE MEMBER: Outside of litigation there would be a pure market for the purpose of sale. That lawyers come, and cut the courts out of it, and creates a market that values the claims which the defendant can buy if they want to.

ROBERT S. PECK: I think that’s a very interesting notion. I don’t think either of us has heard it suggested before, but it points out something else that I think is part of the inadequacy of the analogy that Russell used before when he quoted Judge Posner about going to the roulette table and choosing to spend less than all your money on a gamble. That may be true if you’re treating the time that you’re actually filed against and hauled into court as the moment that you’ve decided to take the gamble.

The fact is that you’ve taken the gamble when you violated the law, whether it’s a wage-and-hour law or employment discrimination law. That’s when you took the gamble. Therefore, the size of that gamble that you took was determined at that point, and not necessarily by the point that you’ve been brought to court to be accountable.

J. RUSSELL JACKSON: The assumption that you’ve violated the law is in fact my point exactly. Many folks don’t think they took the gamble and later in the day get sued for amazing things. Your Crunchberries don’t have real berries in them, and thus that’s a consumer fraud claim. That’s a real suit that was fortunately thrown out by a judge who had some good common sense.

ROBERT S. PECK: Usually the examples of frivolous cases are those that have been thrown out without hesitation.

AUDIENCE MEMBER: Bob you started off this discussion with the observation that access to justice, access to litigation systems, is a big concern and in some sense all the things that were discussed today can be unified
with that theme. And I wonder, as I think about lowered pleading standards, increased use of aggregation, third-party financing of litigation—it seems as though we’re solving this access to justice problem, over and over and over. And so it doesn’t surprise me that we get more litigation; I wonder how we get more meritorious litigation?

ROBERT S. PECK: Well, as I think I outlined, the trends are actually mostly against it. Most of the things that you’ve talked about—more aggregation—the trend is not right now for the courts, more aggregation. The trend is an attack on the aggregation devices that we currently have. Third-party financing is a lovely debate at the moment, but it’s not something that has taken hold. But if you look at the other things that I’m talking about, the expenses in litigation and other obstacles, that’s what is happening. Meritorious litigation is being deterred.

And when you up the stakes—because of the expense of the litigation, because the courts are underfunded, because of the influence of politics—what you’re doing is you’re forcing bigger gambles. You are forcing everyone to go all in on big cases that either pay big or pay nothing. And you’re squeezing out the smaller cases, and that’s the concern that I was expressing.

PAIGE V. BUTLER: Thank you very much to the panelists.

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15 FED. R. CIV. P. 23.
19 See Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), cert. granted sub nom. AT&T Mobility LLC v. Concepcion, 130 S.Ct. 3322 (May 24, 2010) (No. 09-893). Oral argument in the case took place Nov. 9, 2010 as Docket No. 09-813.