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PANEL 3: ALTERNATIVES TO THE CONSUMER CLASS ACTION

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THE FUTURE OF CLASS ACTION LITIGATION:
A VIEW FROM THE CONSUMER CLASS
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MODERATOR: *Michael S. Barr*
PANELISTS: *Mark P. Goodman, David L. Noll, Adam Zimmerman*

PROFESSOR MICHAEL S. BARR: I'm very excited to be moderating this panel. I'm Michael Barr from the University of Michigan. When I was first approached by Peter Zimroth about participating in this panel, I was very intimidated to serve as a moderator. If you look at your programs, you'll see I'm the only moderator who is not a co-director of this Center, and I'm the only moderator who knows nothing at all about civil procedure. So from both those perspectives, I was a little intimidated. I thought maybe they were going to make me a co-director and make me take a class in Civil Procedure, and then I could share this.

I should also say I really know almost nothing about smelly washer-dryers or whatever that case was. The closest I would come, I would say is I tried once to fix a dryer. It ended really badly. I don't recommend any of you out here, who are lawyers, which I think is probably most of you. I don't recommend lawyers try and fix dryers.

What am I doing here? I teach and write about financial regulation. A lot of the activity we've been talking about that you think of as cool, neat examples of civil procedure I think

of as really interesting examples of whether financial regulation is working or not working.

When I haven't been teaching at Michigan, I've spent two tours of duty in the U.S. Treasury Department, most recently for President Obama in 2009 and 2010. One of my jobs there was to develop the Credit Card Act of 2009, which substantially changed the rules in the credit card industry, and the Dodd-Frank Act, which substantially changed the rules in the rest of the financial industry.

One of the things we did in the Dodd-Frank Act was create a new Consumer Financial Protection Bureau [CFPB]—that has not fully market-wide coverage in consumer products, but relatively broadly. We gave, among other duties, the duty to the CFPB to study whether consumer mandatory pre-dispute arbitration clauses should be prohibited or conditioned in some way with respect to consumer financial products and services, which is a pretty broad area of concern.

We gave similar authority for studying investor products to the Securities and Exchange Commission. In both cases, at the end of those studies, the relevant agencies have the authority, if they believe it is appropriate, to prohibit or condition mandatory pre-dispute arbitration clauses.

The CFPB also has the authority and has already issued rules banning mandatory pre-dispute arbitration clauses in mortgage contracts. And, as most of you know, there has long been a prohibition, although it has weakened in recent years, on the use of mandatory pre-dispute arbitration clauses in investment advisor contracts because investment advisors are seen as having a fiduciary duty, which, until quite recently, people uniformly thought precluded that type of action. Whereas broker-dealers traditionally have offered and included mandatory pre-dispute arbitration clauses, and there is a vibrant arbitration industry in the securities sector.

We have these quite different conflicting alternative approaches to thinking about the use of arbitration clauses in the consumer finance and investor protection areas. I think it's a very important and ripe subject for conversation, and importantly for research. I was thrilled to learn that all of you were interested in this topic too even though you thought it was about civil procedure.

We have a terrific panel this afternoon to help us think through those issues, and each of them is likely to take a

slightly different perspective. David Noll, who coincidentally is a Judge Leval clerk, which is the other reason I thought I might have been invited to this panel because Peter is a friend of the Judge's, and Troy was a former clerk of the Judge's. So that's the other unifying theme here. And Mark has appeared before Judge Leval. I'm not sure why Adam got invited. It was just a mistake, Adam, but you could make up for it by being just super excellent on this panel.

David is going to talk to us about contract procedure as a way of enforcing public compliance, so a nice broad frame on the issue. For those of you who are judges in the audience, David thinks you all are secretly members of the national legislature, and he's going to explain why that's a good idea.

Adam is also going to also present a broad frame looking globally at the ways in which public and private enforcement have been converging, at least across the United States and Europe.

Mark, I assume, is going to tell us why all this is nonsense, and not the business of the courts. Without further ado—

PROFESSOR ADAM ZIMMERMAN: Thank you. Pleasure to be here. Really excited to be invited here. Today I'm going to talk to you about something a little different.

When I talked to Troy he said, "I want you to talk about the next steps. What beyond the class action, or what alternative to the class action, can serve as our government sponsored mechanism as providing a means for collective redress?"

The claim I'm going to make today is there's a new trend both in the United States and abroad. The United States is moving beyond just reliance on class action attorneys to provide collective redress, but increasingly attorneys general, federal prosecutors, agencies are moving to compensate victims on a massive scale in a way that looks and resembles class actions.

As that's happening, whether it's through the Department of Justice or state attorneys general settlements, or the CFPB, so it's also occurring in Europe. In Brazil, and the United Kingdom, and Sweden, increasingly new powers are being vested in governmental authorities, not only to seek public kinds of concepts of deterrence, but compensation as well: mass compensation on a large basis. The Competition and Markets Authority recently in Great Britain, the Danish Ombudsman, and the Australian Securities Investment

Commission all have now express powers to seek mass compensation and provide the compensation to a large group of victims while at the same time pursuing an enforcement action.

I'm going to posit that this trend poses a new challenge for judges. Maybe not in quite the same way across civil and common law jurisdictions, because judges have different functions and have different responsibilities across those jurisdictions. To the extent that in many of these countries judges are still tasked with reviewing the fairness of these large settlements, they may find themselves confronting some of the same types of difficult questions that we've confronted in class action law for years—problems associated with how to coordinate cases across different jurisdictions, ensure people adequately participate. How do we overcome different conflicts of interest and distribute the funds fairly?

I suggest today that as government actors are increasingly seeking to compensate people for mass harm through public agencies along with class actions, it's going to raise new questions about what we want and expect from our judges to do in determining who to defer to in setting the appropriate amount of compensation and awards.

I am going to suggest that maybe there are some tools already happening on the ground here in the United States that are being pioneered by U.S. Federal District Court judges that might show one path forward; ways in which courts are already beginning to coordinate amongst each other—when there are overlapping class actions and compensatory actions brought by agencies—to coordinate, to ensure that people are adequately notified, to ensure that ultimately we don't risk over-deterrence, and over-compensation in all these types of actions. As I suggest this, that maybe we can rely on the U.S. model, I'm also going to suggest that maybe there are other models to look to, too.

In the existing literature there's a burgeoning literature since Jack Weinstein published a paper over fifteen years ago, that has been describing the ways in which increasingly criminal law and administrative law, and class action law have begun to overlap, not only in the ways in which they try to accomplish the goals of deterrence, but also compensation.

Increasingly as agencies compensate large groups of people, as agencies seek restitution from some wrongdoers, they

are increasingly distributing those funds to large groups of people in ways that look like class actions. We're seeing the same thing by government prosecutors as well, as well as other types of public actors.

This idea of convergence has been well explored in other types of complex litigation contexts. There's been a burgeoning literature about the rise of managerial judging: the ways in which our American judges are increasingly acting a little bit more like their European counterparts in the ways that they use magistrates, and more inquisitorial methods, particularly when they handle mass and complex litigation. Many people have observed that, when judges are handling mass litigation, they have in some cases taken on a more hands-on approach that we might not traditionally associate with the U.S. judicial system.

Others have described the rise of formal aggregative systems in class actions abroad. Over twenty-two different countries now have adopted class action rules themselves abroad. When you combine that with the backlash against formal class actions here in the United States, it looks like we're converging on this model for how we generally handle mass claims.

There is yet another trend that I want to suggest is occurring that I would call almost double convergence. It's the way in which both in the United States and abroad we're seeing public actors try to accomplish these similar goals of mass compensation. As I said before, public actors include agencies. This is my back-of-the-envelope calculation, but when you put together restitutionary mass judgments rendered and distributed to victims by the SEC, the FTC, the CFPB, and the OCC, over the past decade it's been about $12 billion. The Department of Justice, in terms of its mass compensation through criminal restitution, has been about $10 [billion]. These are just different examples of some of the target defendants in all these cases. In the National Mortgage Foreclosure Settlement, a big chunk of change, but almost over $30 billion associated with some of the different types of distributions associated with that settlement. But, this slide illustrates as all these different countries begin to adapt to different types of aggregate ways to [. . .], they've also given their government bonds new powers to also accomplish very similar goals, to go after wrongdoers, and then to—whether through collective redress orders or through becoming lead members of class ac-

tions themselves—offer compensation on the same kind of retail basis.

In the United States, this trend—this move towards public compensation—can be identified and attributed to three things. One is an increasing movement within the U.S. system, especially in criminal law driven by victim-rights movements to afford victims restitution for crimes and for other wrongdoings that occur when there's an administrative wrong. Also, the rise of corporate dispute resolution has changed the way corporate defendants have responded to those types of actions. Finally, this new model adopted by the DOJ—to not only try to try cases and to settle, but to reform business practices through settlement—has also created this opportunity to seek mass compensation at the same time.

In Europe, we've seen a different kind of trend that's leading towards convergence. In Europe, they recognize that there's a need to afford peace in some kinds of mass litigation cases, and so that's one reason why they've adopted some formal mechanisms for aggregation. But because they're so worried about recreating the monster that is our American style litigation system, they've put public actors in charge of handling a lot of mass distributions at the same time that these class actions also proceed.

In some ways you might say that's totally unremarkable, but that's what we expect of civil law jurisdictions around Europe, particularly jurisdictions that historically have relied on agencies rather than private parties not only to enforce the law, but maybe to afford forms of compensation. Throughout Europe, they've long relied on piggyback actions, actions that follow up on criminal prosecutions to afford compensation to people.

What's notable about this trend is that (A) it's part of an express movement to approve collective redress. This is part of a movement where laws are being amended, in part, because there's a concern about the rise of a large group of cases and how they should be handled by judges. The second is that (B) at least with respect to some of these jurisdictions, it's the court that's still overseeing the terms of these settlements that might involve many different players against the same defendant, seeking overlapping potential awards, and forms of restitution for those defendants.

In the seven and a half minutes I have left, I want to suggest that some of the same types of problems that have historically been confronted, the same challenges in class action law, can also appear in the context of public settlements. I'll give you some examples of some of the attempts to try to deal with coordination problems behind overlapping actions, the struggles that government actors face just gathering enough information to provide adequate compensation, the distribution problems that they sometimes face, as well as, arguably, different conflicts of interest. Then at the end to raise the question about whether or not we can handle some of these problems through some judicial responses that have been advanced in the United States.

The following are some examples of coordination problems. When private attorneys commenced a lawsuit against UBS, they were on the eve of settlement when they claimed that nineteen state attorneys general hijacked their settlement efforts. They set up a second rival fund to compensate people and municipal entities who were wronged by UBS's conduct. The plaintiffs' attorneys were quoted at the time as saying, "This is what happens when you have two ways to reach the same end point." The defendant has a choice of picking door number one or door number two.

Scott Rothstein is popularly discussed in bankruptcy law circles because he was a Ponzi-schemer who used to have lavish cars all parked in front of his home. I think he had nineteen different cars when it was ultimately revealed that his law firm was a front for a Ponzi scheme. Shortly after it was revealed that the scheme was taking place, there was an involuntary bankruptcy proceeding that was filed against him, but criminal prosecutors also brought a case against him, seized the awards, and began distributing those funds through a criminal restitution action before the involuntary bankruptcy proceeding could get off the ground. Even though that money arguably went to different groups of people under a different type of compensation scheme, and might have undermined the priority scheme that we typically privilege in bankruptcy.

There aren't really any formal rules for dealing with what happens when you have simultaneous bankruptcies and criminal restitution actions, or criminal forfeiture actions that take place at the same time. Sometimes government agents struggle with gathering information. With another Ponzi-schemer

known as the Minnesota Madoff, Tom Peters, there was a large distribution plan that was proposed, but the judge ultimately received over 100 different objections claiming that they lacked adequate information. The judge said that the entire government-proposed award was one that was replete with errors and incomplete information—revisions that sometimes dropped people's claims by hundreds of millions of dollars.

The Independent Mortgage Foreclosure Review received a lot of attention—after some GAO reports said that their attempts to spot check banks that were deciding how much to compensate individuals who might have been victims of robo-signed mortgages as well as other types of practices—they were criticized for not doing adequate checks on whether or not the awards that were being distributed through the independent regime were truly independent or were truly correct. Finally, there have been problems associated with distribution and conflict. The DOJ used to have a program called the "Extraordinary Restitution" program. A lot of the problems associated with this program were like the problems, and some of the issues, that we raised with respect cy pres.

There was a deferred prosecution agreement, Bristol-Myers Squibb negotiated with—now, the sitting governor of New Jersey—but at the time the federal prosecutor of New Jersey, and they agreed to fund an ethics chair at Seton Hall University, which was also the alma mater of the same prosecutor. That raised concerns that this type of distribution, which looks a bit like cy pres because the money couldn't go directly to victims in that case, might raise certain types of questions about conflicts of interest, as well as whether or not the money is sufficient. In 2008, the DOJ barred this practice. Since that time they usually will not allow terms that make the defendant pay funds to a charitable organization unless there's some exigent circumstances.

Last distributional type of conflict that sometimes can arise, and it's come up in the Madoff distribution. After the Herculean efforts of Irving Picard to distribute an enormous amount of funds to the Madoff victims, there has been a second fund that's been created through the criminal prosecutor, and through criminal forfeiture.

Picard expressly said, I don't think I should handle this action. I think I'm too conflicted because there are different victims at stake. It really has produced new conflicts. Now

Richard Breeden says that Picard's fund is not doing it right, that you should be coming to my fund. The problem with Picard's fund is he's distributing monies away from the true victims, the widows and orphans. It's better to go through the criminal justice system where we can adequately compensate those who are true victims.

What's going on here is we have a civil process that's meant to handle one group of victims, and a criminal process that's meant to handle a whole group of others, and no way in which to rationalize what these funds are about, and how they should be coordinated, and how we should deal with those potential conflicts.

The implications for this: that public actors are increasingly playing this important role, but they may experience some of the same types of problems that we see in mass settlements all the time. This doesn't mean that it's wrong. I want to make clear to any government attorneys in the room that I'm not critical of these efforts. I think you should be lauded for these efforts. I do think it means that as these efforts continue, we need to give some thought to how we rationalize them, how we rationalize coordinating overlapping actions, obtaining information, and reviewing potential conflicts of interest.

One way to move forward might be some of the experiments that federal judges have already begun to explore. Joint trials; there's been a lot of cases where a judge like Judge Rakoff will sit in a joint trial with the bankruptcy judges to try to sort out all these types of coordination problems at the beginning. Coordinated notice between courts; Judge Marrero has suggested that maybe a judge overseeing a class action should be able to review the notice that's going out to people in a government distribution fund when it's pending against the same defendant. Judicial review; maybe we need judges to review at least, not in a detailed way the substance of a settlement, but at least to serve as that fail-safe to ensure that the agencies, the government actors, when they are distributing funds are doing so in a rational way.

That's not the only way forward. Certainly, coordination could take place through the executive branch as well. That's arguably already happening with the SEC. As well as you could just say maybe this all should happen privately which is arguably what's happening in cases like *GM*. Maybe it's up to the defendant, ultimately, to be coordinating all these types of

things and be seeking out information from private outreach groups.

The major questions that I think this poses is, (A) is this truly a global trend? You can see there's a global trend in that government attorneys around the world are taking a bigger step in compensating large groups of people. The second question is, (B) will the courts really adapt in a way that more aggressively manages what's going on or will they ultimately step back, like I just did, and ultimately allow other parties to shape how those questions are answered?

The central question still remains, which is: What is the role of our public adjudicative system in providing a rational system of compensation in a world of overlapping regimes that compensate people sometimes for the very same wrong from the very same defendant? Thanks.

PROFESSOR BARR: Thank you, Adam. That was terrific. I got a little worried when you stepped back there that if you fell, all the speakers in the room would sue NYU in a class action for the fear that your misstep would cause them the next time they got up there. That was a joke.

I think Adam's paper and presentation is terrific, and I think it helps us see the fluidity and the connections across the public and the private modes of adjudication that a narrow focus just on private adjudication, whether it's in the form of arbitration or class action, or a suit might obscure. And we can begin to see those tradeoffs in mode. I also particularly liked Adam's use of the international evidence we have that shows there are lots of different ways of organizing society. Sometimes in the United States we get a little stuck in the particular form we have here, and seeing that other countries have done this mix in different ways is really useful.

Adam didn't say it, but I do think there's this other dynamic going on that's quite interesting. Adam was mostly focused on the ways the Executive Branch reacts to this mix of modes, but also there is this judicial role that has been playing out quite differently in Europe in the last five or six years in a way that's new to civil law traditions; where you have judges, for example, in Austria, really inventing collective redress as a mode of dealing with relatively weak Austrian public enforcement of financial regulation. There is an interplay that is really worth studying much more carefully, and I'm thankful to Adam for making us look at it.

David?

PROFESSOR DAVID L. NOLL: I think the question Adam is getting at, and all of us are getting at on this panel, is if we're in a post-consumer class action world, then what? What are the alternatives? What are the institutions? What are the procedures that are available to serve the same regulatory role that civil procedure folks are accustomed to seeing class actions perform in?

Adam gave you one alternative. I call this the public alternative, which is that you have something that looks a heck of a lot like a traditional consumer class action, but instead of being conducted under Rule 23, it's being run by a public agency, which has power to collect restitution, make distributions, do all the things we do in a class action under the agency's organic statute.

I'm going to talk briefly about what I'll call the private alternative—and particularly the possibility that dispute resolution systems that are set up by contract, most prominently arbitration—can perform a role that's similar to what we've come to expect from the class action. Particularly in the Supreme Court cases in arbitration, we see the idea that privately designed ADR systems can provide compensation, deterrence; can serve a regulatory function that's similar to what public court class actions have done.

There's not really a better advocate for this position than Andy Pincus. He has completely sold the justices on the idea that if the parties are channeled to private one-on-one arbitration, the regulatory functions that we want the law to be performed are going to be performed just as well as they are in court-based litigation. And in doing so, we're going to dramatically lower the transaction costs that are associated with public court transactions—class actions.

The question that rises for policy makers is: What should we do when we have a dispute that's governed by a contract that purports to direct the parties to a privately designed ADR system and there are questions about the effectiveness of the ADR system as a means of regulatory enforcement? What should the policy response be? If we look at that question, that provides a way of getting at the relationship between private ADR and class actions that we want to see in public courts.

Let me start by talking about the promise and the perils of privately defined dispute resolution systems. For the promise,

I'll go all the way back to a 1972 case that started us down this road. It's called the *Bremen*. There were two parties to an international maritime transaction. They were trying to tow an oil rig from off the coast of Louisiana to the Mediterranean, somewhere in Italy. You can see there's a huge need to coordinate the activities of different sovereigns, to coordinate different dispute resolution systems. We're going to be passing through the Gulf, we're going to be crossing the Atlantic, we're going to be passing south of Portugal. All of these nations have an interest in regulating the transaction. If something goes wrong, all of them can potentially assert jurisdiction.

What the parties did in their services contract is they stipulated that any disputes arising out of the transaction are going to be heard before the High Court of Justice in London. As it happens, there was a bad accident. The oil rig was basically destroyed, and the Supreme Court enforced that forum selection clause. It sent the parties to London to resolve claims arising out of the dispute.

That had some effect on the parties' rights. But I think it's safe to say that the effect on the overall regulatory environment is pretty minimal. By going to London, we're swapping out English tort law for American tort law as the rule of decision. You think about how that's going to affect regulated actors' primary decision-making. It's difficult for me to see much of an effect.

Fast forward to 2012. The issuer of the Aspire Visa Card attempted to do something very similar. I'm going to hazard a guess that no one in this room has ever considered applying for the Aspire Visa. It has a credit limit of $300, it is specifically designed for people who have terrible credit histories, and are trying to rebuild their credit histories. The marketing material that came with the card made the offer that if you used this card responsibly, it's going to help to rebuild your credit history. It's going to help to rebuild your credit score. So far, so good.

The first snag is that buried in the terms and conditions are a bunch of back-end fees that impose costs of about $270 on consumers who sign up for this card regardless of whether they default. So the representation that this is a *credit* card and that the user will actually be extended credit starts to look kind of dubious. I'm also going to go out on a limb and say that

people who are signing up for the Aspire Visa Card probably aren't going to be the most effective pro se litigants. They're not going to be people, who when they realize what's in the terms and conditions, are able to assert their rights effectively. So if this fraud is going to be redressed, there has to be an agent that acts on behalf of the affected consumers.

One possibility is that we could have a public agency do it. We could have state attorneys general do it, but that seems unlikely. I did some research on the Credit Repair Organizations Act, which is the federal statute that governs these kinds of "credit repair" cards. When the Act was passed, witnesses before Congress told Congress that there were about half a million of these companies operating in the United States. I was able to find a handful of settlements, and I think eight cases, where a claim under the Credit Repair Organizations Act had actually been litigated in court.

So, it seems like public enforcement isn't a viable option for this claim and for redressing this harm. That leaves private sector attorneys who, through some formal or informal aggregation mechanism, are willing to undertake a representation of people who signed up for this card, who are out $270 with no possibility of relief.

It's at this point that contract procedure enters the picture because the Aspire Visa Card, in addition to the back-end terms and conditions, also has an arbitration provision that through reference to the Rules of the National Arbitration Forum prohibits any form of aggregate claiming or class actions—in essence, takes the possibility of private enforcement off the table. It makes it impossible for a private sector attorney who needs to be compensated through a contingency fee to redress this regulatory violation.

Contrast that with what happened in the *Bremen*. In the *Bremen*, we're reducing transaction costs. We're not setting up a situation where there's a substantial effect on the regulatory power of U.S. law. Now, we look at the situation in *CompuCredit*, all of a sudden—through the magic of contract procedure and weak public enforcement—we're in a situation where the governing statute, the Credit Repair Organizations Act, really ceases to have any regulatory effect on parties who are operating in the real world.

If you're one of the 440,000 credit repair organizations in the United States, you look at enforcement patterns, you look

at the protection that you're going to get through the arbitration provision, and I think you can safely conclude that this law just doesn't apply to you. There's no reason to worry about what it says when you're advertising, when you're developing new financial products.

The question is: Is that right? And do we want the law to reflect this state of affairs? The *CompuCredit* agreement worked the way it did because we have a body of arbitration law that gives a very, very strong presumption of validity to anything denominated an agreement to arbitrate. There are subject-specific carve-outs in areas such as mortgages and blowing the whistle on accounting fraud, but for the most part, following the last two decades of Supreme Court case law, agreements to arbitrate come into court with an extremely strong presumption of validity.

If we're looking at contracts that modify the procedures public courts use, the law is a bit more unclear. The law is pretty clear that forum selection clauses, and choice of law clauses are going to be enforced in most cases. Academics have talked about the possibility of modifying things like the burden of proof or the pleading standard or the availability of class action procedure. We really haven't seen test cases that are dealing with the enforceability of those kinds of contractual provisions. The rulemaking committees have not taken it on so far, so there's some legal uncertainty there.

The question that I think applies for policy makers at all levels of the government—whether we're talking about Congress, whether we're talking about administrative agencies like the CFPB that have delegated authority to regulate arbitration, whether we're talking about judges who I do think have some capacity to use intelligence and common sense—

AUDIENCE MEMBER: [Laughter] Really?

PROFESSOR BARR: He just meant as opposed to us former federal bureaucrats.

PROFESSOR NOLL: The question is: How do we approach these things? If you're a judge, what do you do when the defendant says, "Sorry Judge, we've agreed to use a different dispute resolution system"? What do you do if you're the CFPB and you're studying the enforceability of a mandatory pre-dispute arbitration?

The suggestion that I want to make is that for all of these policy makers—Congress, agencies engaged in rulemaking,

agencies engaged in adjudication, judges, self-regulatory organizations across the spectrum—the enforceability of contracts that define dispute resolution systems should be driven by regulatory compliance in the real world. Are people who are regulated by federal law generally compliant with the norms that federal regulatory law sets up for their behavior?

The idea is that when regulated actors are generally complying with the law, when there's a general state of compliance, then we should be open towards contract procedure because it provides a way of experimenting with different procedural forums, reducing some transaction costs that otherwise would be lost to public-court litigation. On the other hand, when actors in the real world are in a state of noncompliance, that's when we should look at contract procedure with the most skepticism. And whether we're talking about Congress, or agencies, or courts, it should be tightly restricted or taken off the table altogether.

Let me quickly explain why I think compliance matters. Insofar as we're talking about Congress, it seems to me that the key point is that when we're looking at regulatory domains that are enforced primarily by private litigants, Congress is the institution of government that's playing a role similar to what we would normally see a public prosecutor playing.

If you're looking at a regulatory domain where a prosecutor is picking and choosing cases to prosecute, the prosecutor in the exercise of prosecutorial discretion is in charge of keeping track of whether regulated actors are violating the law in the real world, directing enforcement actions to areas where the violations are most egregious—where litigation is going to have the most deterrent effect. In areas where enforcement is primarily done by private individuals, we see Congress playing a very similar role insofar as it's driving enforcement patterns by setting up particular incentives to litigate: by providing enhanced damages, by providing fee shifting, by making changes to the substantive law that affect the availability of aggregation under Rule 23.

My claim is that Congress in these privately enforced domains is functionally acting like a prosecutor exercising prosecutorial discretion. Just like a prosecutor should be concerned with whether people are violating the law a lot in the real world, so should Congress in enacting regulatory legislation.

Insofar as we're talking about institutions that encounter contract procedure ex post, they don't have that same democratic mandate. They don't have a mandate to say: Where should we direct enforcement? Where do we want to see enforcement actions?

However, they can at least check and see whether laws that were clearly designed to have a regulatory effect on actors in the real world are having such an effect. It's very difficult to say, given just a regulatory statute with some private enforcement apparatus, what Congress actually intended with respect to rates of litigation, with respect to the kinds of claims that should be prosecuted.

The suggestion is that when we look a statute like that, we're sure if nothing else, that Congress wanted regulated actors' primary decisions to be affected in some respect by the regulatory norm in the statute. I'm happy to go into it more in the Q&A, but that seems to be something that courts can test for, that agencies in adjudicatory posture can test for, and also something that has a pretty strong foundation in positive law.

PROFESSOR BARR: Thank you very much, David. That was quite a thought-provoking paper. Like Adam's, it helps us see connections that we might not otherwise see between judges' kinds of questions about how to think about arbitration clauses, and those of Congress. I do think that we may talk about it a little bit when we get to the moderated portion of the panel, that difficulty on an ex post basis of making those judgments is quite different from the ex ante judgment.

In the case of Congress, Congress looked at the *"Fee-Harvester"* case that you described, and essentially in the Card Act prohibited fee-harvester cards now. Similarly, Congress looked and said: We give the CFPB the authority to make this kind of compliance judgment you're talking about for consumer products and the SEC for investor products. It's harder to see judges making that same type of tradeoff between public and private enforcement, though again as I mentioned, the Austrian judicial system saw this huge void in public enforcement and stepped in with collective redress, so it's not impossible. I just think teasing out how that's going to be done, and with what standard, will be quite challenging.

I hope Mark is going to tell us that the whole exercise is a mistake, and that we can have a debate about it.

MR. MARK P. GOODMAN: The first thing I'm going to do is find out how I get an Aspire Visa Card for my kids.

PROFESSOR BARR: You mean one with no credit?

MR. GOODMAN: Well the one with no credit and the $300 limit. That combination would be perfect.

PROFESSOR BARR: But you missed the part about the $270 fee.

PROFESSOR NOLL: It's only $270.

MR. GOODMAN: I'll pay the fee in exchange for the protection.

PROFESSOR BARR: We can do business.

MR. GOODMAN: I think the reason that I was asked to speak on this panel is twofold. Firstly, I split my time pretty much evenly between commercial litigation, including class actions and regulatory white-collar. I spend a lot of time negotiating with regulators and DOJ in the space that we're talking about, and I frequently—as is true with Eric and a couple of other people, Sheila and others who I see here in the audience—am involved in cases where there is simultaneously a regulatory or criminal component, and either a contemporaneous civil component or a follow-on civil component. I can give some sense of where in private practice and in the corporate world people are viewing these things. I found some of the comments really interesting, and I'll respond to a few of them as I go through this.

I come at this—I hate to use the word "cynically"—but what I would say is that I come at this from the perspective of somebody who was hired to give strategic advice and to be tactical about how you deal with all the things we're talking about. Is this a situation in which we should really focus aggressively on this class action because it's got legs and we're going to have to deal with it? Is this a situation in which we could defeat certification, and so at that point we don't have to worry about it? Are these plaintiffs' lawyers who we can deal with and we can essentially pay off early on in this process? Are we better off dealing with our regulator first because they've already got their teeth in this thing?

It's a multi-dimensional process for the people I represent. And, by the way, I don't think all of this is nonsense. It won't surprise you to learn that I don't believe class actions are generally effective either in affecting corporate conduct or in protecting members of the class. It's not to say that you can't

identify some class actions that were successful and that performed all of the functions that Rule 23 had in mind. But, I can tell you that a very high percentage of the class action cases that I'm involved in, and they span lots of different industries, are really not designed to benefit the members of the class, and frankly rarely do benefit the members of the class.

I think on this issue of enforcement, one of the things that's happened that everybody knows about that these guys have talked about is that cases that used to be relatively plain vanilla regulatory—and I say regulatory as opposed to criminal investigations or cases that were civil, commercial cases, class action or otherwise, or that were multi-district litigations—many more of those cases, a much higher percentage are now cases that we're dealing with as regulatory white-collar cases, particularly in the consumer space.

Ten years ago, if you were representing pharmaceutical companies—or car companies, or a manufacturer of some widget in the Midwest—95% of your time, you were focused on civil cases. It was really unusual and rare to be in a situation where a case had criminal and regulatory implications.

It's just the opposite now. Now it happens routinely, and when a case is a relatively high-profile civil case or a class action, that will sometimes trigger the interest of the regulators or DOJ or the state attorneys general, who act in a pack at this point, and individually don't necessarily have that much use, but collectively as a group are a force to be reckoned with.

Traditionally, cases move slowly. There was time to investigate what had happened. There was time to develop defenses. We didn't need to deal with competing demands from regulators from DOJ, from Congress. The amounts in controversy tended to be manageable, and class action litigation was really all about deciding, pretty early on, could you defeat class certification or did you have to deal with class certification, and then pivot and deal with the plaintiffs' lawyers. I see Sheila shaking her head because she's done this many more times than I have.

I have to say that the effect on corporate conduct to the point that you guys were making earlier, in other words, at the end of the day if your client settled a large class action case, how interstitial was that to the conduct of the company going forward? What kind of an impact did that have on senior management? Did the impact flow through the organization in a

way that really fundamentally changed corporate conduct? I'm looking at Eric and Sheila to see if they agree, but my sense of it has been that when you settled a class action case, even a large class action case, that was a business decision, and you did what you needed to do, and you moved forward.

The criminalization of these cases has fundamentally changed all of that, and if you're talking about what benefits society, not necessarily what benefits some of my clients, but if you're talking about what benefits society, in what circumstances do the plaintiffs or the putative class members do better? And more importantly, in what circumstance does the company, the entity that's involved, take to heart the message and fundamentally change its conduct?

There is no comparison in my experience between the impact of a class action resolution on the one hand, and the impact of a criminal resolution on the other, in which there's a large class of individuals who are affected and who are now being paid restitution. It's certainly the case that in some of these resolutions that we do, you don't have a complete match between the group of people on the regulatory side on the one hand, and the group on the class side on the other. That's because the way you define the class or the way the government perceives the harm aren't always completely consistent.

In many cases—as the government has become more sophisticated about this and they have actually gotten much smarter about it, and as class action lawyers have decided that one of the ways to do this is to ride the coattails of the government and do less early on and let the government develop the case—there's actually been some evolution to the point where I think the overlap has increased in the cases, at least in my experience.

If you're in a situation where you have a class action mechanism on the one side or you have a criminal regulatory mechanism on the other, and your goal is to affect corporate conduct, I think you're better off as a society with the latter. I say this because the amount of time and money and effort that companies are putting into compliance is at a completely different level than it's ever been before.

If you take a class action on the one hand and say, "We've got a class action case and we've got to deal with that as run-of-the-mill litigation," that's one piece. But if you've got a government regulation, you've got a public relations problem that is

probably bigger than it is if it's just a class action. You have state attorneys general who are always going to get in the game. You obviously have Congress, which is going to get in the game when it's appropriate. You now have the CFPB, which it's too early to tell how it's going to play into all of this. They've only filed six or seven, some relatively small number of matters, but from my clients' point of view, the CFPB is something that people are learning about. It has their attention, obviously in the financial, big bank world in particular, but also in other worlds. In a government case, you're going to have a securities litigation. So what's happened is the process has become much more politicized. There's much more of a criminalization.

At the end of the day, if I'm negotiating against a group of plaintiffs' lawyers in one of these cases, I have leverage. I have a lot of different levers that I can use in that negotiation, including: I can delay, I can litigate, I can impose discovery, I can argue on the merits, and actually be right most of the time. Whereas when I'm dealing with the government, I have almost no leverage, and a lot of what I just described, frankly including the merits doesn't always make much difference.

People say to me, "Why do you do both white-collar and civil?" One of the reasons I do the civil piece is because I like to fight over these issues from time to time, and I'm not exaggerating when I say that when you're dealing with these issues—these large cases that affect large numbers of people and that are high profile—the combination of impact on large populations and a lot of profile makes it very, very difficult to resolve the cases.

I think from a compliance point of view, the impact is that companies are much more compliant than they were, and they have systems and structures in place that are designed to inculcate compliance, to train, and to make companies function in a way that is more consistent with the rules than they might have otherwise.

On the issue of arbitration, without naming any names, I do have clients who are looking, and not just in the credit card space, but in a lot of different areas, that are looking at the idea that it might be a benefit to be able to require arbitration and a waiver of the class action mechanism. I think some of the assumptions about the way the arbitration will play out

in that context probably aren't entirely accurate even from the defense side.

What I mean by that is, first of all, the notion that arbitration is going to be inexpensive in these situations: that you can do this on the cheap and some poor individual is going to come in pro se, and you're going spend five minutes resolving their case, and then you're going to go to the next one. It just hasn't played out that way in many circumstances.

While obviously defeating a class action certification has a bunch of benefits and basically takes the leverage away from the plaintiffs' lawyers. In a situation where you have hundreds or thousands or tens of thousands of arbitrations, if you're really looking at arbitration as a real alternative to class resolution, where individuals are actually going to be part of a process, it's going to be very expensive.

I've had some cases where we've tried to do sampling. We've tried to use a set of cases as a way of measuring damages and then allocating to the rest of the group. It's much harder when you're doing individual arbitrations because (1) the individuals don't have to agree to it, (2) generally speaking, the courts won't require it, [and] (3) if you're in a situation like that in a class context, particularly where we're trying to settle, both sides are going to take the position that all of these issues are typical as to all the members of the putative class. Once you're in an arbitration setting, the individuals who are arbitrating are generally going to take the position that they're not like everybody else. Every one of them is going to try to make the case that they are kind of like Lake Wobegon where everybody's above average.

As a result of that, in cases that I've been involved—in which there weren't tens of thousands, but there were hundreds or thousands of individuals where we thought arbitration would be easier—it hasn't necessarily been easier. And it's actually been quite effective for the individuals. And so, I don't think the idea that you put one of these clauses into an agreement and suddenly you're home free. That's completely inconsistent with my personal experience in a handful of these cases.

PROFESSOR BARR: Please join me in thanking Mark. Mark's presentation like Adam's and David's shows the importance of this interplay between public and private. I think that's an incredibly fruitful way to think about the issues that we've been

struggling with today. Do any of the panelists want to respond to anything said during this discussion?

PROFESSOR NOLL: From my perspective of somebody who's arguing that we need to calibrate public and private enforcement, and we should be focused on the bottom line of where compliance is at in the real world, I love to hear what you're saying, Mark. Because it seems to me that if you're getting an effective driver of compliance from criminal actions, then it seems much less worrying to me to go along with what the Supreme Court has been doing in the arbitration area, and some other innovations in procedural contracting. If you're in an area where you don't have the DOJ or the SEC or an agency driving compliance, which is my Aspire Visa example, then I start looking at private enforcement. I start looking at class actions. I start asking what can we do to preserve those.

Looking at this at the policy level, the question is: How do we manage that relationship? How does Congress manage that relationship? How do agencies do it? How do courts do it? We're in very uncharted terrain here because the Supreme Court has pushed us to where we, all of a sudden, have to look at this but we don't have a good framework for thinking through these questions.

MR. GOODMAN: One of the things that has changed pretty dramatically—and this may not seem like a huge point, but it has a huge impact—is that boards of directors at companies, the definition of their fiduciary obligation as a result of the government's conduct has changed. I spend, and I'm sure Eric spends, a fair amount of time—in fact, three times this year I've been asked to meet with boards of directors—to talk about what is the board's obligation with respect to compliance in particular.

It's not just enough that you have an audit committee and your head of compliance reports once a year. That's gone. In a derivative context, where you have questions about what was senior management doing, and what was the board doing? In a mass-tort context, where increasingly, what the board was doing? And certainly in a securities context, what the board was doing?

In OIG, in particular in the pharmaceutical space—very focused on board conduct. DOJ in the pharmaceutical settlements, in the CIAs that companies have entered into, they have a specific requirement that boards, not just management,

certify compliance. If that is broadened beyond pharmaceuticals and beyond the financial industry, it makes a big difference. So the board piece is important.

PROFESSOR NOLL: Adam, did you want to add anything to the first round?

PROFESSOR ZIMMERMAN: One reaction I had to David's talk is the extent to which agencies already regulate contract procedure, and what you think about it. The CFPB is still studying arbitration. The SEC also has authority to regulate it, but it's also made informal moves to regulate. It's threatened at least one company that it wouldn't allow it to go public if they included an arbitration provision in their IPO. It seems like there's other ways in which agencies regulate contract procedure too. The Department of Labor has regulations for employment mediation and arbitration that's created ex ante, and has suggestions and recommendation as to how the company should organize those teams.

I'd like to hear your view on the extent to which agencies are already actively, through informal or possibly formal mechanisms, trying to accomplish that goal. And why if you feel that they're not doing that. I think of the SEC's position with respect to why it's so far not been very happy about the idea that arbitration clauses be included in IPOs or other types of shareholders' agreements, mainly because they like high private enforcement. They think it's an important supplement to their function.

Do you think that agencies are not doing it enough already? What's your take on the current scheme for regulating contract procedure?

PROFESSOR NOLL: The SEC has held up one IPO.

PROFESSOR ZIMMERMAN: That sends a signal.

PROFESSOR NOLL: That sends a signal. Eventually somebody is going to litigate that, and the SEC is perhaps going to get smashed in the D.C. Circuit because they're talking actions that are inconsistent with the Federal Arbitration Act without a statutory mandate to do so.

One thing that I wonder about is the extent to which agencies monitor private enforcement. The SEC, for decades, has taken this position that private enforcement is a necessary supplement to the public enforcement activities of the Commission. There, it seems to work because there's almost a division of labor between stock drop class actions and the

other activities that the SEC does. From what I've looked at, I'm not convinced that agencies are monitoring private enforcement, that agencies are aware of what's happening in court, that agencies are even asking regulated companies what they think about private enforcement.

Some of this has to do with the woeful lack of data about what happens in public court, so it's hard for an agency, which has a nationwide perspective, to get a systemic view of what functions private enforcement is performing effectively and which functions it's not.

In terms of where I'd like to see us, I think what Michael did in Dodd-Frank is great. I love an explicit statutory direction to study this where you're going to get funding for statisticians and economists and lawyers to do systematic data collection.

I have lots of thoughts about what kinds of things they should be looking at. But I think if we're in a world where we're asking agencies to manage the relationship between public and private enforcement, in the long run they're going to need statutory authorization to do that; they're going to need appropriations to do that, and there's going to have to be an understanding that this is something that's legitimately within the sphere of agency action.

PROFESSOR BARR: Let me make a brief comment on that comment and then I'll open it up to the floor. The SEC does have, and the CFPB does have already, explicit statutory authorization to address that question. So it's not just that they study it.

In both instances, at the conclusion of the study, they have the authority to prohibit or condition, if it's appropriate, mandatory pre-dispute arbitration clauses. Both agencies, by virtue of their discretion and how they enforce the law, effectively make judgments about the level of public enforcement.

I think your point is when they're doing that, they should have better data and keep in mind what the actual level of private enforcement is, and I totally agree with that. Let me look to all of you for questions.

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Editor's Note: The additional Q&A session with the audience members is not reflected in this transcript, and is available on the *NYU Journal of Law & Business* website. This Conference transcript has been edited for clarity.