Syllabus

Course Description:
This reading group will address current issues that commonly arise in mass tort litigation that range from the practical—how do lawyers get paid and what problems does the contingent-fee system cause—to the theoretical—how do lawyers on both sides of the aisle achieve finality through aggregate settlements in a way that doesn’t violate their ethical obligations? Topics include the use of class actions and multidistrict litigation to resolve cases, the role of the judge in handling aggregate cases, lead counsel’s obligations to the group, strategic and ethical considerations for plaintiffs and defendants, and alternatives to judicial resolution. Specifically, students should be able to understand the multiple roles of a lawyer in mass tort disputes, identify ethical issues involved in mass torts, and begin to formulate his or her version of the moral lawyer.

Reading Materials and Course Website:
A Canvas website for our class is available for student access, and all of our readings are posted there. These materials are for you only, and redistribution is prohibited. A word of warning: You’ll notice that some of the cases are quite lengthy compared with those in your other courses. Judges in this area often self-consciously create new law and thus feel a special need to justify their decisions at great length. It’s not unusual for their decisions to run 80-100 pages in the federal reports; so, what you’re reading is very much an excerpt.

Office Hours:
My office is located in Griswold room 207. Absent the need to meet an urgent deadline and the hour immediately before class (which I typically reserve for class preparation), I regard all hours that I’m in my office as time available to meet with students. If you’d like to reserve a specific time to meet with me, please feel free to e-mail me. This is, of course, for your convenience—so that you can be sure that I’ll be in my office when you stop by—not mine. You certainly don’t need an appointment to drop in. And please feel free to email questions to me as well.

Course Requirements, Recording, and Etiquette:
Class attendance is required. If you have a valid reason for missing a particular class, please make a good-faith effort to notify me in advance. Recording class proceedings is prohibited. Please be in class on time. Laptop computers may be used during class only for viewing class materials and taking notes. Internet and telephone use are not permitted during class.
For each session with an invited speaker, students must submit at least two written questions that they would be prepared to ask the speaker if called upon. Students should email their questions to me by 5:00 p.m. on the Tuesday before the presentation.

**Accessibility:**
Harvard Law School is dedicated to facilitating equal access for students with disabilities and to cultivating a campus culture that is sensitive and responsive to the needs of students. To request an accommodation for a disability during the course, students are welcome to reach out to Accessibility Services in the Dean of Students Office at accessibility@law.harvard.edu or at 617-495-1880. You may also visit the office in WCC 3039. Additional information, including how to register for accommodations can be found at http://hls.harvard.edu/dept/dos/accessibility/.

**Reading Assignments and Meeting Dates:**
This is a one-credit reading group that meets on Wednesdays from 5:00-7:00 p.m. on the following dates –

**Class 1: September 6 - Mass Torts as Class Actions?**

**Readings:**
- Federal Rule of Civil Procedure 23
- *In re Deepwater Horizon Oil Spill*, 2013 WL 144042 (E.D. La. Jan. 11, 2013);
- *In re National Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016);

**Questions:**
- What are the problems with classwide proof in mass torts?
- Why did the Supreme Court decide that the asbestos litigation could not be settled en masse and thereby afford the asbestos manufacturers litigation closure?
- Pay close attention to who is included in the class and who is excluded. Is this a strategic choice by plaintiffs’ attorneys? By defendants?
- Who do plaintiffs’ attorneys have an actual attorney-client relationship with, and what light does that shed on adequate representation concerns?
- Does hindsight give us a better picture of whether the global settlement was a good or a bad thing?
- Is Justice Ginsberg right that asbestos is a legislative and not a judicial problem?
- Do the Third Circuit’s NFL opinion and the District Circuit’s BP opinion follow the dictates of *Amchem*?
- If the class action form is removed, do the issues that *Amchem* highlights disappear or metastasize?
Class 2: September 13 - Private Compensation Programs

Speaker - Kenneth R. Feinberg

Readings:
- Kenneth R. Feinberg, *Is the Glass Half-Empty or Half-Full?*, 44 LOYOLA U. CHI. L.J. 349 (2012);

Questions:
- Remember that you need to submit at least two written questions to me by email before 5:00 p.m. on the Tuesday before the presentation.

Class 3: September 20 – Nonclass Aggregate Settlements & Settlement Consent

Readings:
- What is an Aggregate Settlement? (Excerpt from NAGAREDA ET. AL, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION, p. 553-557, 608-12);
- Model Rule of Prof'l Conduct 1.8(g);
- Excerpt from Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, forthcoming CORNELL L. REV.;
- Excerpt from Howard Erichson & Benjamin Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 279-85 (2011);
- PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. L. INST. 2010).

Questions:
- Should settlement be the end game in multidistrict litigation? For judges? For parties?
- When defendants demand closure by requiring a certain percentage of claimants to participate in a settlement, what ethical dilemmas does that create for plaintiffs’ counsel?

Class 4: Wednesday, September 27: Multidistrict Litigation – the Panel and the Role of the Transferee Judges

Speaker – The Honorable R. David Proctor, JPML, N.D. Al. (first half of class)

Readings:
- Coordination of Parallel Proceedings using Multidistrict Litigation; Selecting the transferee court; In re Silicone Gel Breast Implants Prods. Liab. Litig.; MDL Statute and Choice of Law; DeLaventura v. Columbia Acorn Trust (Excerpt from
Questions:
- Remember that you need to submit at least two written questions to me by email before 5:00 p.m. on the Tuesday before the presentation.
- How do private settlement programs set up by defendants play into an MDL? Does or should it affect the litigation? What about questions of horizontal equity between similarly situated plaintiff?
- What role, if any, should judges play in administering private settlements?

Class 5: Wednesday, October 4  - Selecting and Compensating Lead Lawyers in Multidistrict Litigation

Please note that classes 5 and 6 (particularly class 6) contain longer readings.

In re General Motors Ignition Switch Litigation Case Study
Before class, I will assign you to a particular group. Please read the generalized readings as well as your group-specific reading to prepare for in-class oral argument.

Readings:
- Charles Silver & Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal, 63 VAND. L. REV. 107, 107-135 (2010);
- Judge Stanwood Duval, Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases, 74 LA. L. REV. 391 (2014);
- Max Blau, No Accident: Inside GM’s Deadly Ignition Switch Scandal, ATLANTA MAGAZINE, Jan. 6, 2016;

Group Specific Readings:
Notes on preparing for in-class oral argument/discussion: In this class I will ask you to make two sets of arguments. First, you will argue about the pros and cons of using different methodology to select lead lawyers. Second, once a method is chosen, counsel should then argue as to why they should be selected to a leadership role.

- Group 1: Podhurst Orseck– Letter to Judge Furman re: leadership appointment process; Application for Executive Committee
- Group 2: Hagens Berman & Lieff Cabraser – Letter to Judge Furman re: leadership appointment process; Reply to other letters
- Group 3: Daniel Becnel, Jr. – Letter to Judge Furman re: leadership appointment; Application for Executive Committee
Questions:

- What’s the doctrinal basis for compensating lead lawyers once they’re selected? How are mass cases like GM funded?
- How do judicial selection and compensation methods affect lawyers’ litigation and investment incentives?

Class 6: Wednesday, October 11 - Bellwether Trials and Leaders’ Ethical Obligations

*In re* General Motors Ignition Switch Litigation Case Study

Readings:

- *In re General Motors LLC Ignition Switch Litig.* documents:
  - Plaintiffs’ Motion to Remove the Co-Leads and Reconsider the Bellwether Trial Schedule (Cooper’s Motion)
  - Plaintiffs’ Motion to Reconsider the Order Approving the Establishment of the 2014 New GM Ignition Switch Qualified Settlement Fund (Cooper’s Motion);
  - General Motors LLC’s Combined Response to Motion to Remove the Co-Leads and to Reconsider the Bellwether Trial Schedule and to reconsider the Order Approving the Establishment of the 2015 GM Qualified Settlement Fund;
    - Exhibit: Geoffrey Miller’s Affidavit.
  - Co-Lead Counsel’s Memorandum in Opposition to Lance Cooper’s Motion to Remove Co-Lead Counsel and for Reconsideration of the Order Approving the Qualified Settlement Fund; Hilliard Declaration;
    - Ex. 6 Letter to Hilliard from Pribanic
  - Plaintiffs’ Reply Brief in Response to Co-Lead Counsel’s Memorandum in Opposition to Lance Cooper’s Motion to Remove Co-Lead Counsel, etc.;
    - Ex. 1 Lance Cooper’s Declaration; Ex. 2 Charlie Silver’s Declaration; Ex. 6 Pribanic declaration
  - Order Regarding the Cooper Plaintiffs’ Motions to Remove Lead Counsel and for Reconsideration of the Order Establishing the Qualified Settlement Fund

Notes on preparing for in-class oral argument/discussion: In this class, we will hear oral arguments on Cooper’s motion to remove the co-leads and reconsider the bellwether trial schedule. You should read all of the materials listed above to grasp the arguments on multiple sides, but you will be advocating from the following positions:
1. Groups 1 & 2: General Motors
   a. Group 1 should focus on the motion to remove the co-leads and the bellwether trial schedule
   b. Group 2 should focus on the settlement fund issue
2. Group 3: Lance Cooper
3. Group 4: Lead lawyers

Questions:
- What do judges and parties hope to accomplish through bellwether trials?
- What obligations do lead lawyers have to the plaintiffs? What should happen if their obligations to the group as a whole conflict with their obligations to their own clients?
- Why is GM responding to Cooper’s motion (and providing an ethics opinion)?