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Critical Legal Issues: WORKING PAPER SERIES

WHY SOME "STOP SIGNS" ARE NEEDED:
CIVIL PROCEDURE RULES MUST BALANCE EXPEDIENCY WITH RENDERING JUSTICE

by
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Shook, Hardy & Bacon L.L.P.

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INTRODUCTION

America's civil justice system, the rules which legislators and judges have established for its efficient functioning, and even the rulemakers themselves are under attack by the organized plaintiffs' bar and supportive activist groups. Documentary films such as the 2011 release *Hot Coffee*[1] and the just-released Alliance for Justice movie *Unequal Justice*[2] advance a dim, one-sided view of America's legal system and the judiciary, and have been promoted through advocacy-tinged PR campaigns. Reports from organizations such as the Center for Justice and Democracy extol the virtues of such litigation incentives as unlimited punitive damages and decry efforts to enact fair and reasonable limitations.[3] The U.S. Senate Judiciary Committee has even done its part to advance the narrative, holding a hearing with the loaded title, "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

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[1]For two contrary points of view, *see Hot Coffee, The Movie: Cup-Half-Full Propaganda on Legal Reform* and *Hot Coffee Truth*.

[2]*See* Nan Aron, *The Way Forward*, THE NATION, Sept. 23, 2012.

[3]"What You Need to Know About . . . Punitive Damages"; *see also* Victor Schwartz & Cary Silverman, *Punitive Damage Awards, The Rest Of The Story: A Response To The Center For Justice And Democracy White Paper*, LEGAL BACKGROUNDER (Wash. Lgl. Fndt), Nov. 4, 2011.

This past summer, one of the great law professors and best legal commentators of our time, Professor Arthur Miller, lent his considerable academic weight to this campaign. On July 31, Professor Miller addressed the 2012 Annual Meeting of the American Association for Justice (AAJ), the plaintiffs' lawyer trade association.[4] As a messenger on legal issues, few can match Professor Miller's talent or influence. He is an unquestioned authority on civil procedure and for decades has tried to achieve balance in the law. He has worked to preserve Federal Rule of Civil Procedure 26(c) and the viability of both protective orders and sealed settlements. For those reasons and more, it was surprising to read Professor Miller's published address.

The overall theme of Professor Miller's address was that the U.S. Supreme Court, by action and design, has opted for cases to be terminated early and for trials to occur less frequently. He views such rulings as erecting "procedural stop signs" that are out-of-step with the federal rules of civil procedure, which were adopted to simplify the litigation process. An underlying current throughout Professor Miller's remarks is his hailing of the plaintiffs' bar as "private attorneys general," who determine and enforce "national policy." This WORKING PAPER briefly addresses and responds to Professor Miller's observations in these notions.

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[4]Arthur R. Miller, Awards Luncheon Speech, AAJ 2012 Annual Conference, Chicago, July 31, 2012.

I. "PROCEDURAL STOP SIGNS": UNNECESSARY OBSTACLES OR NEEDED SAFEGUARDS?

Professor Miller decries a series of "procedural stop signs" that he views as imposing obstacles to jury trials and making litigation more expensive for plaintiffs. But are these basic procedural requirements unnecessary, as Professor Miller suggests, or needed safeguards in a developing civil justice system?

Stop signs can be an inconvenience, but they serve an important safety purpose. When a neighborhood is in its infancy—with few pedestrians and few cars—few stop signs may be needed, if any. A small town may have needed no more than a single stop sign in 1938, the year that the federal rules took effect. If you return to some of those towns today, they likely have more homes, more businesses, more cars, more pedestrians and, yes, more stop signs.

The same can be said about the development of the civil justice system over this time period. There are now more laws, more lawsuits, more plaintiffs, and more defendants in each lawsuit, "more experts," and more creative theories than ever before. Today, the civil litigation environment is radically different than it was when the Federal Rules of Civil Procedure were enacted. The difference can be primarily attributed to the increased complexity of litigation. The scale of litigation, the intricacies and advances in legal theory, the scope of legal representation, even the sophistication of litigants, all combine to produce a giant litigation infrastructure that simply

did not exist when the Federal Rules were adopted in 1938. There were no multi-million or billion dollar lawsuits, large national plaintiff and defense firms, or even many of the causes of action most plaintiffs now take for granted. Product liability law regarding warnings and design, which is now a multi-billion dollar litigation enterprise, similarly did not exist as it does today. The mass tort litigation industry is another testament to the incredible leap in size and complexity of legal actions, and the increased specialization among attorneys. Technological innovations such as the computer and jet fighter are a far cry from the farming equipment and automobiles of the 1930s, which at the time of adoption of the Federal Rules represented some of the most complex devices.

Professor Miller, in his remarks to AAJ, acknowledged these changes. He has watched many of them occur during the course of his distinguished career. Professor Miller recognized that when the federal rules came to be, "tort law was primitive by today's standards" and that "civil rights, employment discrimination, environmental, consumer protection, and product safety litigation basically did not exist." Mass and class action litigation, as well as other complex cases, he noted, are now "commonplace." As Professor Miller observed, "Over the past 65 years, we have had the most extraordinary growth in federal law in this country's history."

Professor Miller clearly recognizes the dramatic way that litigation in American has developed over time. For that reason, it is all the more

surprising that he disregards the value of the types of procedural safeguards that the Supreme Court has recognized to address those challenges and preserve the integrity of the civil justice system in this new environment.

II. THE FEDERAL JUDGE AS A GATEKEEPER OVER THE RELIABILITY OF EXPERT TESTIMONY

Professor Miller correctly observed that "[t]oday, issues of science, technology, communications, economics, and legal complexity are commonplace" as well as litigation involving "mind numbingly complex financial transactions, technology claims, defective products, and improper governmental conduct." Yet, he attacks the Supreme Court's deputizing federal trial judges as gatekeepers over the reliability of scientific evidence as unnecessary ("I didn't know we needed gatekeeping") and particularly burdensome for plaintiffs. Over the past two decades, the vast majority of state courts and legislatures have voluntarily adopted the reasoning of that decision, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

It is true that the *Daubert* decision places a burden on lawyers for both sides to select experts whose opinion is not merely bought and paid for, or predicated on speculation, but is rooted in sound science. But, as Professor Miller knows, judges must take some action to prevent juries from being misled by hired guns who simply dress well and have degrees from good schools. Experts have powers far beyond ordinary witnesses. They may testify as to conclusions. They can testify on the basis of hearsay. They testify about

matters that juries know little or nothing about; otherwise, expert testimony is not necessary and is disallowed. Given the increased complexity of litigation, rising reliance on experts, and the special advantages provided to them by the federal rules, the gatekeeping role is a needed safeguard to ensure juries are not misled by junk science.

In addition, Professor Miller's suggestion that the *Daubert* decision allows defense attorneys to create huge billable hours does not bear out in fact. If a *Daubert* motion is successful, and the court does not permit testimony from a plaintiff's expert on a critical element of his or her claim, that is the end of the case and the defense lawyers go home.

III. THE PLAUSIBILITY STANDARD OF *IQBAL/TWOMBLY*

Professor Miller also recognizes that back in 1938, "the typical lawsuit involved a single plaintiff and a single defendant jousting about what usually were relatively simple matters," while, today, class and mass actions are "commonplace" and litigation is generally more complex. Nevertheless, Professor Miller harshly criticizes two Supreme Court decisions, *Bell Atlantic Corp. v. Twomby*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which held that a complaint should provide enough detail to show that a claim is plausible. The move away from bare "notice pleading" was necessary because today, plaintiffs' lawyers frequently file "shotgun" lawsuits that name dozens of defendants, leaving them to wonder what law they allegedly violated

or role they are accused of playing in the plaintiff's injury. For example, *Twombly* arose in the context of a class action against multiple telephone carriers that vaguely accused them of price fixing.

The plausibility standard is very basic. It requires a complaint to include "enough facts to state a claim to relief that is plausible on its face." It does not allow lawyers to cut-and-paste into a complaint a "formulaic recitation of a cause of action's elements." According to the Court, plausibility "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the wrongful conduct alleged. The Court was adamant to distinguish the need to show "plausibility" from "probability," addressing Professor Miller's concern that it will drive courts to conduct an early merits inquiry.

Given the complexity of litigation today, with multiple plaintiffs, defendants, and legal theories in a single complaint, it is reasonable to expect plaintiffs' lawyers to provide more detail to defendants as to the basis of their allegations. *Iqbal* and *Twombly* simply require that before imposing, in the Court's words, the "potentially enormous expense of discovery" on defendants, plaintiffs should provide enough detail of the basis of their lawsuit to allow meaningful consideration of whether they have a claim at all. The alternative is to impose costs on individuals and businesses for clearly meritless allegations and allow discovery that is no more than a fishing expedition to "catch" a claim.

Contrary to what Professor Miller suggests, there is no evidence suggesting that these decisions have blocked legitimate cases, though the issue has been studied carefully. For example, the Federal Judicial Center compared rulings the year preceding *Twombly* to 2010. Its empirical study found that while the number of filed motions to dismiss increased, there was no increase in the rate at which courts granted such motions.[5] Neither Congress nor the Federal Rules Advisory Committee has decided to change the requirement that a complaint include a plausible basis for a claim.

IV. "SIGNIFICANT PROOF" FOR CLASS CERTIFICATION

Professor Miller also criticizes the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) as posing an unnecessary barrier to class action litigation. That criticism is not supported by the holding and reasoning of the case. The *Dukes* decision merely stated that if a single lawsuit is going to broadly accuse a company of employment discrimination (or any other misconduct) on behalf of thousands, hundreds of thousands, or even over a million people, the claims must identify a common practice or course of conduct that caused the plaintiffs' harm.

When Federal Rule of Civil Procedure 23, which governs class actions, was adopted in 1938, no one envisioned that such lawsuits would purport to represent classes spanning the entire country, 3,400 stores, and over one

[5] Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After* Iqbal*, Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, Mar. 2011).

million people. The modern class action came about only after a revision of great practical importance to Rule 23 in 1966, which, instead of requiring class members to "opt in" to the litigation, required that they opt out. This led to much larger classes. With that change came the need for stronger safeguards to protect both the due process rights of plaintiffs, who would be bound by such a judgment, and those of defendants, where the required elements of individual claims or available defenses might be disregarded.

Dukes involved a class of all current and former female Wal-Mart employees. The lead plaintiffs vaguely claimed that the retailer had a "corporate culture" permitting bias against women, without identifying any particular policy or action that supported the allegation that they were at a disadvantage to men for pay raises and promotions. The case was indeed controversial, but Professor Miller, who knows class action rules better than almost anyone, neglects to mention that the Court unanimously held that the class should not have been certified under Rule 23(b)(3) because the plaintiffs sought monetary relief (back pay), that was not incidental to any injunctive or declaratory relief that might be available. The Court split sharply as whether the class could be certified at all, but the majority did not simply throw down an arbitrary barrier to bringing class actions. Given the sheer magnitude of the litigation, the Court understandably focused on the requirement of commonality of claims in class action litigation. The Court found that, without identifying a particular discriminatory practice, the lawsuit lacked "some glue

holding" its claims together and was essentially a lawsuit "about literally millions of employment decisions at once." In order to bridge that gap, the majority found that lawyers for the proposed class must offer "significant proof" of a discriminatory policy common to the class members. Reliance on statistical evidence about pay and promotion disparities between men and women, standing alone, was insufficient to hold the class together.

If the Supreme Court had allowed the case to stand, it would have provided heavy weaponry for Professor Miller's audience: the organized plaintiffs' bar. But the claimants were not left without remedies. Individual lawsuits and smaller, more focused, class actions with common factual and legal issues could proceed and in fact have proceeded.

Class certification transforms one case into a lawsuit involving thousands, a hundred thousand, or, as in *Dukes*, 1.5 million potential claimants. Classwide damages can reach into the billion-dollar range. As the Supreme Court observed in an earlier case, "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense."[6] Judges have recognized that the sheer size and complexity of the action, as well as the added time, expense, and effort needed to defend it as a class suit may force the defendant, despite the doubtful merit of the claims, to settle rather than to pursue the long and costly litigation route required for

[6] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978).

review of the class action certification. Given the extraordinarily high stakes of class certification, requiring commonality of the claims is essential. One can call this a "procedural stop sign," as Professor Miller does in his remarks, or consider it a basic due process safeguard.

V. AN UNWARRANTED, BROAD ATTACK ON THE SUPREME COURT

Professor Miller's attack on the Supreme Court goes beyond a few of its recent rulings. He states that the Court "seems to have a thumb on the scale of justice favoring defendants that has had significant consequences on the access to courts." But the total picture of Supreme Court decisions belies this assertion, even in the specific areas of law discussed by Professor Miller, for example, punitive damages and federal preemption.

A. Punitive Damages

Professor Miller scorns the Supreme Court for "constantly" limiting punitive damage awards. The professor appears to be thinking of punitive damages of the distant past, which were infrequently awarded, limited to a narrow set of intentional torts, and miniscule in size by today's standards.[7] By the 1980s, punitive damages had "run wild," leading to a cascade of procedural and substantive due process safeguards to ensure defendants have notice of the potential penalties, and that punitive damage awards are tied to the defendant's conduct toward the plaintiff and the harm he or she experienced,

[7] *See* Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Punitive Damages Reform By Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1006-08 (2000).

not simply being a member of an unpopular industry, or a disfavored company. Even so, the Supreme Court has upheld very substantial punitive damage awards, which were left unmentioned by Professor Miller.[8] Decisions overturning extraordinarily high punitive damage awards were not arbitrary; to the contrary, they reflected careful and studied concerns of limits that are predicated upon the Constitution's basic rights of procedural and substantive due process, including notice and proportionality.

B. Federal Preemption

The Supreme Court has not acted indiscriminately in finding federal preemption of state tort law claims, another example of Professor Miller's focus on the past. It is understandable that assertions of federal preemption may have become more frequent over time, given that the federal government has drastically expanded its regulation of product safety, particularly since the 1960s. In that context, the Court has carefully considered whether manufacturers who have carefully followed federal safety standards or included federally-mandated warnings are subject to tort suits claiming those very aspects of their products are deficient.

Defendants have not had an easy time invoking the doctrine of preemption. For example, the Court has found that failure-to-warn claims

[8] *See, e.g., TXO Production Corp. v. Alliance Resources*, 509 U.S. 443 (1993) (affirming $10 million punitive damage award stemming from slander case involving $19,000 in actual damages); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (upholding $1 million punitive damage award that was more than four times the amount of compensatory damages, more than two-hundred times the out-of-pocket expenses of plaintiff, and significantly higher than the fine that could be imposed for the conduct at issue).

against makers of brand-name prescription drugs are generally not preempted because these manufacturers can unilaterally change their labeling. *Wyeth v. Levine*, 555 U.S. 555 (2009). A majority of the Court later granted preemption to manufacturers of generic drugs because they did not have such authority under federal law, *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011), but that decision had not a trace of being "corporate friendly." It was firmly rooted in the conflict between the theory underlying a tort claim, which said the manufacturer must strengthen its product labeling, and federal regulations, which said the manufacturer could not do so.

This careful analysis extends to automobile design regulation, where the Court found that tort claims against a manufacturer alleging that it should have installed passenger side airbags were preempted because the National Highway Transportation Safety Administration (NHTSA) made a conscious public policy choice not to do so (At that time it approved the regulation, it was believed that such a requirement could discourage seatbelt use and concerns remained that the technology could injure certain occupants, particularly children. *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)). More recently, however, a unanimous Court ruled that state tort suits alleging that automobile manufacturers should have installed lap-and-shoulder belts, rather than simply lap belts, on rear inner seats were not preempted by federal auto safety standards.[9]

[9] *See Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011).

As these examples show, as do others, the Court has sparingly and discriminatively recognized defenses based on federal preemption of tort law.

C. Arbitration

Professor Miller even labels a Supreme Court ruling that applied longstanding federal policy, codified in law, favoring informal, streamlined proceedings over lengthy and expensive litigation, among the Supreme Court's latest procedural stop signs.

In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), a divided Supreme Court ruled that consumer contracts may include an agreement to arbitrate any dispute that arises between the company and the individual, rather than between the company and lawyers representing a large group of consumers. Professor Miller assails the ruling as "replac[ing] judges and juries with one-by-one arbitrators for resolving disputes better adjudicated by class action or other forms of aggregation." But as the majority recognized, requiring arbitration on a classwide basis "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." In fact, the district court in the case, which considered detailed evidence, found that the consumers were actually better off under the arbitration agreement than they would have been as participants in a class action.[10] Class actions take

[10] *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *11-12 (S.D. Cal., Aug. 11, 2008), *aff'd sub nom., Laster v. AT & T Mobility LLC,* 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.*, *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

substantial time and often result in awards where the attorneys' fees far exceed whatever small amount goes to members of the class.

The Federal Arbitration Act (FAA) recognizes arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. It has been federal law since 1925. In effect here, Professor Miller rejects a public policy that has been in place for nearly a century, while he wishes to freeze pleading standards from 1938. Could it be that his "consistency" is his concern over any decision that disfavors the litigation interests of the plaintiffs' bar?

VI. SHOULD UNACCOUNTABLE PRIVATE LAWYERS SET AND ENFORCE NATIONAL POLICY?

Perhaps it is not surprising that Professor Miller cherry-picked Supreme Court decisions that he viewed as making it more difficult for plaintiffs to prevail in court given his audience: America's organized personal injury bar. His address was received with enthusiasm and was widely publicized by the class action firm, Milberg LLP, where Professor Miller has served as special counsel since 2008. Professor Miller is a strong advocate and it was not his job to balance his comments by discussing in more depth the dramatic expansion of tort liability and federal statutory remedies that have occurred since 1938, which necessitated such "procedural stop signs." It is also not surprising, given his plaintiffs'-lawyer advocate audience, that Professor Miller sets up as heroes what he calls the "public interest bar." His remarks, however, go beyond hailing the good work of plaintiffs' lawyers to obtain recovery for

people who have been harmed due to the carelessness or wrongdoing of another. Rather, Professor Miller enshrines the concept of the private plaintiffs' lawyer as a "private attorney general." This philosophy should concern us all; it has significant implications for a representative government.

In Professor Miller's words, plaintiffs' lawyers play a vital role in the "private enforcement of national policies." Professor Miller states that Supreme Court decisions, such as those discussed above, and tort reform, "jeopardize[] this Nation's longstanding legislative and judicial commitment to the private enforcement of its *fundamental public policies* and constitutional principles to compensate victims." Professor Miller suggests that "[i]f procedural rules are not receptive to lawsuits designed to vindicate those *policies and principles* . . . they will not be instituted. . . ." (emphasis added). He hails the "wonderful and creative legal work" of the plaintiffs' bar as providing an "indispensable satellite regulatory system."

It could sound to some that Professor Miller has endorsed a fourth branch of government, one that is accountable to no one, whose role is to make and enforce the public policy of the United States. He decries a backlash "against private enforcement of public policies." But who has determined these policies? Not elected representatives. Not government agencies or officials. They are determined by plaintiffs' lawyers who depend on profitable lawsuits for a living and politically-driven organizations that need to raise funds to show their worth and survive. Who elected or appointed these

individuals to act as surrogate attorneys general?

Federal statutes provide rights and remedies established by Congress. Tort law makes a person whole for an injury due to improper conduct of another. It should concern us when lawyers, with their own particular interests and beliefs, use the civil justice system not to rectify a loss for, or vindicate the rights of, a particular client, but to impose national public policy.

Along similar lines, Professor Miller suggests that federal courts at every level have created an injustice by declining invitations from the plaintiffs' bar to create "implied causes of action" from federal statutes. Such rulings represent sound public policy, not injustice. If Congress enacts a federal regulatory statute and charges a government agency with enforcing that law, including through imposing significant civil penalties, by what right does a single judge "create" his or her own new private right to sue? Certainly, when Congress intends to create a private right of action, it can and has explicitly done so when it enacts legislation. Federal court decisions that refuse to "divine new ways to sue" are to be commended for upholding the democratic process, not criticized.

CONCLUSION

Professor Miller states that "special interests"—his code words for those who support tort reform—"have defamed [Americans] as litigious fortune hunters." He even invoked the famous McDonald hot coffee case, which he views as "grossly mis-described" in the media. The media, however, described

it *properly*: a woman spilled coffee on herself and won a lawsuit that eventually settled for a substantial amount.[11] Truth be told, those who support tort reform have not criticized American citizens, they have championed them. Those who support tort reform have serious concern about the impact of lawsuits brought by wealthy plaintiffs' lawyers who place their own financial interests above the public interest. In sum, Professor Miller's remarks were meant to rouse his audience, the organized plaintiffs' bar. His remarks do not, however, provide an objective view of the development of the civil justice system.

[11] *See* http://www.hotcoffeetruth.com/.

