CALIFORNIA LAWYER

Roundtable Series

November 2016

Class Action

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Roundtable Series

Class Action

As the late U.S. Supreme Court Justice Byron White once said, "When you change one Justice, you change the whole Court." It leaves practitioners to wonder, will the next president seize upon Justice Scalia's unfilled seat to profoundly reshape the balance of the Supreme Court? On the policy front, a new rule barring mandatory arbitration clauses in nursing home contracts provides a launch point for a spirited discussion on class action waivers and arbitration reform. Our panel of experts discussed these issues as well as emerging trends in class action settlement approvals and third-party litigation funding.

California Lawyer met for an update with Steven A. Ellis of Goodwin Procter; Thomas V. Girardi of Girardi Keese; Brad W. Seiling of Manatt, Phelps & Phillips; and Daniel L. Warshaw of Pearson, Simon & Warshaw.

Participants

STEVEN A. ELLIS
Goodwin Procter

THOMAS V. GIRARDI
Girardi Keese

BRAD W. SEILING
Manatt, Phelps & Phillips

DANIEL L. WARSHAW
Pearson, Simon & Warshaw

Moderated by
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DISCUSSION

MODERATOR: What's next for the U.S. Supreme Court and class actions following the presidential election? Will we see a significant shift in the Supreme Court's balance on class action cases?

DANIEL L. WARSHAW: We have many issues to face if Mr. Trump is elected. He's currently a defendant in a class action lawsuit pending in the Southern District of California. His statements regarding the judge have been very prominent in the news. He would be interested in appointing Supreme Court nominees who would be more pro-business than pro-consumer rights, based upon his personal experience going on right now in the class action world.

STEVEN A. ELLIS: I agree. Secretary Clinton would appoint Justices who are far more sympathetic to class certification and more hostile to arbitration. The election of Mr. Trump would move the Court in the opposite direction. The balance of the Supreme Court is certainly an important issue in this election. As one example, *Campbell-Ewald v. Gomez,* 577 US _ (2016)—about tendering the amount owed to the class representative to moot the case—was a 5-4 decision. One vote, plus or minus on either side, could start making a difference right away.

BRAD W. SEILING: Trump has said Justice Scalia is his model for a Supreme Court Justice. Scalia led the charge on the pro-business, anti-class

STEVEN A. ELLIS is a partner in Goodwin Procter's Los Angeles office. He has extensive experience defending class actions brought against financial institutions, insurance companies, and other corporations involving money transfers, credit card processing, and financial services. Many of these cases have involved allegations of consumer fraud, unfair business practices, breach of contract, and violations of federal and state statutes. Mr. Ellis clerked for D.C. Circuit Judge Douglas H. Ginsburg.

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action side of many of the recent class action decisions. Overall, the Supreme Court's class action cases get a lot of hype before the decision comes down, but the actual rulings, often 5 to 4, are incremental decisions that don't make a sweeping impact—*AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), is maybe an outlier given its sweeping scope and impact. But other decisions have been very focused on the facts and just lead to a lot more litigation about what that case really means. The big question is where the Court's needle will move in those close cases.

THOMAS V. GIRARDI: There are two issues: what happens in the presidency, of course, but also what happens in the Senate. The Senate has an awful lot to do with it. If Trump should win this election, and if the Republican majority in the Senate doesn't change, that's one thing—Holy Toledo; call your mom. On the other hand, if the Democrats win, but do not take the Senate, then you need the Senate to go along with the nomination. Either way, we do know there are probably going to be four appointments in the next term. So it's going to make a huge difference in people's lives, one way or another, without a doubt.

MODERATOR: How will *Tyson Foods, Inc. v. Bouaphakeo*, 577 US _ (2016), affect class certification?

ELLIS: Before the decision, some people thought that this case was going to bring about a major change in class certification cases. But it ended up being a middle-of-the-road ruling. The Court's ruling doesn't mean that statistical evidence will always be admissible or sufficient to establish certification or liability. Judges will continue to have some discretion to consider a broad range of evidence, including statistical evidence.

SEILING: Under *Tyson Foods*, a defendant could bring in its own statistical evidence that contradicts the plaintiff's statistical evidence, or even bring in individual class members to say, "Here's what their expert economist or statistician says. But here are 10 people who are members of this class who say something very different happened to them." You are going to have fights over whether the statistical evidence proves the case or whether it shows that maybe this case shouldn't be certified as a class.

WARSHAW: I agree, it's a middle-of-the-road decision. Steve [Ellis] put it correctly, the decision gives discretion at the trial court level to evaluate the statistical evidence coming in to see if it's sound, and to follow the typical, federal jurisprudence, like *Daubert*.

I don't think *Tyson Foods* or *Spokeo* were ever going to be class-actions-are-over kinds of cases. But *Campbell-Ewald v. Gomez*, the Rule 68 "pick off" case, was something that the plaintiff's bar was concerned about, even though, personally, I didn't think it was going to get much traction in the Supreme Court, which it didn't.

ELLIS: You're right. The defense argument didn't prevail in *Campbell-Ewald*, but there were four Justices who seemed quite interested in that argument and quite open to it. Prior to that decision, plaintiff's lawyers in the Seventh Circuit were regularly filing class certification motions with their complaints to try to avoid any attempt to "pick off" plaintiffs. I had a case here in the Central District where plaintiff's counsel filed a Jane Doe complaint for the same reason; to try to avoid a "pick off." Had *Campbell-Ewald* come out differently, I'm sure plaintiff's lawyers would have come up with different ways to try to combat it.

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Class Action Cases
get more complicated on a daily basis.
The law varies from State-to-State.

Tom Girardi & the Girardi|Keese firm have crossed many difficult bridges and would like to share some insight into all aspects of the class from certification…to notice…to resolution

I think the time would be very worthwhile if you are now or want to be involved in this very interesting area of the law.

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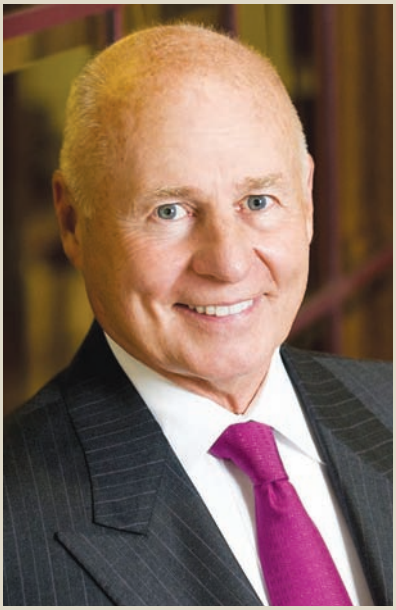

THOMAS V. GIRARDI, founding partner of Girardi & Keese in Los Angeles, has been called the most feared plaintiff's lawyer by the Association of Southern California Defense Counsel. He was inducted into The American Trial Lawyers Hall of Fame in 2014, and listed as a top 100 lawyer in California by the *Daily Journal* legal newspaper. He currently serves as a trustee appointed by the Senate for the Library of Congress.

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The *Campbell-Ewald* decision left open some issues—for example, about what could be considered a full tender—that might be revisited depending on who's on the Court in the future. If Mr. Trump were to win and appoint two or three or four Justices, it could have a big effect on this issue.

SEILING: There is an interesting open issue under *Campell-Ewald*, a California-specific issue, dealing with CLRA demand letters. What happens if a defendant, in response to a CLRA demand letter, offers money to the plaintiff and their attorney, but the plaintiff rejects it to pursue a class action? Then, in the federal court, that individual does not have an injury. What is their right to bring that lawsuit if they've been "picked off," but earlier in the process before a suit is filed?

WARSHAW: It is an interesting concept. However, giving a class representative a narrower form of relief does not make that person whole. It would not meet the settlement demand that plaintiffs are making—they want class relief.

ELLIS: I would argue it does make the named plaintiff whole.

WARSHAW: Then we keep getting more plaintiffs and keep sending more letters. And your clients have to keep litigating or settling cases piecemeal.

MODERATOR: Will *Spokeo v. Robins*, 578 U.S. _ (2016), significantly impact standing?

SEILING: *Spokeo* was a case that was taken up by the business community and the Defense Bar to say these statutory damage cases shouldn't be permissible. That view didn't prevail, and the Supreme Court left a lot open to be determined by the Ninth Circuit and other courts. I think, ultimately, *Spokeo* will have a greater impact on class certification than on pleadings challenges. On the pleadings, the court must accept the plaintiff's allegations as true, so it is relatively easy to plead a concrete but intangible injury.

But can you *prove* your concrete and intangible injury? What does the evidence show? Standing doesn't go away; it can be raised at any time. A plaintiff might get by a Rule 12(b)(6) or 12(b)(1) motion, but what happens if your named plaintiff chokes at the deposition and says they haven't suffered that concrete and intangible injury? What do you have on class certification? How do you determine on a class-wide basis that everyone has suffered that concrete and intangible injury?

So I think you're going to see a lot of action with defendants filing *Spokeo* motions to get rid of cases. Most will probably be unsuccessful on the pleadings. But if you have a plaintiff who testifies at trial, and indicates that they have not suffered the injury that is the basis of standing, the case should be dismissed.

GIRARDI: This is a lesson for the plaintiff's lawyer: clean up your act, pal. Get somebody who has suffered actual damage in this case to serve as the representative member. When you do that, it's fine to have other class members off to the side. I don't think there's ever a situation where the defendant says, "We're going to pay these class members, and we don't want to pay these members." Generally, once the defendant wants to resolve the thing, they want to get the whole mess over with. So the plaintiff's lawyer better do the right thing to have a decent chance for success.

ELLIS: *Spokeo*'s biggest effects on the practice area may be unseen. It may affect settlement negotiations. It's a reminder to all of us on both sides

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>
> – STEVEN A. ELLIS

that there does need to be some actual harm. It doesn't necessarily need to be tangible or quantifiable, but it does need to be actual in order for the plaintiff to proceed.

WARSHAW: When a defendant violates the law and someone's been injured, we have issues between Article III standing and damages for the class—the "damages" class versus the "statutory damages" class. And as a plaintiff's lawyer, you have to plead a complaint that fits the class mold. As soon as you deviate from that concept, individual issues may wind up predominating, and you get yourself into a situation where you can't certify the class.

To avoid those pitfalls, as Tom [Girardi] said, you get the best class representative you can, and you figure out your path and commit to it. If you're smart about it, you can figure out *Spokeo*, and you can figure out how to prove a "statutory damages class," and get it certified while avoiding an Article III issue.

MODERATOR: What are the latest developments on arbitration provisions and class waivers? Is there anything new on the regulatory front?

GIRARDI: I'm all in favor of arbitration if they each have lawyers and willingly enter into an arbitration agreement to resolve their dispute. That's perfect. When you bury some clause on the seventh page of your Visa application that says, "Oh, and by the way, you waive your right to a jury trial; you have to arbitrate any disputes that arise from this agreement," I think that's totally wrong.

We're starting to see cracks in it. For example, the Centers for Medicare and Medicaid Services issued a rule recently blocking nursing homes from using forced arbitration agreements. It's a sign that people are finally deciding that we have got to be fair about arbitration.

MODERATOR: Do you think the presidential election might lead to reforms of the arbitration process? In May, Secretary Clinton pledged to expand on the Consumer Financial Protection Bureau's rule aimed at curbing the use of mandatory arbitration clauses in company contracts signed by customers.

SEILING: I do think there's a way that the election and who is in charge of the regulatory state could impact the future of arbitration. We have seen the CFPB get involved. As Tom [Girardi] pointed out, we have now also seen CMS get involved, saying arbitration provisions are not appropriate in contracts for residents of skilled nursing facilities. In a Clinton Administration, other regulators who have control over parts of the economy—for example, in transportation—might say arbitration doesn't work there.

That fight could end up in the Supreme Court: does the CFPB actually have power to enact those regulations and how do those regulations fit with the Federal Arbitration Act? The business community, the financial industry, maybe the skilled nursing industry, will likely challenge those regulations, arguing that these are not appropriate exercises of regulatory authority. It would give the Supreme Court an opportunity to look at *Concepcion*. That's a long-term play, but that's the next battle on arbitration.

WARSHAW: I, too, think the pendulum is swinging back a little bit towards going against forced arbitration in the regulatory area. We don't need to get into whether *Concepcion* is correct or not; it's the law of the land. I agree with Brad [Seiling]; it boils down to

whether or not a regulatory agency has authority over these forced arbitrations and class action bans. That's the next round that's going see some traction.

ELLIS: It's interesting to talk about the example of the CFPB. Congress specifically asked the CFPB to take a look at arbitration, but the CFPB's proposed rule is fairly modest. The rule assumes *Concepcion* is the law of the land. We live in a post-*Concepcion* world. I haven't heard about any plans to overturn *Concepcion* or to repeal or amend the Federal Arbitration Act. Even if Democrats controlled both houses, I don't think they would have the votes to turn it over.

GIRARDI: You're wrong.

ELLIS: Am I? Let's assume there was a small Democratic majority. You don't think there would be five or ten defectors in the House on an issue like this?

GIRARDI: Perhaps. But I think if Democrats controlled both houses, arbitration would go back to the way it should be: when people truly agree to it, as opposed to imposing it on someone after burying the clause in some document.

SEILING: In an ideal world, you would like to see policy like this made by Congress and the president. And because nothing seems to get passed in Congress these days, the regulatory field is where the action is. Regardless of who wins, I think that's going to continue.

MODERATOR: Have arbitration clauses with class action waivers created an efficiency gap in resolving disputes?

ELLIS: *Concepcion* answered that question: if you have a valid and enforceable arbitration clause with a class action waiver, those cases have to be determined in individual arbitrations. It might or might not be the most efficient way to resolve things, but under *Concepcion*, it is within the power of the parties to agree to arbitration when they're making the contract.

SEILING: And that's not to say a defendant, in certain circumstances, wouldn't want to waive their contractual right to arbitration, and say, "We did something wrong, and instead of 1,000 individual arbitrations, we'd rather resolve this on a global, classwide basis."

GIRARDI: It is a license to steal. Let's suppose Wells Fargo steals $10,000 from you. How are you ever going to get a lawyer to represent you on a case like that? There's no way. Because the costs are going to be more than $10,000 to go through it—way before you even talk about legal fees. No one would take that case. The lawyer would go broke. So that person has no rights, really, individually. That is why forcing people into individual arbitration is awful. It isn't fair. It isn't right.

This isn't all just some terrible plaintiff's lawyers wanting money; this is fairness to good companies that are doing the right thing. They can't compete with companies that get ahead by doing the wrong thing, and the only leveler is the courthouse with a class action.

WARSHAW: Tom is 100 percent right. And I'll just say this from the plaintiff's side: I get these phone calls all the time, where I have to tell people, "Sorry, you're subject to a forced arbitration provision. There's nothing I can do." These are cases where it's important to get redress, but it's economically unfeasible to take them because of the cost of the arbitration fees alone.

BRAD W. SEILING is the co-chair of Manatt, Phelps & Phillip's class action defense practice group. His practice focuses on complex commercial litigation in state and federal courts at the trial and appellate level, and he specializes in defending consumer class action lawsuits. His national class action experience ranges from challenges to the pleadings through trial and appeal. Mr. Seiling has extensive experience litigating certification issues, settling class actions, and defending settlements against objections.

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On the other hand, the class action device gives us the ability to bring multiple small claims, allowing us to help people who have been wronged. We're talking about a bad actor doing something wrong and profiting from it, and there's no redress. And Tom [Girardi] is right. Its competitors should say, "Wait a minute, what's going on here? They are more profitable than us because they are breaking the law, and they're going to get away with it."

SEILING: Well, that assumes that you're the only cop who's out there regulating this conduct. There are regulatory agencies.

WARSHAW: But regulators can't address everything. They don't have the resources to address all these issues.

GIRARDI: Let the regulators do it? Give me a break. If I'm the injured person, do the regulators say, "Hey, immediately mail Tom $20,000?" I haven't gotten it in the mail, if that's the case. Regulators are different from a courtroom. They are different from a jury that listens to the story. Regulators can't get the job done.

ELLIS: Some studies have shown that when consumers are able to bring individual arbitrations, the outcomes tend to be better for consumers. Class actions are not a perfect means to provide redress to consumers. In many class actions, consumers get very little and the lawyers get a lot. That raises public policy concerns on how to provide meaningful redress to consumers.

It would be great if Congress and the president could actually sit down and have this discussion as a matter of public policy: how much enforcement do we want of consumer laws? To ask us to litigate that issue before an individual district judge or superior court judge, or even an appellate court, is just beyond what we can reasonably hope to accomplish.

GIRARDI: At the end of the day, I think if a company has done the right thing, it's wonderful. If a company has done the wrong thing, then there has to be a good mechanism—a fair mechanism—for them to pay back the people that they harmed. That's all there is to it. And, indeed, our current arbitration system doesn't do that.

MODERATOR: Uber recently experienced two high-profile class action settlement rejections. What are some methods of working collaboratively with opposing counsel to help ensure final approval of a class settlement?

WARSHAW: We are at an interesting time for settlements in the class action context. The parties have to become partners to get the settlement approved by the court. But the parties are still advocates. The plaintiffs' attorneys have to maximize the settlement for the class and defense counsel have to make sure it's fair to their client as well.

The judge is going to delve into these issues and look at the litigation risk along with the amount of the monetary value of the settlement, the injunctive relief, and the scope of the release. If the judge doesn't raise an issue—for example, an overly broad release—objectors can raise it.

The Uber independent contractor misclassification case in front of Judge Chen got rejected because of the way plaintiffs' counsel valued the case prior to the settlement. One of Judge Chen's concerns was the Private Attorneys General Act, the (PAGA) claim. And plaintiff's counsel said this claim is a $1 *billion* claim, and they settled for $1 *million*. You have to be careful about how you publicize the claim—plain-

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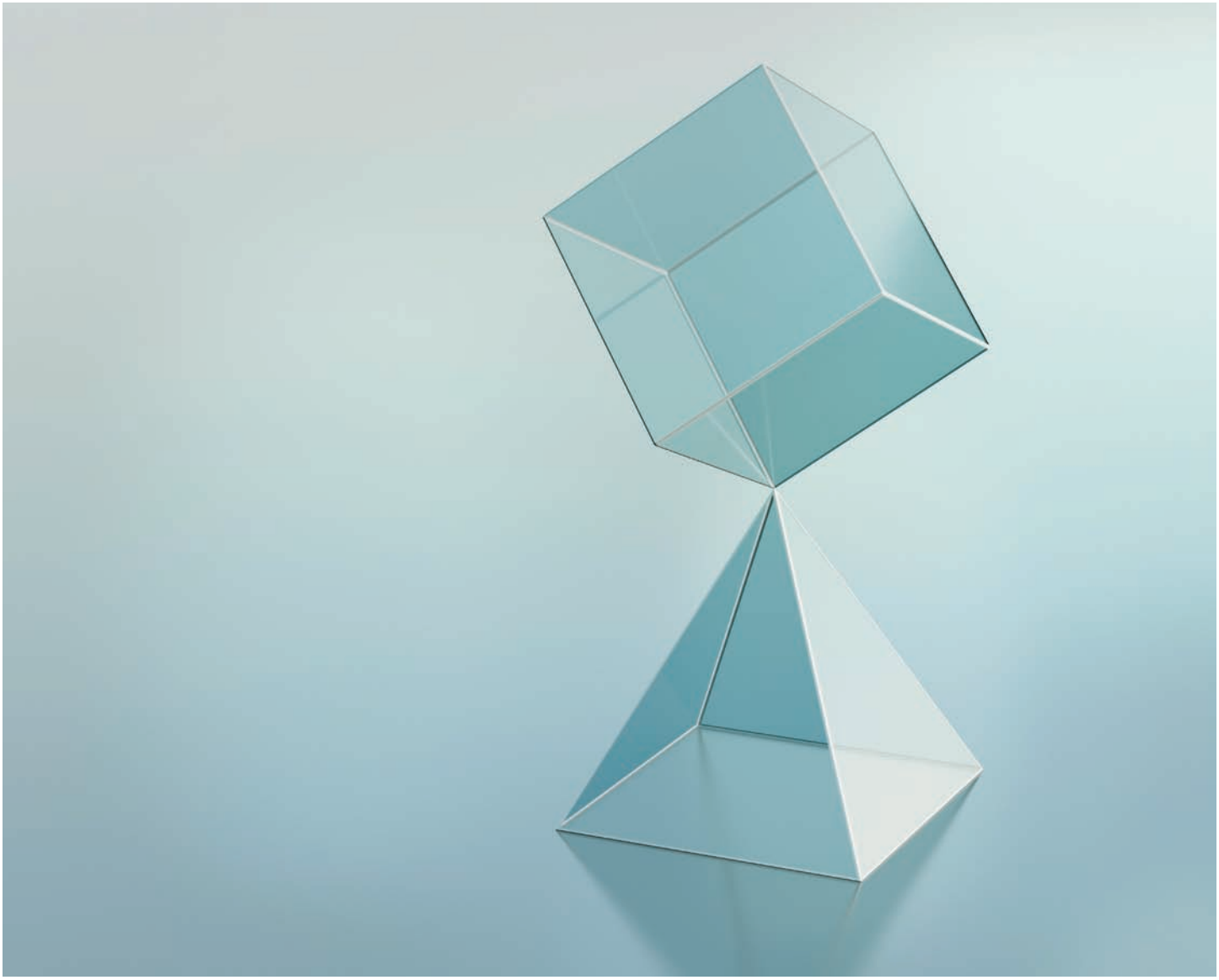

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>
> – THOMAS V. GIRARDI

tiffs overstated their hand. It is fine to settle and compromise, but you have to back it up when you get in front of a judge, and explain that the settlement is fair and reasonable under Rule 23, and your settlement should proceed.

GIRARDI: I hate to chastise my brotherhood but when settlements get rejected, it's usually the fault of an inexperienced plaintiff's lawyer—often by making overly broad allegations. Your opposing counsel wants to solve the problem, too. They don't want this settlement to be rejected. So if the plaintiff's lawyer sets forth a reasonable idea to the other side, the settlement will likely be approved.

SEILING: I do think judges are looking more closely at class settlements, and there are more professional objectors out there than before. To me, both sides need to follow a simple rule: don't get greedy. There are things that defendants do that raise red flags for a judge or an objector—for example, not giving notice in order to try to fly below the radar. Or seeking broad release to wrap up similar but non-identical lawsuits in one package on the cheap.

GIRARDI: Although it isn't statistically proven, but just in talking to various judges, it seems to me that about one-third of class action settlements are rejected. Sometimes the plaintiff's lawyer is overreaching on legal fees. Plaintiff's lawyers aren't used to hourly billing or keeping good billing records. So then they just come in and say they want $1 million for their great services on this case. It doesn't work that way. Judges get very dismayed by that.

ELLIS: These are difficult issues. The Uber case was difficult because there were so many cases pending against the company. Obviously, the narrower the release, the more likely you are to get approval, but it can be a hard sell on the defense side. The defendant will make a substantial payment in a class action settlement. Even sophisticated clients who are not trying to over reach have a legitimate desire to receive, in exchange for the payment, a release that will resolve all of the pending cases. This gets particularly problematic when you are facing multiple cases scattered across the country. Some are class cases, others are not; some are state-specific; some have overlapping claims but only partially. It gets very messy. And you have the defendant say, "Maybe we did something wrong. We want to get this resolved and move on to sell our product and service and not pay lawyers anymore." There's no simple solution.

WARSHAW: I'm noticing a trend for the last two or three years where the courts are taking a more serious look at preliminary approval, which I think is actually a good thing for everybody. You get the court proactively thinking about why it's being settled, what the claims are and what the litigation risks are before you get to final approval because that's when the objectors are going to come in. And the judge is taking their duty seriously to independently evaluate the settlement on behalf of the absent class members.

ELLIS: It is a very positive development to have judicial scrutiny at preliminary approval—otherwise the parties may pay $1 million or more notifying the class, and then if a problem arises that could have been easily predicted at the beginning, they have to go back and re-notice the class. It confuses class members and hurts the system. When you have a judge engaged up-front, you avert some of those problems. There will always be some class settle-

ments that are not approved at final approval. But if you can minimize that, both sides are better off, the system is better off, and class members are better served.

GIRARDI: Many lawyers aren't even aware of these guidelines that are put out by the court. When you know the guidelines, you are able to say, "Your Honor, here's the list of the things you wanted—here's the class definition, the scope of the release, etc." And you know what? The judge signs it. If you go in there without that, you're toast.

WARSHAW: Absolutely right. And look at other orders from the court denying preliminary approval or final approval to figure out a particular judge's preferences.

SEILING: Even if you get along well with the plaintiff's lawyer—maybe you've dealt with each other on cases before, and there's an ability to settle it yourselves—it's essential to have a mediator in the process. A mediator can serve as an added layer of protection so the settlement does not look collusive. Use a mediator whom your judge might know and respect.

On the defense side, if your client is stuck on the notion that they didn't do anything wrong and therefore shouldn't pay anything, or if they want the settlement to go a particular way, a mediator who knows these types of cases can step in and say that's just not going to get approved.

GIRARDI: Also, you need a mediator who knows this area of the law. Ask other lawyers. I call people all the time and ask, "Hey, who do you like to use?" That becomes a very important factor, especially from the plaintiff's side of things, to get the mediator who's going to be respected by the court. And it's different from shop talk about some mediator who is known to be very cheap on damages. This is a legal issue. Unless you have the right neutral saying this is fair and reasonable, the deal ain't going to work.

ELLIS: I agree with the spirit of this discussion, but for smaller class actions, if you can get to the finish line without a mediator and both sides do their homework, that's fine, too. Mediators are certainly valuable and beneficial, but I don't embrace the extreme position that a mediator is necessary in *all* cases.

MODERATOR: Is there a growing market for third-party litigation funding in the class action domain?

ELLIS: My general impression is that there is a growing market for third-party litigation funding. It was happening very little, if at all, 20 years ago. I think it's happening a lot more today. It has mostly been invisible to us on the defense side. In the class action context, there are unique arguments about why it should be disclosed. For example, if there's a third person at that table who has significant input about whether to settle, and, if so, on what terms, I think judges are going to want to hear more about that process. There was a recent ruling from Judge Illston, up in the Northern District, regarding disclosure of the funding agreement. Perhaps the trend will move in favor of more visibility.

GIRARDI: It is highly problematic because obviously it creates a conflict of interest. The funder wants to get his money back; he doesn't care what happens to the case after that. Meanwhile, the plaintiff's lawyer is supposed to want to get justice for the people.

ELLIS: What about when a class is represented by multiple counsel? It is

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> – DANIEL L. WARSHAW

common for several plaintiff's attorneys to be involved in one case, and what if one is representing the funding? They say they're a lawyer for the plaintiff but they're answering to the money behind the case. And obviously, each plaintiff's attorney owes ethical obligations to the plaintiff and to the class, not to the funding. But that's not always the practical reality.

GIRARDI: That's different. You say, "Hey, funding company, we need some money to handle this case, and then we'll pay you at the end with interest, and I'll tell you when the thing is over with; and if we're not successful, then that's my obligation to pay you back." That's a straight lending relationship, and it's fine. But if the lender has any sort of authority in any way, shape or form, as to what the outcome of this case will be—even if the outcome is good—it's a bad idea.

WARSHAW: My firm does not get involved in these contracts. However, I've had a few times recently on contested lead motions the judge asked the question—because we didn't put it in the papers since it wasn't even in our mindset—whether or not any of the firms intend to use litigation financing.

It is a topic that's coming up, and I would warn class counsel to be extremely careful with your obligations to the class. The client is your number one priority; not a lending company. There are so many potential issues you could face with the State Bar, ethics, and Rule 23.

GIRARDI: At least in an individual funding issue, you could get informed consent—not that I think it's a good idea. But you can't even get consent from your class action clients to do it because you don't even know who your clients are. And if some guy has the ability to say "yes" or "no" to the settlement, that would be really problematic.

SEILING: You might not be able to disclose the relationship to the whole class, but you certainly have individual plaintiffs when the case is filed. Do they know about the funder? Do they know what issues are created there? I would hope that that all the ethical i's and t's are dotted and crossed. But it's a relatively new business. I'm sure there are some financiers and lawyers that are sophisticated and advised by good counsel, and some who aren't. Regardless of the size of the plaintiff's firm, if there are third parties involved in financing the litigation, I don't see how that can stay anonymous. Defense counsel ought to be allowed to see the agreement.

WARSHAW: Maybe this should be a decision for the court. With all due respect, defense counsel mostly care about defending against the claims brought by the class. Maybe a better solution would be an in camera review, so the judge can take a first look and find a solution.

SEILING: Defendants never want to show their insurance policies. But plaintiffs think that it is important to review the coverage. This third-party funding issue is the flip side of that. Who's behind this case? Is there something going on, other than a lender advancing money to pay for the expensive experts and testing? Is there something in that agreement that somehow potentially sells out the class and causes the class counsel to have conflicting responsibilities?

MODERATOR: What class action trends will we see emerge in the next year?

SEILING: I think more of the same. We've already seen many lower court

decisions interpreting *Tyson Foods*, *Spokeo*, and *Campbell-Ewald*. Next year, we will continue to see the landscape around those cases become a little clearer. Many of the trends we've talked about are going to continue, but more intensely. We are probably going to see even more scrutiny of class settlements.

ELLIS: The question of experts is always one that is before the courts—*Tyson Foods* is one example of it. We will see a continued trend toward more expert testimony earlier in the case, especially as it relates to damages. I imagine plaintiffs' attorneys will want to make sure their cases are on pretty strong footing before they take the step of filing.

GIRARDI: I hope to see more chips made into the arbitration process, as time goes on, to make it a little bit fairer to people. The CMS rule prohibiting mandatory arbitration clauses in nursing home contracts shows a bit of a trend.

I think the moral of our discussion is telling plaintiff's lawyers, "You've got to get off your butts." Get the experts early, get a good release going, and get a good mediator, so that everybody—including the court—can feel very comfortable about approving the settlement. That's all there is to it.

WARSHAW: I agree with what everyone said. We're going to see a bigger trend of more scrutiny at preliminary approval. Regulatory agencies will start eroding the black and white application of *Concepcion*. We will also see an increase in high-tech claims processing to help maximize claims and get settlements approved.

Substantively, I hope we'll see some changes to Rule 23 regarding "professional objectors," instead of sitting in an appellate court for years trying to resolve those issues, where objectors can hold up a good settlement with boilerplate objections. Other than that, I think it's going to be more of the same.