Foreword

Professor Richard Nagareda wrote the following preface to the original edition of this work. He passed away shortly after the book was published. I will always be grateful to him for his substantial scholarly contributions to the law in general and class actions in particular, as well as his generosity of time and spirit and wonderful sense of humor. A more fulsome tribute to him can be found at the Vanderbilt University Law school website: https://news.vanderbilt.edu/2010/10/11/distinguished-vanderbilt-complex-litigation-scholar-richard-nagareda-dies/.

RICHARD A. NAGAREDA

A Practitioners' Guide to Class Actions continues the American Bar Association's tradition of providing up-to-date guidance to practicing lawyers concerning areas of significant real-world concern. The ABA *Guide* gathers timely work on the part of leading class action lawyers and academics, all facilitated by the able editorial and organizational skills of Marcy Greer, Mike Truesdale, Van Cates, Nikko Fischer, Bo Phillips, Joanne Swanson, and Thomas Thagard.

The present time is an especially auspicious one for lawyers and scholars to step back and assess both the path and the future trajectory of the class action device. In parallel with the ABA's work on the *Guide*, the American Law Institute has developed its *Principles of the Law of Aggregate Litigation*. Professor Samuel Issacharoff served as the Reporter for the project; and I, along with Dean Robert Klonoff and Professor Charles Silver, served as Associate Reporters.

The publication of the ALI *Principles* in 2010 represents the culmination of a multiyear project that involved as advisers a broad cross-section of leading plaintiff- and defense-side practitioners, prominent judges, and distinguished academics. In the collaborative tradition of the ALI, the *Principles* also benefited from multiple presentations before the Institute membership as a whole at its annual

meetings, during which my co-reporters and I received countless comments, suggestions, and constructive criticism that, together, made for major improvements in the final product. In keeping with the growing globalization of law practice, moreover, the ALI *Principles* also were the subject of conferences in Florence, Italy, and Beijing, China, as well as a conference of U.S. class action scholars at George Washington University Law School in Washington, D.C.

The chapters of the ABA *Guide* speak to the richness of class action law today and need no introduction here. The enterprise of this Preface, instead, is to provide a brief and necessarily selective overview of the main features of the ALI *Principles* with respect to class actions. Six such features bear attention, from a bird's-eye perspective.

1. The ALI *Principles* situate the class action device within the larger landscape of "aggregate litigation." This move is apparent from the title of the project itself, consciously chosen so as not to be limited to the class action. The same move also is in keeping with the recognition by the Supreme Court that "class actions constitute but one of several methods for bringing about aggregation of claims, *i.e.*, they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum."[1] Indeed, it is only now—upon 40-plus years of experience with the class action in its modern form—that both its uses and its limitations have come more sharply into focus.[2]

The move to urge the consideration of class actions as part of the larger category of aggregate litigation is in keeping with the nature of a "Principles" project in ALI parlance, as distinct from the Institute's famous "Restatements." Unlike Restatements that—as their title suggests—aspire to restate existing law, Principles projects are explicitly normative. They seek to set forth the view of the Institute on what the law *should* be—albeit, of course, with due regard for its existing content. Indeed, quite apart from their treatment of class actions, the ALI *Principles* arguably bear attention first and foremost for their proposal for reform of the "aggregate settlement rule" in the law of legal ethics[3]—a major source of guidance today for the resolution of related civil claims in a nonclass, aggregate posture.

2. The ALI *Principles* offer a synthesis of the long-standing debate concerning the relationship between the "predominance" requirement of Rule 23(b)(3) and the additional specification in Rule 23(c)(4) of judicial authority—"when appropriate"—to

1. *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, XXX (2008).

2. Scholarly literature offers a window on nonclass aggregation. *See, e.g.*, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769 (2005); Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 S. Ct. Rev. 183; Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 Cornell L. Rev. 1105 (2010); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 Va. L. Rev. 1465 (1998); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 Vand. L. Rev. 107 (2010).

3. Am. Law Inst., Principles of the Law of Aggregate Litigation §§ 3.17–.18 (2010) [hereinafter ALI Principles].

certify class actions confined to particular issues, as among all those presented by a given litigation. These two rule subsections have perplexed practitioners, courts, and scholars for some time. Rather than adopt a view that effectively would read either subsection out of the rule, the ALI *Principles* seek to capture the core insight conveyed by the two subsections as a synthetic whole. In this enterprise, once again, the ALI *Principles* draw on the now-40-plus years of experience with the class action device. Section 2.02(a)(1) does so by recognizing that a court "should exercise its discretion to authorize aggregate treatment of a common issue by way of a class action if the court determines that resolution of the common issue would"—among other things—"materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies."

This language is far from a license for courts to pluck out common issues for certification wherever they might be found. Rather, the remaining sections of Chapter 2 within the ALI *Principles* elaborate the limiting nature of the language in section 2.02(a)(1) by situating substantive law, preclusion principles, and considerations of judicial management as significant constraints on class certification. Comment *c* to section 2.01 conveys the "broad generalization in light of accumulated, real-world experience with class actions" that

> common issues will tend to arise more frequently with respect to "upstream" matters focused on a generally applicable course of conduct on the part of those opposing the claimants in the litigation rather than on "downstream" matters centered upon the individual situations of those claimants themselves. Similarly—again, as a matter of broad generalization from experience—common issues will tend to arise more frequently with respect to economic injuries from a generally applicable course of conduct than with regard to personal injuries, as to which the "upstream" inquiry likely would not materially advance the disposition of claims.[4]

In addition, section 2.09 underscores that issue class certification should come only along with the possibility of interlocutory appellate review as to both "the class-certification determination" (in the manner of Rule 23(f) in current law) and "any class-wide determination of a common issue on the merits."

3. The ALI *Principles* endorse the emergence in lower-court decisions of a distinctive law of class certification in recent years.[5] Those decisions offer considerable clarification of the posture from which courts should approach the class certification determination—a matter famously clouded by language in the Supreme

4. *See also id*. § 2.02 cmt. *a*. The contrast between "upstream" and "downstream" matters stems from Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 831–32 (1997).

5. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

Court's 1974 opinion in *Eisen v. Carlisle & Jacquelin*.[6] Section 2.06(a) of the ALI *Principles* specifies that "[i]f the suitability of multiple civil claims for class-action treatment depends upon the resolution of an underlying question concerning the content of applicable substantive law or the factual situation presented, then the court must decide that question as part of its determination whether to certify the class."

4. The ALI *Principles* recast the legal vocabulary on the dividing line between mandatory classes and opt-out classes. Rather than cast that dividing line in terms of a formalistic, law-versus-equity distinction in the manner of the language used in Rule 23(b)(2), section 2.04 of the ALI *Principles* looks functionally to the divisibility of the remedy involved. "Indivisible remedies"—such as the classic sorts of injunctions or declaratory judgments vis-à-vis a general course of alleged misconduct—"are those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants."[7] An indivisible remedy already situates the persons said to be adversely affected by the alleged misconduct as a kind of interdependent group, such that the law of class actions appropriately may recognize that interdependence by way of mandatory class treatment.[8] For "divisible remedies"—such as plain, old, ordinary damages—the same interdependence does not obtain, because "the distribution of relief to one or more claimants individually" does not "determin[e] in practical effect the application or availability of the same remedy to any other claimant."[9] As a consequence, an opportunity to opt out is required.

5. Speaking to adequate class representation, the ALI *Principles* cast such adequacy in terms of a judicial determination—as among the "necessary conditions" for class treatment—"that there are no structural conflicts of interest," whether between the proposed class and class counsel or among the class members themselves.[10] Recognizing that no class action can realistically ensure a complete alignment of interest in these regards, section 2.07(a)(1) casts disabling "structural" conflicts in terms of "a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves."

---

6. 417 U.S. 156, 177 (1974) (stating, in connection with a dispute over responsibility for the cost of class notice, that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"). On the confusion wrought by *Eisen* and the clarification offered in recent lower-court decisions, *see* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009).

7. ALI Principles, *supra* note 4, § 2.04(b).

8. *See id.* § 2.07(c).

9. *Id.* § 2.04(a).

10. *Id.* § 2.07(a)(1).

6. The ALI *Principles* elaborate a distinctive law of class action settlements. Notable features here include—among other provisions—greater recognition for settlement classes[11] (including those that encompass future claims)[12] and more rigorous judicial standards for the use of cy pres remedies in class settlements.[13]

Taken together, the ALI *Principles* and the ABA *Guide* thus offer a window on the state of class action law today and the directions for its future.

11. *See id.* § 3.06 cmt. *a* ("[Section 3.06] does not require a settlement class to satisfy all of the same criteria as a class certified for purposes of litigation. For example, settlement classes should not be subject to a rigorous evidentiary showing that, in a contested trial, common issues would outweigh individualized issues. So long as there is sufficient commonality to establish that the class is generally cohesive, the propriety of a settlement need not depend on satisfaction of a 'predominance' requirement. However, the inability to certify a class for litigation purposes may be important evidence of the lack of leverage by proposed class counsel and thus may suggest the possibility of inadequate representation.").

12. *See id.* § 3.10 (defining "future claims" and discussing principles for their resolution in class settlements).

13. *See id.* § 3.07 cmt. *a* ("[Section 3.07] generally permits cy pres awards only when direct distributions to class members are not feasible—either because class members cannot be reasonably identified or because distribution would involve such small amounts that, because of the administrative costs involved, such distribution would not be economically viable. In such circumstances, there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.").